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13
14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA

16 PERFECT 10, INC., a California
corporation,

17 Plaintiff,

18 v.

19 GOOGLE, INC., a corporation; and
20 DOES 1 through 100, inclusive,

21 Defendants.

CASE NO. CV 04-9484 AHM (SHx)

**NOTICE OF MOTION AND
MOTION OF PLAINTIFF PERFECT
10, INC. FOR PRELIMINARY
INJUNCTION; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: September 19, 2005

Time: 10:00 a.m.

Ctrm: The Honorable A. Howard Matz

22
23 **TO DEFENDANT GOOGLE, INC. AND ITS ATTORNEYS OF**
24 **RECORD:**

25
26 **PLEASE TAKE NOTICE** that on September 19, 2005, at 10:00 a.m., or as
27 soon thereafter as the matter may be heard, in the courtroom of the Honorable A.
28 Howard Matz, located at 312 N. Spring Street, Los Angeles, California, plaintiff

1 Perfect 10, Inc. ("Perfect 10") will and hereby does move for a preliminary
2 injunction enjoining Google, Inc. ("Google") from engaging in continuing acts of
3 copyright infringement. Specifically, Perfect 10 seeks an order in the form of the
4 [Proposed] Preliminary Injunction lodged herewith and which provides in
5 substance that:

6
7 Google, its parents, subsidiaries, affiliates, officers, agents, servants,
8 employees, and any persons acting in concert or participation with them are
9 preliminarily enjoined from:

10
11 (a) Copying, reproducing, distributing, publicly displaying, adapting or
12 otherwise infringing, or contributing to the infringement of any copyrighted image
13 owned by Perfect 10 which has been or will be identified in notices to Google
14 ("PERFECT 10 COPYRIGHTED IMAGES"). Perfect 10 will provide to Google
15 notice of PERFECT 10 COPYRIGHTED IMAGES within ten (10) business days
16 of the issuance of this Order, and may supplement that notice once each month.
17 Within ten (10) business days of the receipt of notice of PERFECT 10
18 COPYRIGHTED IMAGES, Google shall delete and disable its display of all such
19 images, including without limitation, deletion from any database owned or
20 controlled by Google, and shall not display such images in the future.

21
22 (b) Linking to websites which display or make available PERFECT 10
23 COPYRIGHTED IMAGES, for which Google has received notice ("Infringing
24 Websites"). Infringing Websites are (i) websites which were linked to by Google
25 as identified in any notice of infringement from Perfect 10 to Google prior to June
26 20, 2005 (Exhs. 40-73 of the Declaration of Norman Zada filed herein) and which
27 as of July 11, 2005, continued to display or make available PERFECT 10
28 COPYRIGHTED IMAGES on any of their web pages, or (ii) websites that in the

1 future continue to display or make available PERFECT 10 COPYRIGHTED
2 IMAGES on any of their web pages three (3) weeks after notice of such
3 infringement to Google. Within ten (10) business days of the receipt of each notice
4 of Infringing Websites, Google shall delete and disable all links to such Infringing
5 Websites from any website owned or controlled by Google and shall not link to
6 such Infringing Websites in the future.

7
8 (c) Copying, reproducing, distributing or publishing any username/
9 password combinations to perfect10.com or linking to any websites that provide
10 username/password combinations to perfect10.com which have been or will be
11 identified in notices to Google. Within ten (10) business days of the receipt of
12 notice, Google shall delete all username/password combinations to perfect10.com
13 and disable all links to any website that provides username/password combinations
14 to perfect10.com from any website owned or controlled by Google and shall not
15 publish such username/password combinations or link to such websites in the
16 future.

17
18 This Motion is made on the grounds that Perfect 10 has a probability of
19 success on the merits of its copyright infringement claims and there is the
20 possibility of irreparable harm and, alternatively, that serious questions are raised
21 by this Motion and the balance of hardships tilt in Perfect 10's favor.

22
23 This Motion is based on this Notice of Motion and Motion, the
24 accompanying Memorandum of Points and Authorities, the declarations of
25 Norman Zada, Dave Moreau, Jeffrey Mausner, and Patrick Swart, the Request for
26 Judicial Notice and Declaration of Russell J. Frackman, all records presently on
27

1 file with the Court, any reply Perfect 10 may make, and any argument that may be
2 advanced at or prior to the hearing on this Motion.

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Dated: August 24, 2005

RUSSELL J. FRACKMAN
JEFFREY D. GOLDMAN
MITCHELL SILBERBERG & KNUPP LLP

By *Russell J. Frackman*
Russell J. Frackman
Attorneys for Plaintiff

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H.R. Rep. No. 1476, 94th Cong., 2d Sess. 10

1 noninfringing operation of Google’s search engine. But it is necessary to protect the
2 foundation of Perfect 10’s business – the copyrighted works it created and owns.¹

3 **I. SUMMARY OF FACTS**

4 **A. Perfect 10’s Business and Intellectual Property**

5 Perfect 10 is the publisher of the well-known entertainment magazine
6 “PERFECT 10” and operates a subscription website, perfect10.com, which features
7 high-quality, nude photographs of beautiful, “natural” models. Declaration of
8 Norman Zada (“Zada Decl.”), ¶¶ 9-14. Since 1996, Perfect 10 has invested over
9 \$36,000,000, and substantial effort, to create its unique magazine (which sells for
10 \$7.99 per issue), website (which charges \$25.50 per month for access), and videos,
11 to produce about 6,000 high-quality copyrighted images, and to develop customer
12 goodwill. Id., ¶¶ 11, 16. Perfect 10 also sells approximately 6,000 cellular phone
13 downloads of reduced sized images per month. Id., ¶ 16. Other than the website of
14 its cell phone distribution partner, Perfect 10 has not authorized any third party
15 website to copy, display, or distribute copyrighted images it has created. Id., ¶ 17.

16 **B. Google’s Business and Its Infringement of Perfect 10 Images**

17 Google.com is the third most visited website on the Internet. Id., ¶ 18, Exh. 3.
18 Google offers users both a “Web Search” and an “Image Search.” Through “Web
19 Search,” Google provides text listings of web pages that it determines are related to
20 search terms used. Through “Image Search,” Google displays images it selects and
21 copies from third party websites. Id., ¶¶ 19-21, 49-51, 95, 109, 144, 150, Exhs. 4-5,
22

23 ¹ Much of the law (and many of the facts) supporting Perfect 10’s motion parallel
24 those in its previously-filed motion against Amazon.com, Inc. While both Google
25 and Amazon give away exactly what Perfect 10 sells, there are differences between
26 them. For example, Google also violates Perfect 10’s reproduction right, as it copies,
27 *onto its own website*, Perfect 10’s images from numerous infringing third party
28 websites. (Amazon appears to obtain from Google some or all of the Perfect 10
images it displays and distributes.) And while both use Perfect 10’s copyrighted
works for commercial purposes, their business ends differ: Amazon is an Internet
retailer that uses images to drive traffic to its website to sell more goods; Google is in
the advertising business and uses images to drive traffic to its website and sell more
advertising at higher rates.

1 19-21, 80, 92, 111, 116. Google makes most of its money from the sale of
2 advertising. Zada Decl. ¶ 24, Exh. 6, page 99; Google, Inc., Annual Report (Form
3 10-K) [Request for Judicial Notice, Exh. A] at 2 (March 30, 2005) (“Google 10-K”).

4 **1. Google Copies Perfect 10 Images.**

5 Google searches out and copies Perfect 10 copyrighted images from third
6 party websites (“Infringing Sites”) that have themselves stolen these images. Zada
7 Decl. ¶¶ 21, 109, 144, Exhs. 5, 92, 111. Google obtains the specific images it
8 provides through a sophisticated, proprietary algorithm that locates and selects
9 images by analyzing “the text on the page adjacent to the image content, the image
10 caption, and dozens of other factors to determine the image content.” *Id.*, ¶ 21. See
11 Search King, Inc. v. Google Tech., Inc., 2003 WL 21464568 at *3-4 (W.D. Okla.
12 2003) (Google’s search algorithms reflect Google’s “subjective opinion”). Google
13 admits it “can control which images will appear...as a result of a Google image
14 search on a particular term.” Declaration of Jeffrey W. Mausner (“Mausner Decl.”),
15 Exh. 118, Response to RFA 265. Google also admits it can prevent a particular
16 image associated with a specific URL, or even the URL itself, from appearing in its
17 search results as a link. *Id.*, Response to RFA 245, 247-254, 302, 304. Google
18 controls what is in its search results and can change or delete those results, even
19 excluding duplicate images. See Memorandum in Opposition to Motion for
20 Preliminary Injunction, Search King, Inc. v. Google Tech., Inc. (Dec. 30, 2002)
21 [Request for Judicial Notice, Exh. B] at 19 (“Google is under no obligation to
22 include every web page on the Internet Nor is Google obligated to maintain in
23 its index web pages it once decided to include.”).

24 **2. Google Displays and Distributes Perfect 10 Images.**

25 Through its Image Search, Google displays and distributes, without consent,
26 over 1,000 of Perfect 10’s best copyrighted images. Zada Decl., ¶ 23. Google
27 provides several ways for users to view Perfect 10 images, which are illustrated in a
28 CD entitled “The Google Experience” filed herewith. Zada Decl., Exh. 8.

1 **The first infringing page.** When a user types the name of a Perfect 10 model
2 into the search box on Google’s homepage, presses “enter,” and then clicks
3 “Images,” Google instantaneously displays on the user’s computer screen as many
4 as twenty reduced size Perfect 10 images on a page. (Additional images may be
5 displayed on additional pages.) Zada Decl., ¶¶ 27-37, 58, 92, 95, 104-108, 150,
6 Exhs. 8, 9, 26, 78, 80, 87-91, 116. These images are reduced in size from the
7 originals, but generally are significantly larger than a “thumbnail.” They are
8 comparable to images available only to subscribers to perfect10.com, and are the
9 same size and clarity as versions currently sold by Perfect 10 for download and
10 display on cell phones. Declaration of Dave Moreau, ¶ 6; Zada Decl., ¶¶ 54-56, 58,
11 Exhs. 23-24. In fact, Google *promotes* the downloading of such images onto cell
12 phones and provides instruction and help to enable users to do so. *Id.*, ¶ 55, Exh. 23.

13 **The second infringing page.** When a user clicks on one of these reduced
14 size images, a second Google page appears which displays *another* infringing
15 reduced size Perfect 10 image, accompanied by a link stating “See full-size image”
16 and the message: “Image may be scaled down and *subject to copyright*.” *Id.*, ¶¶ 27-
17 30, 38-39, 114, Exhs. 8, 10-11, 96 (emphasis added). Clicking on this link often
18 enlarges the image to full size. *Id.*, ¶¶ 27-30, 38-39, 114, Exhs. 8, 11, 96.

19 Below the reduced-size image, in a large “window,” Google also displays the
20 portion of the Infringing Site from which the image was copied; this window often
21 contains a full size infringing image which *appears to the user to be on google.com*.
22 *The Google user does not need to leave google.com to view that image.* *Id.*, ¶¶ 27-
23 47, 61, 114, Exhs. 8-18, 28, 96. See Hard Rock Café Int’l (USA) Inc. v. Morton,
24 1999 WL 717995, *25 (S.D.N.Y. 1999) (“Through framing [two sites] are combined
25 together into a single visual presentation....”). The user may navigate through and
26 view different pages of the third party website (which often displays other infringing
27 Perfect 10 images) while the reduced size Perfect 10 image remains at the top of the
28 screen. Zada Decl., ¶¶ 40, 47, Exhs. 12, 18. Thus, Google keeps the user connected

1 to its own website, while the user can view, print, copy, or download infringing
2 Perfect 10 images. Zada Decl., ¶¶ 27-51, 61-64, Exhs. 8-21, 28-30.

3 **The infringing “cache” links.** As described above, when a Web Search is
4 conducted on the name of a Perfect 10 model, listings of web pages are returned.
5 With most such listings, Google provides a “cache link,” which Google says
6 displays a “snapshot” of the third party website when Google “crawled” it on a
7 prior, specific date. These “snapshots” often display full-size Perfect 10 images.
8 Id., ¶¶ 49-51, Exhs. 19-21, 85, 86. Although the term “cache” typically is associated
9 with temporary storage, some full size Perfect 10 images have been displayed by
10 Google in this manner for over a year – and even after the Infringing Site from
11 which Google obtained the image had removed it. Id. ¶¶ 50-51, Exhs. 20, 21.

12 **3. Google Links Perfect 10 Images To Infringing Websites From**
13 **Which Google Receives Revenue.**

14 Google not only copies and displays Perfect 10 images itself, but also links
15 them to Infringing Sites with which Google has partnered and from which Google
16 receives revenue through its “AdSense” advertising program. Google refers to these
17 third-party, AdSense websites as its “Network.” Zada Decl., Exh. 6, p. 98; Google
18 10-K at 21-23. Google places on AdSense websites targeted ads for products or
19 services related to the content of the websites, and shares with its AdSense websites
20 the revenue Google receives from these targeted ads. Zada Decl. ¶¶ 24, 25, Exhs. 6,
21 7. Google’s AdSense contracts state, among other things, that Google “reviews”
22 each AdSense website and “also monitor(s) sites after they begin running Google
23 ads under this program.” Id. ¶ 25, Exh. 7. Revenue from AdSense websites makes
24 up a significant portion of Google’s total revenue. For the quarter ending June 30,
25 2005, Google received \$1.384 billion in revenue, out of which \$630 million came
26 from Google’s partner sites, through AdSense programs. Zada Decl. ¶ 24, Exh. 6,
27 page 98.

1 When Google users click on reduced-size Perfect 10 images displayed by
2 Google, Google often transports them directly to Infringing Sites that are Google's
3 AdSense partners, and which display full size infringing Perfect 10 images *next to*
4 ads provided by Google from Google's advertisers (frequently identified as "Ads by
5 Goooooogle.") When users click on these advertisements, Google and the Infringing
6 Site share in the resulting revenue.² Zada Decl. ¶¶ 61-62, 25, Exh. 28, 83 L-Z, 7.
7 Despite notice from Perfect 10, in some cases 96% of Google web search results on
8 the names of Perfect 10 models lead to AdSense websites displaying infringing
9 Perfect 10 images. *Id.* ¶¶ 65-73, Exhs. 32-35.

10 **4. Google Provides Perfect 10 Passwords.**

11 Paid subscribers to Perfect 10's website, perfect10.com, need a unique
12 username and password to access and view Perfect 10's copyrighted images. In its
13 Web Search results, Google publishes on google.com hundreds of confidential
14 perfect10.com usernames and passwords in response to the query: "perfect10.com
15 passwords." Despite notice, Google has continued to publish these passwords,
16 thereby enabling unauthorized access to perfect10.com (and its copyrighted images)
17 in this manner. Zada Decl. ¶¶ 119-126, Exhs. 101-106. *See* 17 U.S.C. § 1201
18 (circumvention of copyright protection systems).

19 **C. Google's Refusal to Respond to Notices of Infringement.**

20 Since May 2004, Perfect 10 has sent Google thirty-four detailed notices of
21 infringement. Zada Decl., ¶¶ 76-88, Exhs. 37-74. These notices identified specific
22 infringing images displayed by Google; specific infringing web pages linked to by
23 Google; and the source of the Perfect 10 images infringed. *Id.* ¶¶ 86, 97. Although
24 Google's display and distribution of infringing images does not bring it within the
25 limitation on remedies of 17 U.S.C. § 512(d) of the Digital Millennium Copyright
26

27 ² Google advertisements also are displayed next to full size Perfect 10 images that
28 are "cached" on google.com, as well as on websites that provide perfect10.com
passwords. Zada Decl., ¶¶ 64, 125, Exhs. 30, 105.

1 Act (“DMCA”) (which applies to “referring or linking users” to another “online
2 location”), these notices complied with the DMCA’s “take down” requirements. 17
3 U.S.C. § 512(c)(3)(A).³ See, e.g., Zada Decl., ¶¶ 76-88, Exhs. 37-74. Nevertheless,
4 Google continues to display at least 1,043 Perfect 10 copyrighted images from the
5 exact same Infringing Sites and web pages identified in notices, in some cases sent
6 to Google 400 days earlier. Zada Decl. ¶¶ 96-102, 150-151, Exhs. 81-85, 116-117.
7 On August 12, 2005, Google added hundreds of additional Perfect 10 copyrighted
8 images to its image search results despite all of Perfect 10’s notices. Zada Decl. ¶¶
9 150-151, Exhs. 116-117.

10 Google’s conduct is exemplified by its infringement of images of Perfect 10
11 model Monika Zsibrita. Perfect 10 first notified Google on May 31, 2004, that it
12 was infringing specific images of Ms. Zsibrita. *Id.*, ¶¶ 90-91, Exhs. 40, 77. Since
13 then, the number of infringing images of Ms. Zsibrita displayed by Google has
14 *increased*, from 15 in June 2004, to 50 in July 2005, to most recently, 130 on
15 August 12, 2005. Google continues to display over 1,000 of the same images
16 identified in Perfect 10’s notices and has even added back images that were
17 identified in those notices. *Id.*, ¶¶ 92-102, 150-151, Exhs. 78-85, 116-117.

18 **II. PERFECT 10 HAS A HIGH PROBABILITY OF SUCCESS.**

19 “A preliminary injunction should be granted if a plaintiff can show either: (1)
20 a combination of probable success on the merits and the possibility of irreparable
21 harm; or (2) that serious questions are raised and the balance of hardships tilt in the
22

23 ³ Google does not qualify for “safe harbor” as an information location tool under the
24 DMCA for a number of additional reasons – one (but not the only) of which is its
25 failure to “expeditiously” remove infringing images after notice. 17 U.S.C. §
26 512(d)(3). Google’s “caching” of Perfect 10’s images also does not bring it within
27 the “system caching” safe harbor, as the DMCA requires storage to be “temporary,”
28 the material be made available online by the originating website, and the copy not be
changed in any way. 17 U.S.C. § 512(b)(2). Even if Google could qualify for either
safe harbor, Perfect 10 still would be entitled to injunctive relief under the DMCA,
17 U.S.C. § 512(j), as Google itself recognizes. Google 10K at 13, 54 (“the [DMCA]
has provisions that limit, but do not eliminate, our liability for listing or linking to
third-party web-sites that include materials that infringe copyrights...”).

1 plaintiff's favor." Elvis Presley Enters., Inc. v. Passport Video, 349 F.3d 622, 627
2 (9th Cir. 2003). Both standards are satisfied here.

3 **A. Google Is Liable For Direct Copyright Infringement.**

4 Copyright infringement is established if Perfect 10 shows that (1) it owns
5 copyrights in the photographs; and (2) Google violated one of Perfect 10's exclusive
6 rights. See Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361
7 (1991). Intent to infringe and knowledge of infringement are irrelevant. Pinkham v.
8 Sara Lee Corp., 983 F.2d 824, 829 (8th Cir. 1992).

9 **1. Perfect 10 Owns The Copyrights in Its Photographs.**

10 Photographs are copyrightable subject matter. See, e.g., Ets-Hukin v. Skyy
11 Spirits, Inc., 225 F.3d 1068, 1073-75 (9th Cir. 2000) (reviewing history of
12 photography as copyrightable artistic expression). Perfect 10's registration
13 certificates, Zada Decl., ¶ 15, Exh. 1, constitute *prima facie* evidence that (a) Perfect
14 10 owns the copyrights in its images, Hamil America, Inc. v. GFI, 193 F.3d 92, 98
15 (2d Cir. 1999); (b) the individual images are copyrightable, Perfect 10, Inc. v.
16 Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1166 (C.D. Cal. 2002); and (c) the
17 copyrights are valid. 17 U.S.C. § 410(c).

18 **2. Google is Reproducing Perfect 10 Reduced Size Images.**

19 Google infringes Perfect 10's *reproduction* right by using its proprietary "web
20 crawler" to copy infringing images from Infringing Sites by downloading selected
21 images. Zada Decl. ¶¶ 17, 49, 144, Exhs. 19, 111. Google also admits it stores
22 "reduced size extracts of images" on its servers. Mausner Decl., Exh. 118, Response
23 to RFA 24, 263. See Playboy Enters., Inc. v. Webworld, Inc., 991 F. Supp. 2d 543,
24 550 (N.D. Tex. 1997) (describing process), *aff'd*, 168 F.3d 486 (5th Cir. 1999);
25 Kelly v. Arriba Soft Corp., 336 F.3d 811, 815-16 (9th Cir. 2003) (defendant
26 "obtained its database of pictures by copying images from other websites" and
27 conceded *prima facie* case of violation of reproduction right). Copying a computer
28 file containing a copyrighted work is infringement. 17 U.S.C. § 106(1); see MAI

1 Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993); see also 2
2 M.& D. Nimmer, Nimmer On Copyright, § 8.08 [A][1] (2005 ed.) (“input of a work
3 into a computer results in the making of a copy, and hence...such unauthorized input
4 infringes the copyright owner’s reproduction right”).

5 **3. Displaying Perfect 10’s Copyrighted Images.**

6 Google also is violating Perfect 10’s exclusive right to *display* its images by
7 displaying, in both reduced and full size, infringing copies of over 1,000 of Perfect
8 10’s best images. Zada Decl., ¶¶ 23, 27-51, 61, 91-108, 114, 150, Exhs. 8-21, 28,
9 78-91, 96, 116. 17 U.S.C. § 106(5); see 17 U.S.C. § 101 (“‘Display’ covers *any*
10 showing of a ‘copy’ of the work”) (emphasis added); H.R. Rep. No. 1476, 94th
11 Cong., 2d Sess., reprinted in 1976 U.S.C.C.A.N. 5659, 5677 (1976) (“‘display’
12 would include the projection of an image on a screen or other surface by any
13 method”); see also Webbworld, 991 F. Supp. at 549 (display right infringed by
14 displaying thumbnail copies of Playboy’s images it obtained by an automated
15 function from “select adult-oriented Internet ‘newsgroups’.”); Playboy Enters., Inc.
16 v. Webbworld, 968 F. Supp. 1171, 1175 (N.D. Tex. 1997); Video Pipeline, Inc. v.
17 Buena Vista Home Entertainment, Inc., 192 F. Supp. 2d 321, 332 (D. N.J. 2002)
18 (showing movie trailers to individual web users is public display), aff’d, 342 F.3d
19 191 (3d Cir. 2003); Michaels v. Internet Entertainment Group, Inc., 5 F. Supp. 2d
20 823, 831 (C.D. Cal. 1998) (showing copies of still images from videotape over the
21 Internet is public display); Kelly, 336 F.3d at 815-16 (defendant conceded, and
22 district court found, a *prima facie* case of infringement by a search engine by
23 providing “thumbnail” copyrighted images; defendant relied on fair use defense,
24 which is inapposite here).⁴

25
26
27
28 ⁴ By making these images available to millions of users to download, Google also
violates Perfect 10’s *distribution* right. 17 U.S.C. § 106(3); see A&M Records, Inc.
v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001) (making music files available to
individuals over the Internet infringes distribution right); Hotaling v. Church of
Latter-Day Saints, 118 F.3d 199, 203 (4th Cir. 1997) (making unauthorized work

(continued...)

1
2 **B. The Fair Use Defense Is Not Available to Google.**

3 Fair use is an affirmative defense on which the defendant bears the burden of
4 proof. See, e.g., Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394,
5 1403 (9th Cir. 1997) (affirming preliminary injunction). Examination of the four
6 fair use factors, 17 U.S.C. § 107(1)-(4), reveals that this putative defense is
7 unavailable, both with respect to the full size images and the reduced size images
8 infringed by Google. Although a plaintiff need not prevail on all of the fair use
9 factors, see Los Angeles News Service v. Reuters Television Int'l, Ltd., 149 F.3d
10 987, 994-95 (9th Cir. 1998), all four favor Perfect 10 here.

11 **1. Google's Use of Full Size Images Is Not Fair Use.**

12 Purpose and Character of the Use: Google does for free what Perfect 10 does
13 for its paying customers – display and distribute Perfect 10's full size images.
14 Google uses Perfect 10's copyrighted works as a "draw" to attract customers to
15 Google's commercial website, as well as to send customers to Infringing Sites from
16 which Google earns additional advertising revenue. Zada Decl. ¶¶ 61-64, Exhs. 28-
17 30. See A&M Records, 239 F.3d at 1023 ("availability of infringing material acts as
18 a draw for customers"); Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264-65
19 (9th Cir. 1996) (availability of infringing recordings is a "draw" for swap meet
20 customers);⁵ see also Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S.
21 539, 562 (1985) (central inquiry "is not whether the sole motive of the use is
22 monetary gain but whether the user stands to profit from exploitation of the
23 copyrighted material without paying the customary price.").

24
25
26 available to public violates distribution right); Webbworld, 991 F. Supp. at 551-52
(allowing users to download images via web browser is public distribution).

27 ⁵ It is **Google's** use of the copyrighted works that is the relevant commercial use.
28 See, e.g., Infinity Broadcast Corp. v. Kirkwood, 150 F.3d 104, 108 (9th Cir. 1998).
In any event, Google users derive a commercial benefit by obtaining for free that
which they would otherwise have to buy. A&M Records, 239 F.3d at 1015.

1 The second aspect of this inquiry is whether Google's use is "transformative."
2 It is not: Google provides the exact same images through the exact same medium
3 (the Internet) as does Perfect 10. Zada Decl., ¶¶ 27-51, 55-61, 64, 91-109, 114,
4 Exhs. 8-21, 23-28, 30, 77-92, 96. "[W]hatever the intent of the copier, a verbatim
5 reproduction will of necessity serve the function of the plaintiff's work..." 3
6 Nimmer, § 13.05[D][1] at 13-21 (rev. 2003); see Elvis Presley Enters., 349 F.3d
7 622, 629 (9th Cir. 2003) (use not transformative where showing of film clips "serves
8 the same intrinsic entertainment value that is protected by Plaintiffs' copyrights ...
9 [Defendant] crosses the line by making more than mere reference to these events
10 and instead shows significant portions of these copyrighted materials."); Infinity
11 Broadcast, 150 F.3d at 108 (defendant's use not transformative merely because it
12 was "for information rather than entertainment").

13 Nature of the Copyrighted Work: Photographs are creative works at the
14 "core" of copyright protection, militating against fair use. Kelly, 336 F.3d at 820.

15 Amount and Substantiality of the Portion Used: Google has taken *everything*
16 constituting the Perfect 10 copyrighted images. Even when applicable, fair use
17 permits taking only the amount necessary for the specific purpose. Campbell v.
18 Acuff-Rose Music, Inc., 510 U.S. 569, 589 (1994). The full size images Google
19 displays and distributes without authorization are exactly what Perfect 10 sells
20 through its magazine and through perfect10.com. Zada Decl., ¶¶ 27-51, 61, 64, 94,
21 100-103, 114, Exhs. 8-21, 28, 30, 79, 82-83, 85-86, 96. Infringement of an entire
22 copyrighted work always militates against fair use. Worldwide Church of God v.
23 Philadelphia Church of God, 227 F.3d 1110, 1118 (9th Cir. 2000); see also 4
24 Nimmer, § 13.05[A][3] at 13-180.1-181 ("in general, it does not constitute a fair use
25 if the entire work is reproduced"). Displaying and distributing *full size, complete*
26 *copies* is not necessary to the operation of Google's "search engine." Indeed, it is
27 superfluous – because these full size images are made available on a *second page*

1 only *after* a user has completed a search, received the search results, and clicked on
2 a reduced size image. Id., Exhs. 8-21, 28, 30, 82-83, 85-86, 96.

3 Effect of the Use Upon the Potential Market for or Value of the Copyrighted
4 Work: Since Google's use of the Perfect 10 images is commercial, likelihood of
5 market harm is presumed. See Elvis Presley Enterprises, 349 F.3d at 631. Even
6 absent the presumption, Google's infringement self-evidently affects both Perfect
7 10's sale of images through its subscription website and in hard copy via its
8 magazine. See A&M Records, 239 F.3d at 1018 (making copyrighted works
9 available online affects both the markets for online distribution and for brick and
10 mortar sales). First, Google provides and displays, *for free*, the same images in the
11 same Internet medium to the same customers (e.g., those interested in images of a
12 particular model). Second, Google permits users to download and make copies of
13 the images, a replacement for Perfect 10 Magazine. See Michaels, 5 F. Supp. 2d at
14 836 (infringing images "propagate quickly through the Internet, saturating the
15 potential market for the plaintiffs' copyrighted work"). Third, Google uses Perfect
16 10 images to direct its users to Infringing Sites that provide these and other
17 infringing Perfect 10 images and generate advertising revenue for Google. Zada
18 Decl. ¶¶ 61-64, Exhs. 28-30. Finally, because Google's conduct obviates the need
19 for users to visit perfect10.com (or purchase magazines), Perfect 10 loses goodwill,
20 sales of its other products, and advertising revenue. See Los Angeles Times v. Free
21 Republic, 54 U.S.P.Q. 2d 1453, 1471 (C.D. Cal. 2000) (infringement resulted in lost
22 advertising revenue by, among other things, reducing the number of people visiting
23 plaintiffs' website). Google's popularity as the third most visited website on the
24 Internet (Zada Decl., ¶ 18, Exh. 3) only multiplies the harm. See Free Republic, 54
25 U.S.P.Q.2d at 1469 (number of users is relevant to the fourth factor).⁶

26
27 ⁶ That fair use is not available to Google with respect to full size images is
28 supported by Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002), later vacated
on procedural grounds, 336 F.3d 811 (9th Cir. 2003). (The final opinion is discussed
in the next section.) The initial opinion had rejected the fair use defense for the

(continued...)

1 2. **Google’s Use of Reduced Size Images Is Not Fair Use.**

2 Perfect 10 provides reduced size images on its website *and* sells images for
3 download to cell phones that are similar in size and clarity to the smaller Perfect 10
4 images that Google makes available for free (including for downloading and display
5 on cell phones). See Moreau Decl., ¶ 6; Zada Decl., ¶¶ 53-56, 58, Exhs. 22-24, 26.
6 Thus, the term “reduced size” is a misnomer – when viewed through the medium of
7 cell phone downloads, these images are “full size” and serve as replacements for
8 what Perfect 10 sells – and much of the prior discussion concerning “full size”
9 images applies here as well.

10 Google likely will rely on the decision in Kelly, 336 F.3d at 811, in which the
11 Court upheld the fair use defense (as to “thumbnails” only) based on the specific
12 factual record before it. However, the fair use defense necessarily requires a case by
13 case analysis, Campbell, 510 U.S. at 577, because fair use “is a doctrine the
14 application of which *always* depends on consideration of the *precise* facts at hand.”
15 American Geophysical Union v. Texaco Inc., 60 F.3d 913, 916 (2d Cir. 1994)
16 (emphasis added); accord Infinity Broadcast, 150 F.3d at 108. For that reason, it is
17 necessary and instructive to contrast the specific facts here to the very *different* facts
18 in Kelly. The facts are dispositively different and, based on the reasoning of Kelly
19 itself, compel a finding of no fair use here.

20 • In Kelly, there was no market for thumbnail images. 336 F.3d at 821.
21 Here Perfect 10 *sells its reduced size images* for download onto cell phones, and
22 reduced size images also are an integral part of perfect10.com. Zada Decl., ¶¶ 53-
23 56, 58, Exhs 22-24, 26. This difference alone completely changes the fair use
24 equation. See Harper & Row, 471 U.S. at 566.

25
26
27

28 appropriation of large size images by the defendant search engine, concluding that
“fair use does not sanction Arriba’s displaying of Kelly’s images...that puts Kelly’s
original images within the context of Arriba’s web site.” Id. at 949.

1 • In Kelly, the defendant search engine directed those who clicked on the
2 thumbnails *to Kelly's website*. 336 F.3d at 815. Here, clicking on reduced size
3 Perfect 10 images virtually always leads users *away* from perfect10.com and often
4 to websites with *Google advertisements*. Zada Decl., ¶¶ 61-62, 74-75, Exhs. 28, 36.

5 • In Kelly, the thumbnail images were obtained from a legitimate source,
6 in fact the original source. 336 F.3d at 815. Here, the reduced size images are taken
7 from infringing sources, and users are directed to Infringing Sites which, in many
8 instances, provide *hundreds* more infringements of Perfect 10 images. Zada Decl.,
9 ¶¶ 17, 110-114, Exhs. 94-96.⁷

10 • In Kelly, unlike here, the plaintiff could not show *any* harm, Kelly v.
11 Arriba Soft Corp., 77 F. Supp. 2d 1116, 1120-21 (C.D. Cal. 1999), because Kelly
12 provided his images for free. Id. at 1117. Perfect 10 *sells* access to its images.

13 • In Kelly, the defendant's use of Kelly's images did not obviate the need
14 to visit Kelly's website. 336 F.3d at 821. Here, users do not have to visit
15 perfect10.com because Google makes available exactly what Perfect 10 sells.

16 • In Kelly, the plaintiff's website was not a subscription website (unlike
17 perfect10.com) – the defendant was making available what the plaintiff already
18 provided for free. Here, Google gives away what Perfect 10 *sells*. Zada Decl. ¶ 16.

19 • In Kelly, the pictures were of a generic nature, and not readily
20 susceptible to textual description. 336 F.3d at 815. Here, the infringed images
21 easily can be described (which Google already does). Zada Decl., ¶ 145, Exh. 112.

22 • In Kelly, the defendant made available 35 of the plaintiff's images. 336
23 F.3d at 816. Google is making available over 1,000 distinct Perfect 10 images.

24 • In Kelly, the resolution of the thumbnail pictures was poor. Id. at 821.
25 The resolution of Perfect 10 images displayed by Google is comparable to those sold
26 by Perfect 10. Zada Decl., ¶¶ 53-56, 58, Exhs. 22, 24, 26; Moreau Decl. ¶¶ 5-7.

27
28 ⁷ The defendant in Kelly apparently was not sued for contributory or vicarious
infringement, as it was not facilitating and enabling *infringing* websites.

1 • In Kelly, the defendant removed the infringing images after a single
2 objection, and placed Kelly’s websites on a “do not crawl” list. 336 F.3d at 816.
3 Here, despite 34 detailed notices, Google continues to copy and display thousands of
4 Perfect 10 images from the same infringing websites, over and over again. And, on
5 August 12, 2005, Google added hundreds of additional Perfect 10 images. Zada
6 Decl., ¶¶ 79-87, 91-115, 150-151, Exhs. 38-73, 77-97, 116-117.

7 An analysis of the specific fair use factors with respect to the reduced size
8 images further demonstrates that Google’s conduct is not fair use.

9 Purpose And Character of the Use: In Kelly, the Court recognized that the
10 defendant used the thumbnails for commercial purposes and that this weighed, at
11 least slightly, against fair use. 336 F.3d at 818. The display of Perfect 10 images
12 draws traffic to google.com, thus enhancing Google’s overall advertising revenues.
13 But Google’s use is even more directly commercial, as it links over six hundred
14 reduced size Perfect 10 copyrighted images to websites on which Google places ads
15 or search boxes to earn additional revenue. Zada Decl. ¶¶ 25, 61-62, Exhs. 7, 28.

16 Taking the Perfect 10 images, even in reduced size, is not transformative,
17 particularly since Perfect 10 licenses images of identical size and dimension for cell
18 phone downloads. Although reduced in size, these images are clear, discernable,
19 and *complete* copies. At most, reducing the images is a change in medium. See
20 Infinity Broadcast, 150 F.3d at 108; UMG Recordings, Inc. v. MP3.com, 92 F. Supp.
21 2d 349, 351 (S.D.N.Y. 2000); see also Twin Peaks Prods. Inc. v. Publications Int’l,
22 Ltd., 996 F.2d 1366, 1375-76 (2d Cir. 1993) (book of plot details of television show,
23 even for comment and criticism, not transformative). Although Kelly recognized
24 this fact, the Court was persuaded that the defendant’s use was transformative since
25 “users are unlikely to enlarge the thumbnails and use them for artistic purposes
26 because the thumbnails are of much lower-resolution than the originals.” 336 F.3d
27

1 at 818. Here, the reduced size images are of resolution sufficient to clearly depict
2 the image.⁸ Zada Decl., ¶ 53, Exh. 22.

3 More important, with cell phones, a user today need not enlarge reduced size
4 images to “use them for artistic purposes.” The market for cell phone downloads of
5 adult images, in which Perfect 10 participates, is estimated to be \$500 million a year
6 and is projected to grow to \$5 billion a year. *Id.*, ¶ 57, Exh. 25. Thus, unlike *Kelly*,
7 where “it would be unlikely that anyone would use Arriba’s thumbnails for
8 illustrative or aesthetic purposes,” 336 F.3d at 819, here Perfect 10 is selling the
9 same reduced size images that Google is giving away. Zada Decl., ¶¶ 54-58, Exhs.
10 23-26.

11 Google’s use also cannot be transformative because the reduced size images
12 are copies of *infringing* images from unauthorized websites, and the images are
13 used by Google to direct users to Infringing Sites (which in some instances contain
14 hundreds of additional infringing Perfect 10 images). Zada Decl., ¶¶ 27-47, 92-95,
15 110-114, Exhs. 8-18, 78-80, 93-96. In *Kelly*, the copy made available by the
16 defendant was of a *legitimate copy* and was used to direct individuals to the
17 *copyright holder’s website*. 336 F.3d at 821. No amount of taking of an
18 unauthorized and infringing work is “fair.” See *Marcus v. Rowley*, 695 F.2d 1171,
19 1175-76 (9th Cir. 1983) (fair use requires proponent operate “fairly and in good
20 faith”). The Court in *Video Pipeline*, 342 F.3d at 199, found this precise distinction
21 probative:

22 “Video Pipeline’s database does not, however, serve the same function as
23 did Arriba Soft’s search engine. ... VideoPipeline.com does not improve
24 access to *authorized* previews located on other websites. Rather, it indexes
25 and displays *unauthorized copies* of copyrighted works.” 342 F.3d at 199
26 (emphasis added.)

27 ⁸ The Court in *Kelly* specifically noted that the “inferior display quality” was not
28 necessarily dispositive “or will always assist an alleged infringer in demonstrating
particular, inferior quality, American West scenes involved.

1 The Court noted that even a link to a legitimate seller of authorized copies would not
2 make infringement a fair use. Id.; see also Atari Games Corp. v. Nintendo of
3 America, Inc., 975 F.2d 832, 843 (Fed. Cir. 1992) (to invoke fair use, “an individual
4 must possess an authorized copy of a literary work”); Sega Enters. Ltd. v. MAPHIA,
5 857 F. Supp. 679, 687 (N.D. Cal. 1994) (“MAPHIA I”) (same).

6 Nature of the Copyrighted Work. While the Court in Kelly found this factor
7 weighed against fair use, it minimized that finding because Kelly’s works previously
8 had been published and were available on the Internet. 336 F.3d at 820. To the
9 extent that is a relevant distinction, Perfect 10, unlike Kelly, does not make its
10 images available for free. Zada Decl., ¶ 16. Compare Sony Corp. v. Universal City
11 Studios, Inc., 464 U.S. 417, 436 (1984) (noting the defendant provided to users only
12 those works which the plaintiffs provided for free).

13 Amount and Substantiality of the Portion Used. Each reduced size image
14 embodies the *entirety* of the Perfect 10 work copied. The Court in Kelly recognized
15 such a taking as substantial, even without the market for the sale of such images that
16 is present here. 336 F.3d at 821 (referring to the thumbnail images as copies of
17 “each of Kelly’s images as a whole” and to copying of the “entire image”). Kelly
18 ultimately found this factor did not weigh for or against fair use because no more
19 than necessary was taken *under the circumstances* “to allow users to recognize the
20 image and decide whether to pursue more information about the image or *the*
21 *originating web site.*” Id. (emphasis added). By contrast, the use of any image is
22 unnecessary here because Google uses these images to direct users to *infringing*
23 websites, not “the originating website,” perfect10.com. Zada Decl., ¶¶ 17, 75, Exh.
24 36. Moreover, the Court’s conclusion in Kelly was in the context of generic
25 “American West” images not easily capable of textual description – whereas here,
26 Google can “provide directions” to websites that display images of specific models
27 and fully describe those images without *displaying* the images themselves. In fact,
28 Google does precisely this now by descriptions such as: “kristina kovari nudes.”

1 Zada Decl., ¶ 145, Exh. 112. See Free Republic, 54 U.S.P.Q. 2d at 1462 (online
2 display of copies of substantial portions of news articles, even for purposes of
3 comment and criticism, was not fair use because it was unnecessary).

4 In Video Pipeline, the Court affirmed a preliminary injunction prohibiting the
5 display of “clip previews” (two minutes from feature movies). Video Pipeline
6 argued the use was fair, as “the original works have an aesthetic and entertainment
7 purpose while the clip previews serve only to provide information about the movies
8 to internet users, or as advertisements for the company’s retail web site clients.” 342
9 F.3d at 198. The Court rejected that contention, in language applicable here:

10 “We note that the clip previews do not constitute mere ‘information’ about the
11 movies, as would, for example, a list of the names of the actors starring in a
12 film ... the clips are part of – not information about [the copyright holder’s]
expressive creations.” Id. n.5.

13 See also Twin Peaks, 996 F.2d at 1377 (book’s synopses of television shows too
14 substantial even for purposes of criticism); Storm Impact, Inc. v. Software of the
15 Month Club, 13 F. Supp. 2d 783, 788 (N.D. Ill. 1998).

16 Effect of the Use Upon the Potential Market for or Value of the Copyrighted
17 Work. Although Perfect 10 need not show actual harm, Los Angeles News Serv.,
18 149 F.3d at 994, there is an obvious effect on a *current* market for Perfect 10 images
19 that did not exist in Kelly. Perfect 10 participates in an existing and growing market
20 for reduced size images on cell phones. Zada Decl., ¶¶ 16, 57, Exh. 25; see Texaco,
21 60 F.3d at 930, 931 (existence of new licensing market demonstrates substantial
22 harm); see also Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d
23 1381, 1386 (6th Cir. 1996) (market harm where “the copyright holder clearly does
24 have an interest in exploiting a licensing market – and especially where the
25 copyright holder has actually succeeded in doing so”). Google targets that very
26 market by instructing its users how to download Perfect 10 images onto their cell
27 phones and by “reformatting” such images to fit their cell phone display. Zada Decl,
28 ¶ 55, Exh. 23.

1 The fact that Perfect 10 sells reduced sized images via cell phones makes this
2 case completely different from Kelly, where no market existed for the sale of
3 thumbnail images. The Kelly Court further was persuaded that there was no impact
4 on Kelly's market because "by showing the thumbnails on its results page when
5 users enter terms related to Kelly's images, the search engine would guide users to
6 Kelly's website rather than away from it." 336 F.3d at 821. The opposite is true
7 here, as Google refers users away from Perfect 10's website and to Infringing Sites
8 that make available additional infringing Perfect 10 images. Zada Decl., ¶¶ 74-75,
9 61-73, Exhs. 28-36. This changes the fair use analysis radically. See Hustler
10 Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1155 (9th Cir. 1986) ("This
11 last factor is undoubtedly the single most important element of fair use").

12 In sum, Google uses the *entirety* of large numbers of Perfect 10's copyrighted
13 images, which Perfect 10 spent substantial time and money to create, without adding
14 any *new expression*, for the *commercial purpose* of increasing advertising revenue,
15 and with a direct impact on Perfect 10's markets. Where, as here, the second user
16 *replaces* the original, the balance clearly falls against fair use. See Free Republic,
17 54 U.S.P.Q.2d at 1466-67 (no fair use where "the copying is verbatim, encompasses
18 large numbers of [copyrighted] articles, and occurs on an almost daily basis").

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

20 The elements of contributory infringement are (1) direct infringement by
21 another, (2) knowledge of direct infringement, and (3) material contribution to it.
22 Fonovisa, 76 F.3d at 264. A defendant "infringes vicariously by profiting from
23

24 _____
25 ⁹ Google's display and copying of reduced size and full size images is direct
26 infringement. Its *linking* of smaller infringing images to the precise pages on
27 websites that provide full size infringing versions and/or other infringing images may
28 be analyzed under principles of secondary liability. The line in this case between
direct and secondary liability may be a fine one, but in the end these are labels for
similar infringing conduct. See Sony, 464 U.S. at 435 n.17 ("as the District Court
correctly observed ..., 'the lines between direct infringement, contributory
infringement, and vicarious liability are not clearly drawn...'").

1 direct infringement while declining to exercise a right to stop or limit it.” Metro-
2 Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 125 S.Ct. 2764, 2767 (2005); see
3 also Fonovisa, 76 F.3d at 262.

4 Direct infringement is present in two ways: (1) the Infringing Sites that are
5 the source of Google’s infringing images clearly are engaged in direct infringement
6 by reproducing, displaying, and distributing those images (see cases cited at Section
7 III.A.2); and (2) Google users engage in direct infringement when a separate
8 infringing copy is made on their own computers as a Perfect 10 image is transmitted
9 to them from Google’s website. See Sega Enters., Ltd. v. MAPHIA, 948 F. Supp.
10 923, 931 (N.D. Cal. 1996) (“MAPHIA II”); A&M Records, 239 F.3d at 1014.

11 A. **Google Is Contributorily Liable Because It Has Knowledge of and**
12 **Contributes to Direct Infringement.**

13 Google has knowledge of specific infringements by virtue of repeated notice.
14 Zada Decl., ¶¶ 76-91, Exhs. 37-77. See A&M Records, 239 F.3d at 1022 n.6;
15 Fonovisa, 76 F. 3d at 261. Google’s knowledge also is evidenced by the fact that at
16 least 500 of the images that it currently displays contain Perfect 10 copyright
17 notices, or labels such as “P10 Fall 1999,” shorthand for Perfect 10 Magazine, Fall
18 1999. Zada Decl., ¶¶ 58, 79, 108, 113-114, Exhs. 26, 91, 96. Google admits that
19 these images “may be subject to copyright,” *id.*, ¶ 38, Exh. 10, and has been advised
20 repeatedly that many of the websites from which it displays Perfect 10 images
21 expressly disclaim ownership of their content. *Id.*, ¶ 88, Exh. 74. Finally, through
22 its AdSense program, Google monitors the content of Infringing Sites (on which it
23 places advertising next to infringing Perfect 10 images). *Id.* ¶¶ 25, 61-64, Exhs. 7,
24 28-30.

25 Google materially contributes to infringement in several ways: (a) by linking
26 Perfect 10 images to Infringing Sites that contain hundreds of infringements of
27 Perfect 10 copyrights; (b) by providing search results on Perfect 10 model names
28 that lead almost exclusively to websites which infringe Perfect 10 copyrights; (c) by

1 encouraging its users to “See full-size image;” (d) by reformatting Perfect 10 images
2 to fit cell phone screens and encouraging users to download them onto cell phones;
3 (e) by displaying full size infringing images via a window and via its cached link,
4 thereby enabling the immediate copying or downloading of those full size images;
5 and (f) by displaying perfect10.com usernames and passwords which allow the
6 unauthorized copying of images from perfect10.com. Id., ¶¶ 39, 55-56, 65-75, 110-
7 114, 119-126, 27-51, Exhs. 8-21, 23-24, 32-36, 93-96, 101-106. See Intellectual
8 Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1294-95 (D.
9 Utah 1999) (enjoining linking to sites containing infringing works).¹⁰

10 In MAPHIA I, the defendants made copyrighted video games available to
11 users through an electronic bulletin board. The users committed direct infringement
12 when they uploaded or downloaded the games. 857 F. Supp. at 686. By enabling
13 these infringements, the defendants were contributorily liable “[e]ven if defendants
14 do not know exactly when games will be uploaded to or downloaded from the ...
15 bulletin board.” Id. at 686-87; see also A&M Records, Inc. v. Napster, Inc., 114 F.
16 Supp. 2d 896, 905-06 (N.D. Cal. 2000) (defendant provided a “proprietary search
17 engine”; by entering the name of a copyrighted song or of an artist featured in a
18 copyrighted song, the user was provided a list of locations on the Internet where
19 unauthorized copies could be obtained by one click).

20 Google’s contributions enable Infringing Sites to display their Perfect 10
21 images to Google’s users with one click. Without Google’s contributions, its users
22 could not easily find and copy the full size images on Infringing Sites, and those
23 Infringing Sites could not continue to profitably display and distribute Perfect 10
24 images. See A&M Records, 239 F.3d at 1022 (“[w]ithout the support services
25

26 ¹⁰ By including a “See full-size image” link, failing to “take down” known
27 infringements, linking to known Infringing Sites, failing to filter or block infringing
28 images, encouraging cell phone downloading of infringing images and reformatting
infringing images to fit cell phone screens, providing advertising and revenue to
infringing websites, and providing perfect10.com usernames and passwords, Google
also is *inducing* infringement. Metro-Goldwyn-Mayer Studios, 125 S.Ct. at 2764.

1 defendant provides, Napster users could not find and download the music they want
2 with the ease of which defendant boasts”); Fonovisa, 76 F.3d at 264 (“it would be
3 difficult for the infringing activity to take place in the massive quantities alleged
4 without the support services provided by the swap meet”).

5 Google provides the “site and facilities” for the infringement. It is directly
6 from Google’s website that Perfect 10 images are displayed and linked to Infringing
7 Sites that provide additional infringing images. See id. at 264; A&M Records, 239
8 F.3d at 1019-22. Google’s failure to disable access to such images after notice is
9 additional material contribution. See A&M Records, 239 F.3d at 102 (“We agree
10 that if a computer operator learns of specific infringing material available on his
11 system and fails to purge such material from the system, the operator knows of and
12 contributes to direct infringement.”); Religious Tech Ctr. v. Netcom On-Line
13 Comm., 907 F. Supp. 1361, 1374 (N.D. Cal. 1995).

14 **B. Google Is Vicariously Liable Because It Derives a Financial Benefit**
15 **From And Has The Ability to Control Infringement.**¹¹

16 “Turning a blind eye to detectable acts of infringement for the sake of profit
17 gives rise to liability.” A&M Records, 239 F.3d at 1023. Google does far more.
18 Specifically, for a number of Google web searches on Perfect 10 model names, over
19 96% of Google’s results link to infringing Google AdSense advertising partners,
20 while none links to perfect10.com. Zada Decl. ¶¶ 65-75, Exhs. 32-36. In addition,
21 Google derives a financial benefit from the traffic it receives by displaying Perfect
22 10 images and passwords, as well as by linking them to its AdSense partners. Id. ¶¶
23 61, 125. The more users Google draws to its website and to the websites of its
24 AdSense partners, the greater its advertising revenue, on which its business model is
25 based. See A&M Records, 239 F.3d at 1023, quoting Fonovisa, 76 F.3d at 263-64
26 (infringing activities are a draw that “enhance the attractiveness of the venue” to
27

28 ¹¹ Although Google clearly has knowledge of infringement, that is not necessary for
the imposition of vicarious liability. Webbworld, 991 F. Supp. at 553-54.

1 customers); Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 513
2 (N.D. Ohio 1997) (“the quantity of adult files available to customers increased the
3 attractiveness of the service”); Webbworld, 968 F. Supp. at 1177 (photographs
4 “enhanced the attractiveness of the [defendant’s] website to potential customers”);
5 see also Playboy Enters., Inc. v. Netscape Communications, Inc., 354 F.3d 1020,
6 1028 & n.37 (9th Cir. 2004) (describing profit from “click-through” ads).

7 The requisite “right” to supervise and control direct infringement may be legal
8 (e.g., contractual) or practical (e.g., the ability to delete infringing works). See
9 Fonovisa, 76 F.3d at 263. Google has both the legal and practical right to control
10 infringement. Its AdSense contracts provide broad rights to Google, including the
11 right to “monitor” the websites of its advertising partners and to terminate those that
12 infringe. Zada Decl. ¶ 25, Exh. 7. See A&M Records, Inc., 239 F.3d at 1023
13 (Napster “expressly reserves ‘the right to refuse service and terminate accounts’”);
14 Netcom, 907 F. Supp. at 1376 (reservation of right to take remedial action against
15 subscribers is evidence of ability to control); Shapiro, Bernstein & Co. v. H.L. Green
16 Co., 316 F.2d 304 (2d Cir. 1963); Fonovisa, 76 F.3d at 263 (swap meet’s “broad
17 contract with its vendors was sufficient to satisfy the control requirement”). And,
18 Google is the gatekeeper to its system and thus has the practical right to control
19 infringement. Google programs its proprietary “crawler” to determine what images
20 to retrieve and copy, and can delete infringing images and refrain from crawling
21 known infringing websites. Sec. I.B.1, supra. See, e.g., Grokster, 125 S. Ct. at
22 2776; A&M Records, 239 F.3d at 1023 (“[t]he ability to block infringers’ access to a
23 particular environment for any reason whatsoever is evidence of the right and ability
24 to supervise”); Netcom, 907 F. Supp. at 1376 (ability to delete infringing postings –
25 even if not exercised – is ability to control); see also Fonovisa, 76 F.3d at 262-63
26 (ability to control need not be exercised to satisfy this element); Gershwin
27 Publishing Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159 (2d Cir. 1971)
28 (finding ability to control even though defendant lacked the formal contractual right

1 to control). In sum, Google is “vicariously liable when it fails to affirmatively use
2 its ability to patrol its system and preclude access to potentially infringing files listed
3 in its search index,” especially when provided the location of such files. A&M
4 Records, 239 F.3d at 1027.

5 **IV. PERFECT 10 IS SUFFERING IRREPARABLE INJURY.**

6 In copyright cases, “irreparable harm is presumed once a sufficient likelihood
7 of success is raised.” Perfect 10, 213 F. Supp. 2d at 1190. Further, Google’s
8 conduct is causing *actual* injury, and will continue to do so unless it is enjoined.
9 Google provides for free more than 1,000 of Perfect 10’s best images, diluting their
10 value and Perfect 10’s exclusive rights, and diverting consumer traffic from Perfect
11 10 to google.com and to Infringing Sites that in many cases contain hundreds of
12 Perfect 10 infringements. See Zada Decl., ¶¶ 27-51, 61-75, 110-114, Exhs. 8-21,
13 28-36, 94-96. Google also makes Perfect 10 images available for free on cell
14 phones, reformats them for such use, and provides passwords to perfect10.com. Id.
15 ¶¶ 55-56, 120-126, Exhs. 23-24, 101-106. Under these circumstances, there is little
16 reason for consumers to purchase Perfect 10 Magazine, subscribe to perfect10.com,
17 or pay Perfect 10 for cell phone sized images. Id., ¶¶ 132-136.

18 **V. AT A MINIMUM, SERIOUS QUESTIONS ARE RAISED AND THE**
19 **BALANCE OF HARDSHIPS TIPS IN FAVOR OF PERFECT 10.**

20 *At the very least*, this motion raises serious questions. See Cadence Design
21 Systems, Inc. v. Avant! Corp., 125 F.3d 824, 830 (9th Cir. 1997) (the stronger the
22 showing of likelihood of success and the possibility of irreparable injury, the less the
23 balance of hardships must tip in plaintiff’s favor); A&M Records, 239 F.3d at 1025
24 (even though issue will be developed more fully at trial, plaintiffs raised serious
25 questions going to the merits). Suing hundreds of owners of websites around the
26 world from which Google obtains its infringing images is impractical, if not
27 impossible. Zada Decl., ¶¶ 137-140, Exh. 109. See Metro-Goldwyn-Mayer Studios,
28 125 S.Ct. at 2776 (“When a widely shared service or product is used to commit

1 infringement, it may be impossible to enforce rights in the protected work
2 effectively against all direct infringers ...”). When Perfect 10 has sued individual
3 websites, it has been unable to enforce judgments. Zada Decl., ¶ 140.

4 Requiring Google to stop its infringing conduct is not a “hardship.” See, e.g.,
5 Triad Sys. Corp. v. Southeastern Exp. Co., 64 F.3d 1330, 1338 (9th Cir. 1995).
6 Other “search engines” have been able to do so. Zada Decl., ¶¶ 141-144, Exhs. 110-
7 111; see Kelly, 336 F.3d at 816 (defendant search engine placed websites that were
8 source of images "on a list of sites it would not crawl in the future"); see A&M
9 Records, 239 F.3d at 1027 (requiring defendant to disable access to infringing works
10 after notice); A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1098 (9th Cir.
11 2002) (injunction requiring defendant to “do everything feasible” to block infringing
12 works, including implementing filtering system); see also 17 U.S.C. § 512(c), (d)
13 (“upon notification of claimed infringement,” service provider must “expeditiously
14 ... remove, or disable access to, the material that is claimed to be infringing or to be
15 the subject of infringing activity”). Google has the ability to block or delete
16 specified images. Sec. I.B.1, supra. Google also claims it can operate its Google
17 Video Search function by permitting users to search only video content provided by
18 authorized rights holders, and that in its Google Print program it will not copy books
19 requested by publishers to be excluded. Zada Decl. ¶¶ 146, 148, Exhs. 113, 115.
20 Google’s *legitimate* search function would be unaffected by an injunction
21 preventing continued infringement of specified Perfect 10 images. Zada Decl.,
22 ¶¶ 141-146; Exhs. 110-113.

23 CONCLUSION

24 For all of the foregoing reasons, Perfect 10 respectfully requests that the Court
25 enter the proposed preliminary injunction.

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