

COPY

1 RUSSELL J. FRACKMAN (State Bar No. 49087)
JEFFREY D. GOLDMAN (State Bar No. 155589)
2 MITCHELL SILBERBERG & KNUPP LLP
11377 West Olympic Boulevard
3 Los Angeles, CA 90064-1683
Telephone: (310) 312-2000
4 Facsimile: (310) 312-3100

5 JEFFREY N. MAUSNER (State Bar No. 122385)
BERMAN, MAUSNER & RESSER
6 11601 Wilshire Boulevard, Suite 600
Los Angeles, California 90025-1742
7 Telephone: (310) 473-3333
Facsimile: (310) 473-8303

8 DANIEL J. COOPER (State Bar No. 198460)
9 PERFECT 10, INC.
72 Beverly Park Drive
10 Beverly Hills, California 90210
Telephone: (310) 205-9817
11 Facsimile: (310) 205-9638

12 Attorneys for Plaintiff

13
14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA

16
17 PERFECT 10, a California corporation,
18 Plaintiff,
19 v.
20 GOOGLE, INC., a corporation; and
DOES 1 through 100, inclusive,
21 Defendants.
22

CASE NO. CV 04-09484 AHM (SHx)

**REPLY MEMORANDUM IN
SUPPORT OF MOTION OF
PLAINTIFF PERFECT 10, INC.
FOR PRELIMINARY INJUNCTION**

Date: November 7, 2005
Time: 10:00 a.m.
Ctrm: The Honorable A. Howard
Matz

TABLE OF CONTENTS

Page(s)

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

INTRODUCTION 1

I. GOOGLE COPIES AND DISPLAYS PERFECT 10 IMAGES..... 2

II. GOOGLE CANNOT AVAIL ITSELF OF THE FAIR USE DEFENSE..... 3

 A. The Commercial Use of Infringing Images to Direct Users to Infringing Websites Is Not Fair Use..... 4

 B. Perfect 10’s Copyrighted Photographs Are Creative..... 5

 C. Google’s Use Of The Entirety Of Perfect 10’s Images Is Not Necessary To Any Permissible Purpose. 6

 D. Google’s Use Of Perfect 10’s Images Affects Perfect 10’s Market..... 7

 E. The Public Interest Does Not Favor Fair Use..... 9

III. GOOGLE ALSO IS SECONDARILY LIABLE..... 9

 A. Google Is Liable For Contributory Infringement. 9

 B. Google Is Vicariously Liable For Infringement. 12

IV. THE DMCA DOES NOT LIMIT INJUNCTIVE RELIEF. 15

 A. Google Failed To Expediently Remove Infringing Images..... 16

 B. Google Was Provided All Required Information. 16

 C. Google’s Knowledge or, Alternatively, Its Financial Benefit and Ability to Control Also Disqualifies It From Safe Harbor..... 19

 D. Google Did Not Satisfy Section 512(i)..... 19

V. THE PRELIMINARY INJUNCTION IS FAIR AND APPROPRIATE. 21

VI. PERFECT 10 HAS BEEN IRREPARABLY HARMED AND HAS NOT UNREASONABLY DELAYED. 22

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

1 A&M Records, Inc. v. Napster, Inc.
2 114 F. Supp. 2d at 912..... 4
3
4 A&M Records, Inc. v. Napster, Inc.
5 239 F.3d 1004 (9th Cir. 2001)..... passim
6
7 In re Aimster Copyright Litigation
8 252 F. Supp. 2d 634 (N.D. Ill. 2002) 24
9
10 American Geophysical Union v. Texaco, Inc.
11 60 F.3d 913 (2d Cir. 1994)..... 4, 5
12
13 Arista Records, Inc. v. MP3Board, Inc.
14 No. 00 Civ. 4660, 2002 WL 1997918 (S.D.N.Y. Aug. 29, 2002) 9
15
16 Bill Graham Archives LLC v. Doring Kindersley Ltd.
17 No. 03-9507, 2005 WL 1137878 (S.D.N.Y. May 12, 2005) 6
18
19 Campbell v. Acuff-Rose Music, Inc.
20 510 U.S. 569 (1994) 8
21
22 Castle Rock Entertainment v. Carol Pub. Group, Inc.
23 955 F. Supp. 260 (S.D.N.Y. 1997)..... 10
24
25 Citibank, N.A. v. Citytrust
26 756 F.2d 273 (2d Cir. 1985)..... 24
27
28 Columbia Pictures Industries, Inc. v. Redd Horne, Inc.
749 F.2d 154 (3d Cir. 1984)..... 11
CyberMedia, Inc. v. Symantec Corp.
19 F. Supp. 2d 1070 (N.D. Cal. 1998) 24
Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.
109 F.3d 1394 (9th Cir. 1997)..... 4
Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.
924 F. Supp. 1559 (S.D. Cal. 1996) 4

TABLE OF AUTHORITIES
(continued)

Page(s)

1

2

3

4 Elvis Presley Enters., Inc. v. Passport Video

5 349 F.3d 622 (9th Cir. 2003)..... 5

6 Encyclopaedia Britannica Educational Corp. v. Crooks

7 542 F. Supp. 1156 (W.D.N.Y. 1982) 6

8 Fonovisa, Inc. v. Cherry Auction, Inc.

9 76 F.3d 259 (9th Cir. 1996)..... 9, 10, 13

10 Gershwin Pub. Corp. v. Columbia Artists Management, Inc.

11 443 F.2d 1159 (2d Cir. 1971)..... 11

12 Gross v. Seligman

13 212 F. 930 (2d Cir. 1914)..... 6

14 Harper & Row Pubs., Inc. v. Nation Enters.

15 471 U.S. 539 (1985)..... 8

16 Hotaling v. Church of Jesus Christ of Latter-Day Saints

17 118 F.3d 199 (4th Cir. 1997)..... 2

18 Infinity Broadcast Corp. v. Kirkwood

19 150 F.3d 104 (2d Cir. 1998)..... 5, 7

20 Italian Book Corp. v. American Broad. Cos.

21 458 F. Supp. 65 (S.D.N.Y. 1978)..... 3

22 Kelly v. Arriba Soft Corp.

23 336 F.3d 811 (9th Cir. 2003)..... passim

24 Los Angeles Times v. Free Republic

25 54 U.S.P.Q. 2d 1453 (C.D. Cal. 2000)..... 7

26 MAI Systems Corp. v. Peak Computer, Inc.

27 991 F.2d 511 (9th Cir. 1993)..... 2

28 Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.

 125 S. Ct. 2764 (2005) passim

TABLE OF AUTHORITIES
(continued)

Page(s)

1		
2		
3		
4	<u>Nunez v. Caribbean Int’l News Corp.</u>	
5	235 F.3d 18 (1st Cir. 2000).....	6
6	<u>Ocean Garden, Inc. v. Marktrade Co.</u>	
7	953 F.3d 500 (9th Cir. 1991).....	23, 24
8	<u>Pacific & Southern Co. v. Duncan</u>	
9	744 F.2d 1490 (11th Cir. 1984).....	4
10	<u>Perfect 10 v. Cybernet Ventures, Inc.</u>	
11	213 F. Supp. 2d 1146 (C.D. Cal. 2002).....	19, 20
12	<u>Playboy Enters., Inc. v. Starware Publishing Corp.</u>	
13	900 F. Supp. 433 (S.D. Fla. 1995)	6
14	<u>Playboy Enters., Inc. v. Webbworld, Inc.</u>	
15	968 F. Supp. 1175 (N.D. Tex. 1997).....	7, 15
16	<u>Playboy Enters., Inc. v. Webbworld, Inc.</u>	
17	991 F. Supp. 543 (N.D. Tex. 1997).....	3, 13
18	<u>Princeton Univ. Press v. Michigan Document Servs., Inc.</u>	
19	99 F.3d 1381 (6th Cir. 1996).....	4
20	<u>RCA/Ariola International, Inc. v. Thomas & Grayston Co.</u>	
21	845 F.2d 773 (8th Cir. 1988).....	13
22	<u>Sega Enters., Ltd. v. MAPHIA</u>	
23	857 F. Supp. 679 (N.D. Cal. 1994)	9
24	<u>Sega Enterprises, Ltd. v. MAPHIA</u>	
25	948 F. Supp. 923 (N.D. Cal. 1996)	11
26	<u>Sega Enterprises, Ltd. v. Sabella</u>	
27	1996 WL 780560 (N.D. Cal. Dec. 18, 1996).....	11
28	<u>Shapiro, Bernstein & Co. v. H. L. Green Co.</u>	
	316 F.2d 304 (2d Cir. 1963).....	13

TABLE OF AUTHORITIES
(continued)

Page(s)

1

2

3

4 Sony Computer Entertainment, Inc. v. Connectix Corp.

5 203 F.3d 596 (9th Cir. 2000)..... 2

6 Sony Corp. of Am. v. Universal City Studios, Inc.

7 464 U.S. 417 (1984)..... 12

8 Ty, Inc. v. Publications Intern., Ltd.

9 81 F. Supp. 2d 899 (N.D. Ill. 2000) 23, 24

10 UMG Recordings, Inc. v. MP3.com, Inc.

11 92 F. Supp. 2d 349 (S.D.N.Y. 2000)..... 5, 8

12 Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.

13 342 F.3d 191 (3d Cir. 2003)..... 4

14 Wihtol v. Crow

15 309 F.2d 777 (8th Cir. 1962)..... 5

16 Worldwide Church of God v. Philadelphia Church of God, Inc.

17 227 F.3d 1110 (9th Cir. 2000)..... 8

FEDERAL STATUTES

17 17 U.S.C. § 101..... 3

18 17 U.S.C. § 512(a)..... 18

19 17 U.S.C. § 512(b)..... 18

20 17 U.S.C. § 512(c)..... 20, 21

21 17 U.S.C. § 512(d)(1)..... 22

22 17 U.S.C. § 512(i)..... 22, 23, 24

23 17 U.S.C. § 512(j)..... 18, 24

24 17 U.S.C. § 1201(f) 3

25

26

27

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

4 M. & D. Nimmer, <u>Nimmer On Copyright</u>	8, 18
H. R. Rep. No. 105-551 (Part II)	23

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

INTRODUCTION

1
2 Google's opposition fails to answer the fundamental questions presented by
3 Perfect 10's motion: Why is it permissible for Google to knowingly display reduced
4 size Perfect 10 images copied from infringing websites and send users who click on
5 those images not to Perfect 10's legitimate website, but to the infringing websites –
6 including infringing websites from which Google receives a financial benefit? Why
7 is it permissible for Google to display full size versions of infringing Perfect 10
8 images – which Google users can view, copy, download, and e-mail without ever
9 leaving Google's website – just because Google puts a “frame” around the
10 infringing material? Why should Google be allowed to publish confidential
11 usernames and passwords allowing unauthorized entry into Perfect 10's website?
12 Nothing in Google's opposition coherently or persuasively answers these basic
13 questions.

14 Google has submitted error-laden declarations that make broad and
15 unsupported claims regarding “processing” unspecified URLs identified in Perfect
16 10's notices. The real facts tell a much different story, and belie any serious
17 contention of “expeditious” removal of infringing material. Despite 37 DMCA
18 notices, Google currently is displaying more Perfect 10 images than ever, close to
19 5,000 copies, linking them in virtually all cases to infringing websites rather than to
20 Perfect 10's website. Google also is continuing to display hundreds of confidential
21 passwords to Perfect 10's website. Finally, Google has not even removed the
22 infringements that were exhibits to Perfect 10's Preliminary Injunction Motion, even
23 though in some cases Google first received notice of those infringements hundreds
24 of days ago. See Reply Declaration of Norman Zada (“Zada Reply Decl.”).

25 Google attempts to deflect attention from its behavior by arguing that Perfect
26 10 has unreasonably delayed. However, not only has Google failed to even claim
27 any prejudice as a result of such purported “delay,” but Perfect 10 (i) diligently
28 investigated and documented the facts, (ii) afforded Google, in accordance with the

1 DMCA, a chance to remove the infringing material, (iii) made substantial efforts to
2 resolve the issues prior to litigation, and (iv) was continually frustrated in its efforts
3 to discover elemental facts by Google's refusal to provide substantive discovery
4 responses.

5 Google's repeated litany that "search engines are good" ignores that its
6 ongoing infringement of Perfect 10's copyrights can be stopped without interfering
7 with any legitimate aspect of Google's services. The injunction Perfect 10 seeks,
8 providing for notice and then removal of specified infringing images, not only is
9 necessary, it is limited and reasonable.

10 **I. GOOGLE COPIES AND DISPLAYS PERFECT 10 IMAGES.**

11 Google admits that it reproduces *and* displays in reduced size Perfect 10's
12 copyrighted images. Google's Memo. In Opp. to Prelim. Injunction ("Opp.") at 11,
13 n.11. Google argues only that it does not distribute the images that it copies and
14 displays. *Id.* This is a moot point, since reproduction and display are sufficient for
15 infringement. It also is wrong. See A&M Records, Inc. v. Napster, Inc.
16 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who upload file names to the
17 search index for others to copy violate plaintiffs' distribution rights."); Hotaling v.
18 Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 203 (4th Cir. 1997)
19 ("When a public library adds a work to its collection, lists the work in its index or
20 catalog system, and makes the work available to the borrowing or browsing public,
21 it has completed all the steps necessary for distribution to the public.")¹

23 ¹ Google's contention that its copying is analogous to "intermediate" copying for a
24 permissible purpose (Opp. at 11) is misplaced. Google's *final* use is to *display*
25 Perfect 10 images and, in order to do so, it makes copies. That is not "intermediate"
26 use. Moreover, intermediate copying generally is infringement. MAI Systems Corp.
27 v. Peak Computer, Inc., 991 F.2d 511, 518-19 (9th Cir. 1993). Google relies on a
28 case that reflects distinctly different conduct. Sony Computer Entertainment, Inc. v.
Connectix Corp., 203 F.3d 596, 603-06 (9th Cir. 2000) (intermediate copying for
purposes of reverse engineering permissible where (1) the intermediate copying was
"necessary" to obtain access to *unprotected*, functional elements of technology, and
(continued...)

1 Google also argues, without any support, that its display of *full size* images
2 via a window or frame on its website, which it calls “linking and framing,” “does
3 not constitute reproduction, display or distribution of images *by Google*.” (Opp. at
4 12) (emphasis in original). However, the reality is that users can go to google.com
5 to see the full size image that looks exactly the same as it does at any other
6 infringing website or at perfect10.com. Zada Reply Decl. ¶ 55; see Levine Decl., ¶
7 24 n.1 (acknowledging that *Google* “triggers” the framing). Because Google
8 enables its users “to view the images merely by visiting [Google’s] website,”
9 Playboy Enters., Inc. v. Webworld, Inc., 991 F. Supp. 543, 552 (N.D. Tex. 1997), it
10 is immaterial that the infringing images originated from another website or that the
11 images are displayed in a “frame.” See 17 U.S.C. § 101 (to “display” a work is “to
12 show a copy of it, either directly or indirectly or by means of a film, slide, television
13 image or any other device or process”); Kelly v. Arriba Soft Corp., 336 F.3d 811,
14 817 (9th Cir. 2003) (infringement of display right by framing of full size images).
15 See also Reply Memo. In Supp. of Prelim. Injunction Against Amazon.com
16 (“Amazon Reply Memo.”) at 3-4.²

17 II. GOOGLE CANNOT AVAIL ITSELF OF THE FAIR USE DEFENSE.

18 Google’s fair use “analysis” ignores its infringement by display of *full size*
19 Perfect 10 images. It likewise ignores the numerous reasons that its reproduction
20 and display of Perfect 10 *reduced size* images are not shielded by the specific
21 holding in Kelly (Perfect 10’s Memo. In Suppt. of Prelim. Injunction (“PI Memo”))

22 _____
(...continued)

23 (2) the emulation software created was noninfringing, transformative, and an
24 “innovation [which] affords opportunities for game play in new environments.”
25 Further, the kind of “reverse engineering” at issue in Connectix is expressly
permitted by the Copyright Act. See 17 U.S.C. § 1201(f).

26 ² Italian Book Corp. v. American Broad. Cos., 458 F. Supp. 65 (S.D.N.Y. 1978),
27 which Google cites for its claim that “framing and linking are integral to its function
28 in promoting research and access on the Internet” had nothing to do with linking,
framing, or the Internet – only whether playing a song in a newscast was a fair use.

1 at 13-15). Instead, Google essentially argues that because it is a search engine,
2 everything it does furthers the “public interest.” But this case is not about research
3 or news reporting. It is about wholesale copying and display of Perfect 10 images
4 for Google’s commercial purposes. It is about copying those images from and
5 linking them to infringing websites (in a way that enhances Google’s revenue). That
6 conduct is not in the public interest and is not fair use.³

7 **A. The Commercial Use of Infringing Images to Direct Users to**
8 **Infringing Websites Is Not Fair Use.**

9 Google admits the obvious – its Image Search is “part of a commercial
10 enterprise.” Opp. at 12. See, e.g., Video Pipeline, Inc. v. Buena Vista Home
11 Entertainment, Inc., 342 F.3d 191, 198 (3d Cir. 2003) (use of film clips on website
12 was a non-transformative, “commercial” use); Pacific & Southern Co. v. Duncan,
13 744 F.2d 1490, 1496 (11th Cir. 1984) (“The commercial nature of the use militates
14 quite strongly against a finding of fair use.”). Courts routinely hold fair use
15 unavailable to those who have reproduced a copyrighted work as part of a
16 commercial venture, even where the reproduction purportedly furthers scholarship
17 or research. See, e.g., American Geophysical Union v. Texaco, Inc., 60 F.3d 913,
18 918 (2d Cir. 1994) (copying of entire articles for research purposes was not fair use);
19 Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1385 (6th
20 Cir. 1996) (copying of articles for use by students was not fair use).⁴

21 _____
22 ³ Citing the district court in Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 924
23 F. Supp. 1559, 1562 (S.D. Cal. 1996), Google argues it does not have the burden of
24 proof on the fair use affirmative defense. The Ninth Circuit, in affirming Dr. Seuss,
25 held to the contrary. 109 F.3d 1394, 1403 (9th Cir. 1997). This issue most recently
26 was discussed in A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 912
(N.D. Cal. 2000), which held that “defendant bears the burden of proving ...
affirmative defenses” on a motion for preliminary injunction. The Ninth Circuit
affirmed, but declined to decide this issue. A&M Records, 239 F.3d at 1014 n.3.

27 ⁴ Likewise, speculation that some Google *users* may be engaged in “fair uses” (e.g.,
28 for research or scholarship) is irrelevant to whether *Google’s* direct copying and
display is “fair use.” See Princeton Univ. Press, 99 F.3d at 1385.

1 Google's self-serving statement that its wholesale use of Perfect 10 images is
2 fair because its purpose is "not to exploit Perfect 10's works" is suspect, irrelevant,
3 and just plain wrong. First, Google *is* exploiting Perfect 10's copyrighted images by
4 copying and displaying over 1,000 of its best images in order to draw traffic and
5 advertising revenues to its website and those of its AdSense business partners. The
6 Perfect 10 images Google copies and displays are the exact same (and complete)
7 images that Perfect 10 sells. See Texaco, 60 F.3d at 923 (photocopying of journal
8 articles was not a transformative use); UMG Recordings, Inc. v. MP3.com, Inc., 92
9 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) ("Consideration of the first factor...involves
10 inquiring into whether the new use essentially repeats the old or whether, instead, it
11 'transforms' it by infusing it with new meanings, new understandings or the like,");
12 Infinity Broadcast Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998) ("difference
13 in purpose is not quite the same thing as transformation").

14 Second, Google's claim that the "thumbnails" (a misnomer, since the images
15 are much larger than a thumbnail) are transformative because they are "low-
16 resolution" is an unsupported and false assertion. Moreau Decl. ¶ 6; Zada Decl. ¶
17 53. They are clear, discernable, and complete, and are comparable in size and
18 quality to the images Perfect 10 provides on its website and sells for download on
19 cell phones. See PI Memo. at 15; Declaration of Allen Wang, ¶ 2.

20 Finally, Google's claims that it did not *intend* to infringe Perfect 10's
21 copyrights or supplant its market is irrelevant. See Wihtol v. Crow, 309 F.2d 777,
22 780 (8th Cir. 1962) ("Whatever may be the breadth of the doctrine of 'fair use,' it is
23 not conceivable to us that the copying of all, or substantially all, of a copyrighted
24 song can be held to be a 'fair use' merely because the infringer had no intent to
25 infringe.").

26 **B. Perfect 10's Copyrighted Photographs Are Creative.**

27 Photographs "fit squarely within the core of copyright protection." Elvis
28 Presley Enters., Inc. v. Passport Video, 349 F.3d 622, 629-30 (9th Cir. 2003). Kelly,

1 336 F.3d at 819 (“Photographs that are meant to be viewed by the public for
2 *informative and aesthetic* purposes ... are generally creative in nature.”) (emphasis
3 added). This is no less true for photographs of nude models. See Gross v.
4 Seligman, 212 F. 930, 931 (2d Cir. 1914) (“When the [plaintiff’s nude photograph]
5 was produced a distinctly artistic conception was formed”); Playboy Enters., Inc. v.
6 Starware Publishing Corp., 900 F. Supp. 433, 437 (S.D. Fla. 1995) (defendant
7 infringed nude photographs by substantially similar digital images).⁵

8 C. Google’s Use Of The Entirety Of Perfect 10’s Images Is Not
9 Necessary To Any Permissible Purpose.

10 Each Perfect 10 image is a separate, copyrightable work. Accordingly,
11 whether Google has copied the entirety of Perfect 10 Magazine or perfect10.com is
12 not the point. It has copied the entirety of over 1,000 individual works. That gives
13 rise to the presumption that its taking is not fair use. Encyclopaedia Britannica
14 Educational Corp. v. Crooks, 542 F. Supp. 1156, 1179 (W.D.N.Y. 1982) (“Within
15 the framework of reasonableness ... substantial and verbatim copying has usually
16 precluded a finding of fair use.”). Google cites to Nimmer to excuse its complete
17 copying, but omits the most relevant comment: “Whatever the use, generally, it may
18 not constitute fair use if the entire work is reproduced.” 4 M. & D. Nimmer,
19 Nimmer On Copyright § 13.05[A][3] at 13-180.1-181 (rev. 2004).⁶

20
21 ⁵ In Nunez v. Caribbean Int’l News Corp., 235 F.3d 18, 23 (1st Cir. 2000) (Opp. at
22 13), a photographer sued a newspaper that published his photographs (nude images
23 of Miss Universe Puerto Rico) as part of a news story about whether those images
24 disqualified her from retaining her crown. Unlike the fair use issue here, publication
of the photographs was inherently newsworthy – the purpose was to inform the
public, not the aesthetic purposes for which the photographs were taken.

25 ⁶ In Bill Graham Archives LLC v. Doring Kindersley Ltd., No. 03-9507, 2005 WL
26 1137878, *6 (S.D.N.Y. May 12, 2005), the owner of copyright in concert posters
27 sued the publisher of a biography of the Grateful Dead which used a few “thumbnail”
28 images (“isolated examples,” according to the Court) of plaintiff’s posters (which
plaintiff made only in poster size). Accordingly, the use not only was plainly
transformative, but was for the purpose of research and scholarship, because the

(continued...)

1 Nor can Google excuse its conduct by claiming that taking Perfect 10's
2 images is necessary. Google never explains why making available full-size images
3 is necessary to its search function. Nor does Google explain why its users'
4 purported "research" into nude photographs of Monika Zsibrita could not be
5 accomplished by the return of Web Search results that identify the location of "nude
6 photographs of Monika Zsibrita," rather than by reduced size images in addition to
7 the Web Search description. See, e.g., Bridges Decl., Ex. N (text search results for
8 model Aria Giovanni from adult search engine); see also Los Angeles Times v. Free
9 Republic, 54 U.S.P.Q. 2d 1453, 1462 (C.D. Cal. 2000) ("even where copying serves
10 the 'criticism, comment, and news reporting' purposes highlighted in Section 107,
11 its extent cannot exceed what is necessary to the purpose"); Infinity Broadcast, 150
12 F.3d at 109 (no fair use where "the public benefit...can either be accomplished by
13 other methods or is simply not enough to justify Kirkwood's non-transformative
14 retransmissions"). That users can view and copy Perfect 10 images without paying
15 the copyright owner does not make the appropriation of those images "necessary."
16 See Playboy Enters, Inc. v. Webbworld, Inc., 968 F. Supp. 1171, 1175 (N.D. Tex.
17 1997) ("If a business cannot be operated within the bounds of the Copyright Act,
18 then perhaps the question of its legitimate existence needs to be addressed.").
19 Google has an alternative: doing what others who use copyrighted works in
20 businesses must do – obtain consent or limit its use of the works. See, e.g., Bridges
21 Decl., Ex. A, p. 24 (Bettman Archive of *authorized* photographs.)

22 **D. Google's Use Of Perfect 10's Images Affects Perfect 10's Market.**

23
24 (...continued)

25 images were used to illustrate the biography and "to commemorate certain landmark
26 shows in the Grateful Dead's history." Id. at *6. Additionally, the "thumbnail"
27 images of the concert posters as part of a book were no substitute for the original,
28 full-size posters. Id. at *4. They were not used "to attract sales" of the book. Id.
And they did not cause market harm. Id. at 7. The Court did note that "a book that
simply compiled the collection of posters" would be infringing. Id.

1 Google's display of Perfect 10 images obviates the need to view (and pay for)
2 the original, directly supplanting Perfect 10's market in several ways. See Campbell
3 v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (“[W]hen a commercial use
4 amounts to mere duplication of the entirety of an original, it clearly ‘supersede[s] the
5 objects’ ... of the original and serves as a market replacement for it, making it likely
6 that cognizable market harm to the original will occur.”); Worldwide Church of God
7 v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1117 (9th Cir. 2000) (copying
8 book merely “supersedes the object of the original”).

9 More critically (and regardless of the size of the images it displays), Google
10 supersedes the market for authorized Perfect 10 images because it directs users to
11 websites that provide full size, high-quality *infringing* Perfect 10 images. See
12 Harper & Row Pubs., Inc. v. Nation Enters., 471 U.S. 539, 567 (1985) (“Fair use,
13 when properly applied, is limited to copying which does not materially impair the
14 marketability of the work which is copied.”); A&M Records, 239 F.3d at 1016-17
15 (“Having digital downloads available for free on the Napster system necessarily
16 harms the copyright holders’ attempts to charge for the same downloads.”). Google
17 never discusses, let alone refutes, this fact, which dispositively distinguishes this
18 case from Kelly.

19 Finally, Google's display of Perfect 10 images and its facilitation of the
20 downloading of the images to cell phones via Google Mobile further destroys the
21 value of Perfect 10's copyrighted works. Perfect 10's revenues in this market could
22 be vastly greater without Google's “give-away,” as sales in recent months are
23 dwindling. Zada Reply Decl., ¶ 65. If anything, Google's actions are inhibiting
24 sales of Perfect 10 images at the very time the market is developing. See A&M
25 Records, 239 F.3d at 1018 (harm to “plaintiff's entry into the market for the digital
26 downloading of music”); MP3.com, 92 F. Supp. 2d at 352 (defendant not entitled to
27 “usurp a further market that directly derives from reproduction of the plaintiffs’

1 copyrighted works ... even if the copyright holder had not yet entered the new
2 market in issue.”).

3 **E. The Public Interest Does Not Favor Fair Use.**

4 There is no protectible “public interest” in copying or displaying infringing
5 images. See Sega Enters., Ltd. v. MAPHIA, 857 F. Supp. 679, 687 (N.D. Cal. 1994)
6 (“To invoke the fair use exception, an individual must possess an authorized copy of
7 a literary work.”) Nor is locating, displaying, archiving, and directing users to
8 infringing images and infringing websites the type of “news reporting,”
9 “scholarship” or “research” that fair use protects. See Arista Records, Inc. v.
10 MP3Board, Inc., 2002 WL 1997918, *13 (S.D.N.Y. Aug. 29, 2002) (rejecting fair
11 use defense as applied to website providing links to sites containing infringing music
12 files). This key distinction (although it is not the only one) belies the claim that the
13 “purpose and character” of Google’s Image Search is “indistinguishable from those
14 that Kelly validated and permitted.” Opp. at 11.

15 **III. GOOGLE ALSO IS SECONDARILY LIABLE.**

16 **A. Google Is Liable For Contributory Infringement.**

17 Google does not dispute that its users, and the infringing websites from which
18 it displays images and to which it directs its users, are engaged in direct
19 infringement. Actual knowledge is plainly established by Perfect 10’s 37 notices of
20 infringement and additionally, at the least constructive knowledge exists by
21 Google’s monitoring of the content of infringing websites through its AdSense
22 program. Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 261, 264 (9th Cir.
23 1996); A&M Records, 239 F.3d at 1020-21 (elements of actual and constructive
24 knowledge). Google relegates its discussion of knowledge to a footnote, and weakly
25 argues only that it “responded” to notices of infringement or that its AdSense policy
26
27

1 has “since changed” (during the period Perfect 10 was sending notices). Both facts,
2 even if true, only *confirm* Google’s knowledge.⁷

3 Google’s attempted refutation of its “material contribution” rests on the
4 unsupported claim it does not “assist” third party websites in actually scanning or
5 posting the infringing images or “induce” the distribution of those images (even
6 though Google does post the infringing images on its own website and reformats
7 them to fit onto cell phone screens. Zada Decl. ¶ 55, Exh. 23). A defendant need
8 not “induce” the infringement or provide direct assistance in making copies to
9 “materially contribute.”⁸ A defendant “materially contributes” when it provides
10 “support services” or the “site and facilities” for the direct infringement, or
11 otherwise facilitates or enables infringement. A&M Records, 239 F.3d at 1022;
12 Fonovisa, 76 F.3d at 264. Google does far more. In addition to displaying reduced
13 size images, linking such images to infringing websites, reformatting images to fit
14 cell phone screens, and displaying full size infringing images from infringing
15 websites:

17
18 ⁷ Google’s denial that that its knowledge can also be shown because at least 500 of
19 the images it displays contain Perfect 10 copyright notices strains credulity. In fact,
20 Google frequently places what it calls “targeted advertising” (Opp. at 4 n.4) on
21 infringing websites *next to* infringing Perfect 10 images. See Castle Rock
22 Entertainment v. Carol Pub. Group, Inc., 955 F. Supp. 260, 267 (S.D.N.Y. 1997)
23 (reason to know that conduct was infringing where plaintiff’s work contained
24 copyright notices). The websites that display this material even contain express
25 disclaimers that note that “[c]opyright ownership is not claimed, implied, or
26 guaranteed, and remains that of the author(s).” Zada Decl. ¶ 88. Google itself
27 acknowledges that each “[i]mage may be ... subject to copyright.” Zada Decl. ¶ 38.

28 ⁸ Google makes almost no effort to refute that it also is subject to liability under the
inducement theory of contributory liability, Metro-Goldwyn-Mayer Studios, Inc. v.
Grokster, Ltd., 125 S. Ct. 2764 (2005). There is ample evidence that Google
encourages its users to visit infringing websites and download infringing images by
exhorting them to click on a link to “see full size image” while simultaneously
offering the ability to “save” the image to the user’s computer, by advertising the
infringing websites through framing, and by refusing to block infringing works or
delete them from its database. Id. at 2781-82.

1 • Google provides a “roadmap” to the location (and specific infringing
2 content) of infringing works. Sega Enterprises, Ltd. v. Sabella, 1996 WL 780560, at
3 *8 (N.D. Cal. Dec. 18, 1996) (“Sabella did more than provide the site and facilities
4 for the known infringing conduct. She provided a road map . . . for easy
5 identification of Sega games available for downloading.”); Sega Enterprises, Ltd. v.
6 MAPHIA, 948 F. Supp. 923, 933 (N.D. Cal. 1996) (defendant “provided a road map
7 on his BBS for easy identification of Sega games available for downloading”). See
8 Grokster, 125 S.Ct. at 2781 (defendants assisted users in locating copyrighted
9 materials).

10 • Google provides the infringing websites, which unlike Perfect 10, have
11 no brand recognition or goodwill supported by a magazine, with an audience for
12 their content, and effectively advertises the infringing websites. See Gershwin Pub.
13 Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)
14 (material contribution to infringing performance by assisting in creating an audience
15 for concert); Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 160-
16 161 (3d Cir. 1984) (defendant advertised and promoted infringing activity).

17 • Google offers its users a “preview” of the content of the infringing
18 website. A&M Records, 239 F.3d at 1022 (“[w]ithout the support services
19 defendant provides, Napster users could not find and download the music they want
20 with the ease of which defendant boasts”).

21 • Google provides a revenue stream to infringing websites, including
22 placing advertisements next to infringing Perfect 10 images on these third party
23 websites. Zada Reply Decl. ¶¶ 41-45, Exhs. 18-20; Zada Decl. Exhs. 28-30.
24 Grokster, 125 S. Ct. at 2781-82 (fact that defendants “make money by selling
25 advertising space” was relevant to contributory infringement).

26 • Google provides unauthorized access to Perfect 10’s membership
27 website by publishing usernames and confidential passwords (a fact it does not even
28 attempt to deny). Zada Reply Decl. ¶ 46, Exh. 21.

1 ● Google, after learning of specific infringing conduct, failed to take
2 action to stop or limit infringement. See PI Memo. at p. 22, lines 8-13. See also
3 Grokster, 125 S. Ct. at 2781 (fact that defendants never attempted to “diminish the
4 infringing activity” evidence of “unlawful objective.”)

5 Finally, citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S.
6 417, 422 (1984), Google briefly argues that it cannot be liable because its search
7 engine overall is “capable of substantial noninfringing uses.” Opp. at 18. Sony held
8 that contributory infringement could not be based *on presumed constructive*
9 *knowledge based solely* on the fact that a “staple article of commerce” with
10 substantial noninfringing uses might be used to infringe. 464 U.S. at 442. See
11 Grokster, 125 S. Ct. at 2778 (Sony barred secondary liability “based on presuming
12 or imputing intent to cause infringement *solely* from the design or distribution of a
13 product capable of substantial lawful use”) (emphasis added). However, as A&M
14 Records recognized (and Google ignores), when actual knowledge of infringement
15 exists *independent of* “presumed or imputed” knowledge – as it does here including
16 through notice – Sony does not apply, regardless of the magnitude of noninfringing
17 uses. 239 F.3d at 1021 (Sony inapplicable because “[r]egardless of the number of
18 Napster’s infringing versus noninfringing uses ... plaintiffs would likely prevail in
19 establishing that Napster knew or had reason to know of its users’ infringement”).

20 **B. Google Is Vicariously Liable For Infringement.**

21 Google does not refute the “financial benefit” prong of vicarious liability. See
22 Grokster, 125 S. Ct. at 2776 (one infringes vicariously “by profiting from direct
23 infringement while declining to exercise a right to stop or limit it”). In arguing that
24 it does not possess the “right and ability to supervise” infringing conduct, Google
25 initially creates and then knocks down a strawman – that “a parent corporation
26 cannot be held liable for the infringing actions of its subsidiary.” Opp. at 18-19.
27 Perfect 10 never asserted liability here on a parent/subsidiary theory. Google then
28 claims it did not “pre-approve” the content of infringing websites, and does not have

1 “editorial” control over the “design, hosting or transmission of any graphical
2 materials.” But no such “pre-approval” or “editorial control” is necessary for
3 vicarious liability. Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 306
4 (2d Cir. 1963) (vicarious liability imposed against defendant who “did not actively
5 participate in the sale of the [infringing] records and ... had no knowledge of the
6 unauthorized manufacture of the records”).

7 The “right and ability to supervise” is broad and includes the contractual *or*
8 practical right to limit or control infringement, whether or not it is exercised.⁹
9 Fonovisa, 76 F.3d at 262 (defendant controlled access to flea market and reserved
10 the right to exclude certain vendors); Shapiro, 316 F.2d at 308 (ability of defendant
11 department store to police its concessionaire and retention of “the ultimate right of
12 supervision over the conduct of the record concession and its employees” was
13 control); A&M Records, 239 F.3d at 1023 (“The ability to block infringers’ access
14 to a particular environment for any reason whatsoever is evidence of the right and
15 ability to supervise.... To escape imposition of vicarious liability, the reserved right
16 to police must be exercised to its fullest extent.”); Webbworld, 991 F. Supp. at 552
17 (“Webbworld exercised total dominion over the content of its site and the product it
18 offered its clientele. As a shop owner may choose from what sources he or she
19 contracts to buy merchandise, so, too, did Webbworld have the ability to choose its
20 newsgroup sources.”) Google plainly possesses the requisite right and ability to
21 supervise, from the beginning to the end of the process:

22 ● Google controls its proprietary web “crawler” by programming it to
23 determine what images to retrieve, copy, and add to its database. Google can refrain
24

25 ⁹ Of course, simply telling infringing websites not to infringe is meaningless,
26 RCA/Ariola International, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 777 (8th
27 Cir. 1988) (statement to retailers employing defendant’s tape copying machines to
28 “not permit their employees to take any part in the copying process” did not avoid
vicarious liability), as is Google’s AdSense “policy” (Opp. at 4).

1 from “crawling” websites with a history of infringement. Webbworld, 991 F. Supp.
2 at 552 (defendant used software to “troll” the Internet); see Kelly, 336 F.3d at 816
3 (defendant search engine deleted plaintiff’s photographs and placed websites that
4 were the source of images “on a list of sites it would not crawl in the future”).

5 • Google determines the content of its search results, and can remove
6 from its index and database images that are known to be infringing. A&M Records,
7 239 F.3d at 1024. See Opp. at 5-6 (Google claims – wrongly as to Perfect 10 images
8 – that it “suppresses pages or files in its index upon complaint”). It likewise can bar
9 websites that it knows are infringing and stop framing and linking to them, including
10 to its AdSense partners.

11 • Google can block or restrict access to images based on their context or
12 content. Google admits it has a “verbal index” of the context in which the infringing
13 images appear. Opp. at 2, 14. Since Google can use this “context” to block access
14 to explicit or pornographic material, it can use it to block access to infringing or
15 unauthorized Perfect 10 images. See A&M Records, 239 F.3d at 1024 (noting that
16 while Napster did not “read” the content of its indexed files, it had the ability to
17 examine their “file name indices”).

18 • Google’s AdSense contracts gave it the right to “monitor” its
19 advertising partners’ websites and to terminate those that infringe (though it may
20 have changed those contracts to avoid that right).¹⁰ It admits the right to terminate
21 by now promising it “is in the process of reviewing Perfect 10 notices and will
22 terminate sites from participating in AdSense that are in violation.” Opp. at 5.

23
24 ¹⁰ Citing an unpublished order in Perfect 10, Inc. v. Visa Int’l Serv. Ass’n, Google
25 argues that the ability to terminate AdSense contracts, while representing “economic
26 influence,” does not give it the right and ability to control infringing activity. But
27 unlike the relationship between Visa and the infringing websites in that case, Google
28 directs users to infringing websites, directly profits from its users’ access to its
AdSense partners, “actually supplied the product that was being used to enable” the
infringement, and “directly controlled whether users...could see and therefore
downloaded an infringing file by maintaining an index of infringing files.” Id. at 8.

1 Google's focus on its purported inability to dictate the specific content of third
2 party websites misses the point. The relevant inquiry is whether Google has the
3 right and ability to control what occurs on *its own* website. Webbworld, 968 F.
4 Supp. at 1177 ("That defendants had no control over those responsible for originally
5 uploading the infringing materials onto the Internet is not relevant to the issue of
6 defendants' control over their infringing activity. The only relevant question
7 regarding the element of control is whether defendants had the right and ability to
8 control what occurred on the Neptics website.") See A&M Records, 239 F.3d at
9 1023 (Napster had ability to control by policing its own search index, not users'
10 computer files).

11 Likewise, Google's attempt to distinguish A&M Records on the basis that it
12 dealt with a "proprietary, closed system," while the Internet "is an open system not
13 under Google's control" (Opp. at 19) is unavailing. Perfect 10 is not seeking to
14 impose upon Google a duty "to police the entire Internet." Rather, what Google can,
15 and should, control is its *own* "proprietary, closed system" (for which it claims
16 trademark, copyright, and trade secret protection).

17 **IV. THE DMCA DOES NOT LIMIT INJUNCTIVE RELIEF.**

18 Rather than supporting, either factually or legally, its entitlement to DMCA
19 limitation on remedies, Google simply argues that the injunction sought exceeds the
20 scope permitted by 17 U.S.C. § 512(j). That argument is premature because Google
21 fails to meet *any* of the requirements for DMCA safe harbor, a necessary predicate
22 to invoking Section 512(j).¹¹ See 3 Nimmer, § 12B.05[A][2] at 12B-68 (DMCA
23 safe harbor "cannot serve as a subterfuge for wholesale copying of another's work
24
25

26 ¹¹ Google never discusses 512(b) – "system caching" – though it acknowledges its
27 cache function displays Perfect 10 images. That is because Google does not comply
28 with the obligations of that safe harbor. It also does not claim protection under the
far-fetched theory asserted by Amazon that it is a 512(a) "mere conduit."

1 on the pretext it is being undertaken solely to create a complete and faithful ‘index’
2 to that site.”).

3 **A. Google Failed To Expediently Remove Infringing Images.**

4 *Google has not identified a single example of an image or URL it removed,*
5 *or to which it disabled access.* On the contrary, Google is continuing to display
6 virtually every Perfect 10 image that has been the subject of a notice. Zada Reply
7 Decl. ¶ 18. Google claims that it “processed” (not that it “expeditiously removed or
8 disabled,” as required) 414 of the URLs in Exhibit 81 of the Zada Declaration but
9 does not provide: (1) any support for this assertion, (2) which URLs it allegedly
10 “processed,” or (3) when it supposedly processed them.¹² Google does not even
11 suggest that it has ceased displaying confidential Perfect 10 passwords. And, the
12 evidence is that Google continues to display almost 5,000 copies of Perfect 10
13 images – as many Perfect 10 images as ever. See Zada Decl. ¶¶ 11-21, Exhs. 1-10.
14 As of October 1, 2005, *Google was continuing to display virtually every one of the*
15 *approximately 665 Perfect 10 images that were attached as hard copy exhibits to*
16 *the Zada Declaration filed on August 19, 2005, as well as virtually every one of*
17 *the 1300 images that were attached as soft copies.* Zada Reply Decl. ¶¶ 13-19;
18 Exhs. 1-9. Google received notices identifying many of these images hundreds of
19 days earlier. Zada Reply Decl. ¶¶ 15-19, Exhs. 4-9.

20 **B. Google Was Provided All Required Information.**

21 **Location of Copyrighted Work.** Google’s claim that until October 11, 2004,
22 Perfect 10 did not provide Perfect 10 Magazine issue and page numbers for the
23

24 ¹² Moreover, Google asserts that whatever action it purportedly took with respect to
25 these unidentified URLs was “to block them from appearing in response to a *Google*
26 *Web Search.*” *Id.* However, Exhibit 81 specifically dealt with images displayed via
27 *Google Image Search*, and Google has admitted that its Web Search and Image
28 Search indexes are stored separately. *Opp.* at 2. In any event, Google’s statements
regarding expeditious removal of Perfect 10 images locatable via *Web Search* are
also false. Zada Reply Decl. ¶ 19, Exh. 9.

1 original copyrighted images is demonstrably false. Macgillivray Decl. ¶ 21. Perfect
2 10 provided precisely this information in every notice sent in 2004 and 2005,
3 starting with its first notice on May 31, 2004. See Zada Reply Decl. ¶ 23, Exh. 11.
4 Each notice from June 4, 2004, also referred to perfect10.com as a source of the
5 original copyrighted images. Id., ¶ 23, Zada Decl. Exhs 41-45. See 17 U.S.C
6 § 512(c)(3)(A)(i) (requiring only “identification” of the copyrighted work or a
7 “representative list of such works”).

8 **Location of Infringing Image.** In most cases, Perfect 10 identified the
9 location of the infringing work by copying precisely the URL Google placed below
10 the image it displayed. See Zada Reply Decl., ¶ 29. Contrary to Google’s claim that
11 Perfect 10 did not “identify jpg. or image file locations” (Macgillivray Decl. ¶ 24),
12 Perfect 10 provided Google more than 60 URLs ending with “.jpg.” Id., Exh.13.
13 Moreover, Google never even suggested that it required a URL which identified
14 “.jpg. or image file locations.” (The correct term is “.jpg” not “.jpg.”) Zada Reply
15 Decl. ¶ 31. In any event, it is inconceivable that a technological juggernaut like
16 Google could credibly claim that it did not have sufficient information to locate
17 infringing works given that Perfect 10 identified either the exact URL which Google
18 *itself* had placed below the infringing image it displayed or the URL of the
19 infringing web page containing that infringing image. Zada Decl. ¶ 97. Even when
20 exhibits of the infringed image were attached to the Zada Declaration, Google *still*
21 did not remove virtually any of those images. Zada Reply Decl. ¶ 14.

22 Even if none of the above were true, the premise of Google’s argument is
23 faulty, since the only information required to locate the infringing images are model
24 name and base URL of the infringing website, both of which were in every notice.
25 (The base URL is that portion of a URL that determines the website at issue –
26 typically the URL of the home page of the website.) Performing an Image Search
27 on a model name and a base URL will return the images of that model from the
28 subject website. Zada Reply Decl. ¶ 30. See 17 U.S.C. § 512(c)(3)(A)(iii)

1 (requiring only “identification” of infringing material and “information reasonably
2 sufficient to permit the *service provider* to locate the material”) (emphasis added).
3 See also A&M Records, 239 F.3d at 1024 (“As a practical matter, Napster, its users,
4 and the record company plaintiffs have equal access to infringing material by
5 employing Napster’s ‘search function.’”); Grokster, 125 S. Ct. at 2772 (“a few
6 searches using [defendant’s] software would show what is available”).¹³

7 **Service of Notices.** Google does not identify any misdirected notice.
8 Macgillivray Decl. ¶ 21. Perfect 10 sent every notice to the fax number or the e-
9 mail address (legal@google.com) on Google’s filing with the Copyright Office, or
10 both. Zada Decl. ¶¶ 81-87; see 17 U.S.C. § 512(c)(2)(A) (requiring service provider
11 to provide this information to Copyright Office). While Google criticizes Perfect 10
12 for “only fax[ing]” its notices, Google directed Perfect 10 to “provide a written
13 communication (by fax or regular mail, *not by email*)...” Zada Reply Decl. ¶ 35,
14 Exh. 16 (emphasis added). And, Google’s claim (Opp. at 7 n.8) that it never
15 received the notices attached as Exhibits 66 and 67 is wrong, as evidenced by fax
16 receipts. Id. ¶ 38, Exh. 17.

17 **Google’s Silence About Alleged Deficiencies.** Google claims that “if a
18 notice does not contain enough information for Google to process, or if it otherwise
19 fails the requirements of 17 U.S.C. Section 512(c)(3) but contains contact
20 information for the sender, Google’s staff will typically email the sender requesting
21 additional information.” Macgillivray Decl. ¶ 15. Rather than seeking additional
22 information, Google led Perfect 10 to believe that its notices were sufficient to
23 “process.” See Macgillivray Decl. Exh. F, pg. 182 (“Your DMCA complaints dated
24

25 ¹³ Google also claims Perfect 10’s notices were “vastly overbroad” in that they
26 included right of publicity violations. These always were plainly demarcated from
27 the copyright infringements by prefatory language such as “[w]hat follows below are
28 URLs that were also reached by doing Google searches which contain right of
publicity violations.” Zada Reply Decl. ¶ 34, Zada Decl. Exh. 43, page 311.

1 6/28/04 and 6/1/04 are nearly finished processing.”) and Zada Reply Decl. Exh. 15,
2 dated May 13, 2005 (“In accordance with the Digital Millennium Copyright Act, we
3 have completed processing your infringement complaints.”).

4 **C. Google’s Knowledge or, Alternatively, Its Financial Benefit and**
5 **Ability to Control Also Disqualifies It From Safe Harbor.**

6 The 512(d) safe harbor is also unavailable because, pursuant to Section
7 512(d)(1), Google has both actual knowledge and “awareness” of infringing activity,
8 displays infringing images itself, and financially benefits from such activity, which
9 it can control. See pp. 9-15, supra.

10 **D. Google Did Not Satisfy Section 512(i).**

11 **Repeat Infringer Policy.** Google has not produced any evidence of a written
12 repeat infringer policy, a prerequisite to DMCA protection. 17 U.S.C. § 512(i). See
13 Amazon Reply Brief at 8. Google attempts to avoid this obligation by arguing that
14 websites to which it links are not “account holders and subscribers.” This
15 contention is debatable at best, and clearly fails with respect to infringing AdSense
16 websites with which Google has a business relationship that includes sharing
17 revenues from Google-placed advertisements.¹⁴ Zada Decl., ¶¶ 25-26, Exh. 7. See
18 H. R. Rep. No. 105-551 (Part II) at p. 61 (“In using the term ‘subscribers,’ the
19 Committee intends to include account holders that have a *business relationship* with
20 the service provider that justifies treating them as subscribers ... for purposes of new
21 Section 512, even if no formal subscription agreement exists.”) (emphasis added).

22
23
24 ¹⁴ The policy underlying Section 512(i) strongly suggests that non-AdSense websites
25 should be treated the same way, as Google benefits from the infringing content it
26 displays from all websites. See Perfect 10 v. Cybernet Ventures, Inc., 213 F.Supp.2d
27 1146, 1177 (C.D. Cal. 2002) (“The Court does not read §512 to endorse business
28 practices that would encourage content providers to turn a blind eye to the *source* of
massive copyright infringement while continuing to knowingly profit, indirectly or
not, from every single one of those same sources until a court orders the provider to
terminate each individual account.”).

1 **Reasonable Implementation.** Google also has not produced any evidence
2 that it terminated any infringing website pursuant to a repeat infringer policy. On
3 the contrary, Google tacitly admits it has done nothing, instead promising that it “is
4 in the process of reviewing Perfect 10 notices and will terminate sites from
5 participation in AdSense that are in violation.” Opp. at 5. The reality is that after 37
6 DMCA notices, *Google has not taken any steps to terminate infringing websites*
7 *(including AdSense Websites) from inclusion in its database, much less inclusion*
8 *in its AdSense program.* Instead, Google relies on the fact it purportedly
9 “suppresses pages or files in its index upon complaint” (which is demonstrably false,
10 see Section IV(A), supra). However, Section 512(i) requires more, *i.e.*, terminating
11 relationships. See Cybernet Ventures, 213 F. Supp. 2d at 1177 (Section “512(i) is
12 focused on infringing users, whereas [other provisions are] focused primarily on the
13 infringing material itself.”)

14 Google’s argument that it can do no more than simply suppress individual
15 image files because it “cannot terminate access to the web” (Opp. at 21) is a red
16 herring. While Google may not be able to restrict a website from existing on the
17 Internet, it can instruct its computers to delete that website from Google’s own
18 database and to stop crawling that website.¹⁵ Zada Decl. ¶¶ 141-144. And it
19 certainly can terminate participation in the AdSense Program. Rather than doing so,
20 *Google has enhanced its relationship with such infringing sites.* Zada Reply
21 Decl., ¶¶ 41-48, Exh. 18.

22
23
24
25 ¹⁵ Google claims that it does not (not that it cannot) ban an entire domain because
26 that would be overbroad. Opp. at 21 n.21. Apart from the fact that this is what
27 Section 512(i) requires, the illustration Google uses, geocities.com, is vastly different
28 than any URL identified in Perfect 10 notice. Geocities.com is a hosting company
with thousands of subdomains. Perfect 10’s notices identified infringing images or
infringing web pages of individual websites. Zada Reply Decl., ¶ 29.

1 **Google Is The Repeat Infringer.** Finally, Google cannot argue that it has
2 implemented a policy aimed at repeat infringers, when Google itself continues to
3 copy and display thousands of Perfect 10 images and is itself a repeat infringer.¹⁶

4 **V. THE PRELIMINARY INJUNCTION IS FAIR AND APPROPRIATE.**

5 The preliminary injunction requested by Perfect 10 appropriately balances the
6 interests of the parties (and the public). It requires that Google delete identified
7 copyrighted images after notice and not replace them, stop linking to specific
8 websites that provide identified copyrighted images, and cease publishing
9 perfect10.com passwords after notice. See A&M Records, Inc. v. Napster, 284 F.3d
10 1091, 1095-96 (9th Cir. 2002) (describing preliminary injunction).¹⁷ Google's
11 specific objections to the proposed order lack merit:

12
13
14 ¹⁶ While this Court is not restricted to injunctive relief under Section 512(j), even if
15 it were, such relief would be necessary and appropriate. The Court has broad
16 discretion under 512(j)(1)(A) to restrain Google from providing access to infringing
17 material or activity residing at a particular online site, terminating the account of
18 subscribers engaging in infringing activity or other injunctive relief as may be
19 necessary to prevent or restrain infringement of specified material at a particular
20 online location. Google's only response is to eliminate Section 512(j) completely
21 from the equation, concluding that an injunction would not be technically feasible
22 and effective, would interfere with access to noninfringing material at other online
23 locations, and other less burdensome and comparably effective means are available.
24 Google does not support any of these conclusions.

25 ¹⁷ In a footnote, Google recognizes that the preliminary injunction in A&M Records
26 required that the defendant "police the system by searching its index" and the
27 removal after notice of specified works. Opp. at 24 n.23. It also required that the
28 search engine defendant do everything "feasible" to block infringement of which it
had notice from any source. A&M Records, 284 F.3d at 1097, 1098. Google tries to
distinguish A&M Records, but its claimed distinctions are unavailing: (1) Google's
system – like Napster's – is a proprietary search engine built on "sophisticated
algorithms" which indexes and compiles a database of infringing works; (2) the
injunction against Napster was limited to its infringing uses, as is the case here; (3)
Napster's asserted public and First Amendment interests were rejected as they did
not outweigh the public interest in protecting copyright. 239 F.3d at 1004. There is
one difference between Napster's search index and Google's Image Search – Google
directly infringes Perfect 10's copyrights.

1 Paragraph 1(a) of the order requires deletion of identified images. Perfect 10
2 will provide to Google a disk containing copyrighted images categorized by model,
3 and Google need merely ensure, using the technology inherent in its own system,
4 that Image Searches performed on a model's name do not yield the same images
5 contained in that model's folder on the disk. Enjoining Google from displaying
6 images of Perfect 10 models when such display occurs as a direct result of a search
7 on that model's name obviates Google's unsupported claim that it lacks the
8 technology for compliance.

9 Paragraph 1(b) of the order enjoins linking to websites (via both Image Search
10 and Web Search) that display Perfect 10 images. It does not require "screening the
11 entire Web for allegedly infringing items before indexing pages." Opp. at. 24. The
12 prohibition on linking to such websites only takes effect after Perfect 10 has
13 provided notice to Google specifying infringing websites. Nor is it overbroad in
14 requiring Google to "suppress" entire websites. Given the ability to navigate
15 through infringing websites with a single click, unless Google disables all its links to
16 a particular infringing website, the requirement of "disabling access to the infringing
17 material" is rendered pointless. See Zada Decl. ¶¶ 127-131.

18 **VI. PERFECT 10 HAS BEEN IRREPARABLY HARMED AND HAS NOT**
19 **UNREASONABLY DELAYED.**

20 Perfect 10 first discovered that its images were being displayed by Google in
21 *May 2004*, and immediately started sending DMCA notices. Zada Decl. ¶ 79, Exhs.
22 40-73.¹⁸ Perfect 10 afforded Google the opportunity to remove infringing material
23

24 ¹⁸ Perfect 10 did complain to Google about its *Web Search* function in 2001. At that
25 time, Google was not displaying Perfect 10 images. Perfect 10 was dissuaded from
26 taking any action at that time, since in response to one of Perfect 10's notices,
27 Google claimed: "[t]here is nothing that Google can do to remove the offending
28 content without the cooperation of the site administrator." Zada Decl., ¶ 77, Exh. 37.
Perfect 10 did subsequently file actions against infringing websites linked by Google,
but that did not stop the infringement. See Zada Decl., ¶ 140.

1 and was led to believe that Google was abiding by its “notice and takedown”
2 obligations and “processing” its notices. See, e.g., Zada Reply Decl. ¶ 32, Exh. 15.
3 When it became clear that Google was not removing or disabling access to the
4 identified infringing material, Perfect 10 prepared and provided to Google in
5 October 2004 a draft complaint and written settlement proposal. Perfect 10
6 subsequently met with Google representatives for settlement discussions, and
7 engaged in follow-up settlement communications. See, e.g., Ty, Inc. v. Publications
8 Intern., Ltd., 81 F. Supp. 2d 899, 903-04 (N.D. Ill. 2000) (“Of course, a plaintiff can
9 offer a good explanation for the delay and still secure injunctive relief. The
10 explanation usually offered and accepted is that settlement discussions were
11 ongoing.”); Ocean Garden, Inc. v. Marktrade Co., 953 F.3d 500, 508 (9th Cir. 1991)
12 (permissible delay for settlement negotiations). In November 2004, it became clear
13 that settlement was not possible. On November 19, 2004, Perfect 10 sued.¹⁹

14 In December 2004, as Perfect 10 continued to monitor and investigate the
15 uses of its images on google.com, it discovered that Google was infringing its
16 images in an additional, significant way: displaying full-size Perfect 10 images via a
17 “cache” link in Web Search results. Zada Reply Decl. ¶ 63. (In a number of cases,
18 Google continued to display full size Perfect 10 images via its cache link after the
19 infringing websites which were the sources of those images stopped doing so. Zada
20

21 ¹⁹ Immediately after Google filed its Answer and Counterclaims, Perfect 10 sought
22 to schedule the Rule 26(f) conference. Declaration of Jeffrey D. Goldman
23 (“Goldman Decl.”) ¶ 2, Exh. 1. Google delayed the conference by responding that it
24 was “premature.” Id. ¶ 3, Exh. 2. See Ocean Garden, 953 F.3d 500, 508 (9th Cir.
25 1991) (delay did not prevent issuance of injunction where it resulted in part from
26 extensions requested by defendants). The conference finally was held on March 3.
27 Id., ¶ 3. Immediately after the Rule 26 conference, Perfect 10 served interrogatories,
28 requests for admissions, and requests for production of documents, seeking basic
information. The vast preponderance of Google’s responses, served on April 18,
consisted of objections. Google did not produce any responsive documents. Id. ¶ 4,
Exh. 3. Google also largely failed to respond substantively to subsequent requests
for admission. Id. ¶ 5, Exh. 4.

1 Decl. ¶¶ 50-51, Exhs. 20-21) Perfect 10 again prepared and sent DMCA notices
2 specifically identifying infringement via Google’s cache. Zada Reply Decl. ¶ 62.
3 Perfect 10 prepared and, on January 19, 2005, filed an Amended Complaint to
4 include Google’s caching function, and also Google’s publication of usernames and
5 passwords to Perfect 10’s membership website. Amended Complaint ¶ 25. See
6 CyberMedia, Inc. v. Symantec Corp., 19 F. Supp. 2d 1070, 1078 (N.D. Cal. 1998)
7 (“[A] reasonable delay caused by a plaintiff’s good faith efforts to investigate an
8 infringement will not rebut the presumption”).²⁰

9 In May 2005, Perfect 10 discovered that Google was enabling and
10 encouraging users to download to cell phones the reduced size Perfect 10 images
11 Google provides for free. Perfect 10 had an agreement to sell these same images in
12 this exact manner. Zada Decl. ¶ 16; Moreau Decl. Once again, Perfect 10 prepared
13 and served notices, beginning on May 7, identifying this new conduct. Zada Reply
14 Decl. ¶ 64. On June 30, Perfect 10 filed its preliminary injunction motion against
15 Amazon, and immediately thereafter, Perfect 10 prepared this motion.

16 Google completely ignores that “[i]n assessing the excusability of delay in
17 seeking a preliminary injunction, the relevant issue is whether defendant has been
18 ‘lulled into a false sense of security or had acted in reliance on the plaintiff’s
19 delay.’” In re Aimster Copyright Litigation, 252 F. Supp. 2d 634, 662 (N.D. Ill.
20 2002), aff’d, 334 F.3d 643 (7th Cir. 2003); see Ocean Garden, 953 F.3d 500, 508
21 (9th Cir. 1991) (delay did not rebut presumption of irreparable harm where it did not
22 harm defendant). Google never has claimed (much less presented any evidence) that
23 it has been lulled into a false sense of security or has detrimentally relied on “delay.”
24 See Ty, Inc., 237 F.3d at 903 (noting the dearth of “affirmative evidence that
25

26
27 ²⁰ Perfect 10’s investigation contrasts markedly with Citibank, N.A. v. Citytrust, 756
28 F.2d 273, 277 (2d Cir. 1985), in which Citibank failed to investigate basic facts
relating to claimed trademark infringement.

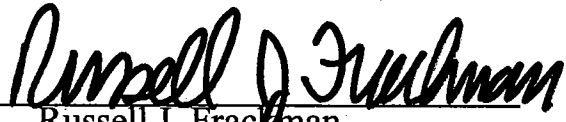
1 [Plaintiff's] delay ... caused [Defendant] to be lulled into a false sense of security or
2 that [Defendant] in any way relied upon delay.") Nor could it credibly so claim,
3 since Perfect 10 continually sent Google DMCA notices. (Zada Decl., ¶¶ 79-89,
4 Exhs. 38-76), gave Google more than sufficient opportunity to respond and to
5 remove or disable access to infringing material, and Google certainly knew that a
6 motion for injunctive relief was a likely consequence of its conduct.²¹

7
8 **CONCLUSION**

9 Perfect 10 respectfully requests that the Court enter the proposed order.

10 October 17, 2005

MITCHELL SILBERBERG & KNUPP LLP

11
12 By: 
13 Russell J. Frachman
14 Attorneys for Plaintiff

15
16
17
18
19
20
21
22
23 ²¹ Google's other cursory arguments ostensibly on the lack of harm are easily
24 dismissed: First, Google points to statements allegedly made eight years ago to
25 incorrectly suggest that Perfect 10 Magazine (not perfect10.com) never was intended
26 to make money. The quotes either were inaccurate or false. Zada Reply Decl. ¶ 59.
27 Second, rather than "crying wolf" about the infringements of its images, even the
28 court in the case cited by Google acknowledged: "[T]his is a case where alleged facts
presented a close question of law." See Perfect 10, Inc. v. Visa Int'l Serv. Assoc.,
2005 WL 2007932, *4 (N.D.Cal. Aug. 12, 2005). Finally, Perfect 10 is being
harmd in several ways, including selling substantially fewer images via cell phones.
Zada Reply Decl. ¶ 65.