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12  
 13 UNITED STATES DISTRICT COURT  
 14 NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION  
 15

16 PERFECT 10, INC., a California  
 17 corporation,,  
 18 Plaintiff,

19 vs.

20 VISA INTERNATIONAL SERVICE  
 ASSOCIATION; FIRST DATA CORP, a  
 21 corporation; CARDSERVICE  
 INTERNATIONAL, INC., a corporation;  
 22 MASTERCARD INTERNATIONAL  
 INCORPORATED, a corporation;  
 23 HUMBOLDT BANK, a national banking  
 association; and DOES 1 through 100,  
 24 inclusive,

25 Defendants.

CASE NO. C 04-00371 JW (PVT)  
 [Assigned for all purposes to  
 Judge James Ware]

Action Commenced: January 28, 2004

**REQUEST FOR JUDICIAL  
 NOTICE IN FURTHER SUPPORT  
 OF PLAINTIFF'S COMBINED  
 OPPOSITION TO DEFENDANTS'  
 MOTIONS FOR ATTORNEYS'  
 FEES**

Date: April 18, 2005  
 Time: 9:00 a.m.  
 Ctrm: 8

26  
 27 Plaintiff Perfect 10, Inc. hereby requests that, pursuant to Federal Rule of  
 28

1 Evidence 201, the Court take judicial notice of the following facts:

- 2 1. That the Order Granting Motion for Reconsideration and Denying
- 3 Request for Attorney's Fees, a true and correct copy of which is
- 4 attached hereto as Exhibit A, was entered on February 11, 2005 in
- 5 the action entitled *Perfect 10, Inc. v. CWIE, LLC, et al.*, United
- 6 States District Court, Central District of California, No. CV 02-7624
- 7 LGB (SHx) (the "February 11 Order"); and,
- 8 2. The opinion and ruling set forth in the February 11 Order.

9 The Court may take judicial notice of another court's orders. *See Mullis v.*  
10 *United States Bank. Ct.* (9th Cir. 1987) 828 F.2d 1385, 1388 fn. 9; FRE 201.

11 The February 11 Order is a recent California District Court opinion  
12 concerning attorneys' fees awards under the Copyright Act, including certain issues  
13 relevant to Defendants' pending Motions for Attorneys' Fees.

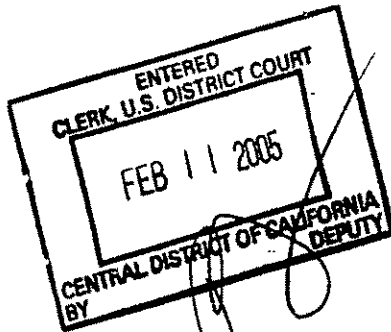
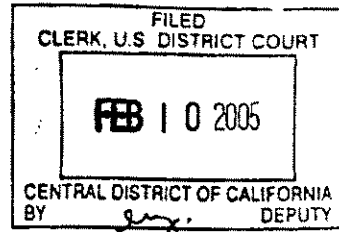
14  
15 DATED: March 15, 2005 KING, HOLMES, PATERNO & BERLINER, LLP

16  
17 By: /s/   
18 SETH MILLER  
Attorneys for Plaintiff PERFECT 10, INC.

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**EXHIBIT “A”**

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- Priority
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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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Perfect 10, Inc  
Plaintiff,  
v.  
CWIE, LLC et al.  
Defendant.

CV 02-7624 LGB (SHx)

ORDER GRANTING MOTION FOR  
RECONSIDERATION AND  
DENYING REQUEST FOR  
ATTORNEY'S FEES

THIS CONSTITUTES NOTICE OF ENTRY  
AS REQUIRED BY FRCP, RULE 77(d).

I. INTRODUCTION

Plaintiff Perfect 10, Inc. ("Perfect 10") brought this action against Cavecreek Whole Sale Internet Exchange ("CWIE") and CCBill, LLC (CCBill) and other defendants on September 30, 2002. On June 22, 2004 this Court granted summary judgment on copyright claims in favor of CWIE and CCBill ("Defendants"). On November 9, 2004 Court granted Plaintiff's motion to dismiss its remaining claims without prejudice. The Court issued a final

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1 judgment in the case that did not include an attorney's fee award  
2 and also issued two minute orders that stated no attorney's fees  
3 would be awarded. Defendants now bring motions to alter or amend  
4 the judgment and add attorney's fees or reconsider the order that  
5 denied attorney's fees.

6 **II. PROCEDURAL BACKGROUND**

7 On November 9, 2004 the Court granted Plaintiff's motion to  
8 dismiss its claims and at that time denied the Defendants'  
9 request for attorney's fees. The Court discussed why it did not  
10 grant attorney's fees as a condition of the voluntary dismissal  
11 but did not address awarding attorney's fees under the Copyright  
12 Act. (Order Granting Plaintiff's Motion for Order to Dismiss  
13 under FRCP Rule 41, Nov. 9, 2004 at 6-8.) On December 14, 2004  
14 Defendants moved for reconsideration of the attorney's fee award  
15 or to alter the judgment and award attorney's fees. Defendants  
16 also brought an application to tax costs. The motions have been  
17 fully briefed.

19 **III. LEGAL STANDARD**

20 Local Rule 7-18 allows a party to move for reconsideration  
21 in one of the following situations: (a) a material difference in  
22 fact or law from that presented to the court at the time of  
23 decision that could not have been known to the moving party at  
24 the time of the decision; or (b) the emergence of new material  
25 facts or a change of law occurring after the time of the  
26 decision; or (c) a manifest showing of a failure to consider  
27 material facts presented to the Court before the decision. L.R.  
28

1 7-18. Reconsideration is appropriate where the district court  
2 failed to "fully address" an issue which was important to the  
3 court's earlier decision. Pegasus Satellite Television, Inc., v.  
4 DirecTV, Inc., 318 F.Supp.2d 968, 979 (C.D. Cal. 2004).

5 **IV. ANALYSIS**

6 A. Motion for Reconsideration

7 Under the Copyright Act, the Court has the discretion to  
8 grant a prevailing party reasonable attorney's fees. 17 U.S.C. §  
9 505. In considering whether to award attorney's fees, the Court  
10 must seek to promote the Copyright Act's objectives of  
11 encouraging the production of original literary, artistic, and  
12 musical expression for the good of the public. Fogerty v.  
13 Fantasy, Inc., 510 U.S. 517, 524 (1994); Magnuson v. Video  
14 Yesteryear, 85 F.3d 1424, 1431 (9th Cir. 1996). The Court's  
15 prior orders did not address the Copyright Act's objectives.  
16 Although the basis cited for this motion is not one of the three  
17 set out in Local Rule 7-18, the Court did not fully address its  
18 analysis underlying its denial of attorney's fees and, on that  
19 basis, the Court shall reconsider.  
20

21 B. Attorney's Fees and Costs Under 17 U.S.C. § 505

22 The Court has discretion to grant attorney's fees to a  
23 prevailing party in a copyright action. 17 U.S.C. § 505. To  
24 determine whether to grant a prevailing defendant attorney's  
25 fees, the district court must determine whether the successful  
26 defense of the action furthered the purposes of the Copyright  
27 Act. Mattel Inc., v. Walking Mountain Productions, 353 F.3d 792,  
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1 816 (9th Cir. 2003). The primary objective of the Copyright Act  
2 is to encourage the production of original literary, artistic,  
3 and musical expression for the good of the public. Fogerty v.  
4 Fantasy, Inc., 510 U.S. 517, 524 (1994). With that objective in  
5 mind, the Court considers the following factors: (1) the degree  
6 of success obtained; (2) frivolousness; (3) motivation; (4)  
7 objective unreasonableness; and (5) the need in particular  
8 circumstances to advance considerations of compensation and  
9 deterrence. Magnuson, 85 F.3d at 1432.

10  
11 *1. The Degree of Success Obtained*

12 The Defendants were completely successful in their defense  
13 on the copyright claims based on the safe harbor provisions of  
14 the DMCA. (Order Granting in Part and Denying in Party  
15 Defendants' Motions for Summary Judgment, June 22, 2004 at 36-  
16 42.) This factor weighs in support of granting the Defendants  
17 attorney's fees.

18 *2. Frivolousness*

19 In the Summary Judgment on copyright the Court considered  
20 whether Defendants were protected by the safe harbor provisions  
21 and whether Plaintiff's notices of infringing materials to CWIE  
22 were sufficient to take the Defendants out of the safe harbor  
23 provisions. (See Order Granting in Part and Denying in Party  
24 Defendants' Motions for Summary Judgment, June 22, 2004 at 36-  
25 42.) These were novel issues of law, where no binding precedent  
26 controlled this Court. See id. As Defendants point out,  
27 Plaintiff had successfully obtained a preliminary injunction in  
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1 the similar case, Perfect 10 v. Cybernet Venture, 213 F.Supp. 2nd  
2 1146, 1170-82 (C.D. Cal. 2002), which indicated that it might  
3 succeed in this similar action. (Motion at 2.) Plaintiff  
4 presented novel legal issues, had a reasonable basis for bringing  
5 the suit, and had an interest in protecting its copyrights. This  
6 was not a frivolous suit and this factor weighs against granting  
7 attorney's fees. See Garnier v. Andin Intern'l, 884 F.Supp. 58,  
8 61-62 (D. R.I. 1995).

9  
10 3. Motivation

11 The Parties dispute the Plaintiff's motivation in bringing  
12 this suit. According to the Defendants, the Plaintiff used this  
13 litigation as a means for profit, not to protect its  
14 photographic images. (See Motion at 18, 6 Fn. 2.) To support  
15 this position, Defendants provide financial records and an  
16 explanation of Perfect 10's financial earnings from a previous  
17 case that indicate Perfect 10's primary source of income comes  
18 from litigation. Id.; (see also Logan Decl. ¶ 15, Exhibits 8-  
19 11,14-15); Perfect 10 v. Cybernet Ventures, 213 F. Supp. 2d at  
20 1156-67. Plaintiff counters this position with the declaration  
21 of Perfect 10's president, Norman Zadeh, stating that Perfect 10  
22 loses money on copyright litigation and that Perfect 10's  
23 motivation is to stop infringement of its images. (See Zadeh  
24 Decl. ¶ 14, 7.) The Court cannot determine with any certainty  
25 the motivations involved in this suit. This factor weighs  
26 neither in support of awarding nor denying attorney's fees.

27  
28 4. Objective Unreasonableness



1 In the summary judgment on the copyright claims, Plaintiff  
2 took the position that CCBill and CWIE did not qualify for safe  
3 harbor protection because CCBill was not transmitting infringing  
4 material and CWIE had received notice of its infringement and  
5 received direct financial benefit from the infringement. (Order  
6 Granting in Part and Denying in Part Defendants' Motions for  
7 Summary Judgment, June 22, 2004 at 37-42.) Defendants took the  
8 positions that they were protected under the language of the safe  
9 harbor provisions, and that they had not received adequate notice  
10 of infringing materials to take them out of that protection. Id.  
11 at 37 - 42. This was a case involving new law with little or no  
12 legal precedent such that both parties' positions were  
13 reasonable. See Garnier v. Andin Internat'l, 884 F. Supp. 58, 62  
14 (D. R.I. 1995) (attorney's fees not awarded to party litigating a  
15 very debatable aspect of the copyright law); Universal City  
16 Studios, Inc. v. Reimerdes, 111 F.Supp.2d 294, 345 (S.D. N.Y.  
17 2000) (inappropriate to award attorney's fees in DMCA test case).  
18 Therefore, this factor weighs in favor of not awarding attorney's  
19 fees.  
20

21 5. *Need to Advance Considerations of Compensation and*  
22 *Deterrence*

23 The Court's finding on attorney's fees can be informed by  
24 considerations of compensation and deterrence, the relative  
25 financial strength of the parties, and whether the amount  
26 requested is excessive in light of the losing party's resources.  
27 See Garnier v. Andin Internat'l, 884 F. Supp. 58, 63 (D. R.I.  
28 1995). In defending the suit successfully, the Defendants have

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1 benefitted by protecting themselves from being subject to similar  
2 suits. Awarding attorney's fees would also punish the Plaintiff  
3 for advancing a theory in an unclear area of copyright law.

4 Furthermore, upon losing this portion of its case, the Plaintiff  
5 dismissed its other claims which saved both parties from  
6 incurring additional attorney's fees. Given this balance of  
7 interests, and the lack of any other circumstances in the record  
8 that require compensation and deterrence, this case does not  
9 present circumstances that indicate that the Court should award  
10 attorney's fees.

11  
12 6. *Primary Objective of the Copyright Act*


13 All of the above factors must be considered in light of the  
14 primary objective of the Copyright Act: to encourage the  
15 production of original literary, artistic, and musical expression  
16 for the good of the public. Fogerty v. Fantasy, Inc., 510 U.S.  
17 527, 534 (1994). Defendants in this case raised the safe harbor  
18 defenses in the DMCA at a time in which the Act was largely  
19 untested. The parties advocated their positions diligently,  
20 resulting in the furtherance of the analysis of this new law.  
21 The Court does not lose sight of the fact that plaintiff had a  
22 legitimate claim of infringement and the safe harbor defenses in  
23 the DMCA had not been developed at the time of the filing of the  
24 claim. After consideration of the factors set out in Fogerty and  
25 Magnuson in light of the primary objective of the Copyright Act,  
26 the court in its equitable discretion denies attorney fees and  
27 costs to Defendants.

28 VI. CONCLUSION

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Defendants request for attorney's fees and costs is DENIED.  
IT IS SO ORDERED.

Dated: January 10, 2005

  
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LOURDES G. BAIRD  
United States District Judge

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