

Court of Appeals Docket No. 10-56316

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PERFECT 10, INC.,

Plaintiff-Appellant

vs.

GOOGLE INC.,

Defendant-Appellee.

On Appeal From The United States District Court, Central District Of
California, Hon. A. Howard Matz, USDC No. CV 04-9484 AHM (SHx)

OPENING BRIEF OF PLAINTIFF-
APPELLANT PERFECT 10, INC.

PUBLICLY FILED, REDACTED VERSION; FULL VERSION FILED
UNDER SEAL PURSUANT TO PROTECTIVE ORDER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Perfect 10, Inc. certifies that it has no parent or subsidiary corporations, and that no publicly held corporation owns 10% or more of its stock. Perfect 10, Inc. has not issued shares to the public.

Dated: October 17, 2010

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FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER

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JURISDICTIONAL STATEMENT

This appeal arises from an Order Denying Perfect 10's Motion for Preliminary Injunction, entered on July 30, 2010 (the "PI Order") and an Order Granting In Part and Denying In Part Google's Motions for Partial Summary Judgment of Entitlement to Safe Harbor, entered on July 26, 2010 and amended on July 28, 2010 (the "SJ Order"). Excerpts of Record ("ER") 10005-10062.¹ The District Court had federal question jurisdiction under 28 U.S.C. §§1331 and 1338(a). ER90239.

This Court has jurisdiction over the PI Order under 28 U.S.C. §1292(a)(1). This Court has pendent appellate jurisdiction over the SJ Order because the SJ Order is inextricably intertwined with the PI Order, provides the legal authority for the PI Order, and is necessary to review to ensure meaningful review of the PI Order. *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 905 (9th Cir. 1995) ("*Ananda*") (partial summary judgment orders reviewable prior to final judgment "because their legality is inextricably bound up with the legality of the dissolution of the injunction"); *Meredith v. State of Oregon*, 321 F.3d 807, 813 (9th Cir. 2003) (approving *Ananda*); *Oregon Natural Resources Council v. Kantor*, 99 F.3d 334, 337 (9th Cir. 1996) (appellate court has "jurisdiction under §1292(a)(1) to review an order granting partial summary

¹ Citations to the ER are by volume and page number. For example, ER10005 means ER volume 1, page 5.

judgment where the order ‘provides the legal authority to issue an injunction.’”)

Perfect 10 timely filed its Notice of Appeal on August 24, 2010, pursuant to Fed.R.App.P. 4. ER10001.

ISSUES PRESENTED

1. Did the District Court err in holding that most notices of infringement sent by Perfect 10 to Google under the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. §512, were deficient as a matter of law, even though these notices:

- (a) complied with all statutory requirements;
- (b) satisfied Google’s published instructions;
- (c) were quickly processed by other internet service providers;
- (d) were belatedly processed in some cases by Google;
- (e) were approved by three technical experts;
- (f) were not challenged by any Google technical expert;
- (g) were less burdensome to process than the textual notices

advocated by the Court; and

- (h) were never individually analyzed by the Court?

2. Did the District Court err in invalidating Perfect 10’s DMCA notices by creating two new requirements that are:

- (a) not part of the statute;

- (b) contrary to case law and legislative history;
- (c) confusing and unnecessary;
- (d) often impossible to meet;
- (e) not requested by Google in its DMCA instructions; and
- (f) would invalidate almost all existing DMCA notices?

3. Did the District Court err in denying Perfect 10's Motion for Preliminary Injunction without ever addressing any of 95 Perfect 10 DMCA notices at issue in the motion?

4. Did the District Court err in concluding that Perfect 10 failed to establish that it was likely to succeed on its contributory and vicarious infringement claims, even though Perfect 10 submitted evidence establishing that Google:

- (a) knew or had reason to know of infringement on its system;
- (b) failed to remove infringing links or take other simple measures to prevent further damage to Perfect 10's copyrighted images ("P10 Images");
- (c) could use image-recognition to remove most P10 Images from its system; and
- (d) earns revenues from Google ads next to thousands of unauthorized P10 Images on Blogger websites it controls?

5. Did the District Court err in holding that Google's forwarding of

Perfect 10's DMCA notices to chillingeffects.org for display on the Internet constitutes fair use, even though:

- (a) the notices contain full-size P10 Images;
- (b) Perfect 10 repeatedly asked Google not to publish the notices;
- (c) Google links to, displays, places ads around, and offers to its users, these full-size P10 Images;
- (d) this process guarantees the never-ending infringement of the very images P10 asked Google to remove?

6. Did the District Court err in holding, as a matter of law, that Google implemented a suitable repeat infringer policy under §512(i) even though:

- (a) Perfect 10 submitted four declarations from third parties stating that Google failed to process most of their DMCA notices;
- (b) Perfect 10 submitted evidence that Google had a policy of not processing most DMCA notices;
- (c) Perfect 10 submitted evidence that Google did not respond to as many as 92 third-party DMCA notices regarding the same repeat infringer;
- (d) the court failed to include Google AdWords and AdSense affiliates in its analysis, even though they constitute most Google account holders;
and
- (e) the District Court's holding was based entirely upon

declarations of one Google employee, to which Perfect 10 raised substantial objections, which the District Court failed to rule upon.

7. Did the District Court err in holding that Google's display of full-size P10 Images stored on Google's own servers did not constitute direct copyright infringement under this Court's server test?

8. Did the District Court err in concluding that Perfect 10 failed to establish that it was likely to succeed on its right of publicity claim, even though this ruling allows Google and other Internet advertising businesses to forever earn revenues by exploiting the names and likenesses of celebrities and models without compensating them?

STATEMENT OF THE CASE

This appeal raises critical issues regarding the application of copyright law to Internet businesses and the degree to which such businesses are allowed to commercially exploit and damage the intellectual property of others. It addresses such key questions as what constitutes a compliant DMCA notice, and what are the responsibilities of Internet Service Providers ("ISPs") to prevent the same repeatedly-identified works from endlessly reappearing on their systems.

The District Court mistakenly imposed burdensome and unwarranted restrictions on DMCA notices that are contrary to the statute, legislative history, and case law. Furthermore, in ruling that Google's forwarding of notices to

chillingeffects.org was fair use, the court permitted Google to copy, distribute, and display Perfect 10's DMCA notices, even though they contain thousands of full-size P10 Images.

The District Court's rulings largely eviscerate the notice-and-takedown provisions of the DMCA and leave copyright holders with no protection for their works. First, they effectively allow ISPs to put back on the Internet whatever infringing works and links a copyright holder asks to be removed. *Because the damage caused by this reinstatement is greater than the damage complained about* ER20195(ln5-17);ER30031-32;ER90136-138¶¶4,7;ER90126¶5; ER20084(ln18)-085(ln1);ER20126-129), *it is now pointless for copyright holders to send DMCA notices.*

Second, even if copyright holders elect to send DMCA notices, it is often impossible for these notices to comply with the court's newly-created notice requirements, because they are so restrictive.

Finally, even if ISPs respond to DMCA notices and suppress an identified infringing image on one infringing website, they need not do anything to prevent the same misuse of that same image on a different infringing website. As a result, ISPs such as Google can endlessly display, place ads around, and profit from, the same infringing work on different infringing websites.

The District Court's rulings thus vastly expand the level of exploitation and

damage that Internet businesses can cause to copyright owners. Such rulings contravene this Court's recent warning not to "give online businesses an unfair advantage over their real-world counterparts, which must comply with the laws of general applicability." *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008) (en banc).

On November 19, 2004, Perfect 10 filed this action against Google, alleging claims for direct, contributory, and vicarious copyright infringement and violation of rights of publicity, among others. On August 24, 2005, Perfect 10 sought a preliminary injunction concerning its copyright infringement claims. The District Court issued an order granting in part and denying in part the preliminary injunction. *Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828 (C.D. Cal. 2006) ("*Google*"). On appeal, this Court affirmed in part, reversed in part, and remanded the case to the District Court for further proceedings. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) ("*P10 I*"). Neither opinion addressed the issue of what constitutes a compliant DMCA notice.

This appeal addresses the District Court's July 30, 2010 PI Order, denying in its entirety Perfect 10's second motion for preliminary injunction (the "PI Motion"), filed after Google began to copy, and distribute on the Internet, the full-size P10 Images attached to Perfect 10's DMCA notices. The PI Order, in turn, incorporates and reiterates the rulings set forth in the District Court's July 26, 2010

SJ Order, in which the Court granted, in large part, Google's three motions for partial summary judgment that Google was entitled to safe harbor protection under §512 of the DMCA (the "SJ Motions"), and invalidated a substantial number of Perfect 10's DMCA notices.

The District Court invalidated most of Perfect 10's notices by creating two additional requirements for DMCA notices not found in §512(c)(3). These added requirements are unnecessary, confusing, and greatly restrict what constitutes a compliant notice. The court imposed these new burdensome requirements even after it recognized that *"it's possible that the Ninth Circuit is going to sooner or later directly confront the problems that copyright owners of massive amounts of content have in complying with the DMCA and doing so consistent with the language of CCBill, which didn't involve such a mass array of claimed ownership[.]"* ER20068(ln14-19) (emphasis added).

First, the Court held that a DMCA notice must be a "single document" – it cannot contain the information required by §512(c)(3) in attachments or folders. This requirement illogically penalizes copyright holders for organizing their notices by infringing website, and effectively makes it impossible to identify thousands of infringements in a single compliant notice.

Second, the Court ruled that a DMCA notice cannot identify the copyrighted work claimed to have been infringed by providing a copy of that work. Rather, the

Court held that a copyright holder must provide the exact location where an authorized copy of that work may be found – a requirement that is contrary to the language and logic of the DMCA, often impossible to satisfy, and *would invalidate the vast majority of DMCA notices, including notices issued by Adobe, Microsoft, the Business Software Alliance, Playboy, Getty Images, the MPAA, and the RIAA.* ER50102-114;ER80172-175.

The PI Order includes the following additional rulings at issue in this appeal:

- 1) Perfect 10's notices were deficient and did not impart knowledge of infringement to Google, even though they complied with Google's DMCA instructions, and Google belatedly processed many of the notices.
- 2) Perfect 10 failed to establish that it was likely to succeed on its contributory infringement claims, even though Google had reason to know of infringement on its system and could have simply removed specific infringing P10 Images.
- 3) Perfect 10 failed to establish that it was likely to succeed on its vicarious infringement claims, even though Google now possesses image-recognition capability and earns revenue from ads on the Blogger websites it controls.
- 4) Google's display of full-size images from its own Blogger servers does not constitute direct infringement, notwithstanding this Court's server test.

5) Google implemented an adequate repeat infringer policy as a matter of law. The District Court reached this ruling in spite of significant contrary evidence submitted by Perfect 10, including *Google's policy of refusing to process DMCA notices concerning its AdWords advertisers*, Google's failure to respond to as many as 92 third-party DMCA notices regarding the same repeat infringer, and four third-party declarations testifying about Google's failure to process their notices.

6) Perfect 10 was not likely to prevail on its right of publicity claim because Google was not inappropriately using the names or likenesses of Perfect 10 models. As a result of this ruling, Google and other Internet advertising businesses can endlessly partner with websites that misuse celebrities' names or likenesses to earn revenue, without compensating the celebrity.

FACTS

I. PERFECT 10'S BUSINESS

From 1997 until 2007, Perfect 10 published Perfect 10 Magazine, which featured tasteful images of models, including Victoria Secret and Sports Illustrated cover model Marisa Miller. ER60179(ln14-18). Since filing its first PI Motion in 2005, Perfect 10 has been forced to close its magazine and end its cell-phone downloading business. It has lost more than \$60 million and is near bankruptcy. Although Perfect 10 still operates perfect10.com and sells back issues of its

magazine, its revenues are now less than \$150,000 a year, while its expenses are over \$3,000,000 a year. ER20076-77¶2;ER20186(ln8-19).

Virtually everything that Perfect 10 attempts to sell is available for free on google.com. ER20186-190¶¶6-7;ER30001-16;ER20191-201¶¶11-16;ER30017-76.

II. GOOGLE'S BUSINESS

Google Web Search provides text and links in response to search queries. ER20193(ln20-22);ER30024. Google Image Search provides webpages of reduced-size images, called thumbnails, in response to search queries. *These webpages are created by Google and stored on Google's servers.* ER20186-188¶6;ER30001-6. When users click on a thumbnail, Google provides a second page displaying the thumbnail at the top and a portion of the third-party website to which Google links the thumbnail at the bottom. ER20188-190¶7;ER30007-16. This display, which frequently includes the full-size image, is called an "in-line link" or "frame." Google also offers a "See full-size image" link near the top left of the second page, which allows Google users to view and download the full-size image. ER20198(ln21-28);ER30045,30063-64;ER80103.

Google uses Web Search and Image Search to attract traffic to sell advertising through AdWords, a program in which advertisers pay Google to place ads on google.com, and on third-party websites affiliated with Google called

AdSense websites. In Google's AdSense program, these affiliated websites share with Google the revenues from clicks on ads placed on their sites. *Google*, 416 F.Supp.2d at 834.

Google owns and operates the websites blogspot.com and blogger.com, which it uses to host third-party websites, store images, and earn revenue from clicks on its ads. ER20190-193¶¶8-11;ER30017-21. Typically, blogspot.com sites contain text and images which, when clicked on, often lead to full-size images on blogger.com webpages. ER20190(ln22-25);ER20229¶56;ER40023-30.

III. **GOOGLE'S INCREASING INFRINGEMENT OF P10 IMAGES**

A. Image Search

At the time of Perfect 10's 2005 PI Motion, Google displayed, at most, 2,500 thumbnails of P10 Images in its Image Search results. Google users clicking on these thumbnails could view and download, on average, between 10 and 20 full-size P10 Images from the infringing website to which the thumbnail was linked. ER20186-188¶6.

Google currently displays *more than 22,000 P10 thumbnails* in its Image Search results, which it links to infringing websites offering, on average, 9,000 full-size infringing P10 Images. ER20186-188¶6. For example, Google links 5,035 of the 22,000 P10 thumbnails to nudecelebforum.com, which offers 17,000 full-size P10 Images. ER20187(ln4-6);ER50177;ER20188(ln25-26). Google

displays and links 1,208 P10 thumbnails to phun.org, which offers more than 4,000 full-size P10 Images; and 1,176 P10 thumbnails to pornbb.org. ER50178-179.

Users have viewed and/or downloaded millions of P10 Images from those websites. ER20249-250¶86;ER40200-210. Consequently, *the damage suffered by Perfect 10 through Google's unauthorized display of P10 thumbnails has vastly increased since 2005*, despite Google's receipt of 167 DMCA notices from Perfect 10. ER20186-190¶¶6-7;ER30001-16.

B. Web Search

Google currently provides more than *100 million Web Search links, which it refuses to remove*, to 108 infringing websites, some of which infringe as many as 26,000 P10 Images. ER20201-204¶17;ER30077-98;ER20193(ln8-10);ER30022.

C. AdSense

Google places its ads *next to at least 18,000 infringing P10 Images* on Google AdSense websites, including AdSense websites that Google itself hosts, *without paying Perfect 10*. ER20191-193¶11;ER30017-21;ER20200-201¶16;ER30068-76;ER50157-163;ER70026-34,37,41;ER70043-45;ER80081;ER80087-88;ER60222-223¶58;ER80122-136;ER80216-218.

D. AdWords

Google links to, promotes, and accepts payments from Google AdWords affiliates that offer at least 300,000 infringing P10 Images.

ER20220¶40;ER30205-208;ER20221-225¶42-45;ER30209-247;[ER70159-196].²

E. Blogger

Google hosts more than 565 websites on its blogspot.com servers that infringe, in total, more than 11,000 P10 Images. More than 4,000 such images are surrounded by Google ads. ER20190(ln19-28). Google's Blogger hosting program *completely conceals the identity of each blogspot.com webmaster*. "Who is" searches on blogspot.com-hosted websites show "Google" as the owner and sole contact. Google has complete control over the blogspot.com websites it hosts and can remove these websites, or infringing images from them, at any time.

ER20191¶10;ER60180(ln3)-60181(ln18);ER70005. Many blogspot.com websites offer links for downloading full-size P10 Images, along with infringing movies and songs, from massive infringing sites such as 

ER20193(ln8-11);ER30022;ER60189(ln21-27);ER70058.

F. Passwords

Google displays perfect10.com passwords in its search results and hosts blogspot.com websites that display perfect10.com passwords. Such passwords have allowed users to illegally download at least 4,500,000 P10 Images from perfect10.com. Users have searched on google.com for perfect10.com passwords, and then entered perfect10.com using such passwords. ER20193-194¶12;

² Brackets around citations mean that exhibits from the SJ Motions are identical or nearly identical to exhibits already cited to from the PI Motion.

ER30024-29;ER20247-249¶85;ER40196-199.

IV. **HISTORY OF PERFECT 10'S DMCA NOTICES**

In 2001, Perfect 10 began sending DMCA notices via email to Google at webmaster@google.com, the address for Google's DMCA agent listed on google.com. ER20026,43;ER60071(ln27)-60072(ln2);ER60078. Google did not respond to the first 14 notices, which the District Court refers to as "Group A" notices. On June 27, 2001, Google sent Perfect 10 an email indicating that Google had a policy not to respond to DMCA notices. ER20205-206¶¶18-20;ER30105;ER30099-104;[ER70063-68,70].

In 2004, Perfect 10 began sending Google spreadsheet-style notices created by following Google's instructions (the "Group B" notices). Perfect 10 cut-and-pasted URLs appearing at the end of Google's Web Search results into spreadsheets and added the search term, as Google requested. ER30112. Perfect 10 also included the volume and issue of Perfect 10 Magazine and the range of pages in that issue where the infringed image(s) appeared. ER20207-209¶¶25-26;ER30112-129;[ER70084-94]. Google did not respond to these notices for at least four months, until after Perfect 10 sent it a draft complaint. In some cases, Google waited as long as seventeen months to remove identified infringing image URLs. ER20212-213¶¶29-30;ER30142-168;[ER70101-121]. For example, although Google removed certain identified infringing Web Search links on

October 11, 2004, Google did not remove the same identified links from its Image Search results until at least [REDACTED]. ER60164(ln6-10);ER20216-219¶¶35-36;ER30174-189;ER60212-215¶¶27-28;[ER70127-142]. Google waited until at least [REDACTED] affiliates identified in Perfect 10's notices. ER20215-216¶¶34;ER90042-44¶¶4-11;ER60201(ln15-18). Finally, Google did not process three Perfect 10 notices forwarded to it by Amazon for four years. ER20219-220¶¶37-39;ER30190-30204;ER60204-205¶¶29-31;[ER70144-158].

In December 2005, and again in June 2007, Perfect 10 started sending notices to Google that included infringing P10 Images. ER20221(ln6-20). Perfect 10 created at least 15 different types of these "Group C" notices. ER20021-23;ER20030;ER50001-101.

V. GOOGLE'S DMCA POLICIES

Google stated on its website until at least April 2007 that it would not respond to most DMCA notices. ER60072(ln7-16);ER60081-82. Google's current policy is to only remove links that lead directly to an infringing work.

ER30112;ER90018. As a result, *Google will only remove, on average, one in 7,000 links to an infringing website.* ER20201(ln3-14);ER30077-78.

Google's stated policy for its AdWords affiliates is that Google will only respond to DMCA notices identifying infringements in the *ads* offered by these affiliates.

ER20256¶95;ER40240-41;ER90018. *Google will take no action against obviously pirate AdWords affiliates* that offer infringing movies, songs or images, even if given notice. ER20256¶95;ER40240-241;ER90018.

Google has asked copyright holders to send additional notices and/or refused to process notices, even though the copyright holders complied with Google's instructions. For example, Google has demanded that Perfect 10: (i) *not* send notices by email; (ii) resend notices first sent by mail or fax *solely by email*; and (iii) then resend the very same notices for a third time *solely by email*. ER20209-211¶27;ER30112;ER30130-134. Other copyright holders have had similar experiences. ER90107-109¶¶2-8;ER90140-142¶¶3-8;ER90136-138¶¶4-9. Google has made unreasonable or impossible requests. ER20254-255¶93;ER40237-239;ER60007-8¶¶13-14. *Google has refused at least 130 requests by Perfect 10 to provide examples of what Google considers to be compliant notices.* ER20253(ln21-23);ER50127-131;ER50004,50007,50012. Google has also refused to stop forwarding DMCA notices to chillingeffects.org for publication on the Internet, even though multiple copyright holders have complained about that practice. ER20195(ln5-14);ER30030-32;ER90136-138¶¶4-5,7-9;ER90126¶5. Other copyright holders have called Google's DMCA policy a "sham." ER90109¶8;ER90020-27.

Google has a policy of not responding to notices regarding rights of

publicity violations, including violations by Google's advertising affiliates on websites that Google hosts. ER30067;ER20260-261¶101;ER40269-276. Many of these violations involve placing the names of Perfect 10 models under images of other models engaged in explicit sex. ER20189(ln23)-190(ln1);ER20091-92¶22;ER20173-179.

VI. GOOGLE CONTINUES TO MISUSE THE SAME REPEATEDLY IDENTIFIED IMAGES

Google continues to make unauthorized copies of tens of thousands of P10 Images displaying Perfect 10 copyright notices, despite repeatedly being advised that it is not authorized to do so. ER30263;ER40110;ER80083. In some cases, *Google has continued to place its ads around the same image, despite 80 notices* from Perfect 10 regarding that image. ER20183(ln2-24);ER50164-166;ER50157-163;ER20200-201¶16;ER30068-71;ER80122-128.

Google currently possesses image-recognition technology, which it could use to locate and remove P10 Images from its index. ER90058(ln2-7);ER20250-252¶¶87-88;ER40211-235.

SUMMARY OF ARGUMENT

The District Court's PI Order, and the SJ Order underlying it, are replete with errors which compel a reversal of these rulings. In the SJ Order, the District Court mistakenly granted, in large part, Google's SJ Motions seeking a DMCA

safe harbor, based on two erroneous rulings. First, the District Court improperly invalidated most of Perfect 10's DMCA notices, even though these notices complied with the statutory requirements listed in §512(c)(3) and satisfied Google's own instructions for DMCA notices. The court never individually analyzed Perfect 10's varied notices or explained why each was deficient. Instead, the court incorrectly analyzed one atypical notice and then used it to invalidate every Group C notice. Moreover, the court concluded that Perfect 10's notices were deficient only by ruling that a compliant DMCA notice must be a "single document" that identifies the infringed work by specifying the exact location of an authorized copy. The "exact location" and "single document" requirements created by the District Court are confusing, unworkable, and contrary to case law and the DMCA's legislative history. These requirements, if accepted by this Court, *would invalidate virtually all third-party DMCA notices.*

The District Court further erred in ruling there was no genuine issue of material fact as to whether Google "adopted and reasonably implemented" an appropriate policy for the termination of repeat infringers, under §512(i)(1). The court made this ruling only by ignoring substantial contrary evidence submitted by Perfect 10, including: (i) four third-party declarations testifying that Google did not process their notices; (ii) Google's failure to terminate repeat infringers even after receiving as many as 92 third-party notices regarding the same repeat infringer;

(iii) *Google's policy of refusing to respond to notices regarding Google's AdWords affiliates*; and (iv) Google's general policy of not responding to DMCA notices. Instead, the District Court relied primarily upon the declarations of one Google DMCA administrator, Shantal Rands Poovala, even though she admittedly lacked technical expertise and repeatedly contradicted herself. Although Perfect 10 raised significant objections to these declarations, the court never ruled on those objections.

The District Court incorporated and reiterated its erroneous rulings in the PI Order, and relied upon them to deny the PI Motion in its entirety. The court relied upon the SJ Order to mistakenly conclude that Google did not have knowledge of infringement on its system and that Google was entitled to a safe harbor affirmative defense, *without discussing or analyzing 95 Perfect 10 notices* that were at issue only in the PI Motion (and not the SJ Motions). Moreover, the PI Order contains numerous additional errors:

1) The District Court erroneously concluded that Perfect 10 failed to establish that it was likely to succeed on its contributory infringement claims, even though Perfect 10 submitted evidence that: (i) Google knew or had reason to know of infringement on its system, because Perfect 10's notices were compliant, Google belatedly processed numerous notices, and Google forwarded infringing P10 Images to chillingeffects.org and then directly linked to those images; and (ii)

Google failed to take simple measures to prevent further damage to P10 Images, including by removing identified infringing links.

2) The court erroneously concluded that Perfect 10 failed to establish that it was likely to succeed on its vicarious infringement claims, without considering Perfect 10's evidence that Google now possessed image-recognition technology and that Google earned revenue from ads next to P10 Images on Blogger websites Google hosted and controlled.

3) The District Court erroneously held that Google's display of full-size P10 Images from on its own Blogger servers did not constitute direct infringement under this Court's server test. The court improperly ignored evidence that Google's creation of thumbnails from such images, and its use of these thumbnails to display such images from Google's servers, was a volitional act.

4) The District Court erroneously concluded that Google's forwarding of full-size P10 Images in Perfect 10's DMCA notices to chillingeffects.org for display on the Internet, and Google's subsequent linking to, display of, and placement of ads around, such full-size images, is fair use. The court ignored evidence of massive damage from such conduct, which effectively prevents Perfect 10 from submitting further DMCA notices.

5) The court erroneously concluded that Perfect 10 was not likely to succeed on the merits of its right of publicity claim. The court incorrectly

determined that Google was not inappropriately using the names and likenesses of Perfect 10 models, even though Google knowingly placed its ads directly next to these likenesses without paying for the right to do so.

ARGUMENT

I. STANDARD OF REVIEW

Although review of the denial of a preliminary injunction is generally for an abuse of discretion,³ this Court reviews the legal issues underlying the district court's decision *de novo*. *Foti v. City of Menlo Park*, 146 F.3d 629, 634-35 (9th Cir. 1998). Where denial of a preliminary injunction “rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, the court may undertake plenary review of [the] issues” rather than limit its review to abuse of discretion. *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000 (*en banc*) (quotation omitted).

Furthermore, where, as here, the district court's preliminary injunction ruling is based on its summary judgment ruling, review is governed by the standard that applies to the SJ Order. *Ananda*, 59 F.3d at 906; *LaVine v. Blaine School Dist.*, 257 F.3d 981, 987 (9th Cir. 2001), *cert. denied*, 536 U.S. 959 (2002) (court

³ “[A] district court abuses its discretion if it ‘base[s] its decision on an erroneous legal standard or clearly erroneous findings of fact.’” *California Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1104 (9th Cir. 2010).

“review[s] any determination underlying the grant of the injunction by the standard that applies to that determination”). “A district court’s grant or denial of summary judgment is reviewed *de novo*.” *LaVine*, 257 F.3d at 987. This Court must view the evidence presented in the light most favorable to Perfect 10, the non-moving party on the SJ Motions, and determine whether there are any issues of material fact. *Rossi v. Motion Picture Ass’n of America Inc.*, 391 F.3d 1000, 1002 (9th Cir. 2004), *cert denied*, 544 U.S. 1018 (2005). Review of the district court’s interpretation of the relevant substantive law – here, §512 of the Copyright Act – is also *de novo*. *Id.*

II. THE DISTRICT COURT ERRED IN ANALYZING PERFECT 10’S DMCA NOTICES

A. The Court Failed To Individually Analyze Each Notice

According to the District Court, Google’s SJ Motions concerned 83 Perfect 10 DMCA notices: 17 notices sent in 2001 (the “Group A” notices), 48 “spreadsheet” notices sent between May 31, 2004 and April 24, 2007 (the “Group B” notices), and 18 notices which attached images, sent in or after December 2005 (the “Group C” notices). ER10034. 95 additional Group C notices were at issue solely in the PI Motion (the “PI” notices). ER20183(ln26-27).

The 113 Group C notices were created using different programs and varied dramatically in size. Perfect 10’s notices concerning Google Web Search, Image

Search and Blogger were almost all created using Adobe (the “Adobe notices”). *See, e.g.*, ER50001-3. A few notices concerning Google’s display of infringing P10 Images were created using a program called Snagit, to capture that display. ER50012-14;ER60073-74¶8. Perfect 10’s largest notice, sent on June 28, 2007, identified over 1.1 million infringing P10 Images downloaded from infringing paysites in .jpeg (non-Adobe) format. ER60206-207¶34;ER70163-178;ER20023. The 95 PI notices were much smaller, and in some cases identified only one infringing image. ER50001-3;ER50012-14;ER50028-30. Perfect 10 submitted at least 15 different types of Group C notices. ER20021-23;ER20030;ER50001-101.

The District Court erred by never individually analyzing these various types of notices. ER20021-23. It never addressed any of the 95 much smaller PI notices or any of the sample Group C notices included in Perfect 10’s pleadings in connection with the SJ Motions. ER60169(ln10)-174(ln28). During the hearing on the PI Motion, the District Court specifically stated that *“there’s no way I’m going to go through tens of thousands of notices one by one.”* ER20008(ln18-20) (emphasis added). Moreover, the court repeatedly complained that the case was too time-consuming. ER20067(ln1-3);ER20007(ln16-17);ER10100-101. Nevertheless, the District Court refused Perfect 10’s requests to appoint a Special Master with the technical background to review the different DMCA notices.

ER10099;ER20030.⁴ Instead, the court focused on one atypical Group C notice created using Snagit (not Adobe), erred in analyzing that notice, and used that errant analysis to invalidate all of the other varied Group C notices, without addressing their differences. ER10015-16;ER10045-55;ER50001-3;ER50028-30. The District Court likewise failed to separately rule on the validity of each Group A and Group B notice. ER10042-45.⁵

The District Court's unquestioned failure to individually analyze Perfect 10's notices, by itself, compels this Court to reverse the SJ Order and the PI Order and remand the case for a particularized determination of whether each of the varied notices complies with the DMCA. Furthermore, because the District Court has already demonstrated an apparent unwillingness to perform this analysis, this Court should either order the District Court to appoint a Special Master or remand the case to a different judge to conduct the review.

B. Perfect 10's Group C Notices Were Compliant

To be effective under the DMCA, "a notification of claimed infringement must be a written communication," rather than an oral communication, that

⁴ Perfect 10 requested the appointment of a Special Master in a November 2009 motion and at the hearing on the SJ Motions. ER10099;ER20030;ER60009;60011(ln12-21).

⁵ As a result, it cannot be determined from the SJ Order which Group B notices were ruled to be compliant. *See* ER10045 (denying Google's motion "for at least some of the Group B notices").

complies with six statutory requirements. §512(c)(3)(A).

Perfect 10's Group C notices were written communications. They contained the requisite sworn statements and contact information, and were sent to Google's designated agent (*see* ER50012-14). Therefore, only two requirements were at issue in the District Court's rulings: §512(c)(3)(A)(ii) and §512(c)(3)(A)(iii). These requirements "do[] not seek to burden copyright holders with the responsibility of identifying every infringing work – or even most of them – when multiple copyrights are involved. Instead, the requirements are written so as to reduce the burden of holders of multiple copyrights who face extensive infringement of their works." *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir.2001).

§512(c)(3)(A)(ii) requires that a notice identify "the copyrighted work claimed to have been infringed..." The statute and legislative history provide that if a single notice covers multiple copyrighted works being infringed at a single infringing website, the notice may provide "a representative list" of infringed works at that site. *Id.*; ER90284. Most DMCA notices satisfy this requirement by providing the name of the infringed song, movie, software program, or model. ER50102-114;ER60231(ln16-26);ER80172-175. Perfect 10's notices provided more; they included the name of the model *and* a copy of the infringing image, which was identical to the infringed image. ER50007-27;ER40123;ER80055-61.

§512(c)(3)(A)(iii) requires that a notice identify “the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.” The legislative history makes clear that a notice satisfies §512(c)(3)(A)(iii) by providing “*a copy* or description of the allegedly infringing material and the URL address of the location (web page) which is alleged to contain the infringing material.” *Viacom International Inc. v. YouTube, Inc.*, ___ F.Supp.2d ___, 2010 WL 2532404, *6 (S.D.N.Y., June 23, 2010) (emphasis added). Most DMCA notices satisfy this requirement by providing the URL of either the infringing web page or the home page. ER50102-14;ER80172-175. Perfect 10’s Group C Adobe notices provided more; they included the URL *and* a color copy of the infringing web page, with the infringing images on that web page clearly identified. ER50001-3;ER50007-11;ER50028-30;ER50080-83.

Typical Notice	Typical Perfect 10 Adobe Notice
URL + text	URL + text + copy of webpage with infringing images clearly identified

Perfect 10’s notices concerning infringements on paysites also satisfied these requirements, by providing the URL of the website containing the infringing

material and copies of the infringed images, and explaining how the infringing images could be located. ER20221-223¶¶42-43;ER30209-226;[ER70163-178].

The District Court nonetheless invalidated all of the Group C notices, without addressing the different types of notices. Google bore the burden of establishing that it was entitled to a safe harbor affirmative defense. *P10 I*, 508 F.3d at 1158. Nevertheless, the court did not require Google to demonstrate that any Group C notices were deficient or provide any examples of feasible alternatives. ER20021-23. Nor did the court consider *Google's refusal to provide Perfect 10 with examples of compliant notices, despite 130 requests from Perfect 10*. Such conduct should have disqualified Google from qualifying for a DMCA safe harbor. *See* §512(c)(3)(B)(ii). ER20253(ln21-23);ER50127-135;ER50004;50007;50012. The court also disregarded evidence that *other ISPs, such as Yahoo! and Interserver, processed Perfect 10's Group C notices in three days or less without requesting additional information*. ER20246-247¶¶83-84;ER40185-195. As the following analysis demonstrates, each type of Group C notice submitted by Perfect 10 complied with applicable statutory requirements.

1. Blogger Notices

An example of a three-page Perfect 10 notice at issue in the PI Motion, identifying infringements on blogger.com, is shown at ER50001-3. A typical DMCA notice provides only the URL shown at the bottom of ER50003. *See*

ER50106. Perfect 10 provided that URL and a copy of the infringing image. To suppress that URL, Google could merely copy and paste the URL using Adobe's URL extraction feature, also known as Adobe's "Copy Link" feature.

Perfect 10's larger Group C Blogger notices were structured the same way. They simply identified more infringing blogger.com and/or blogspot.com webpages in the same fashion. These larger notices were actually easier to process, because Google could remove more infringements at once, without having to review multiple DMCA notices. ER20227-230¶¶49-60;ER30262-40050;ER80039-46;ER80055-61. Google belatedly processed several such Blogger notices, further demonstrating their sufficiency. ER20230¶¶61;ER40051.

The District Court thus erred in holding that such Perfect 10 notices "were not sufficient to put Google on notice of infringement by users of its Blogger sites." ER10018. Its assertion that the Blogger notices had a "myriad of deficiencies" (ER10015), and an "inexplicably complicated organization" (ER10058) is unsupported, erroneous, and suggests that the court never even reviewed such notices.

2. Image Search Notices

In 2007, Perfect 10 began providing Google with several types of notices for Image Search using Adobe, primarily because *Google claimed that all of Perfect 10's Group B spreadsheet notices were deficient.* ER20220-221¶41. One type of

notice was created using a special computer program written by Perfect 10. ER50004-6. This notice satisfied Google’s sole requirement for Image Search notices (ER80096) by providing the image URL requested by Google. [*See* highlighting on ER50006.] It also provided: (1) a copy of the infringing P10 thumbnail; (2) the URL of the webpage to which Google linked the P10 thumbnail, so that users clicking on the thumbnail would see a portion of that third-party web page in the lower portion of their screen; and (iii) the URL assigned by Google for the infringing thumbnail, next to the word “Thumbnail.” *Google belatedly processed this sample notice, demonstrating its sufficiency.* ER20180(ln15-17). Microsoft likewise processed similar notices. ER20235(ln10-13). *The District Court never addressed this sample notice or explained why such notices were deficient.* ER20234(ln28)-235(ln6);ER40084-99;ER20034;ER60174.

<p>Google Requirement:</p> <p><u>Image URL</u></p>	<p>Perfect 10 provided:</p> <p><u>Image URL</u></p> <p><u>Web Page URL</u></p> <p><u>Thumbnail URL</u></p> <div data-bbox="1097 1283 1312 1457" style="border: 1px dashed black; padding: 10px; text-align: center;"> <p>PHOTO</p> </div>
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A second type of Perfect 10 Image Search notice (ER50007-11) was modeled after the District Court’s May 2006 Preliminary Injunction Order. This Order suggested that it would be sufficient for Perfect 10 to notify Google of infringing images *by performing a Google Image Search and then placing check marks beside Perfect 10’s copyrighted images.* The Order noted that Google

represented that it was willing to develop a “secure interface” to allow Perfect 10 to send such notices. ER10112(ln18-23). Google never developed this interface. ER90002-5¶¶2-13;ER90014-15.

The search term Perfect 10 used for this notice (“Vibe Sorenson”) appears in the browser bar and below many images. The full URL of the webpage displaying the check-marked infringing images (“http://images.google.ca/images?hl=en&safe=off&um=1&sa=1&q=%22vibe+sorenson%22&aq=f&oq=”) appears at the bottom of the page. ER50009-10. Google could locate and remove the identified infringing images using either the search term in the browser bar, the webpage URL, or the Image URL of each check-marked image, which was saved by Adobe and could be copied by placing one’s cursor over the thumbnail and using Adobe’s “Copy Link” function. ER90091(ln8-19);ER90102-103;ER90074(ln25)-75(ln6);ER90085-86;ER90058(ln24)-59(ln3);ER90069-70.

This type of notice thus contained the same information as the first type of Image Search notice, in a different format. Both Google and the District Court suggested in 2006 that such notices would be sufficient. ER10112(ln18-23). Nevertheless, without explanation or discussion, the District Court held that all such notices were deficient.

Occasionally, Perfect 10 sent Image Search notices created using the program “Snagit,” to capture Google’s display of P10 Images. ER60073-74¶¶8. Such notices

typically included the P10 thumbnail at the upper left of the page and a portion of the infringing third-party website showing larger infringing P10 Images below. A sample of one such notice, at issue in the PI Motion, is shown at ER50012-14. The full Image URL for the infringing image (<http://wallpapersgallery.net/d/753715-2/Alena-Drazna-2741-5.jpg>) appears at the top and bottom left of ER50014. This notice provided more information than Google requested in its Image Search instructions, and was belatedly processed by Google without any request for additional information, further demonstrating its sufficiency. ER20180(ln15-17).

3. Web Search Notices

Beginning in 2007, Perfect 10 began sending Web Search notices to Google using Adobe to include color copies of infringing web pages and links. An example of one type of Web Search notice, at issue in the PI Motion, is found at ER50015-27.

In this notice, Perfect 10 placed check marks next to the infringing Web Search links on which it clicked to obtain infringing images, explained how each page was found, and clearly identified the infringing images on each page. Because the notice shows Google ads next to P10 Images, it also acted as an AdSense notice. *It would be impossible to capture all the information in this notice* – the ads, URLs of infringing webpages and images, and links between infringing webpages – *using a spreadsheet-style notice*.

A corresponding spreadsheet notice might list the infringing URL as “theplace2.ru/photos/gallery.php?id=848” (*see* ER50017), and identify the infringed work as “Luba Shumeyko photo.” *See* ER50108. It would not contain the same amount of information, nor be as easy to process, as Perfect 10’s notice.

A second type of notice identified infringing Google Web Search links and cache links by providing an Adobe color copy of the infringing Google cache page (on which Google highlighted the search term in yellow), the complete web search link check-marked at the top, and the infringing image identified with a check-mark. ER50028-30.

Both types of notices complied with Google’s requirements for Web Search notices: that the copyright holder provide the search term, the URL of the web page on which the infringing image resides, and “identify in sufficient detail the copyrighted work that you believe has been infringed upon.”

ER30116;[ER70079]. Although *Google suggests that a copyright holder may identify an infringed work “in sufficient detail” by naming the book in which the infringed image appears* ER30116;[ER70079], Perfect 10 did more. It provided actual copies of the infringed images and referred Google to perfect10.com for copies of the authorized works. ER80003;ER80015-75.

Google belatedly processed both notices, further demonstrating their sufficiency. ER50128-129. Examples of similar Web Search notices are at

ER20226-227¶¶47-48;ER30248-261;ER60210(ln12-24);[ER70207-216].

Nevertheless, the District Court invalidated all such notices without explanation.

4. Password And Non-Image Notices

A substantial number of Group C notices identified either: (i) Google's display of unauthorized perfect10.com passwords (ER50034-36;ER60235(ln25)-236(ln17);ER80193-197); or (ii) Google's providing links to webpages offering links for downloading P10 Images from websites such as ██████████

ER50031-33. *These notices were a single document which complied with the District Court's new restrictive standards discussed below.* Furthermore, for notices concerning Google's unauthorized dissemination of perfect10.com passwords, the infringed work was all of perfect10.com. The District Court nevertheless improperly ruled, without explanation, that all such notices were deficient.

5. Paysite Notices

The infringing paysites identified in Perfect 10's notices were obvious pirate websites offering massive quantities of full-length movies, songs and P10 Images for downloading. ER60206-209¶¶34-37;ER70163-206. There were no infringing webpages containing P10 Images on these paysites to identify. Perfect 10's paysite notices were compliant because they identified the infringed work by providing a copy of the work, listed the homepage URL of the infringing website (*the only*

logical URL to provide), and explained how to locate the infringing images.

ER60206-207¶¶34-35;ER70163-181. The District Court mistakenly invalidated all of these paysite notices, without discussing how paysites operated, addressing Perfect 10's notices, *or suggesting any feasible alternative*.

C. The District Court Erred In Invalidating The Group C Notices Based On Two Unworkable, Non-Statutory Requirements It Created

Although Perfect 10's Group C notices complied with §512(c)(3)(A), as explained above, the District Court erred in creating two additional unwarranted requirements which it used to invalidate these notices.

1. The "Exact Location" Requirement

The District Court erroneously concluded that Perfect 10's Group C notices were all deficient because they "lack the identification of the copyrighted work" required by §512(c)(3)(A)(ii). ER10046. It mistakenly ruled that providing a copy of the infringing work "does not identify the copyrighted work," even though Perfect 10 swore that it owned the copyright for that work. ER50001-3;ER50007-11. Instead, the District Court held that Perfect 10 needed to provide either "the URL on the P10 website or the volume number and page number of *Perfect10* magazine at which the original copyrighted image appears." ER10046(n7). This holding, that a text string such as "Perfect 10 Magazine, Volume 2, Number 2, page 27" better identifies an image than an actual copy of that image, is contrary to

the district court's own prior statement that "*words cannot adequately substitute for thumbnails in quickly and accurately conveying the context of indexed full-size images.*" *Google*, 416 F.Supp.2d at 850 (emphasis added). This holding also disregarded Perfect 10's submission that it was not feasible to provide URLs to images in password-protected websites such as perfect10.com. ER20025. The District Court's creation of this "exact location" requirement is unnecessary, unworkable, and contrary to law for the following reasons:

First, §512(c)(3)(A)(ii) only requires that a DMCA notice identify "the copyrighted work claimed to have been infringed." The statute does not require that the copyright holder provide the *exact location of an authorized copy* of that work.

Second, §512(c)(3)(A)(ii) permits a notice covering "multiple copyrighted works at a single online site" to identify "a representative list of such works at that site." This language is directly contrary to the court's "exact location" requirement.

Third, the court's requirement conflicts with the DMCA's legislative history, which states that to satisfy §512(c)(3)(A)(ii) in the case of an infringing Internet jukebox, it is sufficient for a notice to provide a representative list of songs that "ha[ve] been, may have been, or could be infringed" by that website, so that the ISP "can understand the nature and scope of the infringement being claimed."

ER90284. The legislative history nowhere states that the copyright holder must provide the exact location of the authorized work.

Fourth, it is *normally infeasible or impossible to provide a URL to the exact location of authorized copies of movies, television shows, songs, or computer software*. For example, Perfect 10 cannot possibly identify the exact location of an authorized version of the pirated P10 video clip shown at ER30088, which comes from a VHS tape that at one time was sold in stores.

Fifth, the “exact location” requirement is pointless. *There is no need for the ISP to compare a copy of an allegedly infringing movie, song, or image, to an authorized copy*. “To the extent that [copyright holders’] claims about infringing materials prove to be false, [an ISP] has remedies for any injury it suffers as a result of removing or disabling noninfringing material.” *ALS Scan*, 239 F.3d at 635, *citing* §§512(f), (g). One treatise explains:

As the Fourth Circuit reasoned..., the separate cause of action that Section 512(f) provides for false claims of infringement, as well as Section 512(g)’s rules and procedures for avoiding liability for wrongful “take downs,” provides sufficient disincentives and correctives for overbroad notification to obviate any need for hypertechnical interpretation of the requirement for identifying works allegedly infringed.

J. Dratler and S. McJohn, *Cyberlaw-Intellectual Property in the Digital Millennium* (Law Journal Press 2010) at 6-88.7. ER90288-289.

Sixth, it is not feasible to provide a URL to images on password-protected websites. ER20025.

Seventh, many P10 Images cannot be found *anywhere* on the Internet in an authorized location, either because they were never on perfect10.com or because they have been removed from the website. Likewise, because Perfect 10 Magazine is no longer available on newsstands, referring to a particular issue would not help an ISP locate an authorized copy of an infringed image.

Eighth, Perfect 10's June 28, 2007 notice identified 1.1 million infringing P10 Images. ER20223(ln9-15);ER30225-226. Requiring Perfect 10 to determine the magazine page numbers or perfect10.com URLs corresponding to *each of 1.1 million images* would constitute an enormous and purposeless waste of its limited resources, because Perfect 10 provided a copy of each infringed image with the notice.

Finally, *this Court's acceptance of the exact location requirement would invalidate almost all existing third-party DMCA notices*. Very few notices identify the exact location of an authorized copy, because: (i) it is not required by the DMCA; (ii) Google and other ISPs do not request such information; and (iii) such information is unnecessary because copyright holders are required to

attest that they own the copyright for the allegedly infringing material. DMCA notices of the following copyright holders would be invalidated by the District Court's "exact location" requirement, because they provide nothing more than the name of the infringed work: Adobe (name of software) ER50109; Getty Images (name of celebrity) ER50108; MPAA (name of movie) ER50111-112; Microsoft (name of software) ER50110; Playboy (no identification) ER50103; RIAA (name of singer) ER50113; and Warner Brothers (name of movie) ER50114. *Neither the District Court nor Google identified any third-party notices that would comply with this newly-created requirement.*

The District Court's "exact location" requirement is directly contrary to the opinion of the only appellate court to analyze §§512(c)(3)(A)(ii) and (iii). In *ALS Scan*, the Fourth Circuit found that a notice complied with these requirements when it "referred [the ISP] to two web addresses where [it] could find pictures of ALS Scan's models and obtain ALS Scan's copyright information;" and "noted that material at the [infringing] site could be identified as ALS Scan's material because the material included ALS Scan's 'name and/or copyright symbol next to it.'" *ALS Scan*, 239 F.3d at 624.

Perfect 10's Group C notices provided more information. These notices included copies of the infringed images, which in many cases displayed Perfect 10 copyright notices. Perfect 10 also provided either the full URL where the

infringing images were located, or in the case of paysite notices, explained how to find the infringing images. Finally, Perfect 10 referred Google to its website, perfect10.com, if Google wished to view an authorized copy. ER50001-3;ER50080-81;ER70066;ER80055-61;ER80083. *ALS Scan* thus compels the conclusion that the Group C notices are compliant.

2. The “Single Document” Requirement

The District Court erroneously ruled that the Group C notices were also defective because “no single document in any of the Group C notices contains all of the information required in a valid DMCA notification.” ER10047. Neither §512(c)(3)(A) nor the legislative history states that a compliant DMCA notice must be a single document.

Moreover, the court’s ruling is confusing. The court elsewhere states that the Group C notices were “defective because they do not contain all of the required information in a single written communication.” ER10046-47. Is a letter with attachments a “single written communication?” Because the district court did not adequately explain its newly-created requirement, copyright holders have no idea. The District Court failed to rule that any of Perfect 10’s 95 PI notices complied with its new restrictive requirements, *even though some were compliant*, either because they were single documents that identified unauthorized passwords (ER50034-36), or because they were single written communications (with

attachments) that provided the exact location of the infringed image by identifying infringing Perfect 10 Magazine covers. ER50080-81.

Furthermore, the “single document” requirement defies logic and common sense. Perfect 10’s June 28, 2007 notice identified 1.1 million infringing images from 70 different paysites. ER20221-222¶42;ER30209-224. Forcing copyright holders to break up such notices into 1 million “single document” notices would be vastly more burdensome for copyright holders and ISPs, and would undermine the purpose of the statutory notice requirements “to reduce the burden of holders of multiple copyrights who face extensive infringement of their works.” *ALS Scan*, 239 F.3d at 625.

The District Court appeared to base its “single document” requirement entirely on this Court’s discussion of “undue burden” in *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir.), *cert. denied*, 552 U.S. 1062 (2007) (“*CCBill*”). ER10047. *CCBill* does not support this requirement. It merely stands for the proposition that a copyright holder may not “cobble together adequate notice from *separately defective notices*.” *Id.* at 1113 (emphasis added). The District Court conceded that the notices at issue in *CCBill* “were actually sent at different times.” Nevertheless, the court improperly relied upon *CCBill* by making the unsupportable leap that “the thousands of separate electronic files on each disk that P10 sent to Google are the functional equivalent of separate notices.” ER10047.

Less than six months earlier, however, in Perfect 10's related case against Amazon, the District Court specifically found that similar Group C notices sent by Perfect

10

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The "single document" requirement conflicts with *Arista Records, Inc. v. MP3Board, Inc.*, 2002 WL 1997918 (S.D.N.Y., Aug. 29, 2002). *Arista* specifically upheld a DMCA notice from the Recording Industry Association of America ("RIAA") *containing attachments*. The notice included a letter naming particular artists and songs that were allegedly infringed, which "was accompanied by *printouts of screen shots of MP3Board's Web site*, on which the RIAA highlighted and placed an asterisk next to 662 links" which the RIAA believed were infringing. *Id.* at *9 (emphasis added). The notice only provided the pages on MP3Board's website where these links appeared, not the URLs of the pages to which the links connected. The *Arista* court held that "[o]verall, the *letter and its attachments* identified the material or activity claimed to be infringing and provided information reasonably sufficient to permit MP3Board to locate the links and thus complied with the DMCA." *Id.* (emphasis added). The *Arista* court's approval of a notice with attachments, which did not provide the exact location of

either the infringing material or an authorized copy, is directly contrary to both of the District Court's newly-created requirements.

The "single document" requirement is also contrary to the District Court's May 2006 Preliminary Injunction Order, which required that Perfect 10 first provide Google with copies of P10 Images in separate folders by model name, and then later provide lists of infringing URLs with other information. ER10109. The Order thus compelled Google to process infringing P10 Images only by going back and forth between documents.

Finally, the District Court erred in finding that Perfect 10's Group C notices were unduly burdensome to process. *In fact, they are substantially less burdensome to process than typical third-party DMCA notices* and the notices required by the District Court in its May 2006 Order.

Because most DMCA notices consist only of a URL and some text, the ISP cannot immediately view or locate the infringing material. Perfect 10's Group C Adobe notices provided actual copies of infringing webpages, with infringing images on those webpages clearly identified. This allowed Google to skip the following "steps" it would normally need to perform to process a "text-only" or "spreadsheet-style" DMCA notice:

- 1) *Manually* input each URL into Google's browser bar to view the actual infringing webpage (ER20255(ln19-28));

2) Correct, if possible, any URLs corrupted during the fax process.

ER20255-256¶94;ER20259(ln14-17);ER60239(ln8-10);ER20259¶98;ER40257-262;ER80212-215;

3) Locate an authorized copy of the image, which might involve a multiple-week delay to purchase and review a book (ER30116); and

4) Compare the authorized copy to potentially hundreds of images on the infringing webpage, to locate the infringing image. ER60007(ln14-15).

By contrast, Google simply had to employ Adobe's "Copy Link" function to suppress URLs identified in Perfect 10 Adobe notices. No other steps were necessary, because the infringed and infringing image was identified. ER50001-3;ER50028-30.

Perfect 10's paysite notices were also easy to process. Google could send the folder of infringing images to the webmaster of each infringing website and ask him to remove all such images, or examine several images from each folder, determine the extent of the infringement, and then cut all links to that website and end business dealings with that webmaster. ER90284-287;ER20222-223¶43;ER30225-226. For these reasons, the District Court's assertion that processing the Group C notices was impermissibly burdensome is erroneous.

D. The District Court Erred By Incorrectly Analyzing One Atypical Perfect 10 Notice And Using It To Invalidate All Other Group C Notices

To justify its universal condemnation of every one of Perfect 10's varied Group C notices, the District Court selected an atypical Perfect 10 notice created using Snagit, rather than any of the Group C Adobe notices. It then opined, without any evidentiary basis, on the difficulties that Google, *a technical powerhouse*, would have in processing this notice. ER10047-10054. In the process, the District Court made several errors:

First, the District Court *incorrectly assumed that a link existed* that Perfect 10 could specify so Google could suppress that link and end the display of the large P10 Image of Amy Weber found in the SJ Order. ER10053. That critical error invalidated the court's remaining analysis. Because there was no such link, print-screening Google's display of full-size P10 Images, as Perfect 10 did, was the only logical way to provide Google with knowledge of such infringement. ER20189(ln6-16);ER30012.

Second, the notice was actually easy to process. Because the webmaster for big.supereva.com was an AdSense affiliate (ER50142), Google merely had to send all images in the big.supereva.com folder to that webmaster and ask him to remove those images. Alternatively, Google could end its display of images from big.supereva.com. Those were the only ways that Google could end the infringing display of that particular P10 image from big.supereva.com.

Third, *Google has a policy of not processing such display notices under any*

circumstances. ER20189(ln6-16);ER30012. Google's position is that it can display the P10 Image of Amy Weber shown in the notice forever, and need not respond to any notice, compliant or not. The District Court improperly disregarded evidence of this Google policy. ER20189(ln6-16);ER30012. Because Google has no policy for dealing with compliant display notices, it should not receive a safe harbor for such displays.

E. Perfect 10 Never Had The Opportunity To Address The District Court's Newly-Created Requirements

The District Court's new "single document" and "exact location" requirements, and its analysis of the atypical Snagit notice, *were neither raised in Google's moving papers nor discussed in the court's tentative ruling*. ER10063-87. Nor were they in the court's earlier *Veoh* ruling. *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F.Supp.2d 1099 (C.D. Cal 2009). Perfect 10 thus never had the opportunity to brief these issues or provide declarations from computer experts to explain why the court's new requirements are unworkable and contrary to law.

At the May 10 hearing, Perfect 10 presented the District Court with an example of a Group C notice. ER20032;[ER80056]. *The court then stated:*

It says "Copyright 2001, Perfect 10, Inc.," and it presents the necessary specific information as to the place on the web where it's improperly appearing as evidence of infringement. *I don't know*

what more should be necessary.

ER20013(ln1-5) (emphasis added).⁶ Only during that hearing did Google for the first time assert that Perfect 10 needed to identify the exact location of an authorized copy of the work, so Google could compare the infringed work to the infringing image. ER20012(ln5-8);ER20014(ln9-14);ER20015(ln20-23).⁷ The District Court responded: ***“I find that to be imposing. I’m inclined to find that to be imposing and an unnecessary burden on a copyright holder.”***

ER20011(ln25)-20013(ln5)(emphasis added). Nevertheless, without explanation, the District Court adopted these new burdensome notice requirements in its final SJ Order.

F. Perfect 10’s Group B Notices Were Compliant

The District Court erred in ruling that certain unidentified Perfect 10 Group B notices were deficient. That some notices “contain[ed] incomplete URLs” (ER10043) provided no basis to invalidate these notices as a matter of law. Google itself created the incomplete URLs, and Perfect 10 merely followed Google’s instructions by cutting-and-pasting those URLs into its notices. Google belatedly

⁶ If the District Court did not know what more should be necessary for Perfect 10’s notice to comply with the DMCA, how could Perfect 10 possibly have known, when Google’s instructions didn’t ask for this information?

⁷ In fact, Google does not compare these works; [REDACTED] ER60192(ln13-15);ER60167(ln11-16); ER90038(ln3-15);ER60086-90;ER20258(ln21-25);ER40242-256;ER80096.

suppressed a substantial number of incomplete URLs identified by Perfect 10, *demonstrating their sufficiency*. ER20213(ln2-6);ER30153,156,157,159,161,162. Furthermore, Perfect 10 presented substantial evidence, including a declaration from a technical expert, that Google was able to locate and suppress incomplete URLs. ER90091(ln20-23);ER60212(ln3-12);ER80026;ER60238(ln19-22);ER80208. Google failed to provide any contrary technical evidence.

The District Court also erred in invalidating certain Group B notices because they “lack image-specific URLs, or do not reference the copyrighted work with specificity.” ER10043. This ruling is directly contrary to the legislative history of the DMCA, which states that ISPs that link to pirate websites and other known infringers cannot have a safe harbor. ER90284-287.

Finally, the District Court erred by *failing to identify which Group B notices were deficient and which were compliant*, even though this issue was directly relevant to whether Google suitably implemented a policy against repeat infringers. *See* Argument Section VII.C.2, below.

G. The District Court Erred In Invalidating All Group A Notices

The District Court erroneously concluded that “the Group A notices were inadequate to provide notice under the DMCA.” ER10042. The court ignored uncontroverted evidence that Perfect 10 sent these notices to the address Google listed on its website for its copyright agent, as permitted under §512(c)(2), and that

Google received them. ER60071(ln27)-60072(ln2);ER60078;ER20026; ER60191¶17;ER70070;ER20043. The court improperly failed to review each notice and mistakenly held that the notices “do not identify specifically which copyrighted works were infringed.” ER10042. In fact, these notices included copies of the infringed P10 Images, including *Perfect 10 Magazine covers* showing the exact location of the authorized copy. ER20205¶19;ER30099-104;[ER70063-68].

H. Google Is Not Entitled To A Safe Harbor For AdSense Or Image Search

The District Court erred in granting Google a DMCA safe harbor for notices concerning AdSense and Image Search. AdSense involves the placement of ads on third-party websites. Placing ads next to infringing images and earning revenue from clicks on those ads is not storing material at the direction of users or an information location tool function. Consequently, AdSense is not protected by §512. Image Search involves Google’s *volitional* selection, creation, and storage of P10 thumbnails on Google’s servers. Because this storage is not done at the direction of users, Image Search likewise is not protected by the DMCA.

III. THE DISTRICT COURT ERRED IN RULING THAT PERFECT 10 WAS NOT LIKELY TO SUCCEED ON ITS CONTRIBUTORY INFRINGEMENT CLAIMS

This Court previously ruled that “Google could be held contributorily liable

if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such steps." *P10 I*, 508 F.3d at 1172. The District Court correctly found that Perfect 10 "has produced evidence sufficient to establish a prima facie case that at least some third party sites that are indexed on Google have directly infringed [its] copyrights." ER10014(n6). The court nevertheless committed multiple errors in concluding that Perfect 10 was not likely to succeed on the merits of its contributory infringement claims.

A. Google Had Knowledge Of Infringing P10 Images

Relying upon the SJ Order, the District Court concluded that Perfect 10 failed to show that Google had knowledge of infringing P10 Images on its system, because Perfect 10's DMCA notices were deficient. ER10015 ("the myriad of deficiencies in the Group A and Group C notices render them inadequate to confer notice of infringement as to third-party sites.") This conclusion is erroneous for several reasons.

First, as explained in Argument Section II.B, above, Perfect 10's notices were compliant. Therefore, they provided Google with the requisite knowledge of infringement.

Second, the District Court disregarded Google's practice of forwarding Perfect 10's DMCA notices to chillingeffects.org, and then willfully providing

direct links to the thousands of P10 Images contained in those notices. ER20082-085¶¶10-11;ER20113-129;ER20194-200¶¶13-15;ER30030-67. Such conduct unequivocally establishes Google’s actual knowledge that it is directly linking to infringing material. The District Court concluded that Perfect 10 “will likely be able to establish that Google’s forwarding of the Group C notices to Chilling Effects constitutes direct infringement.” ER10023.

Third, the District Court applied the wrong standard for determining whether Google had knowledge of infringement. “Contributory liability requires that the secondary infringer know or *have reason to know* of direct infringement.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001) (emphasis added). Accordingly, actual *or* constructive knowledge is sufficient.

Perfect 10’s evidence satisfied this requirement in several ways. Its notices provided Google with copies of: (i) Blogger web pages with full URLs displaying identified P10 Images (ER50001-3;ER50080-83;ER20032;ER40001-50); (ii) Google Image Search results with infringing P10 thumbnails clearly identified (ER50007-11); and (iii) webpages displaying Google ads next to identified infringing P10 Images (ER50012-30;ER40052-59;ER40121-132). Moreover, Perfect 10 copyright notices appear on thousands of images displayed by Google in its Image Search results.

Such evidence, at the very minimum, should have made Google aware of the

infringing activity occurring on its system. Although the District Court recognized that constructive knowledge is sufficient to establish contributory liability, it never explained why Perfect 10's evidence failed to satisfy this standard. ER10015.

Fourth, Perfect 10's Group B and Group C notices provided Google with more information than Google requested in its DMCA instructions. Moreover, because *Google belatedly processed several types of Group C notices without asking for more information*, those notices necessarily provided Google with actual knowledge of infringement. ER20089(ln11-21);ER20230¶61;ER40051;ER20226-227¶48;ER30258-30261;ER20236-237¶71;ER40106-108.

Fifth, because DMCA safe harbor provisions do not apply to AdSense or Image Search [*see* Argument Section II.H, above], Perfect 10's notices regarding these services provided Google with the requisite knowledge of infringing activity on its system.

For all of these reasons, Perfect 10 satisfied the "knowledge" prong of this Court's contributory infringement test.

B. Simple Measures Were Available To Google

The District Court further erred by mistakenly concluding that no simple measures were available to Google to prevent further damage to Perfect 10's works. ER10015. In so ruling, the District Court disregarded evidence that Google could have taken numerous steps, including:

1. Processing Perfect 10's DMCA notices and removing specific infringing URLs;
2. Requiring infringers to actually remove infringing content from their websites or face the removal of all Google links;
3. Keeping track of infringement complaints against various websites, to avoid endlessly copying P10 Images from those websites to use in Google's Image Search results;
4. Assigning an employee to review Image Search results for identified infringing images;
5. Refraining from copying and distributing Perfect 10's DMCA notices to chillingeffects.org, thereby reinstating thousands of identified infringing P10 Images onto the Internet;
6. Refraining from linking to the image portions of notices sent to chillingeffects.org, thereby permanently offering to Google users the very images Perfect 10 asked Google to remove;
7. Removing all links to, and ceasing to promote, known pirate websites;
8. Using image-recognition to prevent the same repeatedly-identified P10 Images from endlessly appearing in Image Search results or surrounded by Google ads.

The District Court failed even to address the first six simple measures listed

above. Furthermore, the court wrongly asserted that evidence of the last two simple measures “consists exclusively of speculation by Dr. Zada.”

ER10015;ER20092-93¶23;ER20250-252¶¶87-88;ER40211-232. Perfect 10 presented substantial evidence that image-recognition was available, including the “Find Similar Images” feature Google offers its users. Perfect 10 also submitted two declarations from computer experts stating that Google could use image-recognition to completely remove P10 Images from its system. ER20250-252¶¶87-88;ER40211-232;ER60233-234¶67;ER80186-189;ER90058(ln2-7);ER90074(ln5-8). Google provided no contrary technical evidence. The court’s failure to consider these and other simple measures (ER20092-93¶23) caused it to erroneously conclude that Perfect 10 was not likely to succeed on its contributory infringement claims.

IV. THE DISTRICT COURT ERRED IN RULING THAT PERFECT 10 WAS NOT LIKELY TO SUCCEED ON ITS VICARIOUS INFRINGEMENT CLAIMS

Google “infringes vicariously” if it “profit[s] from direct infringement while declining to exercise a right to stop or limit it.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). This Court previously ruled that, to prevail on this claim at the preliminary injunction stage, Perfect 10 must demonstrate a likelihood of success in establishing that Google: (i) “has the right

and ability to stop or limit the infringing activities of third party websites;” and (ii) “derives a direct financial benefit from such activities.” *P10 I*, 508 F.3d at 1173.

Perfect 10 submitted new evidence that Google was vicariously liable because Google can use its image-recognition capability to stop: (i) placing Google ads next to P10 Images; (ii) hosting P10 Images on its blogger.com servers; and (iii) offering P10 Images in Image Search results. ER20250-252¶¶87-88;ER40211-232;ER60233-234¶¶67;ER80186-189; ER90058(ln2-7);ER90074(ln5-8). Google has complete control over each such activity and profits from such direct infringement.

Perfect 10 also submitted new evidence from Google’s expert Dr. John Levine that Google has the same control over its index as Napster. ER90007¶¶20;ER90031(ln4-13). This Court held that Napster was vicariously liable. *Napster*, 239 F.3d at 1022-24.

The District Court never directly addressed this new evidence. Instead, the court incorrectly asserted that Perfect 10 “has provided no justification for departing from the Ninth Circuit’s rulings” concerning vicarious infringement. ER10014. In its prior ruling, however, this Court ruled that Google has less control over its index than Napster, and that Google was not vicariously liable because “[w]ithout image-recognition technology, Google lacks the practical

ability to police the infringing activities of third-party websites.” *P10 I*, 508 F.3d at 1174.

The court also erred in finding an “absence of evidence of any direct financial benefit to Google from the alleged infringement on Blogger sites.”

ER10019. Perfect 10 provided evidence that Google placed its ads, from which it earns revenue, next to at least 4,000 P10 Images on its Blogger websites.

ER20191(ln26)-193(ln7);ER30017-21;ER60185(ln6)-186(ln5);ER70026-

34;70037;70041;ER50167-169. Google hosts, places ads on, and directs traffic to its Blogger websites. This complete control subjects Google to vicarious liability, because it far exceeds the control in any other case in which vicarious liability was found.

V. **THE DISTRICT COURT ERRED IN REFUSING TO REEVALUATE THIS COURT’S RULING REGARDING DISPLAY OF PERFECT10.COM PASSWORDS**

Perfect 10 sought to enjoin Google from displaying in its search results, and linking to or hosting websites that display, perfect10.com passwords. The District Court erred in finding that Perfect 10 presented no new evidence justifying a reevaluation of this Court’s prior ruling on this issue. ER10013n5. This Court previously found that Perfect 10 “point[ed] to no evidence that users logging onto the Perfect 10 site with unauthorized passwords infringed Perfect 10’s rights.” *P10*

l, 508 F.3d at 1173 n.13. *Perfect 10* provided new evidence that users downloaded millions of P10 Images using unauthorized passwords disseminated by Google. ER20193-194¶12;ER30024-29;ER20247-249¶85;ER40196-199;ER60186(ln5-10);ER70035-37;ER60231-232¶65;ER80177-180. The District Court erred in refusing to reconsider the issue in light of this new evidence.

VI. THE DISTRICT COURT ERRED IN MIS-APPLYING THIS COURT'S SERVER TEST

The District Court erroneously held that Perfect 10 was not likely to succeed on its claim that Google's display of full-size P10 Images on its Blogger servers constituted direct infringement. The District Court mistakenly concentrated solely on Google's hosting of full-size P10 Images uploaded by Blogger users.

ER10016-18. It disregarded that Google engages in volitional conduct when it creates thumbnails from such full-size P10 Images and uses those thumbnails to display the same full-size P10 Images from the Blogger websites it hosts.

ER30017;ER70033,41. Google has complete control over which thumbnails appear in its Image Search results, and which full-size images Google displays using those thumbnails. Because Google is both hosting and volitionally

displaying full-size infringing P10 Images, it is not a passive owner.⁸ Rather, such

⁸ In *P10 I*, this Court did not address "whether an entity that merely passively owns and manages an Internet bulletin board or similar system violates a copyright owner's display and distribution rights." *P10 I*, 508 F.3d at 1160 n.6.

volitional conduct subjects Google to direct liability under the server test. *P10 I*, 508 F.3d at 1160 (Google’s communication of stored images it controls directly infringes Perfect 10’s display right”).⁹

A. This Court Should Re-Examine The Server Test

This Court originally upheld the server test based, at least in part, on Google’s misrepresentations, in both pleadings and discovery responses, that it did not store full-size P10 Images on Google’s servers. ER90157-159¶¶12-17;ER90160-170;ER20088¶16;ER20143-150;20158-159. That led this Court to mistakenly conclude that “[b]ecause Google’s computers do not store the photographic images, Google does not have a copy of the images for purposes of the Copyright Act.” *P10 I*, 508 F.3d at 1160.

Moreover, the following new evidence should cause this Court to reexamine the viability of the server test. First, the advent of the server test has led to the development of massive infringing websites, which display infringing images from other websites using the same HTML code as Google, to escape liability for direct infringement. ER20260¶100;ER40263-268. Second, Google’s own expert, Dr.

⁹ Furthermore, the Copyright Act nowhere states, and this Court has never held, that a plaintiff must show volitional conduct by a defendant to establish direct copyright infringement. Rather, in passing the DMCA, Congress defined volitional conduct as a factor to be considered in connection with certain safe harbor affirmative defenses. 3 M. Nimmer and D. Nimmer, *Nimmer on Copyright* (Matthew Bender 2009) §12B.06[B][2][c][ii], at 12B-82.5-12B-83 (non-volitional conduct is not a bar to plaintiff’s establishing *prima facie* case).

John Levine, testified that in-line linking sites are just as responsible for the display of an image as the hosting sites. ER90030(ln9-23) Therefore, both sites should be directly liable. This Court should reexamine the server test and conclude that in-line linking constitutes a display, to close the loophole which currently allows infringing websites to escape liability for direct infringement.

VII. THE DISTRICT COURT ERRED IN RULING, AS A MATTER OF LAW, THAT GOOGLE IMPLEMENTED A SUITABLE POLICY AGAINST REPEAT INFRINGERS

In order to be eligible for any DMCA safe harbor, Google must have “adopted and reasonably implemented ... a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.” 17 U.S.C. §512(i)(1). Notices sent to Google by third-parties, as well as Perfect 10, “are relevant in determining whether a service provider has ‘implemented its repeat infringer policy in an unreasonable manner.’” ER10038, *quoting CCBill*, 488 F.3d at 1113.

The District Court erroneously concluded in the SJ Order that “Google employs an adequate repeat infringer policy” as a matter of law. ER10039. The court then mistakenly relied upon this ruling to deny the PI Motion. ER10016(n7). This conclusion constitutes error for various reasons, each of which is sufficient to deny Google’s safe harbor affirmative defense.

A. The District Court Mistakenly Struck Four Third-Party Declarations

Perfect 10 submitted four uncontroverted third-party declarations criticizing Google's processing of their DMCA notices. Les Schwartz testified that "*Google did not remove most of the infringing material.*" ER90107-90109¶¶2-8 (emphasis added). C.J. Newton testified that "*Google was not taking any action in response to my notices.*" ER90125(ln17-20);ER90126 (emphasis added). Dean Hoffman stated that "*I believe that Google punishes copyright holders for sending take-down notices by republishing the links on Chillingeffects.org.*" ER90136-138¶¶4-9(emphasis added). Margaret Jane Eden testified that Google informed her that it would not process her notices unless she resent them by email, even though Google's published instructions demanded that such notices not be sent by email. Even then, Google refused to remove infringing links. ER90140-90142¶¶4-8;ER70077.

These declarations at the very least established a genuine issue of material fact regarding the adequacy of Google's repeat infringer policy. They demonstrated that Google has an adversarial attitude towards copyright holders, does not process many DMCA notices, and tries to discourage copyright holders from sending DMCA notices by constantly changing its instructions and by forwarding notices to chillingeffects.org. ER90106-153. Perfect 10 has had similar experiences. ER20210(ln1-26);ER30130-134;ER20255-256¶¶94.

Nevertheless, the District Court improperly struck all four declarations, based on two erroneous assertions.

First, the court incorrectly stated that Perfect 10 “has provided no argument as to why its failure [to identify these declarants in its Rule 26 disclosures] was substantially justified or harmless.” ER10038. Perfect 10 explained on two separate occasions that *it did not learn about any of the declarants until days before filing their declarations*. ER60099-100¶¶3-4;ER20028-29.¹⁰ Nevertheless, the court included this erroneous finding in the SJ Order and improperly relied upon it to disregard the four declarations.

Second, the court wrongly asserted that “Google was deprived of the opportunity to depose or directly rebut these witnesses’ declarations.” ER10038. In fact, Google did not depose any of the declarants, even though it had more than 11 months to do so before the court issued the SJ Order.

B. The District Court Incorrectly Disregarded The Bailey Articles

Perfect 10 submitted two articles written by Jonathan Bailey, describing Google’s DMCA policy as unnecessarily complicated, obstructionist, hopelessly broken, and likely illegal. ER90020-27. The District Court further erred by failing to consider either article.

¹⁰ For example, Perfect 10 explained that it first learned of Eden and Schwartz nine days and thirteen days, respectively, before providing their declarations to Google. ER60099-100¶¶3-4;ER20028-29.

C. The District Court Disregarded Overwhelming Evidence That Google Failed To Terminate Repeat Infringers

An ISP such as Google reasonably implements a repeat infringer policy under §512(i) of the DMCA only if it “terminates users who repeatedly or blatantly infringe copyright.” *CCBill*, 488 F.3d at 1109. The District Court erred in ruling that Google had an adequate repeat infringer policy without ever addressing evidence submitted by Perfect 10 that Google failed to terminate numerous repeat infringers despite receiving as many as 92 third-party DMCA notices regarding these infringers, even though Google’s purported policy is to terminate repeat infringers after receiving no more than three notices. ER90154-155¶¶37-38.

1. Google Did Not Terminate Repeat Infringers After As Many As 92 Third-Party DMCA Notices

Google received 92 third-party DMCA notices concerning [REDACTED], a Google AdSense affiliate, and 43 third-party notices regarding [REDACTED]. ER20079-80¶74;ER20095-102. Instead of terminating these repeat infringers, Google created options for its Google Chrome Browser which allowed Google users to download infringing materials from these websites more rapidly. Google also received 29 third-party notices regarding [REDACTED], another Google AdSense affiliate, without taking action. ER20079-82¶¶7-9;ER20095-112;ER60188-190¶14;ER70047-62. The District Court never addressed this evidence in the SJ Order.

2. Google Did Not Terminate Repeat Infringers Despite Receiving As Many As 26 Compliant Perfect 10 Group B Notices

Perfect 10's Group B notices identified at least 8,000 infringing URLs on various websites, including websites in Google's AdSense program.

ER20245(ln6-7). The District Court ruled that many such notices were compliant. ER10043-45. Because Google did not terminate at least 13 repeat Google AdSense infringers identified in as many as 26 separate Group B notices (ER20241-242¶76;ER40143-148), Google failed to satisfy the requirements of §512(i) regarding a suitable repeat infringer policy.

For example, Perfect 10 sent Google at least 26, 25, and 23 separate Group B notices identifying infringements on websites owned by the webmasters of perfectpeople.net, supereva.com, and averlo.com, respectively. As of November 2009, Google failed to terminate any of those webmasters or their websites from its AdSense program, even though Google admits they are account holders or subscribers. ER90154-155¶38;ER50137-50156;ER20239-242¶¶74-76;ER40121-148;ER60222-223¶58;ER80120-136;ER60238(ln28)-239(ln8);ER80211. The District Court never addressed this evidence.

Moreover, Google itself admitted that *it* [REDACTED] *infringers identified by Perfect 10's Group B notices* [REDACTED] ER90042-44;ER60201(ln15-18). This admission alone should have precluded any

DMCA safe harbor for Google before that date. Google further admitted that before [REDACTED]

[REDACTED] ER60164(ln6-10). *Google thus did not remove identified links to infringing webpages from its Image Search results until at least* [REDACTED]

[REDACTED]. Under *CCBill*, Google's admission that it did not have an adequate procedure for dealing with compliant DMCA notices should have precluded any safe harbor protection before [REDACTED]. Nevertheless, the District Court ignored both admissions.

3. The District Court Did Not Consider Evidence That Google Failed To Terminate Repeat Infringers In Its Google Groups Program

The District Court likewise erred in failing to consider evidence that Google did not terminate a repeat infringer from Google Groups, despite receiving at least 30 notices regarding that same infringer, and that Google did not even [REDACTED]

[REDACTED] ER20257(ln19-22);ER50182. Because Google Groups is a program in which Google hosts images uploaded by third parties onto Google servers, it must have account holders or subscribers. ER70008. Perfect 10's evidence regarding Google Groups at the very least should have established a genuine issue of material fact regarding the adequacy of Google's repeat infringer policy.

D. The District Court Disregarded Evidence That Google Has A Policy Of Not Responding To Notices Regarding Its AdWords Affiliates

In order to satisfy §512(i), an ISP must have “a procedure for dealing with DMCA-compliant notifications.” *CCBill*, 488 F.3d at 1109. Perfect 10 submitted evidence that Google has a policy of refusing to process *any* notices regarding its AdWords affiliates, whether compliant or not. ER20256¶95;ER40240-241;ER90018. Google will not remove any Web Search or Image Search links to its AdWords affiliates, require that such websites stop offering identified stolen materials, or end Google’s business dealings with such websites.

Google’s AdWords affiliates are clearly account holders or subscribers under §512(i); Google refers to them as account holders and they are similar to the paysites this Court considered to be account holders in *CCBill*. ER60184-185¶11;ER70025; *CCBill*, 488 F.3d at 1116. Because Google has no policy for dealing with compliant DMCA notices regarding its AdWords account holders, it cannot satisfy the threshold requirements for DMCA safe harbor in §512(i). The District Court erred in ruling that Google had an adequate repeat infringer policy without considering this contrary evidence or even mentioning the term “AdWords” in its rulings. ER20026.

1. There Is No Safe Harbor For Promoting Pirate Websites

The DMCA’s legislative history defines a “pirate” website as one where

“pirate software, books, movies, and music can be downloaded.” ER90286-287. It makes clear that Congress never intended to provide a safe harbor for linking to such pirate websites, let alone receiving payments from such websites. ER90286-287.

Perfect 10 sent DMCA notices to Google identifying more than 300,000 full-size P10 Images infringed by Google AdWords affiliates, such as giganews.com. Perfect 10 also provided evidence in its notices that such websites offer countless pirated movies and songs. ER20220¶40;ER20221-225¶¶42-45;ER30205-247;ER60206-209¶¶34-37;ER70163-206.

Google’s policy of refusing to remove direct links to, or take any action against, infringing AdWords affiliates is directly contrary to the DMCA’s legislative history. Congress made clear that ISPs may lose their safe harbor by linking to the home pages of known infringing sites, specifically stating that ISPs cannot knowingly “refer or link users to an on-line location *containing* infringing material.” ER90285-287 (emphasis added).

E. The District Court Disregarded Evidence That Google’s General Policy Is To Not Respond To DMCA Notices

The District Court further erred by disregarding substantial evidence establishing that Google has failed to comply with §512(i) because Google’s general policy has been to *not* process compliant DMCA notices. Such evidence includes the following:

1) From *2000 to 2007*, Google's stated policy was that it would not comply with the DMCA's notice-and-takedown procedures. Google stated on its website that while it would consider temporarily removing identified links on a case-by-case basis, its crawler would reinstate those links in Google's search results during the next Google crawl. ER60072(ln8-16);ER60081-82.

2) After receiving 14 notices from Perfect 10 in 2001, Google sent Perfect 10 an email stating that it would not prevent the links identified in those notices from appearing in Google search results. The email did not identify any deficiencies in Perfect 10's notices. ER60190-191¶¶15-17;ER70063-70.

3) Google did not process any Group B notices sent by Perfect 10 in 2004 until Perfect 10 drafted a complaint and threatened to sue Google. ER20210(ln24-26); ER601989(ln7-10).

4) [REDACTED]
[REDACTED] See Argument Section VII.F,
below.

The District Court erroneously held that Google had an adequate repeat infringer policy without addressing the above evidence.

F. The District Court Based Its Ruling On An Unsupported And Incorrect Finding Regarding Google's Processing Of Compliant DMCA Notices

The District Court supported its conclusion that Google had an adequate

repeat infringer policy, as a matter of law, with the assertion that “Google has offered evidence that *a//* the notices that did comply with the DMCA were recorded in its logs.” ER10038 (emphasis added). This finding is erroneous for multiple reasons.

First, [REDACTED]

even though virtually all of Google’s revenue comes from AdWords affiliates. The District Court did not even mention AdWords in its rulings.

Second, [REDACTED]

[REDACTED] ER20258(ln13)-259(ln24);ER40242-262; ER10103. Consequently, either Perfect 10 was the only copyright holder to provide substantially compliant Web Search and Image Search notices to Google, or the District Court’s finding is incorrect.

Third, Google could not possibly know which notices were DMCA compliant when the District Court did not even know, at the May 10, 2010 hearing on the SJ Motions, what the requirements were for compliant notices.

ER20011(ln25)-20014(ln8). Moreover, most notices included in Google’s logs, because they presumably complied with Google’s published DMCA instructions, would be defective under the District Court’s newly-created requirements.

ER30116;ER80096.

Fourth, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] ER20257(ln12)-
258(ln5);ER60193(ln19)-194(ln1). [REDACTED]
[REDACTED]

[REDACTED] ER20258(ln1-5).

Fifth, Google [REDACTED] that fail to satisfy the District Court’s “exact location” requirement, either by failing to identify the copyrighted work at all (ER50102-103), or by identifying the work as: “an as yet unpublished Vogue issue” (ER50104); “All Images” (ER50105); “originals are in a file at Wonton Media” (ER50106); “Our content is clearly marked as Met-Art.com” (ER50107); and “photographs of Anna Nicole Smith with her child” (ER50108). Some notices only identified the home page URL. ER50102;ER50104;ER50107; ER50108. Nevertheless, [REDACTED]

Finally, *neither the District Court nor Google identified a single third-party notice listed in any Google log that complied with the District Court’s newly-created requirements.*

For all these reasons, the District Court’s finding that all notices that complied with the DMCA were recorded in Google’s DMCA logs is erroneous. The court erred in relying upon this finding to conclude that Google had an

adequate repeat infringer policy.

G. The District Court Erroneously Disregarded Evidence That Google Does Not Disable Access To The Infringing Material

The District Court erred in failing to consider evidence that Google does not have an adequate procedure for dealing with compliant DMCA notices, because Google has no policy for actually disabling access to infringing material, as required by the DMCA. The court improperly disregarded evidence submitted by Perfect 10 demonstrating that:

1) Google allows the same repeatedly identified infringing P10 Image to endlessly appear in Google's Image Search results or surrounded by Google ads, even when the image was repeatedly identified by compliant Group B notices. ER20183(ln9-24);ER30014-16;ER30068-30071;ER20239-242¶¶74-76;ER40121-148;ER50157-166;ER60222-223¶58;ER80120-136.

2) Google allows the same infringing P10 Image hosted on blogger.com to be identified by an unlimited number of URLs. ER20232-233¶64;ER40067-72;ER60006¶11;ER50170-176.

Such evidence, at a minimum, established a genuine issue of material fact regarding the adequacy of Google's repeat infringer policy.

H. The District Court Erred In Failing To Rule Upon Perfect 10's Objections To The Poovala Declarations

The District Court based its ruling that Google had an adequate repeat

infringer policy primarily on declarations from Shantal Rands Poovala, a Google DMCA administrator with no technical background. Perfect 10 submitted detailed objections to Ms. Poovala's declarations. It argued, among other things, that Ms. Poovala's Rule 30(b)(6) deposition demonstrated that she lacked personal knowledge and expertise, and that the numerous contradictions between Ms. Poovala's declarations and her deposition testimony compelled the court to strike her declarations in their entirety. ER60240(ln16)-241(ln28);ER80219-220;ER60013-69.

Perfect 10 demonstrated that Ms. Poovala could not answer basic DMCA questions at deposition. She did not know: (i) [REDACTED] (ER60120); (ii) [REDACTED] (ER60122-129); (iii) whether a [REDACTED] (ER60139-140); (iv) what [REDACTED] (ER60133-138;ER60142-148); and (v) that [REDACTED] [REDACTED] ER60151-154.

In denying Google's motion to quash Ms. Poovala's deposition in her individual capacity, Magistrate Judge Hillman similarly found that "there appears to be some conflict between the pleadings [Google] has submitted and Ms. Poovala's testimony at the Rule 30(b)(6) deposition. In the Poovala Declaration, she discussed specific actions taken by defendant in response to plaintiff's July 2,

2007 DMCA notice, but at her deposition she appeared to have less knowledge about the same topic.” ER20002.

The District Court never ruled upon any of Perfect 10’s objections, however. The court’s failure to consider these objections, and its substantial reliance upon Ms. Poovala’s declarations, constitute error.

VIII. THE DISTRICT COURT INCLUDED CRITICAL ERRORS IN THE SJ ORDER

Before the hearing on the SJ Motions, the District Court issued a tentative ruling containing significant errors. At the hearing, Perfect 10 submitted a pleading advising the court of these errors, including: (i) the court’s failure to address AdWords or AdSense affiliates in its analysis of Google’s repeat infringer policy (ER20026); (ii) the basis for striking four third-party declarations critical of Google’s DMCA policies was incorrect (ER20028-29); and (iii) that Perfect 10’s Group A notices were sent to the correct email address. ER20026;ER20043. Nevertheless, the District Court included these errors in the SJ Order.

IX. THE DISTRICT COURT ERRED IN ITS FAIR USE ANALYSIS

The District Court erroneously concluded that Google’s forwarding of thousands of P10 Images contained in Perfect 10’s Group C notices to Google’s “partner,” chillingeffects.org, for publication on the Internet, and Google’s subsequent display of those images to its users, constitutes fair use.

ER20087¶13;ER20131,133. First, the court ignored Google’s linking to, and placing ads around, only the portions of those notices with images. ER20082-85¶¶10-11;ER20113-129. Second, the court improperly placed the burden of disproving fair use on Perfect 10. *See, e.g.*, ER10025 (asserting that Perfect 10 “has produced no evidence”). Because fair use is an affirmative defense, the burden is on Google. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994). Finally, the court mistakenly applied three of the “fair use” factors.¹¹

A. Purpose And Character Of Use

The District Court’s mistaken ruling that the publication on chillingeffects.org of “annotated versions of [Perfect 10] notices with scholarly commentary is clearly a transformative, noncommercial use” (ER10023) disregards the following:

1) Although it bore the burden of proof, Google submitted no evidence that chillingeffects.org was conducting research or providing scholarly commentary regarding Perfect 10’s notices. Google *provided no examples* of annotated Perfect 10 notices found on chillingeffects.org. Google’s only “evidence” was six pages from the chillingeffects.org website. ER10023, *citing* Kassabian PI Decl., Ex. N.

2) Google often bypasses the text in Perfect 10’s notices and directly

¹¹ The District Court correctly concluded that the second factor, “Nature of the Work,” weighed slightly in favor of Perfect 10. ER10024, *P10 I*, 508 F.3d at 1167.

links to, and displays, only the P10 Images in those notices. ER20082(ln21)-083(ln12);ER20113-116;ER20084-85¶11;ER20124-129. Such use cannot possibly be “transformative,” because Google is displaying and offering its users the same P10 Images it normally offers, without any transformation whatsoever.

3) If Google’s forwarding of Perfect 10’s notices to chillingeffects.org was truly for scholarly or research purposes, it should have redacted or altered the thousands of P10 Images in these notices, to prevent further damage. ER20082-85¶¶10-11;ER20113-129. The District Court itself noted that Google “could cooperate with Chilling Effects, or promote its functions, by providing it with core information only, such as the website taken down and the copyright owner; *why punish the owner by forwarding valid takedown notices that actually contain the copyrighted material?*” ER10090 (emphasis added). Google also could have disabled the live links in Perfect 10’s notices, which allow users to find as many as 36,000 full-size P10 Images. ER20084(ln18-085(ln1);ER20126-129. Google’s failure to take any such steps weighs heavily against any finding that its use was transformative.

4) Google is placing Google ads around the image portions of Perfect 10’s notices which it has forwarded to chillingeffects.org. ER20084-85¶11;ER20124-129. Such advertising is a commercial use.

5) In several cases, Google has copied and forwarded Perfect 10 notices

to chillingeffects.org *without even processing the notices*. ER20198-200¶15;ER30045-67. Such conduct undermines the District Court’s assertion that Google forwarded notices to help chillingeffects.org analyze the uses of the DMCA. ER10024.

6) Perfect 10’s evidence established that Google forwarded a much higher percentage of Perfect 10 notices to chillingeffects.org relative to notices of other copyright holders and that Google started forwarding P10 notices to chillingeffects.org *only after being sued*. For example, Google forwarded 28 of the 95 PI notices sent by Perfect 10 in October and November, 2009 to chillingeffects.org within three months of receiving those notices and has now forwarded 63 of these 95 notices. By contrast, as of March 23, 2010, Google had forwarded *none* of the [REDACTED] since April 10, 2007. ER20087-88¶14-15;ER20142. Such evidence shows that Google forwarded Perfect 10’s notices not for scholarly purposes, but to punish Perfect 10 for its lawsuit. Google never addressed or controverted this evidence.

B. Amount Used

“The third factor asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586. The District Court erred in ruling that this factor favored neither party. ER10024. Google copied and

distributed *all of the full-size P10 Images* in each notice *in their entirety*, along with *all* of the hundreds of live links in those notices. This Court has repeatedly held that “copying an entire work militates against a finding of fair use.” *Napster*, 239 F.3d at 1016 (9th Cir. 2001) (quotations omitted). Google had no legitimate purpose in copying so much of Perfect 10’s property, without redacting or altering the images or eliminating the live links to these images.

The District Court attempted to justify its ruling by asserting that, for chillingeffects.org “to conduct and communicate [its] research effectively, [it] would need to have access and be able to comment on the notices in their original form.” ER10024. There was no evidence in the record to support this assertion, however, and the court cited to none.

C. Effect On The Market

The fourth factor is “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. §107(4). This factor “requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market for the original.” *Campbell*, 510 U.S. at 590 (citation omitted).

The District Court erred in ruling that this factor favored Google because it

erroneously placed the burden of establishing market harm on Perfect 10.

ER10024-25. This Court has already found that “[t]here is no dispute that Google substantially assists websites to distribute their infringing copies to a worldwide market and assists a worldwide audience of users to access infringing materials,” thereby damaging copyright holders such as Perfect 10. *P10 I*, 508 F. 3d at 1172.

Moreover, the court disregarded the following evidence of massive damage to Perfect 10:

1) Google typically places links to the P10 Images it was asked to remove at the very top of its search results. ER20084-85¶11;ER20124-125. As a result, millions of Google users are likely to click on such links, thereby severely damaging the market for these P10 Images. ER20249-250¶86;ER40200-210.

2) ***Google’s conduct causes substantially more damage than the damage originally identified in Perfect 10’s notices.*** If each Google link identified by Perfect 10’s notices leads to 50 P10 Images, and a notice identifies 100 such links, any link that Google subsequently creates to that notice will lead to $100 \times 50 = 5000$ P10 Images. Some links created by Google to the Adobe portions of Group C notices lead to 36,000 full-size P10 Images. ER20084(ln18)-85(ln1);ER20126-129.

3) Perfect 10’s June 2007 notice includes 1.1 million full-size P10 Images available on 70 different paysites. ER30209-15. Under the District

Court's ruling, Google can forward this notice to chillingeffects.org and in-line link to all of that material, thus making *1.1 million full-size P10 Images permanently available on the Internet!* Such "unrestricted and widespread conduct" would completely destroy "the potential market" for P10 Images, which Perfect 10 spent \$60 million to create. *Campbell*, 510 U.S. at 590 (citation omitted).

4) The end result of Google's conduct is that Google is forever offering thousands of P10 Images to its users for free, and earning revenue by placing ads around those images.

5) Because Google's conduct is so damaging, it effectively prevents Perfect 10 from issuing further DMCA notices. Other copyright holders have elected not to send DMCA notices as a result of Google's actions. ER20195(ln5-17);ER30031-32;ER90136-138¶¶4,7;ER90126¶5. As a result, Google's actions undermine the purpose of the DMCA's notice-and-takedown procedures and cannot be considered fair use. *Campbell*, 510 U.S. at 577-78 (fair use factors "are to be explored, and the results weighed together, in light of the purposes of copyright").

In short, consideration of the four fair use factors dramatically favors Perfect 10 and compels a reversal of the District Court's contrary conclusion.

X. THE DISTRICT COURT FAILED TO REEXAMINE WHETHER

**GOOGLE’S DISPLAY OF P10 THUMBNAILS IS FAIR USE IN
LIGHT OF NEW EVIDENCE OF MASSIVE HARM**

Perfect 10 argued below that Google’s display of P10 thumbnails should no longer be considered fair use, because the number of thumbnails displayed in Google’s Image Search results has increased from 2,500 when the case was originally before this Court to over 22,000 today, despite 167 DMCA notices. ER20186-188¶6;ER30001-6;ER50177-180. The District Court erroneously concluded that no reexamination of this issue was “warranted” because this Court’s “fair use analysis was based on the character, not the quantity, of the thumbnails.” ER10014.

The fourth “fair use” factor, the effect the infringing use has on the market, ***“is undoubtedly the single most important element of fair use.”*** *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985) (emphasis added). Perfect 10 submitted substantial new evidence of massive harm to Perfect 10 from Google’s display of P10 thumbnails, including:

1) *Tens of millions of views and downloads of P10 Images* from websites to which Google linked P10 thumbnails. ER20249¶86;ER40200-210;ER60244¶66;ER80181-185.

2) Dramatic increases in the number of P10 thumbnails displayed by Google and the average number of full-size P10 Images offered by the infringing

websites to which Google links each such P10 thumbnail (9,000 full-size P10 Images each). ER20186-190¶¶6-7;ER30001-16;ER20234-235¶¶67;ER40084-99;ER50177-181.

3) Google's intermixing of explicit images of third parties improperly labeled as Perfect 10 models with P10 Images of those models. ER20091-92¶¶22;ER20173-178;

4) The 2007 closure of Perfect 10 Magazine. ER20076-77¶¶2.

5) The 2006 failure of Perfect 10's cell-phone downloading business. ER20076-77¶¶2;ER20186(ln15-19).

Although Google bore the burden of showing it was likely to succeed on its fair use affirmative defense, Google submitted no evidence controverting the substantial damage suffered by Perfect 10. ER20076-77¶¶2. The District Court thus erred in failing to reexamine whether Google's display of *tens of thousands of additional* P10 thumbnails still constituted fair use in light of the vastly increased harm suffered by Perfect 10.

XI. PERFECT 10 SATISFIED THE REMAINING PRELIMINARY INJUNCTION FACTORS

The District Court erroneously concluded that Perfect 10 failed to satisfy the three other preliminary injunction factors. First, because Perfect 10 demonstrated a likelihood of success on the merits of its copyright infringement claims (and the

court's contrary conclusion was erroneous), Perfect 10 "is entitled to a presumption of irreparable harm." *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir.1999); *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1156-57 (9th Cir. 2006) (copyright holder seeking preliminary injunction is "not required to make an independent demonstration of irreparable harm").

Moreover, Perfect 10 submitted uncontroverted evidence that it has lost an additional \$20 million since 2005, that infringement of P10 Images on Google's system has massively increased since 2005, and that Perfect 10 will suffer a substantial loss of business and likely be forced into bankruptcy without injunctive relief. ER20076-77¶2;ER20186-190¶¶6-7;ER30001-16;ER20201-204¶10;ER30077-98;ER20082-85¶¶10-11;ER20113-20129. An undisputed allegation that "absent preliminary relief [plaintiffs] would suffer a substantial loss of business and perhaps even bankruptcy" establishes irreparable injury. *Doran v. Salem Inn, Inc.*, 422 US 922, 932 (1975). The District Court's assertion that "[n]othing indicates that injunctive relief against Google will help alleviate [Perfect 10's] financial concerns" (ER10027) improperly disregarded this evidence.

Furthermore, the public interest and balance of equities favor Perfect 10. As the District Court held in an earlier opinion in this action, "the public interest is

also served when the rights of copyright holders are protected against acts likely constituting infringement.” *Google*, 416 F.Supp.2d at 859. The court thus erred in finding that these factors favored Google.

XII. THE DISTRICT COURT ERRED IN RULING THAT PERFECT 10 WAS NOT LIKELY TO SUCCEED ON ITS RIGHT OF PUBLICITY CLAIM

Certain Perfect 10 models assigned their rights of publicity to Perfect 10, in an attempt to stop Google’s unauthorized exploitation of their names and likenesses. In denying injunctive relief on Perfect 10’s right of publicity claim (ER10026), the District Court erroneously ignored evidence of Google’s damage to these models. Google used likenesses of these models for a commercial purpose by placing ads around their images, without paying the models. Google exploited these models’ names by falsely placing their names under sexually explicit third-party images and intermixing those revolting images with unauthorized images of the models. ER20091-92¶22ER20173-178. Such conduct damages the models’ reputations and careers. Accordingly, Perfect 10 is entitled to injunctive relief under Cal.Civ.Code §3344, because Google is providing the advertising and the traffic that allows it to exploit these models’ rights of publicity without authorization. Under the District Court’s misguided ruling, Internet advertising businesses such as Google can forever exploit and profit from other persons’ rights

of publicity, as long as they partner with websites that misuse these persons' names and likenesses. ER10026.

CONCLUSION

For all of the above reasons, this Court should reverse the District Court's orders denying Perfect 10's motion for preliminary injunction and granting in part Google's motions for partial summary judgment and/or remand for consideration by a Special Master.

Dated: October 17, 2010

Respectfully submitted,
LAW OFFICES OF JEFFREY N. MAUSNER

By: Jeffrey N. Mausner
Jeffrey N. Mausner
David N. Schultz
Attorneys for Plaintiff Perfect 10, Inc.

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)(C) AND NINTH CIRCUIT RULE 32-1

On October 14, 2010, the Court issued an Order granting permission for Appellant Perfect 10, Inc. to file an oversize opening brief of no more than 16,750 words. *See* Docket Entry 10.

I certify that the attached Opening Brief complies with the enlargement of brief size granted by the Court order dated October 14, 2010. The brief's type size and type face comply with Fed.R.App.P. 32(a)(5) and (6). This brief contains 16,733 words, excluding the portions exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

Dated: October 17, 2010

Respectfully submitted,

By Jeffrey N. Mausner
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Attorneys for Plaintiff-Appellant
Perfect 10, Inc.

STATEMENT OF RELATED CASES

Perfect 10, Inc. v. CCBill, LLC, et al., Court of Appeals Docket Nos. 04-57143 and 04-57207, 488 F.3d 1102 (9th Cir.), *cert. denied*, 552 U.S. 1062 (2007), is a case previously heard in this Court, which raised the same or closely related issues regarding the sufficiency of Perfect 10's DMCA notices under 17 U.S.C. §512(c) and what constitutes an adequate repeat infringer policy under 17 U.S.C. §512(i).

Perfect 10, Inc. v. Amazon.com, Inc., Google, Inc., et al., Court of Appeals Docket Nos. 06-55405, 06-55406, 06-55425, 06-55759, 06-55854, 06-55877, 508 F.3d 1146 (9th Cir. 2007), which arose out of the same case in the District Court, is a case previously heard in this Court, which raised some of the same or closely related issues regarding fair use and liability of search engines for infringement.

UMG Recordings, Inc. v. Veoh Networks, Inc., Court of Appeals Docket No. 09-56777, is a case pending in this Court, which raises the same or closely related issues regarding the interpretation of the DMCA, and was decided by the same District Judge.

Dated: October 17, 2010

Respectfully submitted,

By Jeffrey N. Mausner
Jeffrey N. Mausner
Law Offices of Jeffrey N. Mausner
Attorneys for Plaintiff-Appellant
Perfect 10, Inc.

CERTIFICATE OF MAILING BY FEDEX

I hereby certify that on October 18, 2010, I sent the OPENING BRIEF OF PLAINTIFF-APPELLANT PERFECT 10, INC. and EXCERPTS OF RECORD OF PLAINTIFF-APPELLANT PERFECT 10, INC. to the Clerk of the United States Court of Appeals for the Ninth Circuit via FedEx, for next day delivery to the following address:

Office of the Clerk
U.S. Court of Appeals
95 Seventh Street
San Francisco, California 94103-1526


Brittany Rosen

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2010, I sent two copies of the OPENING BRIEF OF PLAINTIFF-APPELLANT PERFECT 10, INC. and one copy of the EXCERPTS OF RECORD OF PLAINTIFF-APPELLANT PERFECT 10, INC. to each of the following for overnight delivery via FedEx, for delivery to the following addresses:

Margret Caruso
Charles Verhoeven
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STATUTORY ADDENDUM – 17 U.S.C. §512

TITLE 17

§ 512. Limitations on liability relating to material online

(a) **Transitory Digital Network Communications.**— A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

- (1) the transmission of the material was initiated by or at the direction of a person other than the service provider;
- (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
- (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;
- (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and
- (5) the material is transmitted through the system or network without modification of its content.

(b) **System Caching.**—

(1) **Limitation on liability.**— A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which—

- (A) the material is made available online by a person other than the service provider;
- (B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in

subparagraph (A) at the direction of that other person; and
(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A), if the conditions set forth in paragraph (2) are met.

(2) **Conditions.**— The conditions referred to in paragraph (1) are that—

(A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);

(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology—

(i) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

(ii) is consistent with generally accepted industry standard communications protocols; and

(iii) does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

(E) if the person described in paragraph (1)(A) makes that material available online

without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if—

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

(c) Information Residing on Systems or Networks At Direction of Users.—

(1) In general.— A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) Designated agent.— The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) Elements of notification.—

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes

other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

(d) **Information Location Tools.**— A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—

- (1)(A) does not have actual knowledge that the material or activity is infringing;
 - (B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
 - (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- (3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

(e) **Limitation on Liability of Nonprofit Educational Institutions.**—

(1) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if—

- (A) such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;
- (B) the institution has not, within the preceding 3-year period, received more than

two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

(C) the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.

(2) For the purposes of this subsection, the limitations on injunctive relief contained in subsections (j)(2) and (j)(3), but not those in (j)(1), shall apply.

(f) **Misrepresentations.**— Any person who knowingly materially misrepresents under this section—

(1) that material or activity is infringing, or

(2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

(g) **Replacement of Removed or Disabled Material and Limitation on Other Liability.**—

(1) **No liability for taking down generally.**— Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2) **Exception.**— Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—

(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

(3) Contents of counter notification.— To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:

(A) A physical or electronic signature of the subscriber.

(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

(D) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

(4) Limitation on other liability.— A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

(h) Subpoena To Identify Infringer.—

(1) Request.— A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.

(2) Contents of request.— The request may be made by filing with the clerk—

(A) a copy of a notification described in subsection (c)(3)(A);

(B) a proposed subpoena; and

(C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

(3) Contents of subpoena.— The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to

the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.

(4) **Basis for granting subpoena.**— If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

(5) **Actions of service provider receiving subpoena.**— Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

(6) **Rules applicable to subpoena.**— Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.

(i) **Conditions for Eligibility.**—

(1) **Accommodation of technology.**— The limitations on liability established by this section shall apply to a service provider only if the service provider—

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

(2) **Definition.**— As used in this subsection, the term “standard technical measures” means technical measures that are used by copyright owners to identify or protect copyrighted works and—

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

(j) **Injunctions.**— The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to

monetary remedies under this section:

(1) **Scope of relief.**—

(A) With respect to conduct other than that which qualifies for the limitation on remedies set forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

(i) An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network.

(ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

(i) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is using the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(ii) An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.

(2) **Considerations.**— The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider—

(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

(D) whether other less burdensome and comparably effective means of preventing

or restraining access to the infringing material are available.

(3) **Notice and ex parte orders.**— Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider’s communications network.

(k) **Definitions.**—

(1) **Service provider.**—

(A) As used in subsection (a), the term “service provider” means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term “service provider” means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

(2) **Monetary relief.**— As used in this section, the term “monetary relief” means damages, costs, attorneys’ fees, and any other form of monetary payment.

(1) **Other Defenses Not Affected.**— The failure of a service provider’s conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing under this title or any other defense.

(m) **Protection of Privacy.**— Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

(n) **Construction.**— Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.