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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California Corporation Plaintiff, vs. GOOGLE INC., a corporation; and DOES 1 through 100, inclusive	Case No. CV04-9484 AHM (SHx) **GOOGLE'S OPPOSITION TO PERFECT 10'S MOTION FOR PRELIMINARY INJUNCTION** Date: November 7, 2005 Time: 10:00 a.m.

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 1

A. GOOGLE'S SEARCH ENGINE AND RELATED ACTIVITIES 1

1. Web And Image Search Engine 1

2. Google's Advertising Programs 3

3. Google's Copyright Policy 5

B. PERFECT 10'S BUSINESS ACTIVITIES 6

C. GOOGLE'S INTERACTIONS WITH PERFECT 10 6

III. ARGUMENT 9

A. PERFECT 10 HAS FAILED TO JUSTIFY A PRELIMINARY INJUNCTION BECAUSE IT HAS NOT ESTABLISHED PROBABLE SUCCESS OR SERIOUS QUESTIONS, IT HAS NOT SHOWN IMMEDIATE IRREPARABLE HARM, IT DRAGGED ITS FEET, THE BALANCE OF HARMS IS UNFAVORABLE, AND THE PUBLIC INTEREST OPPOSES AN INJUNCTION. 9

B. PERFECT 10 CANNOT ESTABLISH PROBABLE SUCCESS OR SERIOUS QUESTIONS ON THE MERITS 10

1. Google's Search Engine Operations Are Fair Use 10

a. The Purpose And Character Of The Use 10

b. The Nature Of The Copyrighted Work 13

c. The Amount And Substantiality Of The Portion Used In Relation To The Copyrighted Work As A Whole 13

d. The Effect Of The Use Upon The Potential Market For And Value Of The Copyrighted Work 14

e. The Public Interest 15

2. Perfect 10 Is Not Likely To Prevail On Its Claims That Google Is Secondarily Liable For Copyright Infringements. 15

a. Perfect 10 Is Not Likely To Succeed On Its Claim of Contributory Copyright Infringement 16

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San Francisco, CA 94111-5894

b. Perfect 10 Is Not Likely To Succeed on Its Claim of Vicarious Copyright Infringement. 18

3. Section 512(j) Limits The Scope of Any Injunctive Relief..20

C. PERFECT 10 CANNOT SHOW IRREPARABLE HARM. 22

D. THE BALANCE OF HARDSHIPS DISFAVORS AN INJUNCTION....23

E. THE PUBLIC INTEREST OPPOSES AN INJUNCTION. 24

F. A MASSIVE BOND IS REQUIRED FOR ANY INJUNCTION....25

IV. CONCLUSION 25

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1
2
3
4
5
6
7
8
9
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11
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22
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24
25
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27
28

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114 F. Supp. 2d 896 (N.D. Cal. 2000)....................24

A & M Records, Inc., v. Napster, Inc.,
284 F.3d 1081 (9th Cir. 2002)....................24

A&M Records v. Napster,
239 F.3d 1004 (9th Cir. 2001)....................20

Adobe Systems v. Canus Prod.,
173 F. Supp. 2d 1044 (C.D. Cal. 2001)....................18, 19

Agee v. Paramount Comm'ns,
59 F.3d 317 (2d Cir. 1995)....................11

Atari Games Corp. v. Nintendo of Am. Inc.,
975 F.2d 832 (Fed. Cir. 1992), *aff'd*, 109 F.3d 1394 (9th Cir. 1997)....................9-10

Banff Ltd. v. Limited, Inc.,
869 F. Supp. 1103 (S.D.N.Y. 1994)....................19

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No. 03-9507, 2005 WL 1137878 (S.D.N.Y. May 12, 2005)....................14

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125 F.3d 824 (9th Cir. 1997)....................23

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510 U.S. 569 (1994)....................10, 14-15

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844 F.2d 668 (9th Cir. 1988)....................9-10

Citibank N.A. v. Citytrust,
756 F.2d 273 (2d Cir. 1985)....................23

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351 F. Supp. 2d 1090 (W.D. Wash. 2004)....................20

Costar Group v. Loopnet,
164 F. Supp. 2d 688 (D.Md. 2001)....................21

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7 F.3d 1399 (9th Cir. 1993)....................9

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924 F. Supp. 1559 (S.D. Cal. 1996) *aff'd* 109 F.3d 1394 (9th Cir. 1997)....................9

Ellison v. Robertson,
357 F.3d 1072 (9th Cir. 2004) 16, 18

Elvis Presley Ents., Inc., v. Passport Video,
349 F.3d 622 (9th Cir. 2003) 9

Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.,
886 F.2d 1545 (9th Cir. 1989) 19

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739 F.2d 466 (9th Cir. 1984) 22

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165 F. Supp. 2d 1082 (C.D. Cal. 2001) 24-25

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75 F. Supp. 2d 1290 (D. Utah 1999) 17

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Kelly v. Arriba Soft Corp.,
336 F.3d 811 (9th Cir.2003) .... passim

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15 S.Ct. 2764 (2005) 18

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235 F.3d 18 (1st Cir. 2000) 13

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364 F.3d 471 (2d Cir. 2004) 11

Oakland Tribune, Inc. v. Chronicle Pub. Co,
762 F.2d 1374 (9th Cir. 1985) 9-10, 23

Perfect 10 v. CCBill,
340 F. Supp. 2d 1077 (C.D. Cal. 2004) 21

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213 F. Supp. 2d 1146 (C.D. Cal. 2002) 21

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923 F. Supp. 1231 (N.D. Cal. 1995) 9

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907 F. Supp.1361 (N.D. Cal. 1995) 12

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2003 WL 21464568 (W.D. Okla. May 27, 2003) 2

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Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000) 11

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Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) 15

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Statutes

17 U.S.C. §101 11

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17 U.S.C. §107 9-10

17 U.S.C. §512(c) 5, 7

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I. INTRODUCTION

Over four years after sending demands to Google, and over nine months after filing this action, Perfect 10 has moved for a preliminary injunction to force Google to endure a process by which Perfect 10, without court review, may continuously dictate to Google how Google must alter the Web index at the heart of its search engine.

Perfect 10's motion fails every criterion. Perfect 10 has not proved probable, or even reasonably possible, success on the merits. It cannot show irreparable harm, and indeed its own delays make this motion a non-starter even without considering the other factors. The balance of hardships weighs against an injunction. Finally, the public interest is extremely strong in avoiding an injunction that would hobble Google's widely used and beneficial search engine.

II. FACTUAL BACKGROUND

A. GOOGLE'S SEARCH ENGINE AND RELATED ACTIVITIES

1. Web And Image Search Engine

Google's search engine systematically and comprehensively explores the vastness of the World Wide Web, retrieves and stores pages and files located on the Web in storage called a "cache," indexes those pages and files, and delivers to users search results based on the likely relevance of those pages and files to search terms entered by users. The Web is an open, network service that operates over the Internet by means of the hypertext transfer protocol ("HTTP"), which enables the linking of a vast number of documents across the Internet. "Browser" software programs such as Internet Explorer and Netscape enable the transfer and display, across the Web, of pages that are formatted using Hypertext Markup Language ("HTML") as well as images, word processing documents, and other files. The Web connects resources and users in countless ways. Declaration of John Levine ("Levine Dec.") ¶7.

Google's search engine has become one of the most significant and widely used research tools in the world. The variety of its research uses is immense and Google is

1 a staple educational resource. *See* Levine Dec. ¶14; Declaration of Andrew P. Bridges
2 ("Bridges Dec.") ¶2 and Ex. C.[1]
3 Google delivers search results at no charge to either users or providers of
4 information. Google does not require accounts or subscriptions for its general public
5 search engine use that is at issue in this litigation. Declaration of Alexander
6 Macgillivray ("Macgillivray Dec.") ¶4. Like a number of other media, Google's
7 search engine is primarily advertising-supported, as described below.
8 When the Google Web Search engine receives a query, it searches its index for
9 pages relevant to the query. It then returns Web page links with snippets of relevant
10 text. It also provides a link to Google's "cached" copy of the text portion of the Web
11 page. By clicking on the "cached" link, the user will cause the cached page to appear.
12 While it may seem that the cached page contains images, in fact the images are not
13 from the Web Search cache; in fact, a user's web browser fetches any images from
14 their original location and not from Google's servers.[2] Macgillivray Dec. ¶2; Levine
15 Dec. ¶21. Google also provides a link for a version of the cached page that will
16 disable this browser function. Macgillivray Dec. ¶2.
17 When the Google Image Search engine responds to a query, it searches its index
18 for image files (stored in an index apart from the index for Web page files) that are
19 relevant to the query based on the text of their associated Web pages. (Google does
20 not have a technology that is able to translate the pixels of an image into a searchable
21
22 [1] In addition to its research functions, the Google search engine has a news reporting function as it updates its search results to reflect the current status of the Web. Google
23 Alerts delivers updated search results to a user. *See* www.google.com/alerts?hl=en (copy attached as Ex. B to Bridges Dec.). In addition, Google's ranking of search
24 results and its assignment of "PageRank" scores to pages gives Google's opinion of the significance and relevance of pages and files on the Web. *See Search King, Inc. v.*
25 *Google Technology, Inc.*, 2003 WL 21464568 at *4 (W.D. Okla. May 27, 2003); *see also* H. Davis, *Building Research Tools with Google for Dummies* (2005), pg. 47 (Ex.
26 C to Bridges Dec.). ("Research Tools").
[2] In the HTML programming customary for Web pages, images are not part of the
27 page itself. Instead, the HTML code for a Web page identifies a separate file where the image is stored. When a browser shows a Web page with images, the browser
28 obtains the text and images from different locations and knits them together into a single display. Levine Dec. ¶16.

1 textual description.) *See also Research Tools* at 137 (Ex. C to Bridges Dec.).

2 The Image Search engine returns results consisting of a page of "thumbnail"
3 images – small low-resolution extracts of original images that aid the user in
4 identifying and locating the image most relevant to the research. Macgillivray Dec.
5 ¶3. The browser obtains "thumbnail" images from Google's server, together with
6 information about the Web page associated with the image. The user then can choose
7 to click on the image thumbnail and show more information about the image and
8 cause the user's browser (typically Internet Explorer, Netscape, Mozilla Firefox, or
9 Opera) to open a "window" on the screen that will display the underlying Web page in
10 a process called "framing." Macgillivray Dec. ¶3. *See also Research Tools* at 138-39
11 (Bridges Dec. Ex. C.). **Dr. Zada's declaration, its exhibit 8 with the narration by**
12 **Patrick Swart, and the accompanying Swart Declaration mislead the Court when**
13 **they refer to the new window in the browser display and then refer and point to**
14 **the address bar of the browser, which continues to show a "google.com" location,**
15 **to imply that the lower window is coming from google.com. The new material**
16 **displayed in the browser's lower window comes from the underlying site, not**
17 **from Google.** [3]

18 ### 2. Google's Advertising Programs

19 Google has two web advertising programs, AdWords for advertisers and
20 AdSense for web publishers. Macgillivray Dec. ¶9 and Ex. A.

21 Through Google's AdWords program, advertisers purchase advertising

22 [3] The address bar to which the demonstration misleadingly points corresponds to the
23 *top* window of the browser, which displays only a selected "thumbnail," and not to the *bottom* window of the browser, which displays the source Web page or image file of
24 Google's search result. In fact, despite the misleading commentary and declarations (at 1:15-1:22 of the demonstration), the display on the demonstration CD specifically
25 says "Below is the image in its **original context** on the page www.3thehardway.nl/.../vibesorensen002.html" (emphasis in original). When the demonstration navigates
26 within that window, at 1:22-2:27 of the demonstration, the display is coming from the underlying Web site and not from Google, contrary to the narrative of the
27 demonstration. The division of the display into distinct windows drawing from diverse sources, sometimes called "framing," is a common function of Internet
28 browsers, and the browser carries out the navigation function shown in the demonstration without involvement by Google. Levine Dec. ¶24, n 1.

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1 placement on Google's pages, including its search engine, Gmail web-based email
2 service and other services, or on third party Web sites. Macgillivray Dec. ¶9.
3 Google's AdSense program is available to third-party Web publishers. AdSense
4 allows third-party sites to carry Google-sponsored advertising and share revenue that
5 flows from the advertising displays and click-throughs (advertising derived from the
6 "clickthrough" referral from one site to another). AdSense advertising is related to
7 text in the AdSense participant's Web site or search key words.[4] Macgillivray Dec.
8 ¶10.
9 The Google AdSense Program Policies specifically exclude sites with Image
10 Results from participating in the AdSense program. The Policy states: "Copyrighted
11 Material: In order to avoid associations with copyright claims, website publishers
12 may not display Google ads on web pages with MP3, Video, News Groups, and Image
13 Results." In addition, it is Google's intention to exclude sites with pornography, adult,
14 or mature content, along with certain other categories of content, such as gambling
15 and profanity, from its AdSense program. Macgillivray Dec. ¶11 and Ex. B (Google
16 AdSense Program Policies).[5] The Google AdSense Terms and Conditions, execution
17 of which is a prerequisite to participating in the AdSense program, state that "You
18 represent and warrant that . . . each Site and any material displayed therein: (i) comply
19 with all applicable laws, statutes, ordinances and regulations; (ii) do not breach and
20 have not breached any duty toward or rights of any person or entity including, without
21 limitation, rights of intellectual property, publicity or privacy . . . (iii) are not
22 pornographic, hate-related or otherwise violent in content." Macgillivray Dec. ¶12
23 and Ex. C (AdSense Terms and Conditions). Perfect 10 asserts that certain AdSense

24 [4] To participate, a Web site publisher places code on its site that asks Google's servers
25 to algorithmically select relevant advertisements when a user loads the Web page. A Web site publisher identifies its site and receives a token and javascript from Google
26 that the Web site publisher can then use on a page to receive targeted advertising. Google does not control the location of javascript placement. Macgillivray Dec. ¶10
27 [5] Despite the fact that the current version of Google's AdSense Program Policies is posted on Google's Web site, Dr. Zada attached a dated version of the Policies that he
28 printed on September 14, 2004, and does not reflect the current language. *See* Zada Dec. ¶25 (quoting from year old version of Google's AdSense Program Policies).

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partners violate this policy and put the AdSense javascript on pages that contain pornographic images. This merely illustrates Google's lack of control over where third parties choose to place the javascript that triggers AdSense advertising. Moreover, Google reserves the right to terminate third parties from AdSense when it becomes aware that they are violating the AdSense Policies or Terms and Conditions, and is in the process of reviewing Perfect 10 notices and will terminate sites from participation in AdSense that are in violation. Macgillivray Dec. ¶13.

3. Google's Copyright Policy

It is Google's policy diligently to respond to notices of alleged infringement that comply with Section 512(c)(3) of the Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(3). Macgillivray Dec. ¶14. Google provides a detailed explanation of its policy in response to notices of alleged infringement at its google.com Web site. *Id.* and Ex. D (Google's Terms of Service and DMCA policy).

Google receives thousands of inquiries daily concerning search results, including notices about search results that link to allegedly improper content. Those notices concern various issues, including claims that third-party Web sites have infringed the senders' copyright, trademark or other rights. Google has several departments involved in handling notices of alleged infringement. Macgillivray Dec. ¶15.

Trained individuals process notices of alleged infringement that refer to copyright. If a notice does not contain enough information for Google to process, or if it otherwise fails the requirements of 17 U.S.C. §512(c)(3), but contains contact information for the sender, Google's staff will typically email the sender requesting additional information. Macgillivray Dec. ¶15.

Upon receiving a notice of alleged infringement that substantially conforms with the requirements of Section 512(c)(3), Google expeditiously removes or disables access to the material. Macgillivray Dec. ¶16. Google does this by flagging the URL or URL pattern for which Google has received notice so that page or file will no

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longer appear in Search results. For Web Search, the page URL is suppressed; for Image Search, the image file URL is suppressed. Macgillivray Dec. ¶16.

B. PERFECT 10'S BUSINESS ACTIVITIES

Perfect 10 publishes a magazine and Web site devoted to photographs of nude women who have not had surgical breast enhancement. Perfect 10 appears to have met with little commercial success. Perfect 10 magazine has no significant advertising. *See* Bridges Dec. ¶¶5-6 and Ex. D. *See also* D. Weddle, *Among the Mansions of Eden: Tales of Love, Lust, and Land in Beverly Hills* 65 (2003) (Ex. O to Bridges Dec.) (explaining low readership of Perfect 10 and that its CEO Norm Zada (previously Zadeh) "isn't in it for the money, he's in it for the lifestyle") ("Mansions of Eden").

C. GOOGLE'S INTERACTIONS WITH PERFECT 10

Perfect 10 claims that since May 2004 Google has refused to respond to notices by Dr. Zada of infringements by third-party Web sites. Preliminary Injunction Motion ("PIM") at 6-7. That is false. Since May 2004, Google has received more than forty communications from Dr. Zada regarding a plethora of alleged infringements and publicity violations by various Web sites. Macgillivray ¶19. The notices listed thousands of URLs and Web sites which Dr. Zada claimed violated the rights of Perfect 10 and unrelated third parties. Google diligently and promptly responded to Dr. Zada's notices with respect to Perfect 10's alleged rights. Macgillivray Dec. ¶19.

Dr. Zada's communications were impossible to process completely, for a number of reasons. Perfect 10's notices were vastly overbroad, dealing often with unrelated third parties and non-copyright issues; they were incomplete and shoddy in light of the Section 512(c)(3) requirements; and they were delivered in a manner that impeded efficient handling by Google. Macgillivray Dec. ¶20.

Frequently Dr. Zada's communications did not provide enough information. For example, notices beginning on May 31, 2004 through July 2004, simply listed URLs, without sufficiently identifying the copyrighted work claimed to have been

1 infringed or the nature of the infringement. *See, e.g.,* Zada Decl., Ex. 40. Macgillivray
2 Dec. ¶20, Ex. E (notices Google received from Dr. Zada from May 31, 2004 through
3 July 11, 2004). Google promptly responded to Dr. Zada's notices, explaining that he
4 needed to specify the material protected by copyright. Macgillivray Dec. ¶20, Ex. F
5 (Google e-mails to Dr. Zada).

6 On October 11, 2004 (a month before this lawsuit was filed), in response to
7 Google's requests, Dr. Zada finally provided notices in a format that identified Perfect
8 10 magazine issue and page numbers of images whose copyright Dr. Zada claimed to
9 have been infringed, at least for some of the listed URLs. Macgillivray Dec. ¶21, Ex.
10 G (notices Google received from Dr. Zada from October 11, 2004 through June 19,
11 2005).[6] Even though those notices were deficient, beginning on October 11, 2004,
12 Google promptly processed Dr. Zada's notices that Google could confirm identified
13 URLs that did in fact contain images of semi-naked or naked women that looked like
14 they might have been Perfect 10 images and were indexed by Google,[7] and suppressed
15 those showing up in response to user queries in Web Search. Macgillivray Dec. ¶21,
16 Ex. F. **Despite the difficulties with, and size of, Dr. Zada's notices, with only four**
17 **exceptions[8] Google processed Dr. Zada's October 11, 2004 notice and later**
18

19 [6] One communication from Dr. Zada on July 7, 2004 partially identified some information but that communication was itself noncompliant with section 512(c)(3).

20 [7] Although Google processed Dr. Zada's notifications, they did not comply with the DMCA's requirements that a notice must identify "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" and "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." *See* 17 U.S.C. 512(c)(3)(ii) and (iii). Moreover, many of Dr. Zada's notices did not comply with the Section 512(c)(3)'s requirement that notifications must be "provided to the designated agent of a service provider." Macgillivray Dec. ¶21.

[8] The four exceptions involve Exs. 58, 66, 67, and 68 of Dr. Zada's Declaration. Google processed the notice attached as Ex. 68 in 19 days. Google has not, to its knowledge, received the notices attached as Exs. 66 and 67. Through their inclusion as exhibits, Google now has them and Exs. 66 and 67 are now being processed. Due to miscommunication, Google did not complete processing of Ex. 58. Once the mistake was discovered, Google restarted processing this "notice," which will be reflected in Google search results shortly. Macgillivray Dec. ¶22.
21 22 23 24 25 26 27 28

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notices within two weeks of receipt, often within one week.[9]. Macgillivray Dec. ¶22.

Dr. Zada claims that "Google, via its Image Search, is continuing to display at least 1,043 Perfect 10 images from, and link at least 1,043 Perfect 10 images to, web pages that Perfect 10 specifically notified Google were infringing Perfect 10 copyrights." Zada Decl. ¶96, Ex. 81 (spreadsheet reflecting URLs of web pages from which Dr. Zada claims Google continued to display infringing images after notice.) This characterization is entirely *misleading*. First, none of the URLs in Ex. 81 identify .jpg or image file locations, but link to Web pages that may contain hundreds of images, for many of which Perfect 10 has not alleged ownership of copyright. Macgillivray Decl. ¶24. When Dr. Zada identified a Web page with numerous images, Google would be able to process the *Web* page to block it from appearing in response to a Google Web Search (which Google did) but would not be able to prevent a specific image from appearing in response to a search on Image Search, because no *image* file would have been identified and Google did not have the necessary information to block the image. Macgillivray Dec. ¶24.

Google analyzed the 470 URLs identified by Dr. Zada in his Exhibit 81. Of those 470 URLs, before Perfect 10 filed this motion, Google had already processed 414 of them to block them from appearing in response to a Google Web Search. Of the 56 remaining URLs, 21 are not true URLs, but rather end in ellipses and are not fully qualified URLs. Macgillivray Dec. ¶25. Of the 35 remaining URLs, nine are either inactive or do not contain any images of women, other than images that have no connection to rights asserted by Perfect 10. Declaration of Susan E. Lee, ¶2.

[9] Processing termination notices, particularly those that list hundreds or thousands of URLs, like Dr. Zada's, is an involved process. First, the notice is routed to the proper person for handling (a process that is delayed when the sender does not include recipient information, as was the case with a number of Dr. Zada's notices), then the data from the notice must be hand entered and checked, then the allegedly infringing URLs must be reviewed, and questionable URLs re-reviewed, then a list is made and submitted for a check against the URLs in Google's index. Only at that point can a removal happen, which must then be carried out on Google's numerous servers. Macgillivray Dec. ¶23.

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1 Google continues to promptly process new notices from Dr. Zada that
2 substantially conform with Section 512(c). Macgillivray Dec. ¶22.

III. ARGUMENT

A. PERFECT 10 HAS FAILED TO JUSTIFY A PRELIMINARY INJUNCTION BECAUSE IT HAS NOT ESTABLISHED PROBABLE SUCCESS OR SERIOUS QUESTIONS, IT HAS NOT SHOWN IMMEDIATE IRREPARABLE HARM, IT DRAGGED ITS FEET, THE BALANCE OF HARMS IS UNFAVORABLE, AND THE PUBLIC INTEREST OPPOSES AN INJUNCTION.

A preliminary injunction is inappropriate unless a "plaintiff can show either: (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tilts in the plaintiff's favor." *Elvis Presley Ents., Inc., v. Passport Video*, 349 F.3d 622, 627 (9th Cir. 2003). Preliminary injunctions are not appropriate "[w]here no new harm is imminent, and where no compelling reason is apparent." *Oakland Tribune, Inc. v. Chronicle Publishing Co, 762* F.2d 1374, 1377 (9th Cir. 1985). A party seeking a mandatory injunction must meet a higher standard, showing a clear likelihood of success. *Dahl v. HEM Pharmaceuticals Corp.,* 7 F.3d 1399, 1403 (9th Cir. 1993)).

"The plaintiff's burden of showing a likelihood of success on the merits includes the burden of showing a likelihood that it would prevail against any affirmative defenses[10] raised by the defendant." *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559, 1562 (S.D. Cal. 1996), *aff'd,* 109 F.3d 1394 (9th Cir. 1997) (citing *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 837 (Fed. Cir. 1992)); *Religious Tech Ctr. v. Netcom On-Line Comm'n Servs.,* 923 F. Supp. 1231, 1242 n. 12 (N.D. Cal. 1995) ("*Netcom*").

Moreover, a movant must show not only irreparable harm but also immediate

[10] While Perfect 10 bears the burden on the motion even if fair use is an affirmative defense, Google does not concede that fair use is one. *See Sony Corp. of Am. v. Universal City Studios,* 464 U.S. 417,434 (1984) (referring to plaintiff's burden); 17 U.S.C. §107 (fair use as limitation on exclusive rights of section 106); Supp. Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., Copyright Law Revision Part 6 (House Committee Print 1965) at 28 (rejecting proposal to put burden on fair user in language that became the 1976 Copyright Act).

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harm if an injunction does not issue. *Caribbean Marine Services Co., Inc. v. Baldrige,* 844 F.2d 668, 674 (9th Cir. 1988). Delay "implies a lack of urgency and irreparable harm." *Oakland Tribune,* 762 F.2d at 1377.

B. PERFECT 10 CANNOT ESTABLISH PROBABLE SUCCESS OR SERIOUS QUESTIONS ON THE MERITS.

1. Google's Search Engine Operations Are Fair Use.

The fair use doctrine helps to fulfill, and is not in derogation of, the objectives of copyright law. *See* P. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990) ("Leval"); *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994). Copyright's constitutional purpose is to "promote Progress of Science and the Useful Arts," U.S. Const. art. I, §8, cl. 8, and the nonexclusive statutory factors in 17 U.S.C. §107 are to be considered "in light of the objectives of copyright law," *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).

Perfect 10's fair use analysis misses both the forest *and* the trees. In addition to incompletely and in many cases erroneously analyzing the nonexclusive statutory fair use factors, Perfect 10 conspicuously disregards the overarching principle from which the fair use doctrine naturally flows. Copyright law, after all, "is designed . . . to stimulate activity and progress in the arts for the intellectual enrichment of the public." Leval at 1107. "From its beginning, the law of copyright has developed in response to significant changes in technology," *Sony Corp.*, 464 U.S. at 430; *see also Atari*, 975 F.2d at 843 (citations omitted). The Ninth Circuit has specifically recognized the fair-use value of "improving access to information on the Internet." *Kelly,* 336 F.3d at 819. When tested by all relevant factors and considerations, any "use" by the Google search engine operation here is fair.

a. The Purpose And Character Of The Use

The preamble to the fair use statute lists several purposes that typically give rise to fair use, including "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. §107. As

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shown below, courts also evaluate the public interest in a fair use.

The purpose and character of each of the Google search engine's challenged operations[11] weigh overwhelmingly in favor of fair use. **Google's purpose and use are not to exploit Perfect 10's works.** They are (1) to index as broadly as reasonably possible the universe of information on the World Wide Web and (2) to locate, identify, and rank pointers to information relevant to users' research. Google is one of the most important research tools in the world, improving access to information on the Web, and it also has a significant role in news reporting and commentary.

Courts have recognized that intermediate copying may be required to achieve lawful purposes, and they recognize some intermediate copying as fair use. *See Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 602-03 (9th Cir. 2000). Fair use can be based on unauthorized copies. *See NXIVM Corp. v. The Ross Inst.*, 364 F.3d 471, 477-80, 482 (2d Cir. 2004).

Google's Web Search cache is an essential component of Google's search operation. Levine Dec. ¶20. The purpose and character of Google's Image Search cache, to present thumbnail indexes of links to Web searchers so that they may better find relevant images, are indistinguishable from those that *Kelly* validated and permitted. Google, like Arriba's search engine, "functions as a tool to help index and

[11] Perfect 10 alleges the following are direct infringements: (1) Google's "caching," or storage, of copies of Web pages and files as the foundation of its search engine index; (2) Google's presentation of reduced-size "thumbnail" images in response to user searches; (3) Google's providing a link from thumbnails to the underlying Web pages; and (4) "framing," the triggering of a Web browser function to display both Google's search result and the underlying Web page in adjoining windows on the browser's interface. Perfect 10 alleges these violate its rights of reproduction, "distribution," and display under 17 U.S.C. §106. The so-called "distribution" right is not implicated here. The specific right identified in the Copyright Act is "to distribute copies or phonorecords of a copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. §106(3). "Copies" and "phonorecords" are both defined in 17 U.S.C. §101 as "material objects." There is no suggestion that Google either engages in or assists in the distribution of any material objects, and without that there is no valid distribution claim. *See Agee v. Paramount Comm'ns*, 59 F.3d 317, 325-26 (2d Cir. 1995). Moreover, there is no allegation that Google has engaged in "sale or other transfer of ownership, or . . . rental, lease, or lending" of copies as required by section 107. The direct infringement claim must therefore be limited to assertion of the reproduction and display rights.

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improve access to images on the internet and their related web sites." *Kelly*, 336 F.3d at 818. Moreover, the thumbnail search results are transformative because they are low-resolution extracts of the original images that serve an entirely different purpose: information location.

Perfect 10 argues that, because Google's thumbnails are similar to cellphone downloads that Perfect 10 sells, Google's use is therefore not transformative. This argument is misguided. Google's image search use significantly different from the use of any individual Perfect 10 works, even if the images may appear on similar devices. Google is not marketing or exploiting particular works; rather, as in *Kelly*, Google is helping users locate Web-based information.

Google's linking and framing – which are features of the Web and browsers in general, not peculiar to Google – do not constitute reproduction, display, or distribution of images *by Google.*[12] Any reproduction or display emanates from the host of the linked or framed Web page. Levine Dec. ¶24. In any event, Google's framing and linking are integral to its function in promoting research and access to information on the Internet, as well as a kind of news reporting service regarding the online world. *Cf. Italian Book Corp. v. American Broadcasting Co.*, 458 F. Supp. 65, 70-71 (S.D.N.Y. 1978).

The fact that the Google search engine is part of a commercial enterprise presents little obstacle to a finding of fair use. Commercial uses are readily found by courts to be fair uses. In *Netcom,* the court stated: "Netcom's use, though commercial, also benefits the public in allowing for the functioning of the Internet and the dissemination of other creative works, a goal of the Copyright Act." *Netcom,* 907 F. Supp. at 1379 (citing *Sega Enter. Ltd. v. Accolade, Inc.,* 977 F.2d 1510, 1522 (9th Cir. 1993)). In *Kelly,* 336 F.3d at 818, the Ninth Circuit found that a commercial

[12] Perfect 10's reliance upon a vacated Ninth Circuit opinion for the support that the display right is implicated by linking or framing indicates the poverty of its argument. It laments (PIM at 12 n.6) that the opinion was "vacated on procedural grounds"; in fact, the Ninth Circuit withdrew an ill-advised treatment of an issue not briefed or addressed in the district court.

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search engine's reproduction of thumbnail images in users' searches for the images themselves was a fair use and that the commercial nature of the search engine's business mattered little to the analysis. *Id.* The Court noted that the search engine "was neither using Kelly's images to directly promote its web site nor trying to profit by selling Kelly's images. Instead, Kelly's images were among thousands of images in [the] search engine database." *Id.* The same is true of Google.

b. The Nature Of The Copyrighted Work

Perfect 10 is in an awkward spot on this factor. Greater creativity of a plaintiff's work tends against fair use, and a greater factual basis or functionality of a work tends toward fair use.

Perfect 10 hardly mentions any creative component to its works. It does not promote the identity of its photographers or advertise creativity. Bridges Dec. ¶¶5-6 and Ex. D. To the contrary, it emphasizes the objects of the photographs (nude women) and assumes that persons seeking Perfect 10's photos are searching by model name for the models and for sexual gratification,[13] not for creative photography. *Id.* This implies a factual nature of the photographs, which keeps this factor from working in Perfect 10's favor. *See Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) (second fair use factor neutral regarding nude photos).

c. The Amount And Substantiality Of The Portion Used In Relation To The Copyrighted Work As A Whole

In a number of contexts even the reproduction of full works is sufficiently transformative -- purpose adding -- and sufficiently important to society that application of the fair use principle is appropriate. *See* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 13.05[D][2], p. 13-222 ("Nimmer on Copyright"). *Kelly* explained, "the extent of permissible copying varies with the purpose and character of the use. If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or

[13] *See Mansions of Eden* at 86 (explaining inspiration for Perfect 10 magazine with reference to readers' sexual gratification) (Bridges Dec. Ex. O).

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her." *Kelly*, 336 F.3d at 820-21.

Google does not copy Perfect 10's magazine or Web site (Google respects robot exclusion practices that are customary on the Web), although it may copy a few pages of the Web site that Perfect 10 apparently wishes to have indexed. Plaintiff is not suing Google for those things. Plaintiff is suing for copies allegedly made, and search results delivered, in the course of Google's broad Web search functions. Those copies of individual images are allegedly from third-party Web pages and files that have been copied and indexed as an integral part of the Google search engine's functions. Macgillivray Dec. ¶5; Levine Dec. ¶25.

Google's thumbnail images in Image Search results are necessary to describe the results, as there is no satisfactory verbal alternative. *See Kelly,* 336 F.3d at 821. No verbal index of the *content* of images is feasible; Google has only a verbal index of their *context.* Macgillivray Dec. ¶6. Perfect 10's insistence that Google could employ text to describe indexed images is unfounded. Levine Dec. ¶22.

The Google search engine's low-resolution thumbnails and the thumbnails approved in *Kelly* have similar proportions in relation to the underlying works and cannot be said to embody the heart of the full size works. *See also Bill Graham Archives LLC v. Dorling Kindersley Ltd.*, No. 03-9507, 2005 WL 1137878, at *6 (S.D.N.Y. May 12, 2005) (third factor favored using thumbnails to commemorate music history); *Kelly,* 336 F.3d at 821. This factor favors fair use.

d. The Effect Of The Use Upon The Potential Market For And Value Of The Copyrighted Work

"A transformative work is less likely to have an adverse impact on the market of the original than a work that merely supersedes the copyrighted work." *Kelly*, 336 F.3d at 821 (citing *Campbell*, 510 U.S. at 591).

Google's search and its use of thumbnails are transformative. They do not compete with the "high quality" photography that Perfect 10 claims, *cf.* Zada Dec. ¶11: Perhaps recognizing that difficulty, Perfect 10 instead focuses on its recent entry

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into the cellphone download marketplace and argues that market is threatened by Google. Even on this front Perfect 10 falls short: Perfect 10 admits (PIM at 18) this market is growing, despite Google's delivery of thumbnail search results. The Moreau Declaration actually supports the peaceful coexistence of Google search results and Perfect 10's new cellphone business model.

Perfect 10 asserts that Google replaces Perfect 10's Web site and magazine by linking to and framing unauthorized copies of images. PIM at 12. The links and frames themselves, however, cannot replace Perfect 10 images and Perfect 10 again offers only conjecture, not evidence, regarding an effect on its customer base.

e. The Public Interest

Since codification of the fair use factors, courts have continued to view the public interest as a fair-use lodestar. *See, e.g., Sony Computer Entm't. America, Inc. v. Bleem, LLC*, 214 F.3d 1022, 1027 (9th Cir. 2000); *Sega*, 977 F.2d at 1522; *see also* 4 *Nimmer on Copyright*, § 13.05[B][4], at 13-216. As in Kelly, there is a strong public interest in Google's fostering access to information.

Considering all the fair use factors, the constitutional objectives of copyright, and the public interest, Google's uses are fair. Even if there were any doubt on the issue, Perfect 10 has not met its burden of showing, in this preliminary injunction posture, a likelihood of success that it will prevail on the fair use issue. Perfect 10 Is Not Likely To Prevail On Its Claims That Google Is Secondarily Liable For Copyright Infringements.

2. Perfect 10 Is Not Likely To Prevail On Its Claims That Google Is Secondarily Liable For Copyright Infringements.

Perfect 10 also cannot establish that Google should be held secondarily liable for the infringements of others. To establish secondary liability, Perfect 10 must establish direct infringement by third parties. Perfect 10 asserts that occurs in three ways: (1) third parties whose Web sites and files are indexed in Google's search

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results are "reproducing, displaying, and distributing"[14] Perfect 10 copyrighted images; (2) "Google users engage in direct infringement when a separate infringing copy is made on their own computers as a Perfect 10 image is transmitted to them from Google's Web site"; and (3) Google users obtain passwords to gain unauthorized access to Perfect 10's Web site. PIM at 20. Perfect 10 cannot show that Google is liable for the alleged infringements.

a. Perfect 10 Is Not Likely To Succeed On Its Claim of Contributory Copyright Infringement.

To prevail on a claim for contributory infringement, Perfect 10 must show that (1) Google had knowledge of the allegedly infringing activity; and (2) with that knowledge Google induced, caused, or materially contributed to that infringing activity. *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004). Perfect 10 cannot establish that Google materially contributes to infringements by either third-party Web sites or Google's users.[15] *See Sony Corp.,* 464 U.S. at 439-442.

Perfect 10 argues that Google's provision of links to Web sites and display of images in response to search requests constitute material contribution to infringement by the Web sites. PIM at 20-21. Perfect 10 asserts that infringing sites have "reproduce[d], display[ed], and distribut[ed]" Perfect 10 copyrighted images, by displaying or making available Perfect 10 copyrighted images on their Web pages. PIM at 2. There is no evidence that Google assisted those sites in scanning photos or downloading them from Perfect 10, copying them to servers, or posting them to the

[14] As noted above at n. 11, distribution is not properly at issue here.

[15] Perfect 10 also fails to show Google's knowledge of infringing activity. Perfect 10 argues that Google has knowledge of third party infringements based upon (1) notices sent to Google by Dr. Zada; (2) because certain images contain "Perfect 10 copyright notices, or labels such as 'P10 Fall 1999'"; and (3) because Google monitors the content of allegedly infringing Web sites through its AdSense program. PIM at 20. None of these allegations establish knowledge. As discussed above, Google responds to notices from Dr. Zada. Perfect 10 fails to establish how the fact that third party websites might contain certain images with Perfect 10 copyright notices would give Google knowledge of third party infringements. Finally, as stated above, Perfect 10 has cited to a year-old version of Google's AdSense Policies to assert that Google "monitors the content" of Web sites that participate in AdSense; that policy has since changed.

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Web. Google neither provides the instrumentality for, nor induces, such infringements by third-party Web sites. The Google search engine's indexing of those sites and inclusion of them in search results is insufficient to establish material contribution to the alleged infringing activity. Nor has Google contributed to infringing "distribution of copies" by Web sites because, as shown above at n. 11, there is no relevant distribution of material objects. With respect to the Web sites' alleged public display of infringing photos, that activity takes place between the Web site host and the Web user, mediated by a Web browser such as Internet Explorer or Netscape. While Google furnishes a link to the underlying Web page, that link is a normal concomitant of Web-based reference; indeed the Web itself is an enormous collection of hyperlinks, and Google uses the same Web tools as every other Web site. Levine Dec. ¶10.

Perfect 10 cites (PIM at 21) *Intellectual Reserve v. Utah Lighthouse Ministry,* 75 F. Supp. 2d 1290 (D. Utah 1999), to claim that material contribution arises from links to sites containing infringing works. That case is vastly different. In that case defendants had been previously enjoined from infringing the plaintiff's book on their own Web site. After they were enjoined, they posted specific instructions for finding other infringing sites, and they encouraged others to visit those sites, print copies of the book, and send the book to others. *Id.* at 1292. Even on that evidence, the court held that the plaintiff had not shown that the defendant contributed to the infringements of the Web site operators because there was no evidence of a direct relationship between the defendants and the operators. *Id.* at 1293. The court instead found that defendants contributed to infringement by those who browsed the Web sites because of the defendant's *active encouragement* of the infringement. *Id.* at 1294. Perfect 10 can point to no similar evidence that Google actively encouraged infringement.[16]

[16] In a similar vein, Perfect 10 also argues that Google "induces" infringement by third parties, citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.,* 15 S.Ct. 2764 (2005). PIM at 20-21, fn. 10. In *Grokster,* the Supreme Court held that "one who

Nor can Perfect 10 establish that Google materially contributes to any underlying infringement by its users. There are countless ways Google searchers can "use" Google's search results, including fair uses, and Perfect 10's evidence is missing on this point. Google's general purpose search engine is very different from specialized pornographic search engines on the Web. *See* Bridges Dec. ¶13 and Ex. N. Google is shielded from a finding of liability under *Sony Corp.,* 464 U.S. at 430. In that case the Supreme Court held that one who furnishes a copying technology to the public will not be liable for copyright infringement merely because the product may be used for infringing purposes. The Court held that, to avoid liability, the product "need merely be capable of substantial noninfringing uses." *Id.* at 422. Google's search engine is unquestionably capable of substantial noninfringing uses. Levine Dec. ¶14.

b. Perfect 10 Is Not Likely To Succeed on Its Claim of Vicarious Copyright Infringement.

To prevail on its claim for vicarious liability, Perfect 10 must prove that Google (1) possesses the right and ability to supervise the infringing conduct and (2) has an obvious and direct financial interest in the infringing activity. *Ellison*, 357 F.3d at 1079; *Adobe Systems*, 173 F.Supp. 2d at 1049; 3 Nimmer on Copyright § 12.04[A][1]. Perfect 10 cannot establish that Google has the right and ability to supervise allegedly infringing activity.[17]

The supervision must be related to the infringing activity to support vicarious liability. Even in the parent-subsidiary corporate context, "a parent corporation cannot be held liable for the infringing actions of its subsidiary unless there is a

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distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third partiers." *Id.* at 2780. Perfect 10 has adduced no evidence supporting a claim under *Grokster*.

[17] Perfect 10 also fails to show Google's direct financial interest in the infringing activity, but space constraints prevent Google from addressing this further in light of Perfect 10's failure on the control prong of the test.

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substantial and continuing connection between the two with respect to the infringing acts." *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.* 886 F.2d 1545, 1553 (9th Cir. 1989). "[T]here must be indicia beyond the mere legal relationship showing that the parent is actually involved with the decisions, processes, or personnel directly responsible for the infringing activity." *Banff Ltd. v. Limited, Inc.*, 869 F. Supp. 1103, 1109 (S.D.N.Y. 1994); *see also Adobe Sys., Inc. v. Canus Prods.*, 173 F.Supp. 2d 1044, 1053 (C.D. Cal. 2001).

Nor can Perfect 10 establish that Google directs any infringing activity within the allegedly infringing Web sites, that Google pre-approves any infringing content, or that Google has any ability to affect or control infringing conduct by third parties. Google does not have any editorial or other control rights over the design, hosting or transmission of any graphical materials, or any ability to dictate content.[18] Macgillivray Dec. ¶7.

Perfect 10's claim that Google has a duty to patrol and preclude access to potentially infringing files or else face liability is unsupportable. Perfect 10 argues that Google is "vicariously liable when it fails to affirmatively use its ability to patrol its system and preclude access to potentially infringing files listed in its search index, especially when provided the location of such files." PIM at 24. Perfect 10 cites *A & M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1027 (9th Cir. 2001), in support. But *Napster* dealt with a proprietary, closed system where Napster may have "retains the right to control access to its system." *Id.* at 1023. The Web is vastly different. It is an open system not under Google's control. Imposing such a duty on Google would

[18] Perfect 10 argues that Google's AdSense contracts give Google the right to "'monitor' the websites of its advertising partners and to terminate those that infringe." PIM at 23. The ability to terminate AdSense contracts, however, does not demonstrate Google's right and ability to control *infringing activity*. *Cf. Perfect 10, Inc. v. Visa Int'l. Serv. Ass'n., et al.*, No. C 04-00371, Order Granting Defendants' Motion to Dismiss First Amended Complaint ("All that Plaintiff has alleged is that Defendants could terminate their business relationships with the Stolen Content Websites. . . . Economic influence is not the type of 'control' over infringing activity which vicarious copyright infringement addresses") (Bridges Dec. Ex. L.)

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San Francisco, CA 94111-5894

require it to police the entire Internet. Levine Dec. ¶26.

3. Section 512(j) Limits The Scope of Any Injunctive Relief.

Even if the Court were to find a likely infringement and contemplate an injunction, the injunction sought by Perfect 10 far exceeds the scope permitted under Section 512(j) of the DMCA, 17 U.S.C. §512(j), which limits injunctive relief available for copyright infringement in certain cases involving online service providers. *See Corbis Corp. v. Amazon.com*, 351 F. Supp. 2d 1090, 1099 (W.D. Wash. 2004). The limitations apply here because Google qualifies as (1) a "service provider" that (2) "is not subject to monetary remedies under this section." Perfect 10 cannot seriously challenge Google's status as a "service provider" within the statute. The second phrase refers to safe harbors available under subsections (a) through (d) of section 512.

Google is not subject to monetary remedies because Google is protected by the Section 512 safe harbors created by Congress. Section 512(d)'s safe harbor for "information location tools" provides that:

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

Google falls within this section because its search engine refers or links users to online locations using indexes and hypertext links.[19]

Google qualifies for the safe harbor as set forth in both sections 512(d) and 512(i). Google (1) neither has actual knowledge of, nor is aware of, apparent infringing activity and acts expeditiously to remove or disable access to material upon gaining such awareness; (2) does not derive financial benefit where it has the right and ability to control infringing activity; and (3) upon notification of a claimed infringement expeditiously removes or disables access to material identified by its

[19] Google omits the other available safe harbors because of space constraints.

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reference or link. 17 U.S.C. §512(d). Macgillivray Dec. ¶8. Google also "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(d)(2). Google does not have the right and ability to control the alleged infringing activity because Google can only exclude Web pages and files from search results; and it cannot exclude third parties from the Web.[20] Macgillivray Dec. ¶8. This Court need not reach the issue of a direct financial benefit (which Google does not concede).

Section 512(i) requires that a service provider (a) reasonably implement a policy regarding termination of account holders and subscribers who are repeat infringers and (b) accommodate and respect standard technical measures to inhibit copyright infringement. Under Section 512(i)(A), "Congress requires reasonable implementation of a repeat infringer policy rather than perfect implementation." *See Perfect 10 v. CCBill,* 340 F. Supp.2d at 1089. In Google's case, its search engine operates across the open Web, and Web sites are not "account holders and subscribers." Google cannot terminate access to the Web. Nevertheless, Google devotes significant efforts to claims that particular pages or files are infringing; it regularly suppresses pages or files in its index upon complaint (including complaints by Perfect 10),[21] and it respects technical measures.[22] Google thus meets the

[20] Google's ability to remove or block sites from appearing in its search results does not evidence the right and ability to control. As this Court held when Perfect 10 made the same argument in the past, the "right and ability to control infringing activity, 'as the concept is used in the DMCA, cannot simply mean the ability of a service provider to remove or block access to materials posted on its website or stored in its system.'" *Perfect 10, Inc. v. CCBill, LLC,* 340 F. Supp.2d 1077, 1098 (quoting *Costar Group v. Loopnet,* 164 F. Supp. 2d 688, 704 (D.Md. 2001); *see Perfect 10 v. Cybernet Ventures,* 213 F. Supp. 2d 1146, 1181 (C.D. Cal. 2002) ("closing the safe harbor based on the mere ability to exclude users from the system is inconsistent with the statutory scheme").

[21] Google does not review entire domains, as requested by Perfect 10. Many domains contain many "sites" and many pages sponsored by different parties. Geocities, for example, has one domain at geocities.com that hosts numerous sites. Suppression of an entire domain would be vastly overbroad. Nor can Google take on the duty of investigating how many sites are at a single domain and of determining which pages

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requirements under Section 512(i).

Because Google qualifies under the Section 512(d) safe harbor, the Court must take into account the limitations of Section 512(i)(1)(A) and the considerations set forth in Section 512(j)(2), including whether an injunction "would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations" and "whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available." These considerations counsel against any injunction here.

C. PERFECT 10 CANNOT SHOW IRREPARABLE HARM.

Perfect 10's brief discussion of harm offers a speculative conclusion without evidence and should carry no weight where Perfect 10 and Google are in different businesses. *Goldie's Bookstore v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984).

Perfect 10 relies on a presumption, but irreparable harm may be presumed in copyright cases only where the plaintiff has demonstrated a likelihood of success on the merits. *See, e.g., Softman Prod. Co. v. Adobe Sys., Inc.*, 171 F. Supp.2d 1075, 1089 (C.D. Cal. 2001). Perfect 10 has not.

Furthermore, unreasonable delay rebuts any such presumption of immediate harm. *Cf. Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 828 (9th Cir. 1997). "[L]ong delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune,* 762 F.2d at 1377.

Perfect 10 claims it first sent Google notices of infringement in May 2001. Zada Dec. ¶76. Perfect 10 waited three and a half years before filing this lawsuit. Even after filing suit, Perfect 10 waited another nine months to seek a preliminary injunction. While Perfect 10 alleges that it was not aware of Google Image Search

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constitute a single "site." Google's search focus is on Web pages and files, and that is where it applies its suppression efforts. Macgillivray Dec. ¶17.

[22] Google accommodates standard technical measures by respecting robot exclusion protocols on the Web and by not altering protection measures that may be embedded in Web pages or files. Macgillivray Dec. ¶18.

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until May 2004, Zada Dec. ¶76, it still delayed 16 months after that point.

Courts have found even shorter periods of delay to prevent a finding of immediate irreparable harm. *See, e.g., Metro-Media Broad. Corp. v. MGM/UA Entertainment Co.,* 611 F. Supp. 415, 427 (C.D. Cal. 1985) (four months delay); *Tough Traveler, Ltd. v. Outbound Prods.,* 60 F.3d 964, 969 (2d Cir. 1995) (nine months after discovery before suing and four more months before seeking preliminary relief); *Citibank N.A. v. Citytrust,* 756 F.2d 273, 276 (2d Cir. 1985) (over ten weeks after learning directly of harm and nine months after discovery through press).

Moreover, the evidence undercuts Perfect 10's claim of irreparable harm. First, from the outset there were questions whether Perfect 10's business would be profitable; Dr. Zada indicated he was willing to lose money to support his mission. *See* Bridges Dec. ¶7 and Ex. E. Second, Perfect 10 has a habit of crying "wolf" about intellectual property-related harms caused to it by many different businesses, most recently with respect to Visa and MasterCard. *See* Bridges Dec. ¶¶ 9-12 and Exs. G-M. Third, while the Moreau Declaration implies that Google search results on mobile phones threaten Perfect 10's cellphone image market, the declaration shows that market to thrive despite Google's search results. Taking the evidence and the delay into account, this factor weighs so heavily against Perfect 10 that an injunction must be denied on this basis alone.

D. THE BALANCE OF HARDSHIPS DISFAVORS AN INJUNCTION.

Perfect 10 will suffer no hardship waiting for conclusion of the case, given its inordinate delay so far, but by contrast the requested injunction would impose a heavy and continuous, if not impossible, burden on Google. Perfect 10's proposed injunction has four significant flaws. First, Perfect 10 requests that the Court order Google to comply with yet unidentified notices that it may issue monthly, in the case of disabling the display of images, and potentially continuously, in the case of disabling Web sites containing infringing content. Such an injunction essentially gives Perfect 10 an inappropriate function as a special master, with the power to

establish obligations of Google that may be enforceable by contempt of Court and without the Court's own review of Perfect 10's claims.[23]

Second, the requested injunction would require Google to identify and suppress images that Perfect 10 identifies when no technology yet exists that would allow Google to comply. The proposed injunction orders Google, with only a copy of the image in hand, to "delete and disable its display of all images" within ten business days of notice by Perfect 10 of a copyrighted image, and then continuously conduct searches for these image in order to "not display such images in the future." Image recognition technology is not available for Google's search engine. Levine Dec. ¶22.

Third, the requested injunction requires Google to omit Web sites containing infringing content in the future by screening the entire Web for allegedly infringing items before indexing pages. Fourth, the injunction would be overbroad both on equitable principles and under 17 U.S.C. §512(j) by forcing Google to suppress entire Web sites, not just infringing pages or files.

Courts have found such burdens to be impermissible. *See, e.g., Hendrickson v. EBay, Inc.,* 165 F. Supp. 2d 1082, 1095 (C.D. Cal. 2001).

In weighing the balance, the Court must recognize that Google has already been suppressing search results based on notices it received from Perfect 10. Macgillivray Dec. ¶25. Perfect 10 wants an injunction that requires more than the law permits or Google can do. The balance weighs against an injunction.

E. THE PUBLIC INTEREST OPPOSES AN INJUNCTION.

The value of facilitating and improving access to information on the Internet, as the Ninth Circuit recognized in *Kelly, Sega,* and *Netcom,* and of facilitating broad

[23] Google recognizes that in *A & M Records, Inc., v. Napster, Inc.*, 284 F.3d 1081 (9th Cir. 2002), the court approved an injunction that required Napster to remove from its system index files available on its system that were identified by the plaintiffs as infringing. That injunction arose against a very different background, where (1) Napster's system was a proprietary one unlike the Web;, (2) the district court found virtually all the content in the Napster system was infringing and there was actual evidence of massive infringements, and (3) there were no substantial public interest or First Amendment concerns in Napster's favor. *See A & M Records, Inc. v. Napster, Inc.,* 114 F. Supp. 2d 896 (N.D. Cal. 2000).

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research and news reporting, counsels strongly against an injunction here. The Supreme Court has cautioned that "while in the 'vast majority of cases, [an injunctive] remedy is justified because most infringements are simple piracy,' such cases are 'worlds apart from many of those raising reasonable contentions of fair use' where 'there may be a strong public interest in the publication of the secondary work [and] the copyright owner's interest may be adequately protected by an award of damages for whatever infringement is found.'" *Campbell*, 510 U.S. at 578, n.10 (*quoting* Leval at 1134); *see also Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (11th Cir. 2001). In this case with such an important fair use issue, the Court should be reluctant to enter a preliminary injunction.

F. A MASSIVE BOND IS REQUIRED FOR ANY INJUNCTION.

Perfect 10 has failed to address the bond requirement of Rule 65(c), Fed. R. Civ. P. in its motion and brief. If the Court is inclined to enter an injunction, Google requests leave to file supplemental briefing regarding the bond because Google's potential losses arising from the hobbling of its search engine would be staggering.

IV. CONCLUSION

Because Perfect 10 fails to establish Google's direct or secondary liability; because Perfect 10's delay and other factors make clear that it is suffering no immediate and irreparable harm; because the balance of hardships tilts strongly against an injunction, especially in light of Google's procedures for responding to notices; and because the public interest favors robust access to information without hobbling the world's most valued search engine, the Court should deny Perfect 10's motion for preliminary injunction.

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