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Perfect 10, Inc.

8
9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11 PERFECT 10, INC., a California
12 corporation,
13 Plaintiff,
14 v.
15 GOOGLE, INC., a corporation; et al.,
16 Defendants.

Case No. CV 04-9484 AHM (SHx)

**NOTICE OF APPEAL -
PLAINTIFF PERFECT 10, INC.'S
NOTICE OF APPEAL TO THE
UNITED STATES COURT OF
APPEALS FOR THE NINTH
CIRCUIT**

REPRESENTATION STATEMENT

**PRELIMINARY INJUNCTION
APPEAL**

Before Judge A. Howard Matz

NOTICE OF APPEAL

1
2 Notice is hereby given that Perfect 10, Inc., (“Perfect 10”), plaintiff in the
3 above-referenced case, hereby appeals to the United States Court of Appeals for the
4 Ninth Circuit from the District Court’s Minute Order Denying Perfect 10’s Motion
5 for a Preliminary Injunction Against Defendant Google, Inc., entered in this case on
6 July 30, 2010 (Docket No. 953), a copy of which is attached as Exhibit 1 (the
7 “Preliminary Injunction Order”).

8 Perfect 10 also appeals, to the United States Court of Appeals for the Ninth
9 Circuit, from the District Court’s Minute Order Granting In Part Defendant Google,
10 Inc.’s Motions for Partial Summary Judgment As To Safe Harbor Under 17 U.S.C.
11 §512 (Docket No. 937) and amended on July 28, 2010 (Docket No. 948), copies of
12 which are attached hereto collectively as Exhibit 2 (the “Summary Judgment
13 Order”). The United States Court of Appeals for the Ninth Circuit has pendent
14 appellate jurisdiction over the Summary Judgment Order for the following reasons,
15 among others:

- 16 1) The Summary Judgment Order is inextricably intertwined or bound up
17 with the Preliminary Injunction Order;
- 18 2) Review of the Summary Judgment Order is necessary to ensure
19 meaningful review of the Preliminary Injunction Order; and
- 20 3) The Summary Judgment Order provides the legal authority upon which
21 the District Court denied Perfect 10’s Motion for a Preliminary Injunction, as set
22 forth in the Preliminary Injunction Order.

23 Dated: August 24, 2010 Respectfully submitted,

24 LAW OFFICES OF JEFFREY N. MAUSNER

25 By: Jeffrey N. Mausner
26 Jeffrey N. Mausner
27 Attorneys for Plaintiff Perfect 10, Inc.
28

REPRESENTATION STATEMENT

The undersigned represents Perfect 10, Inc., plaintiff and appellant in this matter, and no other party. Attached is a service list that shows all of the parties to the action below, and identifies their counsel by name, firm, address, email and telephone number, where appropriate. (F.R.A.P. 12(b); Circuit Rule 3-2(b).)

Dated: August 24, 2010

Respectfully submitted,
LAW OFFICES OF JEFFREY N. MAUSNER

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

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1 **SERVICE LIST OF REPRESENTATION STATEMENT**

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Exhibit 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

Present: The Honorable	A. HOWARD MATZ, U.S. DISTRICT JUDGE
------------------------	-------------------------------------

Stephen Montes Deputy Clerk	Not Reported Court Reporter / Recorder	Tape No.
Attorneys NOT Present for Plaintiffs:	Attorneys NOT Present for Defendants:	

Proceedings: IN CHAMBERS (No Proceedings Held)

I. INTRODUCTION

Before the Court is Plaintiff Perfect 10, Inc.’s (“P10”) motion for a preliminary injunction against Defendant Google, Inc. (“Google”). The parties are familiar with the procedural history of the case, some of which is set forth in the Court’s July 26, 2010 Order granting in part and denying in part Google’s motions for partial summary judgment as to safe harbor under the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512. The Court need not further elaborate on the procedural history here, other than to note that P10 filed an earlier motion for a preliminary injunction against Google, which the Court granted in part and denied in part on February 17, 2006. *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006). The Ninth Circuit affirmed in part and reversed in part, vacating the injunction that this Court issued based upon direct infringement and remanding for this Court to reconsider P10’s contributory infringement claims. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). P10 now moves for a preliminary injunction against Google based upon the Ninth Circuit’s ruling on its contributory infringement claims, as well as based upon new evidence that—P10 argues—justifies a finding of direct and vicarious infringement.

The Court held a hearing on P10’s preliminary injunction motion on April 5, 2010 and explored related issues at the hearing on Google’s DMCA-based summary judgment motions on May 10, 2010. For the following reasons, the Court DENIES P10’s motion for a preliminary injunction.¹

¹Docket No. 772.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

II. STATEMENT OF FACTS

The parties incorporate by reference their moving papers filed with Google’s motions for partial summary judgment as to safe harbor under the DMCA. *See* Opp’n at 2 n.2; Reply at 3 n.2. Because many of the facts overlap between those motions and this one, the Court also incorporates by reference its recital of the facts in its July 26, 2010 DMCA safe harbor order.² The statement of facts in this Order will be limited to those facts that are newly presented in the preliminary injunction motion. Whenever there is any ambiguity about which set of declarations the Court is citing, the Court will clarify. For example, the Court will specify either “Zada PI Decl.” (for the Zada Declaration filed with the Preliminary Injunction motion) or “Zada DMCA Decl.” (for the Zada Declaration filed with Google’s motions for partial summary judgment as to safe harbor under the DMCA).

In addition to Google’s web search, image search, cache, and Blogger feature, which were described in the Court’s July 26, 2010 Order, P10 has offered evidence that Google has a practice of forwarding the DMCA takedown notices it receives and processes—including those from P10—to the website *chillingeffects.org*.³ Zada PI Decl.

²The Court notes, for clarity purposes, that P10 and Google classify P10’s DMCA takedown notices using different terms. In its July 26, 2010 Order, the Court adopted Google’s use of the terms “Group A,” “Group B,” and “Group C” to refer to the notices sent in 2001; the “spreadsheet” notices sent between May 31, 2004 and April 24, 2007; and the “DVD and hard drive notices” sent in or after December 2005, respectively. *See* July 26, 2010 Order at 4. P10 uses the term “spreadsheet notices” to refer to the Group B notices and the term “Adobe-style” or “Adobe PDF” notices to refer to a subset of the Group C notices that included Adobe PDF files containing the allegedly infringing images (other Group C notices included .png or other image files—rather than Adobe PDF files—of the allegedly infringing images). In this Order, the Court may at times employ P10’s terminology rather than Google’s terminology.

³P10 asserts that Google selectively forwards its notices, based upon the fact that certain notices have not appeared on Chilling Effects’s website, but Google insists that it

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

¶ 13. The Court will explain how Chilling Effects functions, *infra*.

P10 also addresses its claim of violation of its rights of publicity in this preliminary injunction motion. *See* Second Amended Complaint (“SAC”) ¶¶ 84-92.⁴ P10 has offered evidence that the P10 models Aria Giovanni, Erica Campbell, Amy Weber, Amber Smith, and Irina Voronina have assigned their rights of publicity to P10. *Zada* PI Decl. ¶ 101. P10 also offers evidence that blogspot.com websites (meaning, websites hosted on Google’s Blogger servers) display these models’ names (and in some cases, images of them) without authorization from P10. *Id.*

III. LEGAL STANDARDS

A. Motion for Preliminary Injunction

As the Supreme Court has articulated,

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Winter v. Natural Resources Defense Council, Inc., — U.S. —, 129 S. Ct. 365, 374 (2008); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126-27 (9th Cir. 2009) (quoting *Winter*, 129 S. Ct. at 374). On July 28, 2010, in *Alliance for Wild Rockies v. Cottrell*, the Ninth Circuit concluded that “the ‘serious questions’ version of the sliding scale test for preliminary injunctions remains viable after the Supreme Court’s decision in *Winter*.” *Alliance for Wild Rockies v. Cottrell*, — F.3d —, 2010 WL 2926463, at *7 (9th

forwards all notices it receives and speculates that any missing notices must be due to a backlog in Chilling Effects’s processing system. *See* 04/05/2010 Hearing Tr. at 11:19-12:15, 19:3-18. This dispute is immaterial to the Court’s analysis.

⁴After the Court granted P10’s motion for leave to file its SAC, Docket No. 321, P10 never actually filed a copy of its SAC, so the Court is referring to the lodged copy of P10’s Proposed Second Amended Complaint at Docket No. 303.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

Cir. July 28, 2010). In particular, the Ninth Circuit still holds that “A preliminary injunction is appropriate when a plaintiff . . . demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.” *Id.* “Of course, plaintiffs must also satisfy the other *Winter* factors, including the likelihood of irreparable harm.” *Id.*

B. Copyright Law

1. Direct infringement

“Plaintiffs must satisfy two requirements to present a prima facie case of direct infringement: (1) they must show ownership of the allegedly infringed material and (2) they must demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159 (9th Cir. 2007) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) and citing 17 U.S.C. § 501(a)). 17 U.S.C. § 106 states, in pertinent part:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

...

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

...

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly

With respect to the display right, the Ninth Circuit adopted this Court’s “server test,” which held that

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

a computer owner that stores an image as electronic information and serves that electronic information directly to the user (“i.e., physically sending ones and zeroes over the [I]nternet to the user’s browser,” Perfect 10 [v. *Google, Inc.*, 416 F.Supp.2d 828, 839 (C.D. Cal. 2006)]) is displaying the electronic information in violation of a copyright holder’s exclusive display right. *Id.* at 843-45; see 17 U.S.C. § 106(5). Conversely, the owner of a computer that does not store and serve the electronic information to a user is not displaying that information, even if such owner in-line links to or frames the electronic information. *Perfect 10*, 416 F.Supp.2d at 843-45. . . .

Perfect 10, 508 F.3d at 1159.

With respect to the distribution right, the Ninth Circuit also followed this Court’s finding that “[a] distribution of a copyrighted work required an ‘actual dissemination’ of copies.” *Perfect 10*, 508 F.3d at 1162 (citing *Perfect 10*, 416 F. Supp. 2d at 844).

2. Contributory infringement

The Ninth Circuit instructed:

In order for Perfect 10 to show it will likely succeed in its contributory liability claim against Google, it must establish that Google’s activities meet the definition of contributory liability recently enunciated in *Grokster*. Within the general rule that “[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement,” [*Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005)], the Court has defined two categories of contributory liability: “Liability under our jurisprudence may be predicated on actively encouraging (or inducing) infringement through specific acts (as the Court’s opinion develops) or on distributing a product distributees use to infringe copyrights, if the product is not capable of ‘substantial’ or ‘commercially significant’ noninfringing uses.” *Id.* at 942 . . . (Ginsburg, J., concurring) (quoting [*Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984)]).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

Perfect 10, 508 F.3d at 1170. The Court continued,

Accordingly, we hold that a computer system operator can be held contributorily liable if it “has actual knowledge that specific infringing material is available using its system,” *Napster*, 239 F.3d at 1022, and can “take simple measures to prevent further damage” to copyrighted works, [*Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995)], yet continues to provide access to infringing works.

Id. at 1172. Applying this test to P10 and Google, the Ninth Circuit instructed,

Applying our test, 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.

Id. The Ninth Circuit found that disputes of fact still existed as to whether P10’s notices and Google’s responses to these notices were adequate to confer knowledge, as well as whether there are “reasonable and feasible means for Google to refrain from providing access to infringing images.” *Id.* at 1172-73.

3. Vicarious infringement

As the Ninth Circuit articulated,

Grokster states that one “infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.” *Grokster*, 545 U.S. at 930 As this formulation indicates, to succeed in imposing vicarious liability, a plaintiff must establish that the defendant exercises the requisite control over the direct infringer and that the defendant derives a direct financial benefit from the direct infringement. *See id.* *Grokster* further explains the “control” element of the vicarious liability test as the defendant’s “right and ability to

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

supervise the direct infringer.” *Id.* at 930 n. 9 Thus, under *Grokster*, a defendant exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so.

Perfect 10, 508 F.3d at 1173.

4. Fair use

Fair use under 17 U.S.C. § 107 is an affirmative defense to copyright infringement. “[O]nce Perfect 10 has shown a likelihood of success on the merits, the burden shifts to Google to show a likelihood that its affirmative defenses will succeed.” *Perfect 10*, 508 F.3d at 1158.

Section 107 provides,

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107. The Ninth Circuit went on to explain that the fair use doctrine must be

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

analyzed on a case-by-case basis, with all four factors considered together, not in isolation, and in light of the purpose of copyright law, which “is ‘[t]o promote the Progress of Science and useful Arts,’ U.S. Const. art. I, § 8, cl. 8, and to serve ‘the welfare of the public.’ ” *Perfect 10*, 508 F.3d at 1163 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 n. 10 . . . [(1984)] (quoting H.R.Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909))).

5. DMCA safe harbor

DMCA safe harbor, 17 U.S.C. § 512, is also an affirmative defense to copyright infringement. It precludes liability for damages and limits injunctive relief to:

[O]ne 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.

17 U.S.C. §§ 512(a) & (j)(1)(A). In its July 26, 2010 Order, this Court held that Google is entitled to DMCA safe harbor for its web and image search, caching, and Blogger features with respect to all of P10’s Group A and Group C notices, and part of the Group B notices.

IV. DISCUSSION

A. Likelihood of Success on the Merits

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

P10 argues that it is entitled to an injunction based upon three distinct types of Google's conduct that P10 asserts constitute copyright infringement: (1) Google's web and image search and its related caching feature; (2) Google's Blogger service; and (3) Google's forwarding of P10's DMCA notices to the Chilling Effects website for publication.⁵ The Ninth Circuit already addressed the first type of alleged infringement in its 2007 Order and remanded the case to this Court to reconsider the issue of contributory infringement, but the facts pertaining to the two other types of conduct were not before either court at that time. In addition, P10 argues that it is entitled to an injunction based upon Google's alleged violation of its rights of publicity. In examining P10's likelihood of success on the merits on the copyright claim, the Court will determine whether P10 will likely be able to establish a prima facie case for infringement for each type of conduct. The Court will then consider whether Google will likely be able to establish (or has established) the applicability of an affirmative defense. The Court will address the right of publicity claim separately.

1. Google's web and image search and its caching feature

The Ninth Circuit has already issued a dispositive ruling that applies to much of P10's motion with respect to Google's web and image searches and its cache. In its 2007 opinion, the Ninth Circuit applied this Court's "server test" and concluded that P10 was

⁵P10 also argues that the Court should enjoin Google from: (1) linking to sites that display perfect10.com usernames and passwords and (2) from placing AdSense advertisements on or for infringing websites. *See* Motion at 16-17. However, this Court and the Ninth Circuit have already ruled that P10 is not likely to succeed on the merits of its copyright claims based upon password-displaying websites and AdSense advertisements. *See Perfect 10*, 416 F. Supp. 2d 828, 838 n.9 (finding that P10 likely has no copyright interest in the username/password combinations that perfect10.com website users create); *Perfect 10*, 508 F.3d 1173 n.13 (finding that P10 had not presented sufficient evidence that users logging onto the perfect10.com website with unauthorized passwords infringed P10's exclusive rights), 1173-74 (holding that Google's right to terminate an AdSense partnership did not entitle it to stop direct infringement by third-party websites and thus could not subject it to liability for vicarious infringement). P10 has presented no evidence in this motion that would justify a reevaluation of this Court's and the Ninth Circuit's prior rulings on these issues.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

not likely to succeed on the merits of its direct infringement and vicarious infringement claims against Google based upon Google's in-line linking in its web and image search and its cache. *Perfect 10*, 508 F.3d at 1160-62. The Ninth Circuit concluded that although it was likely P10 could establish a prima facie case for direct infringement based upon Google's storage and communication of thumbnail versions of P10's images, Google was likely to prevail on its fair use defense with respect to the thumbnails. P10 argues unconvincingly that this Court should reach a different result and should revise the server test for direct infringement, based upon new evidence of so-called massive infringing websites. The server test is now binding Ninth Circuit precedent, and it is not within this Court's power to revise it. P10 also argues that because Google now hosts over 22,000 thumbnails rather than the 2,500 it hosted when the case was on appeal, Google's hosting of thumbnails should no longer constitute fair use. *See Zada PI Decl.* ¶ 6. However, the Ninth Circuit's fair use analysis was based upon the character, not the quantity, of the thumbnails, so no change in the analysis is warranted. *See Perfect 10*, 508 F.3d at 1163-68. Because P10 has provided no justification for departing from the Ninth Circuit's rulings with respect to direct and vicarious infringement for Google's web search, image search, and cache, the Court need only analyze whether Google is likely to be liable for contributory infringement as a result of these services.

As noted above, the Ninth Circuit specifically instructed that, with respect to the in-line linking in its web and image search and cache, "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." *Perfect 10*, 508 F.3d at 1172. The Ninth Circuit found that disputes of fact still existed as to whether P10's notices of infringement and Google's responses to those notices were adequate, as well as whether there are "reasonable and feasible means for Google to refrain from providing access to infringing images." *Id.* at 1172-73.⁶

⁶Google now argues that P10 has not provided evidence of direct infringement on third-party sites, as is required for contributory liability. Google conceded for the purposes of the Ninth Circuit appeal that third-parties were infringing. *Perfect 10*, 508 F.3d at 1169. Even if Google has not waived this argument, P10 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 P10's copyrights. *Zada PI Decl.* ¶ 86, Ex. 65.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

As discussed at length in this Court’s July 26, 2010 Order, 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. July 26, 2010 Order at 12, 15-25. Portions of the Group B notices are adequate to confer notice of infringement. July 26, 2010 Order at 13-15. Google has offered evidence that it has processed the majority—it asserts all—of the Group B notices. Poovala DMCA Decl. ¶¶ 79-80, Exs. FF-GG. For its part, P10 offers evidence that Google has failed to process some of the Group B notices. Zada DMCA Decl. ¶ 26, Ex. 14. However, P10 has not provided evidence on this preliminary injunction motion that those Group B notices that Google failed to process are the ones that conferred sufficient notice of infringement. Instead, P10’s arguments about those notices are so general as to be generic. For example, they encompass all three sets of notices, without focusing on the portion of the Group B notices that are in issue, which such notices are the only remaining potential basis for imposing liability. *See Reply* at 13-14. P10 has not met its burden of establishing that it is likely to prevail on its contributory infringement claim as to *all* the links and websites that it identified in any of its notices. *See Proposed Order* ¶¶ A-B. Nor has P10 tailored the relief requested in its proposed order to removal of those relatively few links for which P10 conferred valid notice of infringement.

P10 also argues that its notices in general should have put Google on constructive notice of infringement. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001) (“Contributory liability requires that the secondary infringer know or *have reason to know* of direct infringement.” (emphasis added and quotation omitted)). Even if this were true, the doctrine of contributory infringement liability still requires that the alleged infringer be able to take simple measures to prevent further damage to the copyrighted works. *Perfect 10*, 508 F.3d at 1172. P10 argues that Google could take simple measures to block all links to any website that contains any infringed image (particularly the so-called massive infringing websites) or that it could use image recognition software to find similar images to the infringed ones and then block them. P10’s “evidence” in support of these alternatives consists exclusively of speculation by Dr. Zada. Zada Reply PI Decl. ¶ 23. Moreover, as Google points out, these methods run the risk of being dramatically overinclusive because neither can identify images that are properly licensed or fair use as opposed to infringing. *See Poovala DMCA Decl.* ¶ 15.

Thus, P10 has not established that it is likely to succeed on the merits of its claim

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

for contributory infringement as to Google's web search, image search, and cache.⁷

2. Google's Blogger service

a. P10's prima facie case of infringement

One of the issues that was not before this Court or the Ninth Circuit on P10's prior motion for a preliminary injunction is whether Google is likely to be held liable for infringement based upon its Blogger service. Blogger is a service that Google owns and operates that allows Blogger account holders to create their own blogs hosted on Google's servers. Poovala DMCA Decl. ¶ 26. Most of these Blogger web pages bear the suffixes "blogspot.com" or "blogger.com." *Id.* Google does not charge users to set up Blogger accounts. *Id.* Blogger account holders may display images on their blogs. In some cases the images are uploaded onto Google's servers and in other cases a user hyperlinks to content hosted on other servers. *Id.* In either case, the user decides to display the image on the Blogger site; Google's servers passively process users' upload requests. *See Id.*

⁷The Court reiterates its previous ruling that Google established its entitlement to a safe harbor defense for its web search, image search, and cache, with respect to the Group A and Group C notices, as well as part of the Group B notices. Even if P10 were to prevail on the merits as to these claims, the injunctive relief would be limited to specific relief necessary to prevent infringement at a particular online location and to relief that is also the least burdensome effective alternative. *See* 17 U.S.C. § 512(j)(1)(A)(iii). The relief P10 seeks on this motion fails to satisfy this requirement, with the possible exception of its request that the Court enjoin Google from "powering *rapidshare.com* search engines used to find infringing materials offered by *rapidshare.com*." Proposed Order ¶ F. However, neither in its moving papers nor at the hearing did P10 ever explain what it meant by "powering *rapidshare.com* search engines" or provide any evidence that Google is, in fact, doing so. In any event, P10 sued Rapidshare.com for copyright infringement in the Southern District of California. On July 15, 2010, Rapidshare filed a document indicating that the parties in that case had reached a settlement. *See* Rapidshare's Notice of Withdrawal of Its Motion for Partial Summary Judgment, *Perfect 10, Inc. v. Rapidshare AG*, No. 09-CV-2596 (S.D. Cal. July 15, 2010) (Docket No. 99).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

Does Google’s hosting on its services of infringing images for its users’ Blogger pages constitute direct infringement under the server test, as the Ninth Circuit found as to thumbnails? Not necessarily. Unlike the thumbnails, where Google’s servers created the copies of the images, the evidence indicates that, with respect to the Blogger service, Google’s servers merely automatically and passively process uploads of photographs initiated by Blogger users. *See* Poovala DMCA Decl. ¶ 26.

In its opinion, the Ninth Circuit explicitly reserved ruling on the issue of 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 when the users of the bulletin board or similar system post infringing works.” *Perfect 10*, 508 F.3d at 1160 n.6 (citing *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004)). The *CoStar Group* court held that

[Internet Service Providers (“ISPs”)], when passively storing material at the direction of users in order to make that material available to other users upon their request, do not “copy” the material in direct violation of § 106 of the Copyright Act. Agreeing with the analysis in *Netcom*, we hold that the automatic copying, storage, and transmission of copyrighted materials, when instigated by others, does not render an ISP strictly liable for copyright infringement under §§ 501 and 106 of the Copyright Act. An ISP, however, can become liable indirectly upon a showing of additional involvement sufficient to establish a contributory or vicarious violation of the Act. In that case, the ISP could still look to the DMCA for a safe harbor if it fulfilled the conditions therein.

CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 555 (4th Cir. 2004) (following *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) and holding that an online real estate listing website whose members were uploading material that violated the plaintiff’s copyrights was not liable for direct infringement). *See also Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1056-57 (C.D. Cal. 2002) (Cooper, J.) (noting in dicta that a passive internet service provider is not responsible for direct infringement based upon a user’s uploading of infringing material in a case involving USENET users uploading copyrighted works to USENET servers), *aff’d in part and rev’d in part on other grounds*, 357 F.3d 1072 (9th Cir. 2004).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

The *Field* and *Parker* courts also held that automated copying was not sufficient to invoke direct liability, but those cases involved Google's cache rather than uploads by users, so the context is slightly different. *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 496-98 (E.D. Pa. 2006).⁸ This Court agrees with the *CoStar Group* and *Netcom* courts and finds that because Google's conduct with respect to its Blogger service involves only the passive processing of users' uploads, Poovala DMCA Decl. ¶ 26, P10 is unlikely to be able to establish that Google has directly infringed its copyrights.

Is Google liable for contributory infringement for its Blogger service? For the same reasons that P10 is unlikely to establish that Google is liable for contributory infringement for its web and image search and cache, it also is unlikely that P10 will prove contributory liability for blogspot.com. In particular, P10's notices were not sufficient to put Google on notice of infringement by users of its Blogger sites. Only the Group B and Group C notices contained Blogger URLs, and the only Blogger URLs that Google failed to remove fall within the defective Group C notices. *See* Poovala DMCA Decl. ¶ 93; Chou PI Decl. ¶ 8. Because P10 cannot prove that Google received valid notices of images in its Blogger system that infringe P10's copyrights, P10 is unlikely to be able to prove that Google is liable for contributory infringement.

As for vicarious infringement, the Ninth Circuit has explained that in order "to succeed in imposing vicarious liability, a plaintiff must establish that the defendant exercises the requisite control over the direct infringer and that the defendant derives a direct financial benefit from the direct infringement." *Perfect 10*, 508 F.3d at 1173. P10 has failed to provide evidence that it is likely to be able to establish that Google derives a direct financial benefit from the direct infringement. P10 does not dispute that Google provides Blogger as a free service to users, without charging a fee. P10's only evidence

⁸The distinguished commentator David Nimmer does not consider volitional conduct on the part of the defendant as a necessary element to establish direct infringement. *See*, 3 *Nimmer on Copyright* § 12B.06[B][2][c][ii], at 12B-82.5-12B-83 ("[The *Field v. Google*] focus on non-volitional conduct is appropriate in the context of evaluating liability for serving cached material. But rather than it being a bar at the outset to plaintiff's establishing a prima facie case, Congress has defined it as one factor to be considered in evaluating the propriety of the caching safe harbor.")

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

of financial benefit to Google from Blogger infringement is “from clicks on ads placed next to infringing P10 images.” Reply at 15-16 (citing Zada PI Decl. ¶¶ 16, 74-76, Exs. 8, 9, 54-56). None of the webpages with ads placed next to infringing images discussed or shown in paragraphs 16 and 74-76 or Exhibits 8 and 54-56 of the Zada PI Declaration is a Blogger webpage. Exhibit 9 is a disc submitted to the Court containing dozens of top-level folders and hundreds, if not thousands, of files. Nowhere in the cited paragraphs of Zada’s Declaration does he explain how to locate Blogger webpages containing AdSense advertisements within Exhibit 9. The Court will not scour Exhibit 9 to find evidence of Google advertisements on Blogger pages when P10 has not specifically cited to such evidence. Moreover, even if P10 had cited to evidence of Google advertising on Blogger pages, it is unclear that such evidence would qualify as the *direct* financial benefit necessary to impose vicarious liability. *See, e.g., Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (finding that the “essential aspect of the ‘direct financial benefit’ inquiry is whether there is a causal relationship between the infringing activity and any financial benefit a defendant reaps” and holding that the plaintiff had not established a direct financial benefit from providing access to infringing material where the record lacked evidence that the defendant attracted or retained subscriptions because of infringement). Given the absence of evidence of any direct financial benefit to Google from the alleged infringement on Blogger sites, the Court finds that P10 is unlikely to be able to establish vicarious liability for Google’s Blogger service.

b. Google’s DMCA safe harbor defense

In any event, Google has established that it is entitled to DMCA safe harbor for its Blogger Service. In its July 26, 2010 Order, the Court granted Google’s motion for DMCA safe harbor with respect to that service with the possible exception of several blogspot.com links from the Group B notices that Google had failed to expeditiously process as of December 12, 2005. *See Zada DMCA Decl. ¶ 27, Ex. 16 at 1, 2, 4, 6.*⁹

⁹As explained in the Court’s July 28, 2010 Notice of Errata, the Court’s July 26, 2010 Order at pages 27-28 referred to 23 blogspot.com URLs in Exhibit 45 to the Zada DMCA Declaration that Google may not have expeditiously processed. That reference should actually have been to six blogspot.com URLs on pages 1, 2, 4, and 6 of Ex. 16 to the Zada DMCA Declaration.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

However, P10 has presented no evidence in this preliminary injunction motion that any of these blogspot.com URLs remain unprocessed. The Chou Declaration describes the process by which P10 verified which of the Blogger URLs it had identified in its notices had not been blocked by Google as of February 22, 2010. *See* Chou PI Decl. ¶¶ 8-11; Zada PI Decl. ¶ 60. The Chou Declaration only addresses Group C “Adobe notices sent to Google from July 2, 2007 through May 7, 2009.” Chou PI Decl. ¶ 8. Ms. Chou compiled her findings in an Excel spreadsheet, which is contained in the Exhibit 9 disc lodged with the Court. That spreadsheet file, entitled “blogger still up 22610 sc.xls,” contains only links from the Group C notices.¹⁰

With respect to the Group C notices, P10 would be limited to receiving relief in

[O]ne 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.

17 U.S.C. § 512(j)(1)(A) (emphasis added). In its proposed order on this motion, P10’s requested relief is, once again, entirely general. It does not

¹⁰There is one possible exception to this finding. The spreadsheet contains the URL “photos1.blogger.com/img/114/2202/1600/SylviaKaczmarek.jpg,” which was purportedly included in a June 12, 2005 notice to Google, but the image at this URL has been removed from Google’s servers. When the Court visited that page on July 27, 2010, it displayed a “URL not found” error message.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

request relief specific to Google’s Blogger feature, much less pertaining to any particular Blogger user or page. In particular, it fails to provide the specificity required by the portions of the statute set forth above in bold. For that additional reason, P10 is unlikely to be able to establish that it is entitled to an injunction that applies to Google’s Blogger feature.

3. Google’s forwarding of DMCA notices to Chilling Effects

Chilling Effects is a nonprofit, educational project run jointly by the Electronic Frontier Foundation and Harvard, Stanford, Berkeley, University of San Francisco, University of Maine, George Washington School of Law, and Santa Clara University School of Law clinics. It is designed to help Internet users “understand the protections that the First Amendment and intellectual property laws give to your online activities.” Kassabian PI Decl., Ex. N. The public is invited to submit cease and desist notices (including DMCA takedown notices) to the website, on which law students conduct research. The notices, commentary on the notices, and research conducted based upon the notices are all posted in an online database. *Id.* Google argues that it forwards P10’s (and other) notices to Chilling Effects to further that research and to notify the provider of the material that it has removed or disabled access to the material, as required by the DMCA, 17 U.S.C. § 512(g)(2)(A). *See* Opp’n at 9 & n.12. When Google removes an image or link from its search results, it posts a statement at the bottom of the page, indicating “In response to a complaint we received under the US Digital Millennium Copyright Act, we have removed [number of] result(s) from this page. If you wish, you may read the DMCA complaint that caused the removal(s) at ChillingEffects.org.” *See, e.g.*, Kassabian PI Decl., Ex. L at 159. The phrase “read the DMCA complaint” hyperlinks to the DMCA takedown notice on the Chilling Effects website. *Id.*¹¹

¹¹Dr. Zada himself relies upon the research uses of Chilling Effects to provide evidence to support P10’s motion. In order to support his argument that Rapidshare is a “massive infringing website,” and Google should discontinue linking to it entirely, he searched Chilling Effect’s database of DMCA notices to find how many copyright holders had complained against Rapidshare. *See Zada Reply Decl.* ¶ 7.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

Since June 2007, P10's DMCA notices have consisted of Adobe PDF files that include actual copies of the images at issue, as well as embedded links to the infringing websites. Zada PI Decl. ¶ 13. Thus, whenever Google has forwarded these Adobe PDF notices, it has sent copies of allegedly infringing images to Chilling Effects.

P10 argues that Google's practice of forwarding to Chilling Effects the P10 takedown notices that Google had honored constitutes direct and contributory copyright infringement. Though P10 asserts that forwarding both the spreadsheet-style and the Adobe-style notices to Chilling Effects constitutes infringement, its primary concern appears to be with the Adobe-style notices, which contain copies of the actual images, as well as embedded links to the infringing websites. See Motion at 9; Zada PI Decl. ¶ 13. P10 asserts that forwarding copies of the infringed images to Chilling Effects constitutes direct copyright infringement and for Google to place on the result for the original image search an in-line link to the notices on Chilling Effects constitutes contributory infringement. See Reply at 6.

a. Prima facie case of infringement

P10 has not established that forwarding the "spreadsheet style" Group B notices likely constitutes direct infringement. The Copyright Office itself has determined that "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents" are not subject to copyright. 37 C.F.R. § 202.1(a). See *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286 (3d Cir. 2004) (holding that the "Copyright Office's longstanding practice of denying registration to short phrases merits deference").

On the other hand, if 17 U.S.C. §106 were construed literally, Google's sending of the Adobe PDF "screenshot-style" Group C notices to Chilling Effects probably would constitute direct infringement, since it involves an "actual dissemination" of copies of P10's claimed copyrighted work with an intent that they be made available to the public. See *Perfect 10*, 508 F.3d at 1162. In its Opposition, Google implicitly concedes that forwarding the Group

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

C notices to Chilling Effects could constitute direct infringement. *See* Opp’n at 9-10 (“Even if P10 is correct that Google’s forwarding of such notices constitutes a ‘direct infringement’ of P10’s copyrights—and P10 has failed to make this showing—that forwarding is clearly a fair use under 17 U.S.C. § 107.”). Thus, P10 will likely be able to establish that Google’s forwarding of the Group C notices to Chilling Effects constitutes direct infringement.

b. Fair use

17 U.S.C. § 107 explicitly provides that the use of a copyrighted work for purposes such as “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” The Court now applies the four fair use factors set forth in section 107, as follows:

- i. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes

“The central purpose of this inquiry is to determine whether and to what extent the new work is ‘transformative.’ . . . A work is ‘transformative’ when the new work does not ‘merely supersede the objects of the original creation’ but rather ‘adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.’ ” *Perfect 10*, 508 F.3d at 1164 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). Chilling Effect’s publication of annotated versions of the notices with scholarly commentary is clearly a transformative, noncommercial use. Kassabian PI Decl., Ex. N (describing the work of Chilling Effects). Though Chilling Effects is the entity conducting the transformation, Google **assists** Chilling Effects in this endeavor. By substituting the image it has removed pursuant to a takedown notice with the statement “In response to a complaint we received under the US Digital Millennium Copyright Act, we have removed [number of] result(s) from this page. If you wish, you may read the DMCA complaint that caused the removal(s) at ChillingEffects.org” and then linking to

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

the commentary at Chilling Effects, Google makes it clear that its purpose in forwarding the notices to Chilling Effects is to aid in that nonprofit organization's mission of providing analysis and commentary on the uses of the DMCA. *See* Kassabian PI Decl., Ex. L at 159. Thus, this factor weighs in favor of a finding of fair use.

ii. The nature of the copyrighted work

As this Court found in its February 16, 2006 Order on P10's prior preliminary injunction motion, and as the Ninth Circuit affirmed, P10's images are creative but also previously published. *Perfect 10*, 416 F. Supp. 2d at 849-50; *Perfect 10*, 508 F.3d at 1167. Thus, this factor weighs only slightly in favor of P10. *Id.*

iii. The amount and substantiality of the portion used in relation to the copyrighted work as a whole

"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." *Perfect 10*, 508 F.3d at 1167 (quoting *Campbell*, 510 U.S. at 586). Here, Google's purpose in forwarding the notices to Chilling Effects is to allow Chilling Effects to conduct and publish research and commentary on the notices. *See* Kassabian PI Decl., Ex. L at 159, Ex. N. P10 argues that Google could accomplish these same purposes even if it redacted the images from the notices or at least removed the live links in the notices. However, in order for the administrators of Chilling Effects to be able to conduct and communicate their research effectively, they would need to have access and be able to comment on the notices in their original form. Thus, although what is sent to Chilling Effects is typically the complete copyrighted work (the photo), this factor does not weigh in favor of either party.

iv. The effect of the use upon the potential market for or value of the copyrighted work

The fourth factor is the effect of the use upon the potential market for or

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

value of the copyrighted work. Where a use is highly transformative—as the use is here—market harm cannot be presumed. *Perfect 10*, 508 F.3d at 1168. The Ninth Circuit’s analysis in its ruling on P10’s first preliminary injunction motion largely focused on the fact that the images in question there were thumbnails and did not threaten P10’s market for full-sized images. *Id.* Though many of the images in the notices that Google has sent to Chilling Effects are full-sized, P10 has offered no evidence—only speculation—that posting of these notices on Chilling Effects is likely to affect the potential market for P10’s works. P10 argues that by in-line linking to the notices, Google is facilitating the free download of P10 images and that by placing the links to Chilling Effects near the top of its search results, Google is making it likely that users will click on these links. Reply at 8-9. P10 has provided no evidence that visitors to Chilling Effects use these notices as substitutes for viewing the images on perfect10.com. Nor could Chilling Effects be considered a potential customer of P10, whose business Google usurped. Under these circumstances, factor four favors Google.

v. Weighing the four factors together

After weighing the required factors, the Court finds that Google’s practice of forwarding and linking to the DMCA notices on Chilling Effects likely constitutes fair use.

4. P10’s rights of publicity

P10 devotes only two sentences in its Memorandum of Points and Authorities to the likelihood of success on its right of publicity claim and cites no law to support its position. *See* Motion at 5. Google pointed out this deficiency in its Opposition, and P10 thereafter did devote three pages of its reply to this claim. Reply at 19-22. Nonetheless, P10 fails to establish that it is likely to prevail on its right of publicity claim.

The parties argue about whether the Communications Decency Act, 47 U.S.C. § 230, provides Google immunity for its actions or whether the P10 models effectively assigned their rights of publicity to P10. The Court need not reach these questions, however, because Perfect 10 has failed to show that it is

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

likely to be able to prove several essential elements of its right of publicity claim.

As Google points out in its Opposition, harm to the plaintiff (in this case, the assignor- models) is a required element of a right of publicity claim for appropriation of name or likeness. *See* Cal. Civ. Code § 3344; *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417-18 (Ct. App. 1983); *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1918 (Ct. App. 1996). In its moving papers, P10 never explains how the models are harmed by Google’s hosting of Blogger websites that display their names or likenesses. Moreover, in order to prove a right of publicity claim under section 3344, a plaintiff must show that *the defendant* appropriated the plaintiff’s name or likeness for commercial purposes, and there must be a direct connection between the defendant’s use of the likeness and that commercial purpose. *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318, 322 (Ct. App. 1997). Here, P10 argues that “Google is materially contributing to violations of Perfect 10’s assigned rights of publicity by providing the advertising which satisfies the commercial purpose necessary to establish a violation of Section 3344(a) and the common law.” “Contributing” to someone’s violation of something is not the same as actually “violating” it. P10 has not shown that Google is, in fact, inappropriately *using* the models’ likenesses. Because both the statutory and common law versions of a right of publicity claim require that the defendant actually use the plaintiff’s likeness, *see Fleet*, 50 Cal. App. 4th at 1918, P10 has not established that it is likely to prevail on its right of publicity claim.

After evaluating P10’s assorted claims, this Court finds that P10 has not established that it is likely to succeed on the merits of either its copyright claims or its right of publicity claim.

B. Irreparable Harm in the Absence of Preliminary Relief

P10 has failed to establish that it will suffer irreparable harm in the

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

absence of preliminary relief.¹² It offers evidence of its recent financial woes, Zada PI Decl. ¶ 5 & Zada Reply PI Decl. ¶ 2, but it fails to tie those financial difficulties in any meaningful way to Google’s conduct. Nothing indicates that injunctive relief against Google will help to alleviate P10’s financial concerns. Thus, P10 has not established irreparable harm in the absence of preliminary relief.

C. Balance of Equities and the Public Interest

Nowhere in its Motion or Reply did P10 address the final two preliminary injunction factors of whether the balance of equities or the public interest weigh in its favor. Accordingly, the Court agrees with Google that, given the overbroad nature of P10’s requested relief in its Proposed Order and the potential for such an injunction to limit the free exchange of information on the internet, the balance of the equities and the public interest weigh in favor of Google.

Nor does the Ninth Circuit’s recent reaffirmation of the viability of the “serious questions” version of the sliding scale test entitle P10 to a preliminary injunction. P10 has not shown that the balance of hardships tips sharply in **its** favor. *See Alliance for Wild Rockies*, 2010 WL 2926463, at *7.

V. CONCLUSION

For the foregoing reasons, the Court DENIES P10’s motion for a preliminary injunction.

_____ : _____

¹²P10 is not entitled to a presumption of irreparable harm (even if such a presumption still applies after *Winter*, 129 S. Ct. at 374), since it has not demonstrated a likelihood of success on the merits of its copyright infringement claims. *See Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

Initials of Preparer _____ SMO

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

- I. INTRODUCTION 1
- II. STATEMENT OF FACTS 2
- III. LEGAL STANDARDS 4
 - A. Motion for Preliminary Injunction 4
 - B. Copyright Law 5
 - 1. Direct infringement 6
 - 2. Contributory infringement 8
 - 3. Vicarious infringement 10
 - 4. Fair use 11
 - 5. DMCA safe harbor 13
- IV. DISCUSSION 14
 - A. Likelihood of Success on the Merits 15
 - 1. Google’s web and image search and its caching feature 16
 - 2. Google’s Blogger service 20
 - a. P10’s prima facie case of infringement 20
 - b. Google’s DMCA safe harbor defense 26
 - 3. Google’s forwarding of DMCA notices to Chilling Effects .. 28
 - a. Prima facie case of infringement 31
 - b. Fair use 32
 - i. The purpose and character of the use, including
whether such use is of a
commercial
nature or is for
nonprofit
educational
purposes ... 32
 - ii. The nature of the copyrighted work 34
 - iii. The amount and substantiality of the portion used
in relation to the copyrighted work as a whole 34
 - iv. The effect of the use upon the potential market for
or value of the copyrighted work 35

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 30, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

v. Weighing the four factors together 36

4. P10’s rights of publicity 36

B. Irreparable Harm in the Absence of Preliminary Relief 38

C. Balance of Equities and the Public Interest 39

V. CONCLUSION 40

Exhibit 2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

Present: The Honorable	A. HOWARD MATZ, U.S. DISTRICT JUDGE
------------------------	-------------------------------------

Stephen Montes Deputy Clerk	Not Reported Court Reporter / Recorder	Tape No.
Attorneys NOT Present for Plaintiffs:	Attorneys NOT Present for Defendants:	

Proceedings: IN CHAMBERS (No Proceedings Held)

I. INTRODUCTION

On November 19, 2004, Perfect 10, Inc. (“P10”) filed suit against Google, Inc. (“Google”), alleging a variety of claims, including direct, contributory, and vicarious copyright infringement. P10 creates and sells pictures of nude models through a now-defunct print magazine and through a password-protected subscription website. It alleges that Google—a search engine and provider of other internet services—infringes on its copyright by, among other things, linking to third-party websites that host images that infringe P10’s copyrights, caching portions of websites that host infringing images, and hosting infringing images on its own servers that have been uploaded by users of its “Blogger” service.¹

In three separate motions, Google has moved for partial summary judgment that it is entitled to immunity under three different provisions of the Digital Millennium

¹The Court notes that the Ninth Circuit has already examined whether P10 has met its prima facie infringement case in an opinion granting P10 a preliminary injunction against Google on certain of its claims. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), *superseding* 487 F.3d 701. The Ninth Circuit examined the underlying copyright liability without considering the merits of Google’s affirmative defense under the DMCA. 508 F.3d at 1158 n.4 (“Therefore, we must consider Google’s potential liability under the Copyright Act without reference to title II of the DMCA.”).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

Copyright Act (“DMCA”). Specifically, Google asserts that it deserves safe harbor under 17 U.S.C. § 512(d) for its web and image searches, under 17 U.S.C. § 512(b) for its caching feature, and under 17 U.S.C. § 512(c) for its Blogger service.

For the following reasons, the Court GRANTS IN PART AND DENIES IN PART Google’s motion for partial summary judgment of entitlement to safe harbor under 17 U.S.C. § 512(d) for its Web and Image Search.² The Court GRANTS Google’s motion for partial summary judgment for its caching feature based on 17 U.S.C. § 512(d), without having to assess whether it would be separately entitled to safe harbor under 17 U.S.C. § 512(b).³ The Court GRANTS Google’s motion for partial summary judgment of entitlement to safe harbor under 17 U.S.C. § 512(c) for its Blogger feature.⁴

II. FACTUAL BACKGROUND⁵

²Docket No. 456.

³Docket No. 458.

⁴Docket No. 457.

⁵Unless otherwise stated, the facts below are undisputed. Although the parties have claimed confidentiality in many filed documents, they have not provided the Court with specifications necessary to redact any of the specific recitals. Throughout P10’s Statements of Genuine Issues for all three of the motions, it purports to “dispute” a fact, but then states allegations that are consistent with the asserted fact. *See, e.g.*, Perfect 10’s Statement of Genuine Issues In Opposition to Google’s Motion for Summary Judgment Re: Safe Harbor Under 17 U.S.C. § 512(d) For Web And Image Search (“SGI(d)”) ¶ 25 (responding to the assertion that “[w]ebsites are included in Google’s organic search results if they were crawled by the Googlebot and if they are relevant to users’ queries,” P10 states, “Disputed. Perfect10.com is presumably ‘relevant’ to a search for Jamike Hansen, as P10 is the sole owner of copyrights of her published images. However, a Google search on Jamike Hansen yields only infringing websites, most of which are Google advertising affiliates. Such search results do not contain a single link to perfect10.com.” This purported dispute does not account for whether perfect10.com is crawled by the Googlebot, and, indeed, the Googlebot does not crawl websites that are

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

Google operates an Internet search engine by using an automated software program, known as a web crawler or the “Googlebot,” to obtain copies of publicly-available webpages for use in its search index. Google’s Consolidated Statement of Undisputed Facts in Support of Google’s Motion for Summary Judgment Re: Safe Harbor Under 17 U.S.C. § 512(d) for Web and Image Search (“CSUF(d)”) ¶¶ 1-2. For Image Search, Google’s search engine compiles an index of the text associated with each image crawled, which is associated with a particular “thumbnail” image. *Id.* at ¶ 2. The Googlebot does not crawl literally every website. Haahr Decl. ¶ 14.

Google also provides Web Search users with the option of selecting a link to a “cached copy” of the webpages that appear in its search results. Google’s Consolidated Statement of Undisputed Facts in Support of Google’s Motion for Summary Judgment Re: Google’s Entitlement to Safe Harbor Under 17 U.S.C. § 512(b) for its Caching Feature (“CSUF(b)”) ¶ 5. The cached copy is an archival copy that Google stores on its servers until the next time its Googlebot visits that particular webpage. CSUF(b) ¶ 9. In most cases, the cached copy is stored only for a few weeks, and all of the copies are replaced within 18 months. Rebuttal Brougher Decl. ¶¶ 3-5. No images are stored in Google’s cache, only the text; however, any images displayed on a cached page are delivered from their original source, if they still exist at that source. CSUF(b) ¶¶ 7-8.

In addition, Google provides a service, known as Blogger, that allows Blogger account holders to create their own blogs hosted on Google’s servers. Google’s Corrected Consolidated Separate Statement of Undisputed Facts in Support of Google’s Motion for Summary Judgment Re: Safe Harbor Under 17 U.S.C. § 512(c) for its Blogger Service (“CSUF(c)”) ¶ 1. *See* www.blogspot.com. Blogger account holders may display images on their blogs—in some cases the images are uploaded onto Google’s servers and in other cases a user hyperlinks to content hosted on other servers. Poovala Decl. ¶ 26.

Google has a DMCA notification policy for each of these services. Poovala Decl., Ex. B (web search and cache), Ex. D (image search), Ex. G (Blogger). Google requires a

password protected, like perfect10.com is. *See* Haahr Decl. ¶ 14.). The Court will not address these immaterial “disputes,” which do nothing more than strain the Court’s resources and distract from the real issues in this litigation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

complainant to send a DMCA notice to Google’s designated agent, specifying the copyrighted work infringed (including how to locate it), the complete URL at which the infringing material is located, and the Web Search query that links to the web page. Poovala Decl. ¶¶ 6-8. Google maintains the same DMCA policy for its Web Search and its cache. Poovala Decl. ¶ 5. Its policies differ slightly for its Image Search (requiring copyright holders to include the “image URL” for each image) and for the Blogger service (requiring copyright holders to include the “post URL” for each post and to target their notifications to the DMCA agent for its blogger site). Poovala Decl. ¶¶ 22-23; 27-31.

Google then verifies that the copyrighted work is, in fact, infringed, and, if so, it blocks the infringing URL from appearing in Google search results. Google allows the operator of the infringing website to file a counter-notification, which would then unblock the URL, unless the complainant files a lawsuit within 10 days. Poovala Decl. ¶¶ 11-20. Google will terminate account holders on its Blogger service if it determines that three DMCA notices of infringement were valid. Poovala Decl. ¶ 37.

Between 2001 and the time the summary judgment motion papers were filed, P10 sent Google 83 DMCA notices. Kassabian Decl., Exhs. L1-L17; Poovala Decl. Exhs. L1-L48, N1-N18. The parties sort these notices into three groups—the 17 Group A notices sent in 2001, Kassabian Decl. ¶ 13, Exhs. L1-L17; the 48 Group B “spreadsheet” notices sent between May 31, 2004 and April 24, 2007, Poovala Decl. ¶ 41, Exhs. L1-L48; and the 18 Group C “DVD and hard drive notices” sent in or after December 2005, Poovala Decl. ¶ 48, Exhs. N1-N18. Google has not processed any of the Group A notices. CSUF(d) ¶¶ 33, Poovala Decl. ¶ 79-80, Exh. FF-GG. The parties dispute whether Google has processed all of the Group B notices. CSUF(d) ¶¶ 33, Poovala Decl. ¶ 79-80, Exh. FF-GG; Zada Decl. ¶ 26, Ex. 14. Google has processed a fraction of the Group C notices beginning in 2007, but it has not processed the majority of the notices. Poovala Decl. ¶¶ 87-88, Exs. HH & II.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) provides for summary judgment when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” The moving party bears the initial burden of demonstrating the absence of a “genuine issue of material fact for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A fact is material if it could affect the outcome of the suit under the governing substantive law. *Id.* at 248. The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

“When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party’s case. *See Celotex*, 477 U.S. at 325. Thus, “[s]ummary judgment for a defendant is appropriate when the plaintiff ‘fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial.’” *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06 (1999) (citing *Celotex*, 477 U.S. at 322).

When the moving party meets its burden, the “opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial.” Fed. R. Civ. P. 56(e). Summary judgment will be entered against the opposing party if that party does not present such specific facts. *Id.* Only admissible evidence may be considered in deciding a motion for summary judgment. *Id.*; *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988).

“[I]n ruling on a motion for summary judgment, the nonmoving party’s evidence ‘is to be believed, and all justifiable inferences are to be drawn in [that party’s] favor.’” *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (quoting *Anderson*, 477 U.S. at 255). But the non-moving party must come forward with more than “the mere existence of a

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

scintilla of evidence.” *Anderson*, 477 U.S. at 252. Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

IV. ANALYSIS

A. Threshold Requirements for Safe Harbor Under All Three Sections

In order to be eligible for any of these three safe harbors under the DMCA, a party must satisfy three threshold conditions. First, the party must be a service provider as defined under 17 U.S.C. § 512(k)(1)(B). Second, the party must have “adopted and reasonably implemented, and inform[] 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.” 17 U.S.C. § 512(i)(1). Third, the party must “accommodate[] and . . . not interfere with standard technical measures” used by copyright owners to identify or protect copyrighted works. 17 U.S.C. §§ 512(i)(1)-(2).

P10 does not dispute that Google meets the first and third threshold requirements—service provider status and non-interference with standard technical measures. CSUF(d) ¶¶ 1-3. P10 does argue, however, that there are genuine issues of material fact as to whether Google has implemented a suitable repeat infringer policy.

The key case analyzing the “repeat infringer” requirement under 512(i) is *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1110-11 (9th Cir. 2007). As this Court noted in *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1117 (C.D. Cal. 2009),

In *CCBill*, the Ninth Circuit set forth the standard for evaluating termination policies under the DMCA:

[A] service provider “implements” a policy if it has a working notification system, a procedure for dealing with

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

DMCA-compliant notifications, and if it does not actively prevent copyright owners from collecting information needed to issue such notifications.... The statute permits service providers to implement a variety of procedures, but an implementation is reasonable if, under “appropriate circumstances,” the service provider terminates users who repeatedly or blatantly infringe copyright.

CCBill, 488 F.3d at 1109 (citations omitted). *See also Corbis Corp. [v. Amazon.com, Inc.]*, 351 F. Supp. 2d 1090, 1104 (W.D. Wash. 2004)] (“Because it does not have an affirmative duty to police its users, failure to properly implement an infringement policy requires a showing of instances where a service provider fails to terminate a user even though it has sufficient evidence to create actual knowledge of that user’s blatant, repeat infringement of a willful and commercial nature.”); H.R. Rep. 105-551(II), at 61 (“[T]he Committee does not intend this provision to undermine the principles of new subsection (1) or the knowledge standard of new subsection (c) by suggesting that a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing.”).

Here, Google has provided evidence that it has a system for receiving and processing notifications. *See CSUF(d) ¶¶ 4-8*. Moreover, Google points out—and P10 does not dispute—that Web Search, Image Search, and the caching feature do not have account holders or subscribers, *CSUF(d) ¶ 23*. P10 does not contend that Google must, or even can, have a repeat infringer policy for those services. *See 17 U.S.C. § 512(i)(1)(A)* (requiring a repeat infringer policy for those services with “subscribers and account holders”).

As for the Blogger service, Google provides clear evidence that it terminates Blogger users who repeatedly or blatantly infringe copyright. *CSUF(c) ¶¶ 13, 15, 34*. P10 nevertheless makes several unavailing arguments that Google’s repeat infringer policy is deficient. It argues that Google has not removed many of the links that P10 complained about or placed on its DMCA log. In response, Google counters that it is

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

required to record into its log only notices that are DMCA compliant, *CCBill*, 488 F.3d at 1113-14, and that all of the notices that were not recorded were within Group C, in the form of DVDs or hard drives. *See* CSUF(c) ¶ 35. Google has offered evidence that all the notices that did comply with the DMCA were recorded in its logs. CSUF(c) ¶ 15. P10 next argues that the DMCA logs contain too few entries to be truly comprehensive. However, this argument suffers from the same deficiency—that Google was required to record only DMCA compliant notices. P10 also argues that Google could not have had an effective repeat offender policy because it tracks only email addresses, not the actual names of users. However, the DMCA does not impose an obligation on service providers to track their users in any particular way. In *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1144 (N.D. Cal. 2008), the court did not require the service provider to verify or track actual identities because “the hypothetical possibility that a rogue user might reappear under a different user name and identity does not raise a genuine fact issue as to the implementation of” the service provider’s repeat infringer policy. This Court agrees.

P10 also offers declarations from four copyright holders—Dean Hoffman, C.J. Newton, Les Schwartz, and Margaret Jane Eden—complaining about Google’s processing of their DMCA notices. The Ninth Circuit has held that evidence of notices provided by a party other than the plaintiff may be relevant in determining whether a service provider has “implemented its repeat infringer policy in an unreasonable manner.” *CCBill*, 488 F.3d at 1113. However, as Google notes, P10 did not identify any of these individuals in its Rule 26 disclosures. Rebuttal Kassabian Decl. ¶ 6. “If a party fails to provide information or identify a witness as required by Rule 26(a) or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). Here, Google was deprived of the opportunity to depose or otherwise directly rebut these witnesses’ declarations. P10 has provided no argument as to why its failure was substantially justified or harmless. Thus, the Court will not consider these declarations on this motion for partial summary judgment. *See Guang Dong Light Headgear Factory Co. v. ACI Intern., Inc.*, 2008 WL 53665 at *1 (D. Kan. Jan. 2, 2008) (striking an affidavit in a motion for summary judgment because the witness’s identity and testimony were not properly disclosed under Rule 26).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

For the foregoing reasons, then, the Court concludes that Google employs an adequate repeat infringer policy and practice.

B. Safe Harbor For Web and Image Searches Under Section 512(d) (“Information Location Tools”)

The Court will now analyze whether Google has proven it has met all the requirements for a safe harbor for its web and image searches under 17 U.S.C. § 512(d). To the extent that Google’s Blogger service and web search caching feature function as information location tools by linking users to content hosted on third-party websites, rather than any content hosted by Google, this analysis will apply to those tools as well.⁶

Section 512(d) entitled “Information location tools,” provides a safe harbor from liability for a “service provider” that infringes a copyright by “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”—provided that the 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

⁶In particular, Google offers evidence, which is undisputed by P10, that no images found in Google’s cache are stored on Google’s servers. CSUF(b) ¶ 7. Thus, any claims for copyright infringement based on images “found in” Google’s cache are actually claims for infringement based on linking users to content hosted on third-party websites, and therefore the § 512(d) safe harbor will apply to these claims.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

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.

17 U.S.C. § 512(d).

The preceding cited portion of the DMCA thus effectively requires that for P10 to have provided adequate notice purporting to disclose infringements on Google's web and image searches, P10 had to satisfy 17 U.S.C. § 512(c)(3)(A), which applies to "Information residing on systems or networks at direction of users." It specifies that in order for a notification of claimed infringement to be effective, it must include:

- (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.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

(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.

17 U.S.C. § 512(c)(3).

P10 argues that Google acquired knowledge of infringement upon its receiving notices of infringement from P10 and that once Google had this knowledge, it did not act expeditiously to suppress the infringing links. (P10 does not, however, argue that Google receives a direct financial benefit from the infringing activity, has the right and ability to control such activity, and thus cannot enjoy safe harbor for its web and image search results.)

For its part, Google asserts that it has met all of the requirements necessary to qualify for the section 512(d) safe harbor for its web and image search results. It counters P10's arguments that Google had knowledge of infringement by asserting that P10's notices of infringement were defective for a multitude of reasons and that Google nonetheless expeditiously processed numerous notices in circumstances where it was feasible to do so. The Court must examine the specific characteristics of the notices to determine which party is correct.

The parties divide the DMCA notices into three groups based on when they were sent to Google. (See Section II of this Order.) The Group A notices consist of email communications that P10 sent between May 11, 2001 and July 6, 2001. CSUF(d) ¶¶ 28-31 n.1. The Group B notices comprise notices sent primarily in Excel spreadsheet form

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

between May 31, 2004 and April 24, 2007. CSUF(d) ¶¶ 32-48 n.2. The Group C notices were provided on DVDs and external hard drives between December 9, 2005 and June 13, 2009. CSUF(d) ¶¶ 49-68 n.3.

1. The Group A notices

Google first argues that the Group A notices are irrelevant because they are time-barred. Google is incorrect, as the Ninth Circuit has held that “[i]n a case of continuing copyright infringements, an action may be brought for all acts that accrued within the three years preceding the filing of the suit.” *Roley v. New World Pictures*, 19 F.3d 479, 481 (9th Cir. 1994). P10 has presented facts that indicate that Google was still linking to URLs identified as infringing in the Group A notices within three years of when the lawsuit commenced. Zada Decl. ¶¶ 15-17, Ex. 8-10. Thus, the claims are not time-barred.

Google also argues that because P10 has not answered Google’s requests for admission pertaining to the Group A notices, P10 cannot rely on these notices as evidence of Google’s knowledge. Google bases this argument on Fed. R. Civ. P. 26 and 37, but these rules merely allow the court *discretion* to prohibit a party who disobeys a discovery order or a request for discovery from introducing the related evidence. The Court does not find that P10’s conduct with respect to the Group A notices rises to a level that would justify their exclusion from consideration.

However, the Court does find that Google has shown that there is no genuine dispute of material fact that the Group A notices were inadequate to provide notice under the DMCA. Google has offered undisputed evidence that all of the Group A notices were sent by email to “webmaster@google.com” instead of to the address of Google’s designated agent listed at the Copyright Office. Kassabian Decl. Exhs. L1-L17; Rebuttal Kassabian Decl. Ex. B. In addition, the notices are substantively deficient. They uniformly do not identify specifically which copyrighted works were infringed as required by 17 U.S.C. § 512(c)(3)(A)(ii). Kassabian Decl. ¶ 13, Exhs. L1-L17. Thus, the Court finds that Google has shown that there is no genuine dispute of material fact that the Group A notices did not provide notice under the DMCA.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

2. The Group B notices

As for the Group B notices, Google has *not* met its burden of showing that there is no dispute of material fact as to whether these notifications were valid under the DMCA. Each notice contains references to dozens or even hundreds of alleged infringing links. Google argues that these notices are invalid in their entirety because the majority of the references are invalid. Google is correct that many of the references do contain incomplete URLs, lack image-specific URLs, or do not reference the copyrighted work with specificity. Poovala Decl. Exhs. L1-L48. References having these deficiencies do not confer adequate notice under the DMCA. The DMCA requires a notification to include “[i]dentification of the copyrighted work claimed to be infringed,” 17 U.S.C. § 512(c)(3)(A)(ii), and “identification of the reference or link, to material 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,” 17 U.S.C. § 512(d)(3). Of course, Google was not required to act to remove any entry that did not meet the DMCA requirements.

However, P10 does point to some notices that *do* meet all of the requirements of the DMCA. For example, in its May 31, 2004 notice, P10 provided Google with the complete URL “http://pix.alronix.net/Photo_Scans/Tits/Monika_Zsibrita/pic00076.htm” along with the volume, issue, and page number of *Perfect 10 Magazine* in which the image originally appeared. Zada Decl. ¶ 21; Exh. 13. These individual references sufficed to confer notice of infringement for those particular URLs, despite the fact that other URL references within the notices were insufficient.

In *CCBill*, the Ninth Circuit expressed concern that “[p]ermitting a copyright holder to cobble together adequate notice from separately defective notices . . . unduly burdens service providers.” 488 F.3d at 1113. In that case, P10 provided CCBill with three sets of documents that would have required the defendant service provider to “find the relevant line in the spreadsheet indicating ownership information, then comb the 22,185 pages provided by Perfect 10 in order to find the appropriate image, and finally copy into a browser the location printed at the top of the page—a location which was, in some instances, truncated.” *Id.* Here, by-and-large the Group B notices also are organized in spreadsheet format, including a cover letter or email and a three-column

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

spreadsheet. Poovala Decl. ¶ 42, Ex. L1-L48. The first column lists infringing URLs, the second lists the search terms used to find the URL, and the third lists the location of the copyrighted work at issue within P10's website or magazine. *Id.* Unlike in *CCBill*, where the service provider would have to refer back and forth between different files, here the Group B notices enabled Google to scan the entries to determine their compliance with the DMCA. This is not an undue burden. Therefore, P10 has demonstrated that at least some of those notices were valid under the DMCA.

The parties dispute whether Google has processed all of the adequate Group B notices. SGI(d) ¶ 33; Zada Decl. ¶ 26, Ex. 14. In addition, P10 argues that even as to those notices that Google did process, Google failed to do so quickly enough to satisfy the DMCA requirement that “upon notification of claimed infringement” the alleged infringer act “expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.” *See* 17 U.S.C. § 512(d)(3).

Google has the burden as the moving party on this summary judgment motion, to show that there is no genuine issue of material fact as to whether it is entitled to DMCA safe harbor for the Group B notices and thus is entitled to judgment as a matter of law on this issue. It has not met that burden. Google offers evidence that it began processing P10's Group B notices immediately upon receipt and completed processing the majority of the notices within one-to-two weeks of receipt. Poovala Decl. ¶¶ 56-91. However, P10 offers other evidence that sometimes Google waited between four and seventeen months to process a number of the Group B notices, as well as evidence that some notices were not processed at all. Zada Decl. ¶ 26. This factual dispute as to how long the processing took precludes summary judgment for Google for the Group B notices.

In addition, the legislative history suggests that Congress contemplated that whether a service provider's removal or disabling of access to infringing material was expeditious ordinarily would be a factual rather than a legal inquiry, unless the delay is unusually lengthy and not justifiable. Thus, the Senate Judiciary Committee Report on the DMCA notes

Subsection (c)(1)(A)(iii) provides that once a service provider obtains actual knowledge or awareness of facts or circumstances from which

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

infringing material or activity on the service provider's system or network is apparent, the service provider does not lose the limitation of liability set forth in subsection (c) if it acts expeditiously to remove or disable access to the infringing material. *Because the factual circumstances and technical parameters may vary from case to case, it is not possible to identify a uniform time limit for expeditious action.*

S. Rep. No. 105-190, at 44 (1998) (emphasis added). Thus, the Court DENIES Google's motion for summary judgment as to safe harbor for at least some of the Group B notices.

3. The Group C notices

The Group C notices are, however, a different story. As Google has demonstrated, the Group C notices, much like the notices described in *CCBill*, require the service provider to move back and forth between several different files in order to determine that a given URL was infringing (in the instances where the URLs were provided, which was not always the case). The Group C notices generally consist of a cover letter, a spreadsheet, and a hard drive or DVDs containing electronic files. Poovala Decl. ¶ 48, ex. N1-N18. Where P10 provided spreadsheets, the spreadsheets do not identify the infringing URL, but merely the top-level URL for the entire website. Poovala Decl. ¶ 51. P10 evidently expected Google to comb through hundreds of nested electronic folders containing over 70,000 distinct files, including raw image files such as JPEG files and screen shots of Google search results, in order to find which link was allegedly infringing. Poovala Decl. ¶¶ 52-53, Ex. O; Khan Decl. ¶ 6. In many cases, the file containing the allegedly infringing image does not even include a URL, or the URL was truncated. Poovala Decl. ¶¶ 54-55. The spreadsheets also do not identify the copyrighted work that was allegedly infringed. *Id.* at ¶ 50. Instead, the cover letters contain a statement similar or identical to the following:

If you wish to examine the copyrighted images of Perfect 10 which correspond to these infringing images, I have previously sent to you all of the images on our website, as of June, 2007. [sic] Also, as I have previously advised you, if you would like a free subscription to Perfect 10's website, please let me know and I will provide a user name and

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

password for you.

Poovala Decl., Ex. N4 at 846. P10 then expected Google to search through a separate electronic folder—attached only to the June 28, 2007 DMCA notice—containing all of the more than 15,000 images that appeared on P10's website as of June 2007, in order to identify the copyrighted work that was infringed. Poovala Decl. ¶ 50, Ex. N3.

As the Ninth Circuit explained in *CCBill*, “The DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright.” *CCBill*, 488 F.3d at 1113. P10's Group C notices do not “identif[y] . . . the copyrighted work claimed to have been infringed” 17 U.S.C. § 512(c)(3). To refer Google to more than 15,000 images appearing on the entirety of P10's website falls far short of identifying what may have been infringed. Nor is a reference to the totality of the P10 image collection “a representative list” of “multiple copyrighted works” appearing without authorization at a single infringing site. *See* 17 U.S.C. § 512(c)(3). Thus, all of P10's Group C notices lack the identification of the copyrighted work required by section 512(c)(3)(A)(ii).⁷

P10's Group C notices are additionally defective because they do not contain all of

⁷P10 argued at the hearing that if an allegedly infringing photo included in the thousands of website screenshot files sent to Google contains a P10 copyright notice—*see, e.g.*, Zada Decl., Ex. 33 at 2—that copyright notice should satisfy the requirement that P10 “identif[y] . . . the copyrighted work claimed to have been infringed.” 17 U.S.C. § 512(c)(3)(A)(ii). However, such a copyright notice on a screenshot taken from an infringing website does not identify the copyrighted *work*. At best, the notice merely serves to identify someone claiming to own the image, whereas it would contain the necessary identification if it also showed the URL on the P10 website or the volume and page number of *Perfect10* magazine at which the original copyrighted image appears. In any event, Google is not obligated to comb through tens of thousands of images to determine which ones contain copyright notices. This would impermissibly “shift a substantial burden from the copyright owner to the provider,” *CCBill*, 488 F.3d at 1113, as described more fully in the next paragraph.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

the required information in a single written communication. In *CCBill*, the Ninth Circuit held that Perfect 10's "separate communications" in that case were inadequate because "[p]ermitting a copyright holder to cobble together adequate notice from separately defective notices . . . unduly burdens service providers." *CCBill*, 488 F.3d at 1113. As the *CCBill* court noted, "the text of § 512(c)(3) requires that the notice be 'a written communication.' (Emphasis added)." *Id.* Though the notices at issue in that case were actually sent at different times, the thousands of separate electronic files on each disk that P10 sent to Google are the functional equivalent of separate notices. Unlike certain of the Group B notices that contain all of the statutorily required information in a single spreadsheet, no single document in any of the Group C notices contains all of the information required in a valid DMCA notification. Instead, in order to process a Group C notice, Google would be required to examine thousands of separate files in order to determine which URLs might be infringing and which copyrighted images are alleged to be infringed. This would impermissibly "shift a substantial burden from the copyright owner to the provider." *Id.*

For example, in order to process one entry in the spreadsheet for the July 2, 2007 notice—Ex. N4 to the Poovala Declaration (the cover letter of which is attached hereto as Exhibit 1) —Google would have to go through the following steps, among others.

Step One. First, it would have to look to the cover letter for the required statements by the copyright owner of ownership, nonlicensed use, and veracity of the notice, as well as for instructions about how to process the two enclosed DVDs. Ex. N4 at 845-47.

Step Two. Then Google would have to refer to the attached Excel spreadsheet, which specifies the top-level (not image-specific) URL for the allegedly infringing website, the DVD on which the images at that site appear, and the folder or subfolder in which the images appear. *See* Ex. N4 at 848-56. This, for example, is the first page of the spreadsheet accompanying the July 2, 2007 notice, reproduced as Page 848 of Exhibit N4:

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

INFRINGING WEBSITE	LOCATION OF IMAGES	FOLDER OR SUBFOLDER
4eyes.free.fr	DISK I	ALL LARGE ARE P10
82.208.64.6	DISK I	ALL LARGE ARE P10
99modelle.com	DISK I	ALL LARGE ARE P10
abshell.net	DISK I	ALL ARE P10
adamast.ru	DISK I	ALL LARGE ARE P10
adamscelebs.net	DISK I	ALL LARGE ARE P10
aeonsuper.250x.com	DISK I	ALL ARE P10
aeonsuper.250x.com	DISK I	ALL LARGE ARE P10
agrreviews.com	DISK I	ALL LARGE ARE P10
akty.cz	DISK I	ALL LARGE ARE P10
alecarga.com	DISK I	ALL LARGE ARE P10
alibi.com.mk	DISK I	ALL LARGE ARE P10
all-sascholk.infostore.org	DISK I	ALL ARE P10
ailwallpapers.net	DISK I	ALL LARGE ARE P10
amp2000.com.ar	DISK I	ALL LARGE ARE P10
anarkasis.com	DISK I	ALL ARE P10
angeliscans.com	DISK I	ALL LARGE ARE P10
angolodellasega.com	DISK I	ALL LARGE ARE P10
ar1.picturetrades.com	DISK I	ALL ARE P10
averlo.com	DISK I	ALL LARGE ARE P10
babefocus.com	DISK I	ALL LARGE ARE P10
babeportal.dk	DISK I	ALL LARGE ARE P10
babereactor.com.ar	DISK I	ALL LARGE ARE P10
bevarfiideling.dk	DISK I	ALL LARGE ARE P10
big.dada.net	DISK I	ALL ARE P10
big.supereva.com	DISK I	ALL LARGE ARE P10
bimmer.roadfly.com	DISK I	ALL LARGE ARE P10
blastyourbrain.com	DISK I	ALL ARE P10
blinkyou.com	DISK I	ALL LARGE ARE P10
boobieblog.com	DISK I	ALL LARGE ARE P10

Page 1 of 10

Figure 1. (Sample spreadsheet.)

Step Three. Then, for Google to figure out which images P10 alleged to be infringing on the website referred to as “big.supereva.com” on the above shown Ex. N4 at 848, it would have to load Disk I on a computer and open the “ALL LARGE ARE P10” folder. This is the top-level menu window that loads when that is done:

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///
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

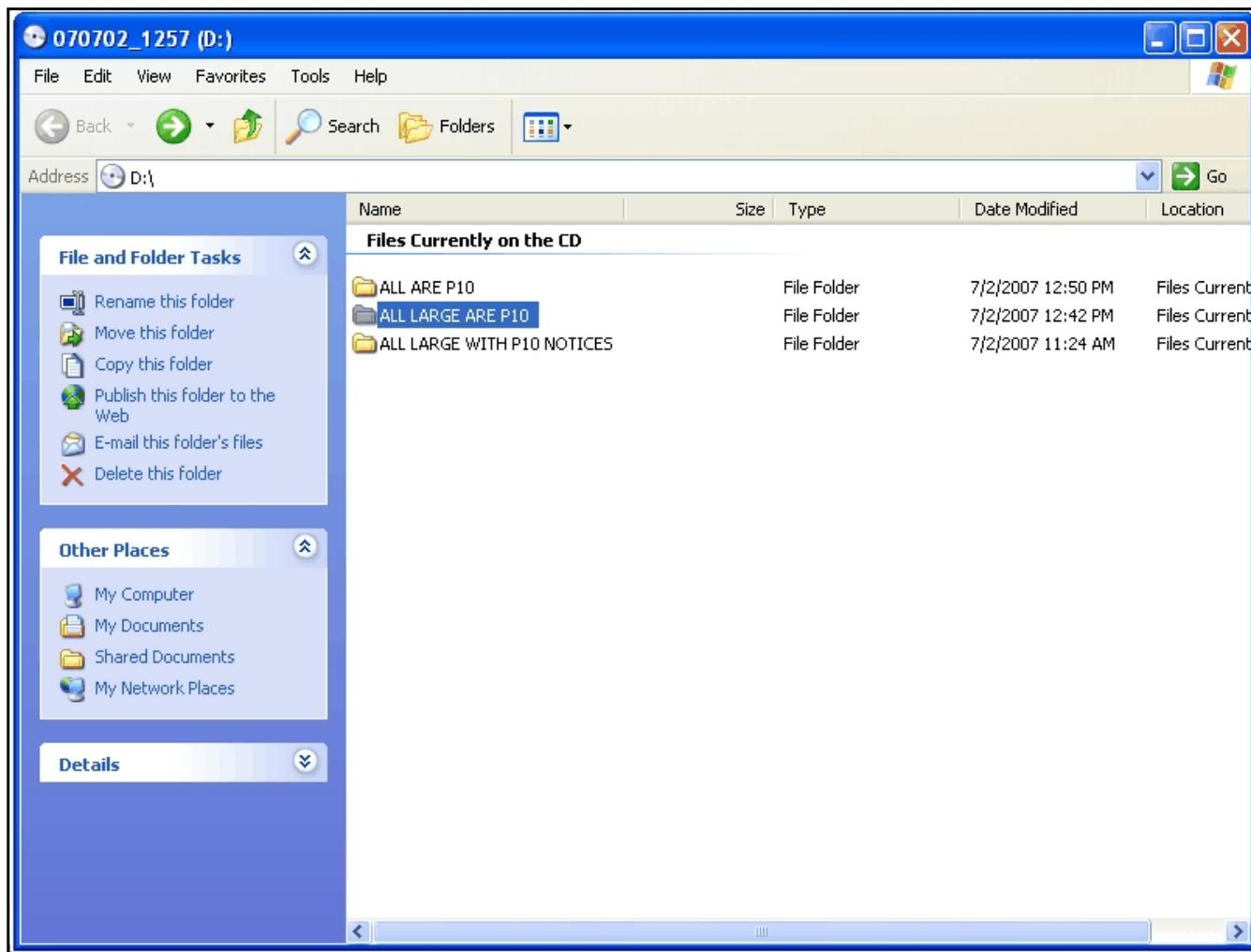


Figure 2. (Top-Level Menu)

The contents of the “ALL LARGE ARE P10” folder are shown next.

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///
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

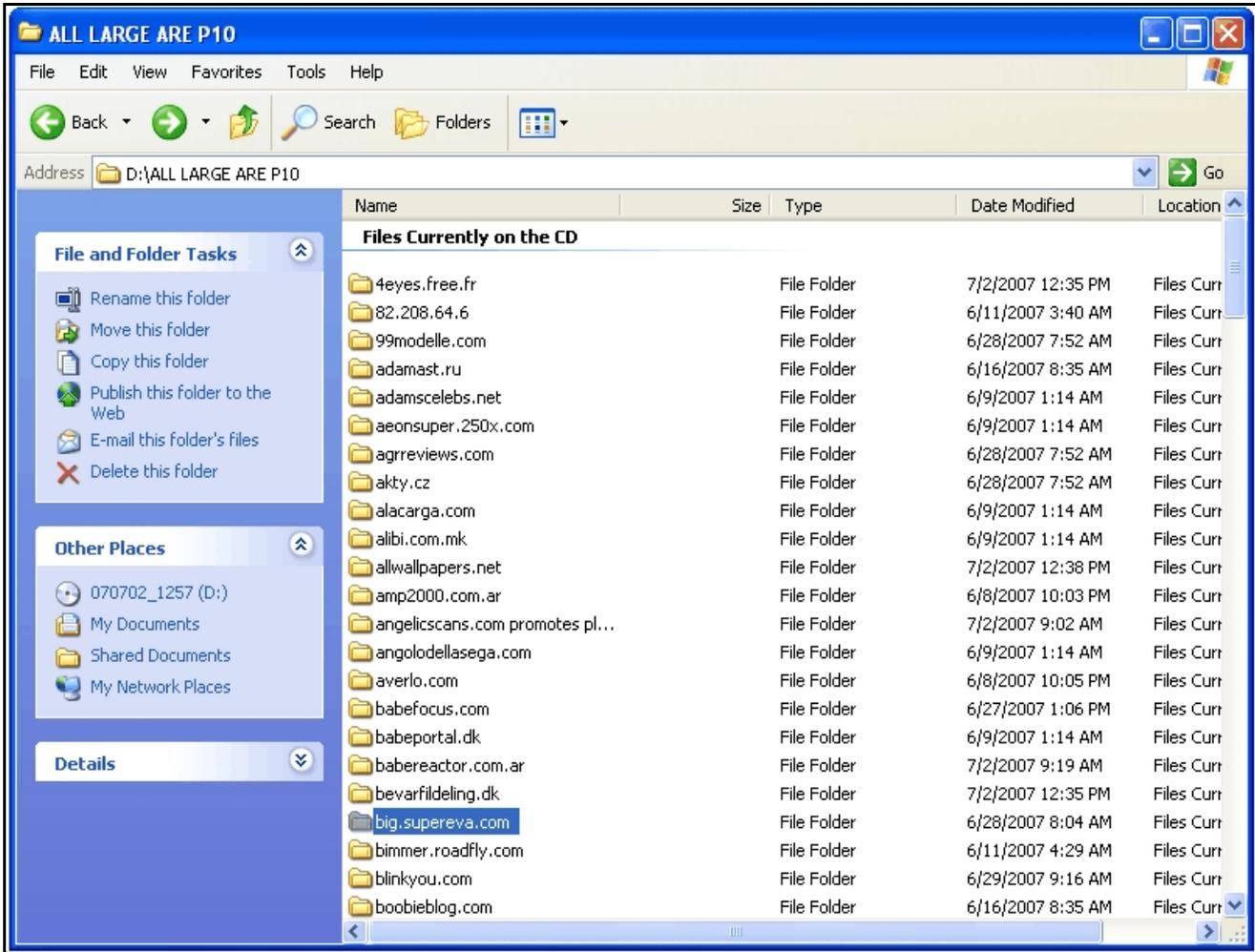


Figure 3. (Files shown when Top-Level Window is opened.)

Step Four.

Google would next have to open the “big.supereva.com” folder, which contains 129 files. Figure 4, below, shows some of the contents of a very small portion of the “big.supereva.com” folder.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

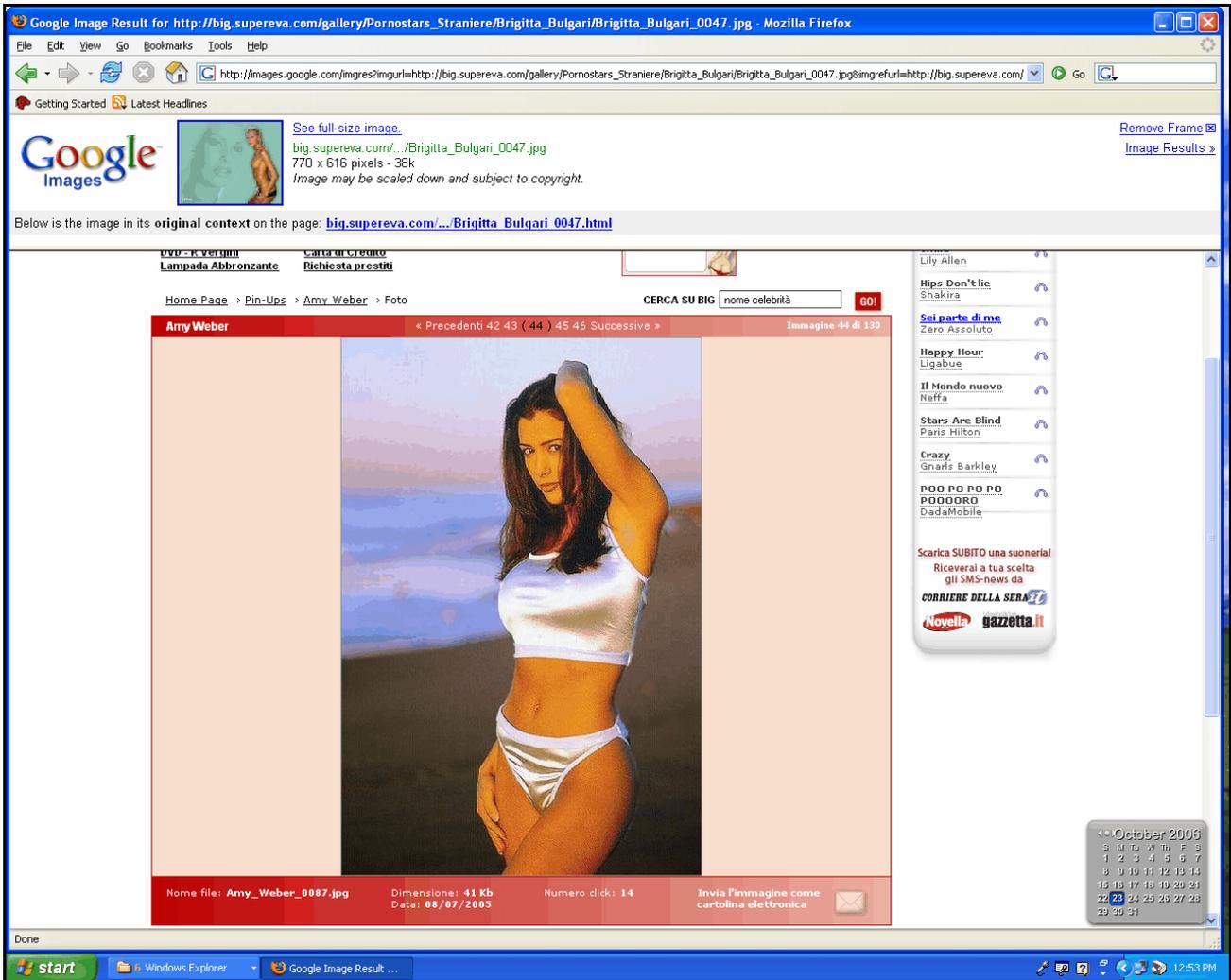


Figure 5.

Figure 5 does not contain a complete URL specifying where the image or images in question appear. The URL is truncated by ellipses in the middle, thereby requiring Google to search within the big.supereva.com website to find the allegedly infringing

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

image.⁹ As discussed above, in order to find the copyrighted work to which Figure 5 corresponds, Google would have to search through either the perfect10.com website or through a folder containing over 15,000 P10 images that P10 had submitted with its June 28, 2007 DMCA notice. Poovala Decl. ¶ 50, Ex. N3.

Thus, in order to process a single allegedly infringing URL, Google would have to go through at least eight steps—(1) review the cover letter; (2) review the spreadsheet; (3) insert Disk I; (4) open the “ALL LARGE ARE P10” folder; (5) open the “big.supereva.com” folder; (6) open the “amy large 2.png” file; (7) determine the image URL for the image in that file notwithstanding that the URL was truncated; and (8) refer to the folder sent with a separate DMCA notice containing the 15,000 P10 images in order to find the copyrighted image that corresponds to the “amy large 2.png” file. Google might have to complete this process for many, if not all, of the 70,000 distinct files contained in the DVDs (including some files that each contain hundreds of pages of images), as well as for the external hard drive submitted with Ex. N3, which contained at least 46,187 pages of material. *See* Khan Decl. ¶¶ 6, 13, 19. This would be even more onerous than the situation in *CCBill*, where the Ninth Circuit found it was improper to require the defendant to “first find the relevant line in the spreadsheet indicating ownership information, then comb the 22,185 pages provided by Perfect 10 in order to find the appropriate image, and finally copy into a browser the location printed at the top of the page—a location which was, in some instances, truncated.” *CCBill*, 488 F.3d at 1113.

At the hearing, P10 voiced its concern that this Court’s ruling would prevent it from including collections of infringing images as supporting evidence for otherwise valid DMCA notices. Not so; P10 remains free to include additional supporting evidence, such as screenshots, with the material it submits to a service provider. However, at a minimum, the essential elements of notification—the copyright owner’s attestations of ownership, nonlicensed use, and veracity of the notice; contact information

⁹Some of the files submitted to Google did include complete URLs, such as page 2 of Exhibit 33 to the Zada Declaration. However, the numerous steps Google would nonetheless have to take to process a Group C notice for those files would render that notice invalid.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

for the complainant; identification of the copyrighted work; and identification of the infringing material (including the location of that material and if necessary, a specific link under section 512(d))—must be included in a single written communication. Because the Group C notices fail to provide all of this information in one place, they do not impute knowledge to Google. Perfect 10 has therefore not raised a genuine issue of material fact as to whether Google is eligible for safe harbor under § 512(d).

C. Safe Harbor for Caching Feature Under Section 512(b)

Google has moved for summary judgment that it is entitled to safe harbor under 17 U.S.C. § 512(b) for its caching feature. As discussed in footnote six, *supra*, it is undisputed that Google’s servers do not store images found in its cache. The images displayed on a cached page are made available to a viewer from their original source, if they still exist at that source. CSUF(b) ¶ 7-8. Thus, P10’s claims for infringement based on images “located in” Google’s cache are really claims based on Google’s linking to outside infringing content, and the preceding § 512(d) analysis applies. That analysis concluded that Google is entitled to the § 512(d) safe harbor with respect to linking to outside infringement for all of the Group A, all of the Group C, and some of the Group B notices. For those Group B notices for which Google would not be entitled to safe harbor under § 512(d), a question could remain whether Google might nevertheless be entitled to safe harbor under § 512(b) because P10 had failed to indicate in its notices that the infringing material had been removed from the originating site, as required by § 512(b)(2)(E)(ii). But it is unnecessary to go through that analysis. On July 21, 2010, the Court ordered the parties to file statements identifying “where in the existing briefs on Google’s motion for safe harbor under 17 U.S.C. § 512(b) there is any reference in any of the “Group B” “spreadsheet” notices sent between May 31, 2004 and April 24, 2007 (Poovala Decl. ¶ 41, Exhs. L1-L48) identifying any specific material on Google’s cache as infringing.” The Court has reviewed the parties’ responses to this Order. In its response, Google demonstrated that nowhere in any of the Group B notices did P10 identify any specific material in Google’s cache as infringing. P10 merely cited to one Group B notice that mentioned in passing that “Jerkengine.com has thousands of Perfect 10 infringements available by clicking on the Google cache link and dainews.nu has

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

many as well.”¹⁰ Poovala Decl., Ex. L22 at 431. However, the spreadsheet attached to that notice does not cite to any Google cache pages as infringing, and the mere reference to “thousands of Perfect 10 infringements” could not reasonably be deemed to confer notice of infringement as to these cache pages on Google. Thus, the Court has been presented with no evidence that any portion of the Group B notices for which the availability of safe harbor is still at issue contains a valid notification of infringement for a Google cache page. As a result, the Court GRANTS Google’s motion for partial summary judgment for its caching feature.

D. Safe Harbor for Google’s Blogger Service Under Section 512(c)

Because Google’s Blogger service allows account holders to create their own blogs, which in some cases include allegedly infringing images that are uploaded onto Google’s own servers, it is necessary to analyze the availability of a safe harbor under 17 U.S.C. § 512(c), which addresses service providers that store material on their systems at the direction of users. *See* CSUF(c) ¶ 1; Poovala Decl. ¶ 26. A service provider that stores allegedly infringing material on its system or network at the direction of users is entitled to safe harbor under 17 U.S.C. § 512(c)(1) if it

(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

¹⁰In its response, P10 argued—without any statutory or case law support—that a notice identifying a web page necessarily identifies the cached page as well. In support, P10 cites to the Poovala Declaration, which discloses that it is Google’s practice to automatically remove a cached link when it suppresses the corresponding live web page URL. Poovala Decl. ¶ 10. Google’s policy in responding to a notice is irrelevant to the question of whether that notice identified a cached web page in the first place. P10 also ignored the Court’s instructions and cited to references to Group C notices. *See* Response (Docket No. 932) at 3 (citing Zada Decl. ¶ 39 for the proposition that “The Google cache link matches the full URL of the infringing web page” but not acknowledging that this paragraph of Zada’s declaration is referring to Group C notices).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

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.

17 U.S.C. § 512(c)(1). Sixteen of P10's DMCA notices contain Blogger URLs. Poovala Decl. ¶ 93. Fourteen of these notices are part of the Group B notices, and two of them are part of Group C. *Id.*

The Court set forth the notice requirements for the § 512(c) safe harbor above in Section IV.B. *See* p. 10 of this Order. In *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1107 (C.D. Cal. 2009), this Court noted that in *CCBill, supra*, “the Ninth Circuit provided clear guidance on how to apply the knowledge elements of the Section 512(c) safe harbor.” The Court incorporates that discussion by reference and will not repeat it here.¹¹

As discussed above in the section of this Order concerning § 512(d), some Group B notices could be considered adequate for imparting notice under the DMCA. However, in its opposition papers and in oral argument at the hearing P10 did not contend that Google failed to expeditiously process even a single Blogger URL within that group of notices, although it did include one such page (Exh. 45, p. 11) in the binder it handed up in court. *See Zada Decl.* ¶¶ 8, 41-51, 60-61, Exhs. 1, 9, 28-35, 45; *Chou Decl.* ¶¶ 8-11

¹¹Suffice it to say that much of this Court’s analysis was embraced by and quoted by the Court in *Viacom International, Inc. v. YouTube, Inc.*, — F. Supp. 2d —, 2010 WL 2532404, at *9, *12-*13 (S.D.N.Y. June 23, 2010).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

(citing only examples of a delay in removing Blogger infringing material identified in P10's Group C notices). Thus, Google clearly is entitled to safe harbor under § 512(c) for its Blogger service for the links identified only in the Group B notices, with the possible exception of the 23 supposedly infringing URLs that were included in that single page.

The Group C notices that list Blogger URLs are inadequate, however. They have all of the same deficiencies as the rest of the Group C notices. The requirements for a copyright holder are slightly less stringent under § 512(c) than under § 512(d) in that the former does not explicitly require the copyright holder to provide what the latter does: a specific “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.” 17 U.S.C. § 512(d)(3). Section 512(c) merely requires the copyright holder to provide “identification of the material that is claimed to be infringing . . . and information reasonably sufficient to permit the service provider to locate the material.” 17 U.S.C. § 513(c)(3)(A)(iii). Google has a tenable argument that a copyright holder would need to provide the post-URL of a particular Blogger post in order to include information “reasonably sufficient” to permit the location of the material. However, the Court need not address this argument now, since the other manifest deficiencies in the Group C notices—including their lack of specific identification of the copyrighted material and their inexplicably complicated organization—prevent them from imparting knowledge under the statute. Thus, Google need not show that it acted expeditiously on the Group C Blogger notices in order to be eligible for safe harbor under § 512(c).

The other requirement Google must meet to be eligible for safe harbor under § 512(c) is that it must show that it “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.” 17 U.S.C. § 512(c)(1)(B). In order to lose the protection of the safe harbor, a service provider must both be able to control the infringement *and* receive a financial benefit directly attributable to the infringement. *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1109 (W.D. Wash. 2004).

P10's only argument that Google has a right and ability to control infringing activity on Blogger is that the infringing material is on Google's servers and Google can take it down after it has been uploaded by users. The mere ability of a service provider to

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 26, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC.		

remove content after it has been uploaded is insufficient as a matter of law to establish the right and ability to control the infringing activity required by § 512(c)(1)(B). *UMG Recordings v. Veoh, supra*, 665 F. Supp. 26 at 1112-13. P10 has not raised a triable issue that Google has a right and ability to control infringing activity. Thus, the Court need not consider whether Google receives a financial benefit from the alleged infringement because it already meets the criteria for safe harbor under 17 U.S.C. § 512(c)(1)(B).

Thus, Google has demonstrated that it is entitled to safe harbor for its Blogger service under 17 U.S.C. § 512(c) as a matter of law.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART AND DENIES IN PART Google’s motion for partial summary judgment of entitlement to safe harbor under 17 U.S.C. § 512(d) for its Web and Image Search. The Court GRANTS Google’s motion for partial summary judgment for its caching feature based on 17 U.S.C. § 512(d), without having to assess whether it would be separately entitled to safe harbor under 17 U.S.C. § 512(b). The Court GRANTS Google’s motion for partial summary judgment of entitlement to safe harbor under 17 U.S.C. § 512(c) for its Blogger feature.

Initials of Preparer _____ : _____
smo

July 2, 2007

To Alexander Macgillivray, Google's DMCA Agent and in-house counsel
Google, Inc.
1600 Amphitheatre Parkway, Building 47
Mountain View, CA 94043
By FedEx and by e-mail to: amac@google.com

To Andrew Bridges, Esq.
Winston & Strawn, LLP
101 California Street
San Francisco, CA 94111
By e-mail to: ABridges@winston.com

Dear Mr. Macgillivray and Mr. Bridges:

The following is a DMCA notice as well as a discovery production in *Perfect 10 v. Google*.

If you have difficulties locating the infringements identified in this DMCA notice, please do not hesitate to contact me. Although we believe all the required information is contained in this notice, I would be happy to walk you through the process of identifying our copyrighted works, if necessary. I can be reached at normanuz@earthlink.net.

Accompanying this notice are two DVDs which contain approximately 20,000 full-size P10 copyrighted images from infringing web sites to which Google links. The DVDs are being sent to Mr. Macgillivray at Google, both for purposes of the DMCA notice and for production in the *Perfect 10 v. Google* case.

How to locate infringing images on the DVDs.

Disk I contains images displayed by Google from infringing web sites. The images are separated into three folders. The first folder is labeled "ALL ARE P10," which means that all of the images of models in that folder, with the exception of model images that are part of advertising banners, etc., are copyrighted by Perfect 10. The second folder is labeled "ALL LARGE ARE P10." This means that all full-sized images are copyrighted by Perfect 10. The third folder is labeled, "ALL LARGE WITH P10 NOTICES." This means that all large images which display Perfect 10 copyright notices are copyrighted by Perfect 10.

Typically, the large Perfect 10 images in Disk I are viewable in one of three ways: a) they appear immediately after the thumbnail is clicked on; b) after the thumbnail is clicked on, a page of thumbnails appears and one of those is clicked on; or c) it is necessary to go to a list of model names or otherwise navigate through the third party web site while remaining at google.com and then click on a model name or thumbnail to view the full-size image.

I have included an excel spreadsheet which details the folders on the hard drive that are related to this DMCA notice.

The left column of the spreadsheet lists the infringing web site (except on the last page). The middle column indicates which disk contains the infringing images from that web site. The right column indicates which folder or subfolder contains those images.

Disk II contains more images on infringing web sites to which Google links. The last folder, entitled "MODEL - ALL LARGE ARE P10," was obtained by doing searches on Perfect 10 model names. All large images in that folder, even if they are of a different model, are copyrighted by Perfect 10.

Neither Google nor the infringing third party web sites on which Perfect 10 images appear in either Disk I or Disk II, are authorized to make copies of the Perfect 10 images appearing in Disk I or Disk II.

As I have stated to you before, Google is not authorized to make any copies of any Perfect 10 copyrighted image, or to allow Google ads to appear near such images.

If you wish to examine the copyrighted images of Perfect 10 which correspond to these infringing images, I have previously sent to you all of the images on our web site, as of June, 2007. Also, as I have previously advised you, if you would like a free subscription to Perfect 10's website, please let me know and I will provide a user name and password for you.

I swear under penalty of perjury that a) I have a good faith belief that the use of the Perfect 10 copyrighted material in the manner complained of in this email is not authorized by the copyright holder Perfect 10, its agent, or the law, b) that the information in this notification is accurate, to the best of my knowledge, and c) that I am authorized to act on behalf of Perfect 10, Inc. the owner of the exclusive rights in the material which is being infringed.

Please contact me if you have any questions about this notice.

Sincerely,



Norm Zada, Ph.D.
Perfect 10, Inc.
800-606-6639
P.O. Box 3398
Beverly Hills, CA 90212
Fax: 310-205-9644
normanz@earthlink.net

Enclosure to Mr. Macgillivray: Two DVDs.

cc: Mark Jansen, Esq., without enclosure

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484 AHM (SHx)	Date	July 28, 2010
Title	PERFECT 10, INC. v. GOOGLE, INC., <i>et al.</i>		

Present: The Honorable	A. HOWARD MATZ, U.S. DISTRICT JUDGE
------------------------	-------------------------------------

Stephen Montes Deputy Clerk	Not Reported Court Reporter / Recorder	Tape No.
Attorneys NOT Present for Plaintiffs:	Attorneys NOT Present for Defendants:	

Proceedings: IN CHAMBERS (No Proceedings Held)
NOTICE OF ERRATA REGARDING ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT GOOGLE, INC.’S MOTIONS FOR PARTIAL SUMMARY JUDGMENT AS TO SAFE HARBOR UNDER 17 U.S.C. § 512 (DOCUMENT 937)

The Court issues this order to correct the paragraph that begins at the bottom of page 27 of the Order with “As discussed above in the section of this Order” The reference in that paragraph to Exh. 45 was incorrect. It was Exhibit 16. So, with the corrections reflected in bold, that paragraph is modified to read:

As discussed above in the section of this Order concerning § 512(d), some Group B notices could be considered adequate for imparting notice under the DMCA. However, in its opposition papers and in oral argument at the hearing P10 did not contend that Google failed to expeditiously process even a single Blogger URL within that group of notices, although it did include **an exhibit supporting this position (Exh. 16, pp. 1, 2, 4, 6)** in the binder it handed up in court. *See* Zada Decl. ¶¶ 8, 41-51, 60-61, Exhs. 1, 9, 16, 28-35; Chou Decl. ¶¶ 8-11 (citing only examples of a delay in removing Blogger infringing material identified in P10’s Group C notices). Thus, Google clearly is entitled to safe harbor under § 512(c) for its Blogger service for the links identified only in the Group B notices, with the possible exception of the **six** supposedly infringing URLs that were included in **Exhibit 16**.

Initials of Preparer	_____ : _____ SMO
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