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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.

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
 JUDGMENT RE: SAFE HARBOR
 UNDER 17 U.S.C. §512(b) FOR ITS
 CACHING FEATURE**

19 AND CONSOLIDATED CASE.

**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(b) FOR ITS CACHING FEATURE (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(d) FOR WEB AND IMAGE SEARCH; 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(d) FOR WEB AND IMAGE SEARCH**

TABLE OF CONTENTS

1

2 I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

3 II. GOOGLE’S STORING OF WEB PAGES IN ITS CACHE FOR UP

4 TO FOURTEEN MONTHS IS NOT TEMPORARY STORAGE..... 1

5 III. PERFECT 10’S NOTICES FROM 2001 ARE NOT TIME BARRED 3

6 IV. REFUTATION OF GOOGLE’S EXAMPLES OF ALLEGED

7 DEFICIENCIES 4

8 A. Incorrect Complaints About Notices From 2001 (“A” Notices). 4

9 1. Google’s Incorrect Assertion: “[The 2001 notices] suffer

10 from a myriad of defects, including failing to identify

11 the copyrighted works at issue, or the URLs of the

12 infringing material.” (Search Brief, pg. 8, lns. 23-24) 4

13 B. Incorrect Complaints About Spreadsheet Style Notices

14 (“B” Notices)..... 6

15 1. Incorrect Assertion: Perfect 10 failed to email its notices,

16 and Google had to manually type in all the URLs.

17 Pgs. 11-13, 22 6

18 2. Incorrect Assertion: P10’s notices were repetitive.

19 Pgs. 1, 15, 22..... 7

20 3. Incorrect Assertion: Perfect 10’s notices were burdensome

21 and abusive. Pg. 1 7

22 4. Incorrect Assertion: Perfect 10’s notices failed to identify

23 the URLs of infringing material or the copyrighted

24 works at issue. Pgs. 8-9, 11-12, 21. 7

25 5. Incorrect Assertion: Google had to go through 15,000

26 images on perfect10.com to find the infringed

27 image. Pgs. 10, 13, 21..... 9

28 C. Incorrect Complaints Regarding Perfect 10’s Adobe Style

Notices (“C Notices”) 10

1	1.	Examples Of Perfect 10 Adobe Style (Group “C”)	
2		Notices	11
3	2.	Incorrect Assertion: “Without exception, they fail to identify the	
4		‘copyrighted work claimed to have been infringed’	
5		or the ‘material that is claimed to be infringing.’”	
6		Pgs. 20:4-6; 22.....	17
7	3.	Incorrect Assertion: Google Could Not Determine	
8		Which Image Was Infringing. Pg. 11.....	17
9	4.	Incorrect Assertion: None of P10’s Notices was Actually	
10		Directed to a Google Service with Account Holders or	
11		Subscribers. Pg. 16.	18
12	D.	Incorrect Complaints About Screen Shots.....	19
13	E.	Incorrect Complaints About Perfect 10’s Usenet/Paysite	
14		Notices. Pgs. 9-11.	19
15	1.	Incorrect Assertion: P10’s Notices Regarding Usenet	
16		Sites Were Burdensome. Pg. 11.	19
17	2.	Incorrect Assertion: None of the Raw Data Files	
18		Displayed A Web Page or Image URL. Pgs. 10-11.	19
19	3.	Incorrect Assertion: Many Raw Image Files Displayed	
20		Other Companies’ Copyright Notices (Such As Playboy),	
21		And May Not Have Even Belonged To P10. Pg. 10.....	20
22	F.	Incorrect Complaints About Perfect 10’s Blogger Notices	20
23	1.	Incorrect Assertion: Not One of P10’s Notices Contained	
24		A Post URL. Pg. 4.	20
25	2.	Incorrect Assertion: “Perfect 10’s notices identifying	
26		Blogger URLs were ‘buried among Web Search and	
27		Image Search notices” Pg. 5.....	20
28	3.	Incorrect Assertion: “Not A Single One of P10’s Notices	
		Was Directed to Blogger Pursuant to Google’s Published	
		Policy For That Service.” Blogger Brief, Pg. 8.....	21
	4.	Incorrect Assertion: Google’s Processing Efforts for	
		Blogger Were Expeditious. Pg. 10.	21

1 V. COUNTERNOTIFICATIONS..... 22
2 VI. PERFECT 10’S NOTICES SUBSTANTIALLY COMPLIED
3 WITH DMCA REQUIREMENTS 23
4 VII. CONCLUSION 25
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
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TABLE OF AUTHORITIES

Cases

Field v. Google, 412 F. Supp. 2d 1106 (D. Nev. 2006) 1-2

Statutes

17 U.S.C. § 512(c) passim

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 This opposition will deal primarily with Google’s Cache Motion. It will also refute
6 Google’s various arguments concerning the alleged deficiencies in Perfect 10’s
7 notices, which are set forth in Google’s Search Motion and incorporated into
8 Google’s Cache Motion. This brief provides actual examples of portions of Perfect
9 10’s 2001 (Group A) notices, spreadsheet (Group B) notices, and Adobe style
10 (Group C) notices, which demonstrate their sufficiency.

11 This Court should deny Google’s Cache Motion for a variety of reasons,
12 including that Google’s cache is not “temporary storage.” In *Field v. Google*,
13 Google asserted that it temporarily stored material in its cache for 14 to 20 days. In
14 fact, Google has cached infringing web pages for up to *fourteen months*.
15 Declaration of Dr. Norman Zada (“Zada Decl.”) ¶39, Exh. 26, pages 11-15. That is
16 not “temporary storage.” Furthermore, even after many months, Google simply
17 refreshes these web pages, it does not remove them. *See* Section II below.

18 **II. GOOGLE’S STORING OF WEB PAGES IN ITS CACHE FOR UP TO**
19 **FOURTEEN MONTHS IS NOT TEMPORARY STORAGE**

20 The safe harbor in 17 U.S.C. §512(b) is only applicable for “intermediate and
21 temporary storage of material on a system or network controlled or operated by or
22 for the service provider.” Google incorrectly claims that its storage of the
23 infringing web pages in its cache is “intermediate and temporary.” Google relies on
24 the holding of the District Court of Nevada, in *Field v. Google*, 412 F. Supp. 2d
25 1106 (D. Nev. 2006) for this proposition. The court in *Field* held that storage by
26 Google in its cache *for 14 to 20 days* was temporary under Section 512(b) of the
27 DMCA. The *Field* court based its ruling on testimony by Google’s Mr. Brougher
28 that the copy of Web pages that Google stores in its cache is present for

1 approximately 14 to 20 days.¹ In our case, Mr. Brougher testified that “[i]n the vast
2 majority of cases, the cache will be refreshed approximately every few weeks.”
3 Brougher Decl. ¶6.

4 However, Perfect 10 has found a large number of infringing web pages
5 containing full-size P10 Images that Google has cached for *eleven to fourteen*
6 months. Zada Decl. ¶39, Exh. 26, pages 11-15, Exh. 9. Even if the District Court
7 in Nevada were correct that caching for 14 to 20 days is “intermediate and
8 temporary storage,” *caching for 11 to 14 months or more* is certainly not.

9 Furthermore, Google does not meet other conditions of Section 512(b)(1):

10 As for Subsection (A), Google’s cache is not a situation where the material is
11 temporarily stored en route while being transmitted from a website to an end user,
12 as contemplated by Section 512(b). Google affirmatively finds and provides the
13 material itself.

14 As for Subsection (B), Google’s cache is not involved in the facilitation of
15 communications between two individuals. Google goes on the Internet, determines
16 which cache links to create, and then stores a “snapshot” of web pages on its
17 servers. When a Google user requests the material, Google transmits it to its user.

18 As for Subsection (C), the users aren’t requesting the material from the
19 person in subparagraph A; they are requesting it from Google. Furthermore,
20 Google makes modifications to the material, as it creates its own page which
21 incorporates that material. Google puts its own logo and text on the cache page.

22 ¹ In *Field v. Google*, the Court held:

23 Like AOL's repository of Usenet postings in *Ellison* which operated between
24 the individuals posting information and the users requesting it, Google's
25 cache is a repository of material that operates between the individual posting
26 the information, and the end-user requesting it. Further, *the copy of Web*
27 *pages that Google stores in its cache is present for approximately 14 to 20*
28 *days. See Brougher Dep. at 68:19-69:2 (Google caches information for*
approximately 14 to 20 days). The Court finds that Google's cache for
approximately 14 to 20 days-like the 14 days deemed “transient storage” in
Ellison-is “temporary” under Section 512(b) of the DMCA. The Court thus
concludes that Google makes “intermediate and temporary storage” of the
material stored in its cache, within the meaning of the DMCA. Id. at 1124
(emphasis added).

1 Zada Decl. ¶39, Exh. 26.

2 Google’s cache is not a repository of material that operates between the
3 individual posting the information and the end-user requesting it, another
4 requirement for Section 512(b) safe harbor. The third-party website does not post
5 the infringing material in Google’s cache – Google goes out and gets it itself
6 through Google’s web crawl.

7 For these reasons, and particularly because Google stores the material for 11
8 to 14 months or more, Google is not entitled to the Section 512(b) safe harbor.

9 **III. PERFECT 10’S NOTICES FROM 2001 ARE NOT TIME BARRED**

10 Google incorrectly claims that its failure to process any of Perfect 10’s
11 notices from 2001 is “irrelevant” and that “Perfect 10 has conceded that its suit is
12 not based on these alleged notices.” Perfect 10 has conceded nothing of the kind
13 regarding its 2001 notices, and what Google refers to as “evidence” is a
14 typographical error which does not even say what Google claims. See Declaration
15 of Jeffrey N. Mausner Submitted in Opposition to Google’s Three Motions for
16 Summary Judgment Re DMCA Safe Harbor (“Mausner Decl.”) ¶¶14-16.

17 Google’s failure to process Perfect 10’s 2001 notices, and anyone else’s
18 notices for that matter, is very relevant as to whether Google can argue that it
19 expeditiously processed notices and that it suitably implemented a policy against
20 repeat infringement. [REDACTED], let alone

21 [REDACTED] Google cannot argue that Perfect 10’s 2001 notices
22 were deficient when it did not attempt to cure any allegedly deficiencies and would
23 not process any notices, even if compliant.

24 Perfect 10’s notices from 2001 are not time barred because Google was
25 continuing to link to the infringing material set forth in those notices well after that.
26 For example, Google was still linking to the identified infringing URL
27 *http://www.celebritypictures.com/MayaRubin/maya1.htm* as late as September 10,
28 2004, well within three years of Perfect 10’s filing of its complaint on November

1 10, 2004. Google also displayed the same Maya Rubin images in its Image Search
2 results in November of 2005, adjacent to Google sponsored links. Zada Decl. ¶16,
3 Exh. 8. The date of notice to Google is not determinative because Google was
4 linking to that infringing web page within three years of the filing of the lawsuit.

5 **IV. REFUTATION OF GOOGLE’S EXAMPLES OF ALLEGED**
6 **DEFICIENCIES**

7 Google should be estopped from contending that Perfect 10’s notices are
8 deficient because Perfect 10 followed Google’s instructions, and because Google
9 has not provided any concrete examples of compliant notices to compare to Perfect
10 10’s notices. Google’s criticisms may be broken into five main categories:

11 **A. Incorrect Complaints About Notices From 2001 (“A” Notices).**

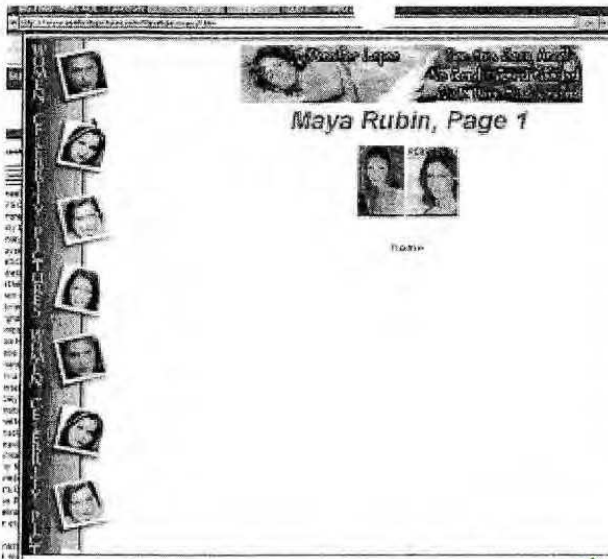
12 In 2001, Google never claimed that any of the notices sent by Perfect 10 were
13 deficient. However, Google refused to process any of those notices, claiming at
14 that time that it could not suppress URLs. Google’s failure to process anyone’s
15 notices from 2001 [REDACTED], and possibly beyond, creates a
16 triable issue of fact as to whether Google is eligible for any safe harbor, and if so,
17 starting as of what date. Zada Decl. ¶¶15-17, 19, Exhs. 8, 10.

18 **1. Google’s Incorrect Assertion: “[The 2001 notices] suffer from a**
19 **myriad of defects, including failing to identify the copyrighted**
20 **works at issue, or the URLs of the infringing material.”**

21 **(Search Brief, pg. 8, Ins. 23-24)**

22 Perfect 10’s 2001 notices identified the URLs of the infringing material.
23 They also in many cases showed a copy of the infringing image on the infringing
24 web page. Included below as Example 1 is a page from one such notice. Zada Decl.
25 ¶16, Exh. 8, page 4. The identified web page URL is checkmarked on the left of the
26 page. Perfect 10 also provided an image URL for the large Perfect 10 cover on the
27 upper right, which is check marked as well. Google has not explained what would
28 constitute a compliant notice for this example and should be required to do so.

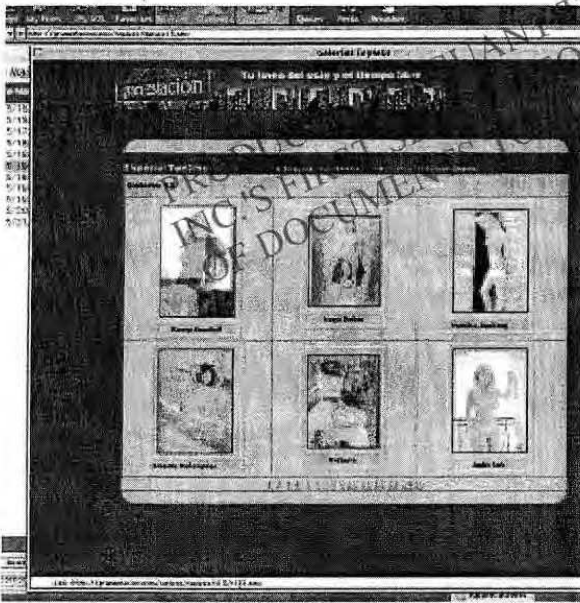
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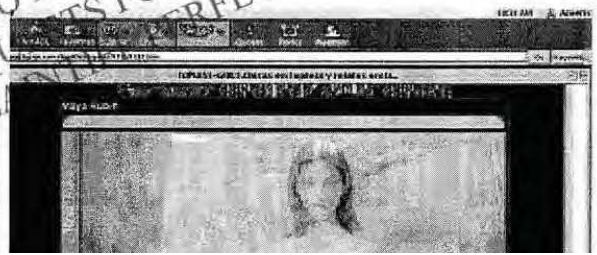
<http://www.celebritypictures.com/MayaRubin/maya1.htm> ✓



<http://www.celebritypictures.com/Pictures/MayaRubin/maya2.jpg>



<http://granestacion.com/topless/topless13.htm>



**REDACTED TO DISCOURAGE
UNAUTHORIZED COPYING FROM PACER**



<http://granestacion.com/topless/topless/t13/t131.htm>

CONFIDENTIAL

Exh. 8, Pg. 4

PG DMCA0040

1 Because Google was still linking to the infringing web page,
2 <http://www.celebritypictures.com/MayaRubin/maya1.htm>, identified by this notice,
3 as late as September 10, 2004, it should have liability for its failure to act.

4 **B. Incorrect Complaints About Spreadsheet Style Notices (“B” Notices).**

5 Perfect 10’s spreadsheet style notices *followed Google’s instructions and*
6 *provided more information than Google requested.* Yahoo! was able to process
7 such notices in three days, and Google was able to process such notices as well.
8 Zada Decl. ¶¶23-24, 62-63, Exhs. 12-13, 46-47, 9. So Google has no basis for its
9 allegations, as explained below.

10 **1. Incorrect Assertion: Perfect 10 failed to email its notices, and**
11 **Google had to manually type in all the URLs. Pgs. 11-13, 22**

12 Google’s instructions require that the notice be sent “*by fax or regular mail,*
13 *not by email.*” Zada Decl. ¶23, Exh. 12, page 1. So Google has no basis for its
14 complaints. Furthermore, there is no DMCA requirement that notices be sent by
15 email. However, when Google asked Perfect 10 to send its notices by email,
16 Perfect 10 complied and sent most of its notices by email. Zada Decl. ¶26, Exh. 9.

17 Perfect 10 sent all fourteen notices in 2001 by email. However, Google
18 refused to process any of those notices. Zada Decl. ¶¶15-17, Exhs. 8, 10.
19 In 2004, Perfect 10’s first notice to Google was sent by email. Google then
20 instructed Perfect 10 to send its notices by fax or mail, *not by email.* However,
21 Google subsequently requested that Perfect 10 *resend* the notices that it had faxed,
22 by email. So on July 19, 2004, at Google’s request, Perfect 10 sent an excel
23 spreadsheet to Google by email which contained all of the URLs in Perfect 10’s
24 first seven notices sent in 2004. Nevertheless, Google still did not suppress any of
25 the identified URLs until October 11, 2004, after it received a draft complaint from
26 Perfect 10. Because Google received Perfect 10’s notices in excel format, it did not
27 need to manually type them in, as it claims. Zada Decl. ¶26, Exh. 14, page 32.
28 Perfect 10 sent a total of 24 notices to Google in 2004 through April of 2007 by

1 email, which contained thousands of identified URLs. *Id.* Exh. 9.

2 **2. Incorrect Assertion: P10's notices were repetitive. Pgs. 1, 15, 22**

3 Any repetition was due to the fact that Google did not process prior notices.
4 Zada Decl. ¶¶26, 61, Exhs. 14, 45. If Google had [REDACTED] it would have
5 realized that the URL was repeated because it had not been suppressed at the time
6 of the previous notice.

7 **3. Incorrect Assertion: Perfect 10's notices were burdensome and**
8 **abusive. Pg. 1**

9 Most of Perfect 10's initial notices were short. For example, Perfect 10's
10 2001 notices were typically five pages in length. They contained the complete URL
11 of the infringing web page, as well as, in many cases, a copy of the infringing web
12 page. Google never claimed those notices were deficient, as required by 17 U.S.C.
13 §512(c)(3)(B)(ii). Instead, Google simply incorrectly claimed it could not suppress
14 URLs. Zada Decl. ¶¶15-17, Exhs. 8-10; Mausner Decl. ¶16, Exh. M.

15 **4. Incorrect Assertion: Perfect 10's notices failed to identify the**
16 **URLs of infringing material or the copyrighted works at issue.**
17 **Pgs. 8-9, 11-12, 21.**

18 Such complaints are unjustified because a) Perfect 10 followed Google's
19 instructions, and b) Google admittedly processed thousands of Perfect 10 identified
20 URLs.

21 Perfect 10 put the URL Google requested in the left column of its
22 spreadsheets, and placed the search term Google requested in the center column.
23 That search term was also almost always the name of the model whose image was
24 infringed. In addition, on the right side of Perfect 10's spreadsheet, Perfect 10
25 specified the Volume and Issue number of Perfect 10 Magazine that the infringed
26 image(s) appeared in, as well as the page range, for example, Volume 1, Number 2,
27 pages 6-11. That is more than Google requires, which is just the title of the
28 publication. Zada Decl. ¶¶23, Exh. 12, page 3.

1 In response to Perfect 10's initial notices, Google never complained about
2 any deficiency of which it now complains. Yahoo! was able to process such
3 notices, and Google belatedly did also. Zada Decl. ¶¶25-26, 61-3, Exhs. 14, 45-47.

4 Google's claims of deficiency now center around Google's assertion that
5 Perfect 10 failed to provide Image URLs with its Group B notices. However,
6 ***Google has never asked for Image URLs in its published Web Search***
7 ***instructions***, and there is good reason. When a web page is infringing, Google's
8 own policy calls for it to remove all direct links to that web page, independent of
9 which images on the page are infringing. To do this, Google ***only needs the web***
10 ***page URL***, which it must disable. By removing all direct links to an infringing web
11 page, Google must necessarily remove all thumbnails from its Image Search results
12 that *link to that web page*. Thus, if an infringing web page contained 500 P10
13 thumbnails, by specifying that single web page URL, Perfect 10 could get all 500
14 P10 thumbnails removed from Google Image Search, and there is little if any reason
15 to require P10 to identify 500 separate Image URLs. In other words, Google's
16 separate Image Search instructions are largely unnecessary as well as unnecessarily
17 burdensome, and there is no reason to require Perfect 10 or anyone else to specify
18 *image URLs* to remove infringing *web page links*. Declaration of Sheena Chou
19 ("Chou Decl.") ¶12; Declaration of Sean Chumura ("Chumura Decl.") ¶8; Zada
20 Decl. ¶54. If Google had wanted to find the identified infringing P10 Image(s), it
21 could have done so with the URL and model name that Perfect 10 provided by
22 searching the identified web page for images with that model name.

23 Even when Perfect 10 did provide hundreds of Image URLs in its July 19,
24 2004 notice, Google did not process them. Zada Decl. ¶26, Exh. 14, pages 28-30.
25 Nor did Google process Image URLs from Perfect 10's "check the box" style
26 notices. Google also did not expeditiously process other identified Image URLs.
27 Zada Decl. ¶¶53-55, Exhs. 38-40.

28 Because Perfect 10 followed Google's Image Search instructions, Google

1 should be estopped from asserting that Perfect 10's notices are deficient.

2 In the alternative, Google should be required to provide a concrete example
3 of what a compliant type "B" notice would be for the web page that appears as page
4 9 of Exhibit 41 to the Zada Decl. This web page contains 16 images, of which 13
5 (the ones without the red X's) are copyrighted by Perfect 10.

6 **5. Incorrect Assertion: Google had to go through 15,000 images**
7 **on perfect10.com to find the infringed image. Pgs. 10, 13, 21.**

8 This is not correct. The images on perfect10.com are arranged alphabetically
9 by model name to allow the user to readily find images of a particular model. Zada
10 Decl. ¶5.

11 Google has not provided any documents in discovery which suggest that it
12 has ever actually compared an allegedly infringing image to any other image. In
13 fact, Google's directions for image search require only the Image URL, and do not
14 require information regarding the infringed image. Zada Decl. ¶¶19, 54, Exh. 39.
15 This means Google just simply blocks image URLs without ever verifying whether
16 or not the allegedly infringed image matches anything. Dr. Zada has stated under
17 penalty of perjury that to the best of his belief, Perfect 10 owns the copyright.
18 Furthermore, infringing P10 Images frequently display a Perfect 10 copyright
19 notice. Google could have easily compared an allegedly infringing image to the
20 one on perfect10.com if it had wanted to do so. It is clear that Google's complaints
21 in this regard are just another after-the fact excuse for its inaction.

22 **6. Incorrect Assertion: Identified URLs Did Not Link Directly To**
23 **Infringing Content or Contained Ellipses. Pgs. 5, 23.**

24 There is no DMCA requirement that an identified URL must link directly to
25 an infringing image, or to an infringing movie or song. Perfect 10 is clearly entitled
26 to identify (1) a page displaying perfect10.com passwords; or (2) a page with a
27 menu of Perfect 10 model names, which when clicked on, display P10 Images; or
28 (3) a page of rapidshare.com links, which when clicked on, allow the downloading

1 of large quantities of P10 Images. So even in the few cases² where the URL which
2 Perfect 10 identified might not have led directly to an infringing image, the notice
3 was not defective. The link that Perfect 10 identified was involved in the
4 infringement of P10 Images.

5 [REDACTED]
6 [REDACTED]. Perfect 10 simply cut and pasted whatever URL
7 Google had listed in its search results, which is exactly what Google stated to do in
8 its instructions. Google could have located the full URL by simply doing a
9 combination Google search on the base URL and some other portion of the URL, or
10 in several other ways. Zada Decl. ¶41, Exh. 28; Chumura Decl. ¶6; Declaration of
11 David O'Connor (“O’Connor Decl.”), submitted herewith, ¶6, Exh. 1. A URL
12 cannot be deemed “deficient” when it is the same URL that Google uses to identify
13 the web page or image in its own search results. Google also never suggested that
14 any URLs provided by Perfect 10 with ellipses were deficient, until *after Perfect 10*
15 *had sent to Google 29 DMCA notices and had filed a lawsuit.* Zada Decl. ¶25.

16 **C. Incorrect Complaints Regarding Perfect 10’s Adobe Style Notices**
17 **(“C Notices”)**

18 The DMCA only requires that the copyright holder provide information
19 reasonably sufficient to locate the infringing material. Perfect 10 complied with
20 this requirement by providing Google with all of the URLs that Google asked for in
21 its *instructions for Web Search, Image Search, and AdSense*. Perfect 10 provided
22 not only the URLs requested by Google, but also provided a copy of the infringing
23 web page as well, on which the infringing/infringed images were clearly identified
24 by a check mark or in another manner.

25 Perfect 10’s notices were clearly sufficient to locate the infringing material,

26 ² This issue comes up again in the important context of the massive infringing
27 paysites (usenet sites), for which the infringing images are not contained on web
28 pages. In those instances, involving hundreds of thousands of infringing copies,
Perfect 10 provided the home page URL and instructions for locating the infringing
P10 images from there. See Search Opposition pages 20-22.

1 because Google admits that it suppressed approximately ██████████ URLs using Perfect
2 10's Adobe-style notices and then *choose not to continue*. Google states that it
3 ██████████ in the URLs from Perfect 10's Adobe folders when *Google could*
4 *have rapidly extracted them using Adobe's URL extraction feature*, at the rate of at
5 least 300 URLs an hour. Zada Decl. ¶9, Exh. 2, pages 6-8; Chou Decl. ¶7. Google
6 not only suppressed at least 2,300 URLs from Perfect 10's June 28, 2007 and July
7 2, 2007 notices, it also nearly or completely processed Perfect 10's November 27,
8 2008, June 4, 2008, and June 13 notices. Zada Decl. ¶61, Exh. 45. So Google has
9 no basis whatsoever to claim that Perfect 10's Adobe style notices were deficient.

10 **1. Examples of Perfect 10 Adobe Style (Group "C") Notices**

11 Examples of various types of Perfect 10 notices are included below. In each
12 case, all images were stated as being copyrighted by Perfect 10. If the Court has
13 difficulty seeing any of the URLs in the reduced size reproductions below, the full
14 size exhibit is attached to the Zada Declaration, as noted.

15 Example 2, below, is taken from Exh. 26, page 9 to the Zada Decl. Perfect
16 10 sent Google that copy of a Google cache page and stated that all images were
17 copyrighted by Perfect 10 other than images in advertising banners. Example 2
18 gives the complete URL of the infringing web page (see highlighted link) as well as
19 a copy of the infringing/infringed image, and the search term (which was not really
20 necessary for this example). Google could have simply extracted the highlighted
21 link using Adobe's URL Extraction feature. Zada Decl. ¶9, Exh. 2, Pages 6-8;
22 Chou. Decl. ¶7. Google has no basis to claim that it cannot find its own web page
23 when given a copy of that web page.

24 ////////////////

25 ////////////////

26 ////////////////

27 ////////////////

28 ////////////////

This is **G o o g l e**'s cache of <http://www.monitor.hr/belle/0405/040507.htm> as retrieved on Sep 9, 2006 18:31:56 GMT.

G o o g l e's cache is the snapshot that we took of the page as we crawled the web.

The page may have changed since that time. Click here for the [current page](#) without highlighting.

This cached page may reference images which are no longer available. Click here for the [cached text](#) only.

To link to or bookmark this page, use the following url: <http://www.google.com/search?q=cache:697shbnOXAgJ:www.monitor.hr/belle/0405/040507.htm+site:monitor.hr+%22alessandrina+herrera%22&hl=en&gl=us&ct=clnk&cd=2&ie=UTF-8>

Google is neither affiliated with the authors of this page nor responsible for its content.

These search terms have been highlighted: **alessandrina herrera**

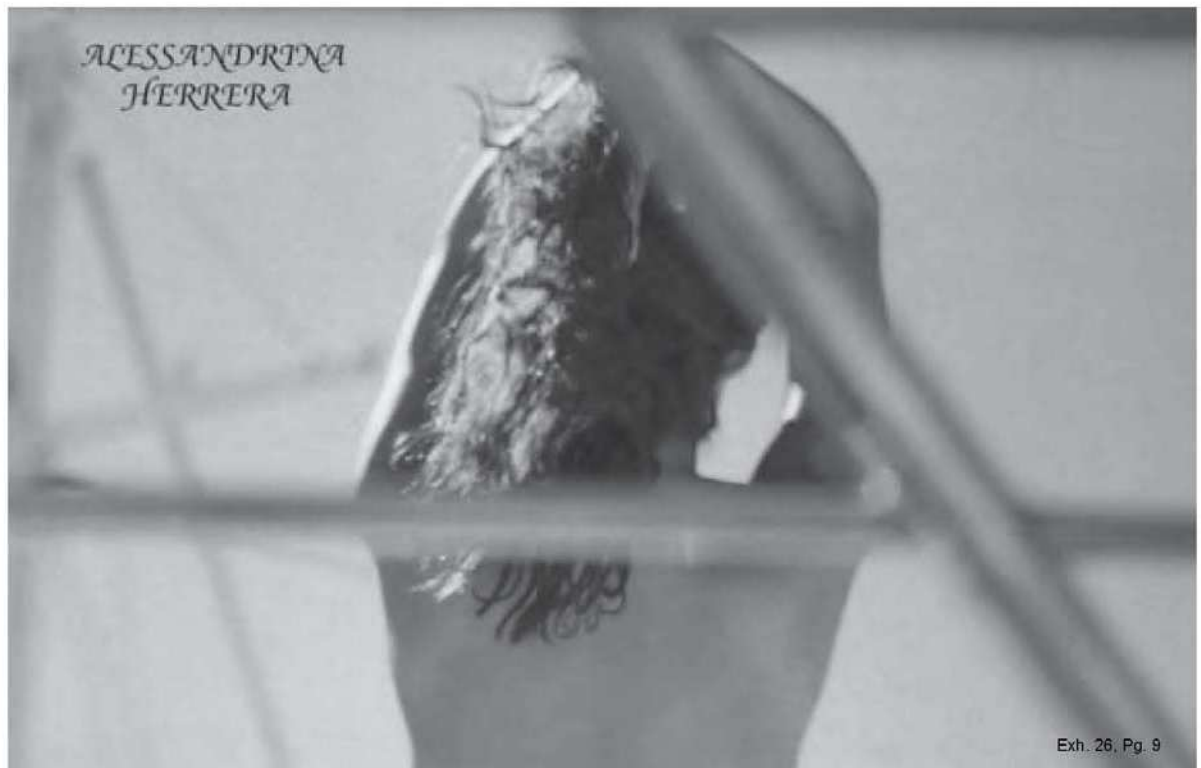
popbabe.com

Daily quality pictures of most beautiful, young and nude models



Alessandrina Herrera

[Monitor home](#) | [Belle indeks](#) | [Svibanj 2004](#) | [Prije](#) | [Poslije](#)



Exh. 26, Pg. 9

<http://66.102.7.104/search?q=cache:697shbnOXAgJ:ww...drina+herrera%22&hl=en&gl=us&ct=clnk&cd=2&ie=UTF-8> (1 of 2)11/13/2006 11:07:53 PM

Example 3, below, was contained in Perfect 10's March 17, 2008 DMCA notice, regarding Image Search. Zada Decl. ¶¶55, 2, Exh. 40, page 1. Perfect 10

1 provided the URL Google requires (highlighted in yellow) along with a copy of the
2 actual infringing web page. Google's Image Search instructions do not ask for the
3 identification of the infringed image, but it was provided. *Id.* ¶¶54-55, Exs.39-40.



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16 **REDACTED TO DISCOURAGE**
17 **UNAUTHORIZED COPYING FROM PACER**



1 Example 4, below, is an example from Perfect 10's January 24, 2008 DMCA
2 notice to Google. This example comes from an "ALL ARE P10" folder, which
3 means that both images were P10 Images. Green check marks have been added to
4 the original notice to show that both the Image URL and the Web page URL in this
5 example are complete. Google ads are clearly visible. Nevertheless, Google did
6 nothing in response, even though it could have obviously found its own web page
7 given a copy of that page. Zada Decl. ¶53, Exh. 38, page 1.




25 Example 5, below, is an example from Perfect 10's April 24, 2009 DMCA
26 notice to Google showing infringing P10 thumbnails. Perfect 10 stated that all the
27 images, other than those that are crossed out, were copyrighted by Perfect 10. The
28 search used to obtain this page is highlighted at the upper left of the page. Zada
















1 Decl. ¶72, Exh. 54, page 1. Google could have performed that same search to find
2 the images shown in Exhibit 5. Instead, Google refused to process this notice, and
3

4 **site:af.2i.cz "Monika Zsibrita"** - Google Image Search

5 [Web](#) [Images](#) [Maps](#) [News](#) [Video](#) [Gmail](#) [more](#) [Sign in](#)

6  [Advanced Image Search](#)
[Preferences](#)
SafeSearch is off

7 **Images** Showing: Results **1 - 18** of about **66** (0.19 seconds)

 <p>Monika Zsibrita nude photos, ... 455 x 640 - 33k - jpg www.mahalo.com</p>	 <p>Monika Zsibrita 451 x 640 - 29k - jpg galerie.albumfotek.cz</p>	 <p>Monika Zsibrita 640 x 480 - 22k - jpg galerie.albumfotek.cz</p>
 <p>Monika Zsibrita 277 x 640 - 20k - jpg galerie.albumfotek.cz</p>	 <p>Monika Zsibrita 130 x 130 - 4k - jpg galerie.albumfotek.cz</p>	 <p>Monika Zsibrita 91 x 130 - 4k - jpg galerie.albumfotek.cz</p>
 <p>Monika Zsibrita 130 x 97 - 3k - jpg galerie.albumfotek.cz</p>	 <p>Monika Zsibrita 92 x 130 - 4k - jpg galerie.albumfotek.cz</p>	 <p>Monika Zsibrita 130 x 87 - 4k - jpg galerie.albumfotek.cz</p>
 <p>Monika Zsibrita 86 x 130 - 4k - jpg galerie.albumfotek.cz</p>	 <p>Monika Zsibrita 86 x 130 - 3k - jpg galerie.albumfotek.cz</p>	 <p>Monika Zsibrita 86 x 130 - 4k - jpg galerie.albumfotek.cz</p>
 <p>Monika Zsibrita 56 x 130 - 3k - jpg galerie.albumfotek.cz</p>	  <p>playboy kalendář 2008 130 x 130 - 6k www.albumfotek.cz</p>	 <p>Alice Bendová. Vytvořil: misc1 130 x 127 - 5k - jpg www.albumfotek.cz</p>


28 [http://images.google.com/images?hl=en&safe=off&um=1&q="+site:af.2i.cz+%22Monika+Zsibrita%22\[4/14/2009+4:22:29+PM\]](http://images.google.com/images?hl=en&safe=off&um=1&q=)

Exh. 54, Pg. 1


1 others like it, even though it could have obviously found its own search results,
2 given a copy of those results. Zada Decl. ¶72, Exh. 54; O'Connor Decl. ¶5, Exh. 1.

3 Example 6, below, was sent to Google as part of Perfect 10's July 9, 2008
4 DMCA notice. It is an example of another kind of Perfect 10 check the box type


5 **GOOGLE Images**
6 **51 results for "Xenia Szabo"** 7/8/2008

7 **1**  Search string: "Xenia Szabo"Image http://img133.imagevenue.com/loc173/th_64278_21.jpgSite <http://forum.phun.org/showthread.php?p=729907>Image Info: 106x160 Size: 7Kb


8
9 Thumbnail http://tbn0.google.com/images?q=tbn:Vs0bIZd_igxVPM:http://img133.imagevenue.com/loc173/th_64278_21.jpg

10
11 **2**  Search string: "Xenia Szabo"Image http://www.imagerise.com/images.php/t4766_XeniaSzabo22.jpgSite <http://titsandhentai.wordpress.com/2008/04/16/xenia-szabo/>Image Info: 99x150 Size: 6Kb


12
13 Thumbnail http://tbn0.google.com/images?q=tbn:MYCIndOeHiRYpM:http://www.imagerise.com/images.php/t4766_XeniaSzabo22.jpg

14
15 **3**  Search string: "Xenia Szabo"Image http://www.imagerise.com/images.php/t4755_XeniaSzabo01.jpgSite <http://titsandhentai.wordpress.com/2008/04/16/xenia-szabo/>Image Info: 99x150 Size: 6Kb

16
17 Thumbnail http://tbn0.google.com/images?q=tbn:YSICEWl5K6tg6M:http://www.imagerise.com/images.php/t4755_XeniaSzabo01.jpg

18
19 **4**  Search string: "Xenia Szabo"Image http://img11.imagevenue.com/loc229/th_16866_01.jpgSite <http://www.szstar.com/showthread.php?p=1367574>Image Info: 106x160 Size: 7Kb

20
21 Thumbnail http://tbn0.google.com/images?q=tbn:kSvskXqpK00tXM:http://img11.imagevenue.com/loc229/th_16866_01.jpg

22
23 **5**  Search string: "Xenia Szabo"Image <http://blog7.fc2.com/a/aitaine/file/20060525.jpg>Site <http://aitaine.blog7.fc2.com/blog-date-200605.html>Image Info: 300x451 Size: 49Kb

24
25
26 Thumbnail <http://tbn0.google.com/images?q=tbn:zfMv2sApk-Kw4M:http://blog7.fc2.com/a/aitaine/file/20060525.jpg>

1 notice for identifying infringing P10 thumbnails. Zada Decl. ¶53, Exh. 38 page 7.
2 Perfect 10 stated that all of the images were copyrighted by Perfect 10. Perfect 10
3 also gave all three URLs that could be obtained from Google’s Image Search
4 results. The top link is the “See full-size image” link, which is what Google
5 requests to identify images in its Image Search results. Perfect 10 also provided the
6 web search link (shown in blue) and the thumbnail URL (at the bottom). Google
7 refused to process such notices, which Microsoft did process, and which were
8 clearly sufficient. Zada Decl. ¶¶53-54, Exhs. 38-39; Chumura Decl. ¶¶4-5, Exh. 1;
9 O’Connor Decl. ¶¶4-6, Exh. 1; Bennett McPhatter Decl. ¶¶4-6.

10 **2. Incorrect Assertion: “Without exception, they fail to identify**
11 **the ‘copyrighted work claimed to have been infringed’ or the**
12 **‘material that is claimed to be infringing.’” Pgs. 20:4-6; 22.**

13 This statement is incorrect because Perfect 10 sent Google a copy of the
14 infringing web page, as shown by Examples 2-6 above, showing the complete URL
15 of that web page, as well as the infringing/infringed image. In some cases those
16 images even displayed a Perfect 10 copyright notice. Since the infringing image
17 was the same as the infringed image, Google had 1) the location of the
18 infringement, as well as 2) a copy of the infringing and infringed image. And if
19 Google really wanted to compare the copy of the infringing/infringed work Perfect
20 10 sent with what was on perfect10.com, it could have done so.

21 Perfect 10 also followed Google’s instructions for AdSense, Image Search,
22 and Web Search. Google has incorrectly claimed in its blogger brief that Perfect 10
23 did not provide post URLs. In fact, Perfect 10 provided at least 329 of them. Zada
24 Decl. ¶¶8, 41, 61, Exhs. 1, 28, 45; Chou Decl. ¶9. So Google has no basis
25 whatsoever for its claims regarding alleged deficiencies in Perfect 10’s notices.

26 **3. Incorrect Assertion: Google Could Not Determine Which**
27 **Image Was Infringing. Pg. 11.**

28 Although Google claims that it couldn’t figure out which image was

1 infringing, that was actually very easy. In the folders labeled “ALL ARE P10,”
2 Perfect 10 edited out all the non-P10 images so that *every model image in those*
3 *folders was infringing*. Most of Perfect 10’s Adobe style notices were of that type.
4 In the folders labeled “ALL LARGE ARE P10,” Perfect 10 edited the attachments
5 so that *every large image in the files was a P10 Image*. Zada Decl. ¶¶38, 61. If
6 there were only a few P10 Images out of many, Perfect 10 put check marks next to
7 them. If there were a few non-P10 Images, Perfect 10 crossed them out. This was
8 all explained in the cover letter. It was actually very easy to see which images were
9 P10, as is apparent from Example 5 above, and other exhibits to the Zada Decl.

10 **4. Incorrect Assertion: None of P10’s Notices was Actually**
11 **Directed to a Google Service with Account Holders or**
12 **Subscribers. Pg. 16.**

13 The only formal instructions which Perfect 10 has ever received from Google
14 were sent to Perfect 10 on June 1, 2004. Those instructions did not mention any
15 Google products other than Web Search and Google Groups. Google has never
16 formally supplemented those instructions. Google only has one agent listed at the
17 Copyright Office and cannot object to Perfect 10 sending its notices to that agent.
18 Perfect 10 does not even know what different programs a particular infringing
19 website may be involved in. For example, a website can be a Google AdSense site
20 without showing “ads by Google.” Zada Decl. ¶¶12, 71, Exh. 5, page 15. Given
21 the size of Perfect 10’s notices, it is completely unreasonable for Google to suggest
22 that Perfect 10 must go through thousands of images, try to figure out which Google
23 programs are infringing those images, and then somehow break its notices down so
24 as to send various pieces to different Google departments, especially when none of
25 those departments are listed at the Copyright Office. This is just another example
26 of Google trying to make it as difficult as it can for the copyright holder. *See*
27 *Declarations of C.J. Newton, Dean Hoffman, Margaret Jane Eden, and Les*
28 *Schwartz, submitted herewith; Mausner Decl. Exh. C.*

1 **D. Incorrect Complaints About Screen Shots**

2 Google complains that “Some of the screen shots failed to include a complete
3 URL of the page depicted. Other screen shots appear to have been manipulated
4 such that the image depicted could not be found at the URL depicted.” Perfect 10
5 did not “manipulate” anything. It simply took a screen shot of what was on
6 Google’s web page, showing whatever Google was providing to its users. Zada
7 Decl. ¶75. Perfect 10 could only provide a complete URL in those screen shots if
8 Google was. But either way, Google can find its own web page, given a copy of it.

9 **E. Incorrect Complaints About Perfect 10’s Usenet/Paysite Notices.**

10 **Pgs. 9-11.**

11 After claiming for years that Perfect 10’s notices were deficient, Google
12 finally admitted that it won’t process usenet notices under any circumstances.
13 Mausner Decl. Exh. B. However, Perfect 10’s Notices, which provided copies of
14 thousands of infringing images and directions for finding those images, gave
15 Google sufficient knowledge of the infringement on its system to take action.

16 **1. Incorrect Assertion: P10’s Notices Regarding Usenet Sites**
17 **Were Burdensome. Pg. 11.**

18 When Google received thousands of copies of P10 Images infringed by one
19 of its affiliates, it did not need to look at all of them, It merely needed to look at
20 enough of them to conclude that there was massive infringement and that Google
21 should stop linking to or doing business with such infringers.

22 **2. Incorrect Assertion: None of the Raw Data Files Displayed A**
23 **Web Page or Image URL. Pgs. 10-11.**

24 Google’s statement is not correct. Most of the images that Perfect 10
25 included in its notices to Google did display image URLs that could be used to
26 search for that particular image in the infringing paysite. Zada Decl. ¶35, Exh. 23.

27
28

1 **3. Incorrect Assertion: Many Raw Image Files Displayed Other**
2 **Companies' Copyright Notices (Such As Playboy), And May**
3 **Not Have Even Belonged To P10. Pg. 10.**

4 Perfect 10 made clear that the images identified by its usenet notices were
5 those images that displayed Perfect 10 copyright notices and which were contained
6 in a file labeled "P10." In other folders, labeled "unfair competition," there were
7 examples of hundreds of full-length movies and songs to show Google the scope of
8 the infringement. Zada Decl. ¶34 , Exh. 22.

9 **F. Incorrect Complaints About Perfect 10's Blogger Notices**

10 Google makes a number of complaints about Perfect 10's blogger related
11 notices that are demonstrably incorrect.

12 **1. Incorrect Assertion: Not One of P10's Notices Contained A**
13 **Post URL. Pg. 4.**

14 This is demonstrably incorrect. Perfect 10 identified to Google at least 329
15 "post URLs," at least 201 of which Google did not expeditiously suppress. Zada
16 Decl. ¶61, Exhs. 45, 9; Chou Decl. ¶9. Furthermore, there are no "post URLs" on
17 full-size blogger.com infringing web pages, so Google's instructions are not even
18 correct. Chou Decl. ¶10. Finally, the post URL requested by Google is just one of
19 the URLs that could be used to identify the location of the infringing material.

20 Perfect 10 also provided Google with the infringing web page URL (per Google's
21 web search and AdSense instructions), and the infringing Image URL (per Google's
22 Image Search instructions), any of which were sufficient. Zada Decl. ¶61, Exh. 45;
23 O'Connor Decl. ¶¶4-6, Exh. 1; Chumura Decl. ¶¶3-5, 7, Exhs. 1-2; McPhatter Decl.

24 **2. Incorrect Assertion: "Perfect 10's notices identifying Blogger**
25 **URLs were 'buried among Web Search and Image Search**
26 **notices'" Pg. 5.**

27 Google's agent was supposed to go through Perfect 10's notices, so the
28 location of various infringing web pages should have been irrelevant, as well as

1 apparent. Furthermore, using Adobe’s search feature, Google could have found all
2 blogger and blogspot URLs by simply doing an Adobe search on blogger.com and
3 blogspot, and then extracting those URLs using the Adobe URL Extraction feature.
4 Zada Decl. ¶¶9, 12, Exh. 2, pages 6-8, Exh. 5, pages 13-14; Chou Decl. ¶7. Adobe
5 also has a “bookmark” feature which lists all the URLs contained in each file.
6 Zada Decl. ¶12, Exh. 5, page 13. Had Google employed that Adobe feature, it
7 would have seen thousands of blogger URLs listed in Perfect 10’s Adobe notices.

8 **3. Incorrect Assertion: “Not A Single One of P10’s Notices Was**
9 **Directed to Blogger Pursuant to Google’s Published Policy For**
10 **That Service.” Blogger Brief, Pg. 8.**

11 Perfect 10 has never received any instructions from Google asking it to send
12 notices care of blogger. Zada Decl. ¶70. Perfect 10 is only required to send notices
13 to the agent which Google has listed at the Copyright Office, which is exactly what
14 Perfect 10 did. *Id.* ¶21, Exh. 11. Given the size of Perfect 10’s notices, and the fact
15 that each image may be infringed by multiple Google programs, it would have been
16 extremely burdensome, and completely unnecessary, for Perfect 10 to attempt to
17 break its notices into various pieces, based on which combination of Google
18 programs may have been infringing a particular image. That is not required by
19 U.S.C. §512(c). Furthermore, in contrast to the burden this would place on Perfect
20 10, it was not burdensome for Google to simply remove or disable access to web
21 and image links, and remove ads, all for the same URL. This is just another
22 example of Google attempting to make it as difficult as possible for copyright
23 holders to protect their rights.

24 **4. Incorrect Assertion: Google’s Processing Efforts for Blogger**
25 **Were Expeditious. Pg. 10.**

26 Google has admittedly suppressed at least [REDACTED] blogger URLs and at least [REDACTED]
27 blogspot.com URLs as a result of Perfect 10’s June 28, 2007 and July 2, 2007
28 notices, but has not explained why it waited at least ten months to do so. Google

1 also failed to suppress at least 201 blogspot.com post URLs, and at least 3737
2 blogger URLs that were identified in the same fashion as the URLs which it did
3 suppress. Zada Decl. ¶¶61, Exhs. 45, 9. Chou Decl. ¶¶8-10, Exh. 9. Such delay and
4 inaction precludes a safe harbor.

5 **V. COUNTERNOTIFICATIONS**

6 Perfect 10 has identified to Google at least 30,000 infringing URLs from free
7 sites in its notices, along with at least 1.2 million infringing images from more than
8 3,000 infringing websites. Zada Decl. ¶¶19, 74. Meanwhile, Google has found
9 almost no errors on the part of Perfect 10. In fact, most of the “counternotifications”
10 are simply admissions of infringement.

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 **VI. PERFECT 10'S NOTICES SUBSTANTIALLY COMPLIED WITH**
5 **DMCA REQUIREMENTS**

6 The relevant statutory requirements for DMCA notices are set forth in 17
7 U.S.C. § 512(c)(3). The notices sent by Perfect 10 to Google substantially
8 complied with these requirements, for at least eight separate reasons.

9 First, there is no dispute that Perfect 10's notices satisfied subsections (i),
10 (iv), (v), and (vi) of Section 512(c)(3) because they contained: (i) a physical or
11 electronic signature of Dr. Zada; (iv) information reasonably sufficient to permit
12 Google to contact Dr. Zada; (v) a statement that Dr. Zada, on behalf of Perfect 10,
13 had a good faith belief that use of the material in the manner complained of was not
14 authorized; and (vi) a statement that the information in each notice was accurate,
15 and under penalty of perjury, that Dr. Zada is authorized to act on behalf of Perfect
16 10. *See* Zada Decl., ¶¶24, 34, 40, 53, 56, Exhs. 13, 22, 27, 37, 41, 9.

17 Second, to satisfy the remaining two subsections, (ii) and (iii), Perfect 10 sent
18 notices to Google in 2004 *based on Google's own instructions*. Perfect 10
19 complied with subsection (ii) by providing: (a) the name of the model in the
20 infringed image(s) and (b) either the volume, issue, and page numbers of the Perfect
21 10 Magazine containing those infringed images, or a reference to perfect10.com
22 sufficient to allow Google to locate those images on perfect10.com.

23 Later, beginning in June 2007, Perfect 10 satisfied subsection (ii) by sending
24 *actual copies of the infringed/infringing images*, meticulously edited to exclude
25 non-P10 Images. Zada Decl. ¶¶33-39, Exhs. 22-26.

26 Third, to satisfy subsection (iii), Perfect 10 initially provided the infringing
27 URLs from Google's Web Search results, as instructed by Google. Later, starting
28 in June 2007, Perfect 10 sent Google copies, using Adobe, of the infringing web

1 pages which contained *the full URL of the infringing web page, as well as a copy of*
2 *the infringed/infringing image*. Google cannot argue that it could not find its own
3 web page when provided with a copy of that page. *Id.* ¶¶33-57, Exhs. 22-42, 9.

4 Fourth, Google admittedly suppressed thousands of URLs based on Perfect
5 10's notices, so they could not be deficient.. *Id.* ¶¶26-28, 61, Exhs. 14-17, 45.

6 Fifth, it cannot be disputed that Perfect 10's Adobe (Group C) notices
7 provided Google with sufficient information to locate and remove infringing links.
8 Google has admittedly suppressed ██████████ URLs from Perfect 10's June 28, 2007 and
9 July 2, 2007 Adobe style notices, and completely, or nearly completely, processed
10 ██████████ additional Perfect 10 Adobe style notices in June of 2009. *Id.* ¶61, Exh. 45.

11 Sixth, Google sent emails to Perfect 10 dated May 13, 2005, August 1, 2005,
12 and August 9, 2005, which did not suggest any deficiencies in Perfect 10's notices.
13 Zada Decl. ¶61, Exh. 45.

14 Seventh, Google has stated that if a notice were deficient, Google would
15 contact the copyright holder. Google did not do that in 2001. In 2004, the letters
16 that Google sent to Perfect 10 in response to Perfect 10's first seven notices did not
17 ask for image URLs, complete URLs, or suggest that Perfect 10's notices did not
18 identify the location of the infringing material or the copyrighted work allegedly
19 infringed. Instead, Google stated that it had nearly processed, or had processed,
20 Perfect 10's notices. Zada Decl. ¶25. To the extent that there were any deficiencies
21 in Perfect 10's notices, Google was required, under §512(c)(3)(B)(ii), to contact
22 Perfect 10 to cure any such deficiencies. Google not only failed to work with
23 Perfect 10 in any meaningful way, it refused repeated requests by Perfect 10
24 to provide Perfect 10 with concrete examples of compliant notices, which Perfect 10
25 could then use as a template. Zada Decl. ¶70, Exh. 53.

26 Eighth, Yahoo! was able to process Perfect 10's notices in three days. Zada
27 Decl. ¶¶62-63, Exhs. 46-47.

28

1 **VII. CONCLUSION**

2 Google has admittedly processed thousands of URLs identified by Perfect 10,
3 and failed to process thousands of others. It cannot claim that Perfect 10's notices
4 are deficient when a) the notices were created following Google's instructions; b)
5 Google has suppressed [REDACTED] URLs identified by such notices, but [REDACTED]
6 [REDACTED] of other URLs identified in the same manner; c) Yahoo! has processed
7 similar notices in three days; and d) [REDACTED]
8 [REDACTED]

9 Google cannot prove that it has suitably implemented a policy against repeat
10 infringers because it has not acted in response to most of Perfect 10's notices
11 regarding its blogger and AdSense account holders, and because it has not
12 [REDACTED]

13 Google has continued to misuse massive quantities of Perfect 10's
14 intellectual property for its own commercial gain, despite receiving 68 Perfect 10
15 DMCA notices, beginning in 2001. The thousands of P10 Images which Google
16 continues to display in its Image Search results and place Google ads around, for
17 which Google has received repeated notice and which display P10 copyright
18 notices, by themselves create a triable issue of fact as to whether Google is entitled
19 to a safe harbor.

20 Perfect 10 respectfully requests that this Court deny each of Google's
21 motions for summary judgment. Because of the amount of information and number
22 of arguments that Perfect 10 has had to respond to, Perfect 10 requests that it be
23 allowed to submit a surreply brief if the Court contemplates granting Google's
24 motions, or Perfect 10 be given the opportunity to present oral argument.

25 Dated: August 9, 2009

Respectfully submitted,
Law Offices of Jeffrey N. Mausner

27 By: /s/ Jeffrey N. Mausner
Jeffrey N. Mausner,
28 Attorney for Perfect 10, Inc.