

No. 10-56316

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PERFECT 10, INC.,

Plaintiff-Appellant,

v.

GOOGLE INC.,

Defendant-Appellee.

*On Appeal from the United States District Court
For the Central District of California
Hon. A. Howard Matz, District Judge*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel for Defendant Google Inc. (“Google”) certifies that Google is a publicly traded corporation and no corporation owns greater than 10% of its stock.

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JURISDICTIONAL STATEMENT

This Court does not have general jurisdiction over the partial summary judgment order (SER27-58) because it is not an appealable, final order. 28 U.S.C. §1291; *Cheng v. C.I.R.*, 878 F.2d 306, 309 (9th Cir. 1989). Because pendant jurisdiction is “narrowly construed” to extend only to issues “necessary to ensure meaningful review” of an appealable order, this Court cannot exercise pendent jurisdiction to review the summary judgment order’s finding that Google has a reasonably implemented repeat infringer policy—or any other issue addressed in that order except for the inadequacy of Perfect 10, Inc.’s (“P10”) notices, which the district court relied on in denying the preliminary injunction motion. *California v. Campbell*, 138 F.3d 772, 778-779 (9th Cir. 1998) (citing *Swint v. Chambers County Commission*, 514 U.S. 35, 38-51 (1995)).

Google agrees with P10’s statements that the district court has subject matter jurisdiction, that P10’s appeal was timely, and that this Court has jurisdiction to hear the portions of P10’s appeal addressing the district court’s denial of P10’s second motion for a preliminary injunction (“Second PI Motion”) (SER1-26).

STATEMENT OF THE ISSUES

1. Did the district court properly exercise its discretion in denying the Second PI Motion brought by P10—filed over two years after this Court vacated the first preliminary injunction it obtained in 2006—where P10 presented no new evidence tying Google’s conduct to any potential harm or showing that the balance of hardships and public interest favored an injunction?

2. Did the district court properly exercise its discretion in following this Court’s earlier ruling that P10 is not likely to succeed on its direct infringement claims regarding Google Web Search, Cache, and Image Search because (i) under the “server test,” in-line linking and framing content stored on third-party servers does not constitute direct copyright infringement, and (ii) Google’s creation of thumbnail images for use in Image Search results is likely a fair use?

3. Did the district court properly exercise its discretion in finding that P10 is not likely to succeed in proving direct liability for copyright infringement resulting from Google’s Blogger service, where Google merely passively copies images selected, uploaded, and displayed by Blogger account holders?

4. Did the district court properly exercise its discretion in finding that P10 is not likely to succeed on the merits of its secondary copyright infringement claims where P10 did not present evidence to show that Google could have taken simple measures to prevent further damage to P10’s copyrights, that Google had

knowledge of infringement notwithstanding the deficiencies the district court identified with P10's notices of infringement under the Digital Millennium Copyright Act ("DMCA"), or that Google controls third-party websites or receives a "direct financial benefit" from the alleged infringement on Blogger?

5. Did the district court properly exercise its discretion in finding that Google is likely to establish a fair use defense for forwarding P10's DMCA notices to a non-profit organization for research and analysis of cease and desist letters?

6. Did the district court properly exercise its discretion in finding that P10 is not likely to succeed on its right of publicity claim, where P10 presented no evidence that it could satisfy any element?

7. Did the district court properly find that P10's notices of copyright infringement did not comply with the DMCA's requirements where they did not, among other things, identify the copyrighted image claimed to be infringed and/or the location of the allegedly infringing material?

STATEMENT OF THE CASE

In 2004, P10 sued Google on a variety of claims, mostly focused on the alleged copyright infringement of P10's "adult entertainment" images. In 2009, Google moved for summary judgment concerning its entitlement to safe harbor under the DMCA. With the factual and legal defects of its copyright theories exposed, P10 did the one thing it could to extend its case before Google could prevail at trial on the remaining issues: it manufactured an appealable order by moving for a preliminary injunction it was not entitled to—six months after the district court took Google's motions for summary judgment under submission, more than two years after this Court vacated the partial preliminary injunction P10 previously obtained, and more than five years after initiating this action.

The district court properly denied P10's motion. It applied this Court's holdings from the last preliminary injunction appeal to the revisited issues and other binding precedent to the few new issues. The district court also relied on the holding from its partial summary order that because the majority of P10's notices of claimed infringement did not comply with the requirements of the DMCA, they were legally inadequate to provide Google with knowledge of infringement—without which P10's contributory infringement claim necessarily fails.

On appeal, P10 asks this Court to reverse many of its prior holdings, ignore the requirements of the DMCA, and shift the burden of identifying copyright

infringement from copyright holders to Internet service providers (“ISPs”). Specifically, P10 seeks a regime in which copyright owners merely send screenshots or images to ISPs, which then must scour the Internet to find infringing content, disable links to it, and compel third-party website owners to remove infringing content or have all links to their websites disabled, including links to non-infringing content. The district court properly rejected P10’s demand that service providers like Google affirmatively police the Internet for copyright infringement and upheld the careful balance the DMCA struck between the interests of copyright owners and ISPs. The district court’s findings were not an abuse of discretion, and its order denying P10’s Second PI Motion should be affirmed.

STATEMENT OF RELEVANT FACTS

A. Google

Web and Image Search. Google’s mission is to organize the world’s information and make it universally accessible and useful. The keystone of fulfilling that mission is Google’s operation of the world’s most popular Internet search engine. Supplemental Excerpts of Record (“SER”), 398.

Google uses an automated software program, known as a web crawler, to obtain copies of publicly-available webpages for use in its search index. SER398. For Image Search, Google’s search engine compiles an index of the text associated

with each image crawled, which is then associated with a “thumbnail” image. *Id.* When a user enters a query, the search engine searches the relevant index and delivers the links (for Web Search) or thumbnails (for Image Search) that aid the user in identifying and locating the most relevant content. SER398-399.

Cache. Google’s Web Search provides users with the option of selecting a link to a “cached copy” of the webpages appearing in search results. SER398-399. Any images that appeared in response to users’ clicks on a “cached” link were served directly from the originating site if still available from it. SER399. Google did not serve “cached” copies of the images displayed. *Id.*

Blogger. The Blogger service allows account holders to create and post content on specially-formatted webpages (“blogs”), hosted on Google servers. SER415. Account holders could upload content to their blogs on Google’s servers or hyperlink to content hosted on other servers. *Id.* Account holders control whether Google’s search engine crawls and indexes their blogs. SER333-335.

B. Perfect 10

P10 once published an “adult entertainment” magazine. ER90241. Following the magazine’s demise, P10 continued to operate an “adult entertainment” website. *Id.* P10 also purchased the rights to display certain photographs of models created by others, which P10 uses as a basis for lawsuits. SER85; SER156; *e.g.*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th

Cir. 2007); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *Perfect 10, Inc. v. Visa International Service Ass'n*, 494 F.3d 788 (9th Cir. 2007); SER2220-2225.

C. P10's Relevant Allegations Against Google

P10 contends Google directly and secondarily infringes P10's copyrights by operating its search engine and hosting Blogger. ER90247-90254.

P10 further claims Google violates the rights of publicity of nine models, who purportedly assigned certain limited publicity rights to P10, by providing their images in response to searches for their names, allowing their names to be used as keywords to trigger advertising, and maintaining advertising relationships with third-party websites allegedly infringing P10's copyrights and violating models' rights of publicity. ER90251; ER90253-90254; SER2238-2241; SER77-85; SER155-161; SER167-176; SER182-186.

D. P10's Defective DMCA Notices And Google's Processing Of Them

1. Google's General Approach To P10's Notices

As of July 2, 2009, when Google moved for summary judgment of entitlement to safe harbor under the DMCA, P10 purported to have sent Google 83 DMCA notices. SER248-328; SER549-1214; SER1220-1691. These notices were unlike any others Google had received, both in volume and incomprehensibility. SER427. Almost all of them failed to identify the specific infringing image and/or which P10 image was infringed. SER248-328; SER419-424; SER549-1214;

SER1220-1691.

Google repeatedly advised P10 of the various defects hindering or precluding Google from completely processing its notices, and recommended that P10:

- follow Google's DMCA guidelines (which comply with the statute's requirements);
- provide complete URLs, rather than truncated URLs;
- submit notices in electronic soft copy, given the large number of URLs involved;
- identify the infringed works at issue; and
- identify image-specific URLs, rather than Internet addresses of webpages often displaying dozens or hundreds of images.

SER424-427; SER1771-1812. P10 never resubmitted its defective notices in a useful and DMCA-compliant format. SER427.

Although not legally required, Google undertook extraordinary efforts attempting to process P10's non-compliant notices. SER427-428; SER1813-1919. For example, because the notices failed to specify the location of the infringing materials and the allegedly infringed work, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] SER428. Despite the inadequacy of P10's notices, Google reviewed [REDACTED] URLs, and blocked [REDACTED] them from appearing in Web or Image Search results. SER433. [REDACTED]

[REDACTED] *Id.*

Google received numerous counter-notifications from website operators who swore under oath that the images displayed on their sites were not owned by P10, and/or who could not decipher P10's notices. SER435-436; SER2137-2196. Google provided P10 with copies of the counter-notifications, but P10 did not respond. 17 U.S.C. §512(g); SER435.

2. Google's Approach To P10's Notices By Category

For ease of reference in this litigation, P10's notices were categorized as the Group A, Group B, and Group C Notices, according to their shared characteristics. *See generally* SER248-328; SER549-1214; SER1220-1691.

During discovery, P10 produced seventeen notices from 2001 (the "Group A Notices"), which were sent to the wrong address. SER205-207; SER218-219; SER248-328. Google has no record of receiving these notices. Nor could it have processed them, as none of the Group A Notices identified the copyrighted works claimed to be infringed. SER248-328.

P10 also sent Google a series of notices (the “Group B Notices”) with its written “identification” of the infringing URLs, the corresponding search terms used, and the claimed copyrighted image allegedly infringed—mostly in spreadsheet format. SER419-420; SER549-1214. The Group B Notices rarely identified either the specific copyrighted image infringed or the specific infringing image. *Id.* In addition to the notices’ substantive defects, their format was burdensome to process. As Google repeatedly explained to P10, identifying URLs in electronic soft copy would have facilitated the speed and accuracy of processing by allowing the URLs to be copied and pasted directly to/from the browser address bar. SER430. P10 only sporadically provided soft copy lists of URLs. *Id.* Without electronic soft copies, Google manually typed thousands of URLs, many of which were lengthy and complex. *Id.* Nonetheless, as P10 conceded, Google processed the Group B Notices (SER214-215)—mostly within one to two weeks. SER430-431; SER1813-1882; SER1919.

In December 2005, and from spring 2007 onward, P10 sent notices with thousands of electronic files, contained in DVDs or, on one occasion, a several-hundred gigabyte hard drive (“Group C Notices”). SER421-422; SER1220-1691. These massive notices containing legions of nested files in a jumble of folders and subfolders failed to direct Google to the specific images or infringements claimed. SER421-423; SER1220-1706; SER403-408.

Given the tremendous volume of the Group C Notices and their general incomprehensibility, Google [REDACTED] to process them. SER431-432. Although not required by the DMCA, the team reviewed [REDACTED] screenshots page by page, manually typed in discernible URLs, and suppressed [REDACTED] URLs from search results. *Id.*; SER1883-1919. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. Google's Processing Of P10's Blogger Notices And Enforcement Of Its Repeat Infringer Policies

Web and Image Search have no account holders or subscribers and, therefore, no repeat infringer policies. SER335. P10 did not direct any notices to a Google service with account holders or subscribers or provide the information necessary to process removals for any such services. *See, e.g.*, SER413; SER415; SER433-435; SER 440; SER476-478. Nonetheless, Google carefully reviewed P10's notices to ensure its repeat infringer policies were enforced. SER433-435.

Google located references identifying Blogger URLs buried in non-Blogger notices and removed the offending content to the extent possible. SER433-434. Google tracked these complaints as "strikes" against Blogger accounts and terminated them [REDACTED]. *Id.*

Google also identified AdSense account holders in P10's notices [REDACTED]

[REDACTED]

None of P10's DMCA notices identified infringement on pages linked to AdWords advertisements, nor did they provide the information required to locate alleged infringement accessible via AdWords. SER435. Therefore, P10's mere reference to an allegedly infringing webpage provided no indication of whether the URL was a destination for an AdWords advertisement. [REDACTED]

[REDACTED]

E. Procedural History

1. P10's First Motion For A Preliminary Injunction And Appeal

P10 first moved for a preliminary injunction in 2005 to enjoin Google's alleged direct and secondary copyright infringement via Web and Image Search ("First PI Motion"), which the district court partially granted. *Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828 (C.D. Cal. 2006). On appeal, this Court vacated

the injunction, holding that Google's use of frames and in-line links does not constitute direct infringement. *Amazon.com*, 508 F.3d at 1159-60. It also held that Google is likely to succeed on its fair use defense for its use of thumbnail images in Image Search. *Id.* at 1168. This Court remanded P10's contributory infringement claim because the district court had not resolved factual disputes over the adequacy of P10's DMCA notices and whether there are feasible means for Google to refrain from providing access to infringing images. *Id.* at 1173. On vicarious infringement, this Court agreed P10 had not established probable success. *Id.* at 1175.

2. Google's Summary Judgment Motions

In July 2009, Google filed motions for partial summary judgment regarding its eligibility for DMCA safe harbor regarding Web & Image Search ("Search Motion"), Blogger ("Blogger Motion"), and its Caching Feature ("Cache Motion"). P10 opposed Google's motions, and the district court took the motions under submission in August 2009. SER208.

In July 2010, the district court issued an order granting Google's Cache Motion and Blogger Motion and granting in part and denying in part Google's Search Motion. It found no genuine dispute of material fact that all of the Group A and Group C Notices, as well as most of the Group B Notices, did not provide notice under the DMCA. Finding that disputes of fact remained regarding whether

some references within the Group B Notices satisfied the DMCA's requirements and whether Google processed those references expeditiously, the district court left these issues for the jury to decide.¹ SER27-58.

3. P10's Second Motion For A Preliminary Injunction And The District Court's Order Denying P10's Motion

In March 2010—over five years after filing suit and while Google's summary judgment motions were under submission—P10 filed its Second PI Motion, which the district court denied in July 2010. SER1-26. The court found P10 unlikely to succeed on its direct and vicarious copyright infringement claims directed to Web Search, Image Search, and Cache. SER9-10. Relying in part on relevant factual findings from its partial summary judgment order, the district court found P10 unlikely to succeed on its contributory infringement claims because the Group A and C Notices did not confer legally-actionable knowledge of infringement, and P10 did not provide evidence that Google failed to process the compliant Group B notices nor show that Google could take simple measures to prevent further damage to P10's copyrights. SER11-12. The district court also found P10 unlikely to succeed on the merits of its copyright infringement claims directed at Blogger and Google's forwarding DMCA notices to Chilling Effects, a non-profit, educational organization, and its right of publicity claim. SER12-22.

¹ Google contends it is entitled to judgment as a matter of law on all of the references within the Group B Notices, but does not appeal the order because it is not yet ripe for appeal. 28 U.S.C. §1291.

In addition, the district court found P10 failed to establish it is likely to suffer irreparable harm in the absence of preliminary relief, and that given the overbroad nature of P10's requested relief and P10's failure to address the issues, the balance of equities and public interest weigh in favor of Google. SER22-23.

P10 now appeals the denial of its Second PI Motion.

SUMMARY OF ARGUMENT

The district court properly exercised its discretion in denying P10's Second PI Motion. P10's lengthy delay in filing its motion—more than two years after this Court's ruling on P10's first preliminary injunction motion—and the overbroad nature of the relief P10 sought, which threatens freedom of expression, independently justify affirming the district court's denial. *E.g.*, *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 381-382 (2008); *Nader v. Brewer*, 386 F.3d 1168, 1169 (9th Cir. 2004) (per curiam).

In addition, the district court properly exercised its discretion in applying well-established precedent—including, in many instances, the rulings of this Court *in this very case*—to conclude that P10 is unlikely to succeed on the merits of its copyright and publicity claims arising from Google's operation of its Web Search, Image Search, Cache, and Blogger services and its transmission of notices of claimed infringement to Chilling Effects, a non-profit, educational organization.

Regarding the district court's summary judgment factual findings, only those concerning the insufficiency of P10's notices under the DMCA are properly on appeal because they are relevant to the issue of Google's lack of actionable knowledge for purposes of contributory infringement. The district court properly applied settled law to the undisputed facts in making its findings and they should also be affirmed. Any holding to the contrary would necessarily contravene the statutory requirements of the DMCA and the purpose of its enactment.

STANDARD OF REVIEW

A district court's denial of a preliminary injunction motion is reviewed for abuse of discretion. *Quinn v. Anvil Corp.*, 620 F.3d 1005, 1010 (9th Cir. 2010); *Nader*, 386 F.3d at 1169. A district court abuses its discretion in denying a preliminary injunction only if it bases its decision on "an erroneous legal standard or clearly erroneous factual findings." *Id.*

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING IRREPARABLE HARM UNLIKELY AND THAT THE BALANCE OF THE HARDSHIPS AND THE PUBLIC INTEREST FAVORED DENIAL OF P10'S MOTION

The district court properly exercised its discretion in concluding that P10 failed to meet its burden of entitlement to a preliminary injunction—i.e., that it was likely to succeed on the merits, likely to suffer irreparable harm in the absence of an injunction, and that the balance of the hardships and public interest support an

injunction. *E.g., N.D. et al, through their Parents Acting as Guardians Ad Litem v. State of Hawaii Dep't. of Education*, 600 F.3d 1104, 1111 (9th Cir. 2010); SER1-23. This Court need not even consider the merits of P10's copyright and publicity claims to affirm the district court's denial given P10's abject failure to establish a likelihood of irreparable harm and that the balance of the hardships and public interest support an injunction. *E.g., Winter*, 129 S.Ct. at 381-382; *Nader*, 386 F.3d at 1169.

A. P10 Will Not Suffer Irreparable Harm Absent Injunctive Relief.

1. P10's Long Delay Refutes Any Irreparable Harm.

P10's delay of more than half a decade before filing its Second PI Motion belies its claim of irreparable harm. *E.g., McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 964-65 (9th Cir. 2010) (no irreparable harm where two month delay); *Edge Games, Inc. v. Electronic Arts, Inc.*, --- F.Supp.2d ---, 2010 WL 3895533, *13 (N.D. Cal. Oct. 1, 2010) (no irreparable harm where 21 month delay); *Putz v. Schwarzenegger*, 2010 WL 1838717, *8 (N.D. Cal. May 5, 2010) (no irreparable harm where four month delay). On this ground alone, P10's motion was properly denied because a long delay "implies a lack of urgency and irreparable harm." *Id.* (citations omitted).

2. P10's Alleged Monetary Loss Does Not Establish Irreparable Harm.

The district court did not abuse its discretion in finding irreparable harm unlikely. SER22-23. P10 did not tie its alleged financial difficulties to Google's conduct or show that enjoining Google will rescue P10 from financial failure. *Id.*; Appellant's Opening Brief ("AOB"), 82. P10 has *never* operated at a profit; it persists only through Dr. Zada's loans. *See* SER190; ER20186. Legally, an investor's voluntary election to stop funding a money-losing enterprise does not constitute irreparable harm. *See Getty Petroleum Marketing, Inc. v. Shipley Fuels Marketing, LLC*, 2007 WL 2844872, *22-23 (E.D. Pa. Sept. 27, 2007) (denying preliminary injunction where harm was "self-inflicted" by plaintiff's own business decisions); *Southtech Orthopedics, Inc. v. Dingus*, 428 F.Supp.2d 410, 422 (E.D.N.C. 2006) (same). Even if somehow attributable to Google, monetary losses cannot constitute the irreparable harm required for a preliminary injunction; they can be addressed through damages. *E.g., Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

Lacking evidence of irreparable harm, P10 argues it is entitled to a presumption of harm. AOB, 82. But irreparable harm is no longer presumed. *Winter*, 129 S.Ct. at 375-76; *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-93 (2006); *Aurora World, Inc. v. Ty Inc.*, 719 F.Supp.2d 1115, 1168-69 (C.D. Cal. 2009) (no presumption of irreparable harm in copyright case at preliminary

injunction stage); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F.Supp.2d 1197, 1211 (C.D. Cal. 2007) (no presumption of irreparable harm in copyright case).

B. The Balance Of Hardships Weighs Against P10.

The district court did not abuse its discretion in finding the balance of hardships favored Google. SER23. P10's proposed injunction is drastically overbroad, poses a direct threat to free speech, and would require independent investigation by Google and removal of content that P10 never identified as infringing. SER192-195. Combined with P10's failure even to brief this issue below (SER23), the record amply supports the district court's conclusion.

C. The Public Interest Weighs Against An Injunction.

Given the absence of any argument by P10, the overbroad nature of P10's proposed injunction, and the free speech implications of P10's request, the district court appropriately held that the public interest weighs against an injunction. SER23. P10's sole argument for reversal is the general statement "the public interest is also served when the rights of copyright holders are protected against acts likely constituting infringement." AOB, 83-84. P10 waived this argument by not raising it below. SER23; *e.g., Cold Mountain v. Garber*, 375 F.3d 884, 891 (9th Cir. 2004). Regardless, such a general interest does not trump the significant public interest against the sweeping scope of injunctive relief P10 seeks. *See*

Perfect 10, 416 F.Supp.2d at 859 (the “value of facilitating and improving access to information on the Internet ... counsels against an injunction here”). This is particularly true where, as here, P10’s claims implicate strong fair use defenses. *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING P10 UNLIKELY TO SUCCEED ON THE MERITS

A. The District Court Properly Held That P10 Is Unlikely To Succeed On Its Copyright Claims.

1. P10 Is Unlikely To Succeed On Its Web Search, Image Search, And Cache Claims.

(a) Web Search and Cache Do Not Directly Infringe.

To prove direct infringement, P10 must show “ownership of the allegedly infringed material” and that Google “violate[s] at least one exclusive right granted to copyright holders under 17 U.S.C. § 106.” *Amazon.com*, 508 F.3d at 1159. The district court properly exercised its discretion in finding that P10 is not likely to meet its burden as to Web Search and Cache.

The district court properly held that P10 failed to show it is likely to succeed in proving Google directly infringes by in-line linking to or framing infringing content on third-party websites. As this Court previously held, “the owner of a computer that does not store and serve the electronic information to a user is not displaying that information, even if such owner in-line links to or frames the electronic information.” *Amazon.com*, 508 F.3d at 1159. “Because Google’s

computers do not store the photographic images, Google does not have a copy of the images for purposes of the Copyright Act.” *Id.* at 1160-61.

Procedurally, this Court can neither reverse its earlier decision nor disturb the law of the case on purely legal issues. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dep’t of Agriculture*, 499 F.3d 1108, 1116 (9th Cir. 2007). Substantively, P10 gives it no reason to do so. The legally relevant fact that “Google does not have a copy of the images for purposes of the Copyright Act,” *Amazon.com*, 508 F.3d at 1160-61, is unchanged despite speculation by P10’s president that the server test “led to development of massive infringing websites, which display infringing images from other websites using the same HTML code as Google” (AOB, 59), or non-party testimony that, as between in-line linking sites and hosting sites, “I’m not sure how you could say that one or the other was more responsible [for web browser functions].” ER90030 (ln. 9-23); *cf.* AOB, 59-60. Nor is imposing liability on search engines the answer to the asserted proliferation of copyright infringement by third-party websites. And Google’s storage of images in connection with hosting its Blogger services does not have any legal relevance to whether Web Search and Cache directly infringe P10’s copyrights. *See* ER20088, ER20143-150, ER20158-59.

(b) Use Of Thumbnails In Image Search Is A Fair Use.

The district court properly followed this Court's earlier determination that Google is likely to establish its fair use defense regarding thumbnails. SER10; 508 F.3d at 1168. P10 provides no justification to overrule this prior ruling.

P10's only new arguments rest on an increase in the number of thumbnails, an increase in views and downloads of P10 images from other websites, and P10's decision to stop publishing its magazine and offering cell-phone downloads. AOB, 80-81. P10's quantitative arguments do not diminish the quality of "the significant transformative use" this Court previously found that Google makes. 508 F.3d at 1168. Nor do P10's own business decisions to curtail its operations provide relevant evidence of Google affecting P10's market without evidence of Google thumbnails actually being downloaded to cell phones or replacing the market for full-size P10 images available from P10's magazine. *Id.* P10 cites no authority showing how intermixing images of models with other thumbnails is relevant to copyright infringement. AOB, 81.

(c) Google Is Not Contributorily Liable.

Applying the elements of contributory infringement this Court previously identified, the district court properly held that P10 was unlikely to prove that Google "had knowledge that infringing [P10] images were available using its search engine, could take simple measures to prevent further damage to [P10's]

copyrighted works, and failed to take such steps.” *Amazon.com*, 508 F.3d at 1172; SER10-12.

No Simple Measures. P10 fails to demonstrate clear error in the district court’s rejection of the “simple measures” P10 suggested, which consisted of Google affirmatively policing the Internet to prevent all copies of P10 images from appearing in Image Search. SER11; AOB, 54. Specifically, P10 suggested that Google monitor infringement complaints for various websites and preemptively identify and disable P10 images on those websites from appearing in Image Search results regardless of context; assign an employee to review Image Search results to remove all P10 images; use image recognition to block P10 images from appearing in Image Search results; identify and refuse to link to any page of any website that displays infringing content anywhere; and remove all URLs complained of irrespective of whether the notice complies with the DMCA. AOB, 54-55 (items 1-4, and 7-8).

The DMCA appropriately places the burden of identifying infringement on the copyright owner, not the ISP. 17 U.S.C. § 512; *CCBill*, 488 F.3d at 1111. Without proper notice of infringement, Google does not know which uses are considered infringing and which are licensed, a fair use, or otherwise unobjectionable. SER413; SER415. The dramatically over-inclusive removals P10 seeks would prevent users from accessing legitimate content not even

associated with P10 that happens to reside on websites that somewhere displayed infringing material.

P10's remaining "simple measures" relate to Google sending DMCA notices to Chilling Effects (AOB, 54 (items 5 and 6)), which the district court properly held is a fair use. P10 cites no precedent that prohibiting a fair use of copyrighted images constitutes a "simple measure."

No Knowledge of Infringement. Contributory liability requires that the secondary infringer "has actual knowledge that specific infringing material is available using its system." *Amazon.com*, 508 F.3d at 1172 (citation omitted); *Ellison v. Robertson*, 357 F.3d 1072, 1077 (9th Cir. 2004). Here, Google has no knowledge of specific infringement except through DMCA notices. 17 U.S.C. §512(c)(3)(B)(i); *CCBill*, 488 F.3d at 1113 (defective DMCA notices do not impute "knowledge of infringement"); *Amazon.com*, 508 F.3d at 1172-73. Having removed links to all content at any discernable URLs for which it received notice, Google has no specific knowledge of any infringement that P10 wants enjoined.

P10 seeks to have knowledge imputed to Google for all notices that led to removals, even if non-compliant. AOB, 53. P10 identified no reason to enjoin Google regarding links that were already removed. *See BP West Coast Products, LLC v. Takhar Borthers Inc.*, 2007 WL 3342613, *1 (D. Ariz. November 8, 2007). Further, although Google was able to process some non-DMCA compliant notices,

it only did so through extraordinary efforts. SER427-433. Twisting Google's good faith efforts into an independent basis for liability would contravene the DMCA. 17 U.S.C. § 512(c)(3)(ii), (iii); *Hendrickson v. eBay, Inc.*, 165 F.Supp.2d 1082, 1092 (C.D. Cal. 2001) (eBay's removal of a listing "out of an abundance of caution" did not alter the fact that plaintiff failed to identify the location of the allegedly infringing material). It would also create a perverse incentive for ISPs to avoid attempting to process defective notices. *See also* Section III.

On appeal, P10 raises several arguments regarding knowledge that it did not make in its Second PI Motion. AOB, 50-53. Accordingly, they are waived. *See e.g., Cold Mountain*, 375 F.3d at 891; *DocuSign, Inc. v. Sertifi, Inc.*, 468 F.Supp.2d 1305, 1307 (W.D. Wash. 2006) ("new arguments and evidence presented for the first time on Reply are waived."). The new arguments are also substantively invalid.²

² First, Google's practices regarding Chilling Effects do not establish Google's knowledge that it is linking to infringing material, either as a matter of logic or legal liability. Second, the general knowledge P10 attempts to impute "constructively" is legally insufficient to establish Google knew "that *specific* infringing material is available using its system." *Amazon.com*, 508 F.3d at 1172 (emphasis added). Third, P10's arguments about the applicability of the DMCA to Image Search and AdSense are unfounded. The district court properly ruled that because Image Search is an "information location tool," it is within the safe harbor of 17 U.S.C. §512(d). SER35-51. Further, P10 identified no evidence that Google had knowledge "that specific infringing material" was available via AdSense. *Amazon.com*, 508 F.3d at 1172; SER434-435.

(d) Google Is Not Vicariously Liable.

Applying this Court's prior instructions, the district court properly exercised its discretion in finding P10 unlikely to establish that Google "exercises the requisite control over the direct infringer and that the defendant derives a direct financial benefit from the direct infringement." *Amazon.com*, 508 F.3d at 1173.

No direct financial benefit. P10 concedes by its silence that Google receives no direct financial benefit from the alleged direct infringement by third-party websites in connection with Web Search, Image Search, or Cache. *Cf.* AOB, 57 (addressing Blogger).

Right to stop or limit the directly infringing conduct. The district court did not err in following this Court's binding precedent that to prevail, P10 must prove that Google "has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so." *Amazon.com*, 508 F.3d at 1173; SER10. As this Court previously held, "Google's right to terminate an AdSense partnership does not give Google the right to stop direct infringement by third-party websites. An infringing third-party website can continue to [infringe] after its participation in the AdSense program has ended." *Amazon.com*, 508 F.3d at 1173-74.

Neither of P10's new arguments on its Second PI Motion justifies overturning the prior ruling. Image recognition technology does not give Google

“control over a direct infringer” (AOB, 56) because even if it could detect *infringement*, it cannot stop other websites’ display of infringing content. *Amazon.com*, 508 F.3d at 1173-74. Nor does testimony that Google and Napster each controlled their respective indices (ER90031, ln.4-13) change the basis for this Court’s legal distinction between Google and Napster:

Google cannot stop any of the third-party websites from reproducing, displaying and distributing unauthorized copies of [P10’s] images because that infringing conduct takes place on the third-party websites. Google cannot terminate those third-party websites or block their ability to ‘host and serve infringing full-size images’ on the Internet.

Amazon.com, 508 F.3d at 1174. Because Google still cannot stop third parties’ direct infringement, the district court’s denial of P10’s motion should be affirmed.

2. P10 Is Unlikely To Succeed On Claims Directed At Blogger.

(a) Blogger Does Not Directly Infringe.

Blogger was not at issue in P10’s First PI Motion, but relying on ample precedent, the district court did not abuse its discretion in finding P10 unlikely to succeed in proving direct infringement by Google for its passive storage of Blogger content created by third parties. SER415. ISPs, “when passively storing material at the direction of users in order to make that material available to other users upon their request,” as Blogger does, “do not ‘copy’ the material in direct violation of § 106 of the Copyright Act. . . . [T]he automatic copying, storage, and transmission of copyrighted materials, when instigated by others, does not render

an ISP strictly liable for copyright infringement.” *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004) (following *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, 907 F.Supp. 1361 (N.D. Cal. 1995)); *see also Field v. Google, Inc.*, 412 F.Supp.2d 1106, 1115 (D. Nev. 2006) (“The automated, non-volitional conduct by Google in response to a user’s request does not constitute direct infringement under the Copyright Act”); *Parker v. Google, Inc.*, 422 F.Supp.2d 492, 496-98 (E.D. Pa. 2006) (“When an ISP automatically and temporarily stores data without human intervention so that the system can operate and transmit data to its users, the necessary element of volition is missing.”).

P10 concedes that volitional conduct is legally required and tries to prove it by relying on Google’s creation of thumbnails of images stored on Blogger servers. However, this fair use cannot satisfy the volitional requirement. *See* Section II.A.1.b, *supra*.

(b) Blogger Is A Fair Use.

Alternatively, the district court’s finding should be affirmed because Google’s passive, content-neutral copying of material uploaded by and hosted for users constitutes a transformative use of P10’s images. *Quinn*, 620 F.3d at 1010 n.3 (appellate court may affirm on any ground supported by the record); 17 U.S.C. § 107.

Blogger provides a social benefit as a means of self-expression, and its users' expressions incorporating P10's images are themselves new works. *See* SER415; SER464-474; *cf. Amazon.com*, 508 F.3d at 1165 (“a search engine provides social benefit by incorporating an original work into a new work”). Google is not paid to host Blogger material and it copies no more than is necessary to fulfill the back-end hosting requirements of the Blogger program. SER415; SER464-474. P10 has no evidence that Google's automatic copying impacts the market for P10's images. *See* 508 F.3d at 1168. And Google's good faith in passively copying content uploaded by users weighs in favor of fair use. *Field*, 412 F.Supp.2d at 1122 (“courts may evaluate whether an alleged copyright infringer has acted in good faith as part of a fair use inquiry”) (citing *Fisher v. Dees*, 794 F.2d 432, 436-37 (9th Cir. 1986)).

Finding Google's Blogger hosting to be a fair use is consistent with courts' recognition that automated copying is necessary and appropriate to support the significant transformative power of the Internet. *See, e.g., Perfect 10*, 416 F.Supp.2d at 852 n.17; *Field*, 412 F.Supp.2d. at 1123. Google is therefore likely to establish a fair use defense.

(c) Google Is Not Contributorily Liable.

The district court correctly found that P10 is not likely to succeed on its Blogger contributory infringement claim for the same reasons its Web Search,

Image Search, and Cache claims are likely to fail. SER14; *see* Section II.A.1.c. P10 did not identify any Blogger-specific “simple measures” that Google could have taken to prevent further damage to P10’s copyrights, and does not dispute that Google removed access to the allegedly infringing content identified in the Group B Blogger URLs, such that there is no conduct to enjoin. SER53-54, SER14. P10’s sole argument arguably unique to Blogger (AOB, 52) is a variation on its improperly raised constructive knowledge argument, which was debunked above in footnote 2 and the accompanying text.

(d) Google Is Not Vicariously Liable.

The district court properly exercised its discretion in holding P10 unlikely to prove Google receives a direct financial benefit from infringement on Blogger—the only product that P10 even argued satisfied this element of vicarious infringement. SER14-15 (citing 508 F.3d at 1173).

The general presence of ads on Blogger pages is not enough to prove a direct financial benefit, yet P10’s sole evidence of “direct financial benefit” is the appearance of ads on Blogger pages displaying allegedly infringing material. AOB, 57; *see UMG Recordings, Inc. v. Veoh Networks, Inc.*, 2009 WL334022, *5-6 (C.D. Cal. February 2, 2009) (general evidence of advertising revenue insufficient to establish a “direct financial benefit”). Even if P10 had offered evidence that Google earned revenue from clicks on these specific ads, that alone

is insufficient to prove “direct financial benefit” from infringing activity because the “essential aspect of the ‘direct financial benefit’ inquiry is whether there is a causal relationship between the infringing activity and any financial benefit a defendant reaps.” *Ellison*, 357 F.3d at 1079.

Applying the causal relationship test, *Ellison* held that AOL received no direct financial benefit from providing access to infringing material absent evidence that it attracted or retained subscriptions *because of* infringement or lost subscriptions *because of* stopping infringement. 357 F.3d at 1079. Because P10 failed to demonstrate a causal connection between the alleged infringing activity and hypothesized financial benefit, any financial benefit to Google is “too far removed from the alleged infringement to be considered a ‘direct’ financial interest.” *UMG*, 2009 WL334022, *6.

3. P10 Is Unlikely To Succeed On Claims Based On Display Or Distribution Of Its Passwords.

P10 is not likely to succeed in proving Google liable for copyright infringement by displaying or hosting P10 passwords because passwords are not copyrightable. SER9 n.5; *see* 37 C.F.R. § 202.1 (2010); *see also Perfect 10*, 416 F.Supp.2d at 838 n.9. In addition, as this Court held: “In the absence of evidence that Google’s actions led to any direct infringement, this argument does not assist Perfect 10 in establishing that it would prevail on the merits of its contributory liability claim.” *Amazon.com*, 508 F.3d at 1173 n.13. Such evidence is still

absent. P10 only showed that [REDACTED]

[REDACTED]; it cites no evidence that this was unauthorized or that Google was at fault. AOB, 57-58.

4. P10 Is Unlikely To Succeed On Its Claims Regarding Chilling Effects.

The district court properly held that Google’s practice of forwarding DMCA notices to Chilling Effects is likely a fair use. SER19-21; SER412; SER440. Chilling Effects is a non-profit research institution dedicated to the protection of free expression on the Internet. SER17; SER145-150. It is a “joint project of the Electronic Frontier Foundation and Harvard, Stanford, Berkeley, University of San Francisco, University of Maine, George Washington School of Law, and Santa Clara University School of Law clinics,” designed to help Internet users “understand the protections that the First Amendment and intellectual property laws give to your online activities.” *Id.* It provides a clearinghouse service in which the public is invited to submit cease and desist notices, which law students can research—all of which is posted in an online database. *Id.*

Although P10 was aware of Google’s policy regarding Chilling Effects since 2005, in 2007, P10 began sending notices with screenshots of allegedly infringing images (the Group C Notices). P10 then argued that Google’s forwarding of these notices gave rise to an additional copyright infringement theory. The district court

did not abuse its discretion in evaluating the four fair use factors and concluding Google is likely to prevail on its fair use defense for forwarding notices to Chilling Effects. *See Field*, 412 F.Supp.2d at 1113 (rejecting copyright owner’s attempt to manufacture claim to make money from Google’s standard practice).

Purpose and Character of the Use. The “central purpose” of this factor is “to determine whether and to what extent the new work is ‘transformative.’” *Amazon.com*, 508 F.3d at 1164 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). A court must consider whether the use is “of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1).

The district court did not abuse its discretion in finding that Google’s forwarding of Group C Notices to Chilling Effects is transformative because Google did so to aid Chilling Effects’ research and analysis of the uses of the DMCA. SER19-20; SER145-150; SER412; *see also Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (use of images of concert posters in biography was transformative); *Quinn*, 620 F.3d at 1010 n.3. Google’s practice also serves to give statutory notice to providers when material is removed in response to a DMCA notice. *See* 17 U.S.C. § 512(g)(2)(A); SER331; SER412; SER440.

P10 takes issue with Google’s sending complete, un-redacted notices, serving ads to sites displaying images from Chilling Effects’ site, and providing

links to the notices from its crawls of Chilling Effects' website, the scope of Chilling Effects' research, and the speed of its postings. AOB, 74-76. None of these arguments shows clear error.

Redacting or otherwise altering the images in P10's notices before sending them to Chilling Effects would undermine the purpose of sending them to Chilling Effects: to send the actual notices *as they were received*. SER65-66. Google's use of the entire notice, including the images it contains, does not diminish the transformative nature of Google's use. *E.g.*, 508 F.3d at 1165.

Nor do ads displayed on third-party websites displaying images in P10's notices from Chilling Effects' website defeat the transformative nature of Google's use. ER20084-85, ER20124-29. More direct commercial relationships have been inadequate to override a use's transformative nature. *Sony Computer Entertainment America, Inc. v. Bleem, LLC*, 214 F.3d 1022, 1027 (9th Cir. 2000).

P10's remaining arguments are based on the speed and order in which Chilling Effects posts notices sent by Google, and the scope of its research.³ These arguments do not demonstrate clear error in the district court's factual finding that Google forwards DMCA notices to Chilling Effects and Chilling Effects analyzes

³ P10 argues Google "never addressed or controverted this evidence," (AOB, 76), which was improperly submitted in Dr. Zada's *reply* declaration. *See Docusign*, 468 F.Supp.2d at 1307. In fact, Google addressed it during oral argument. SER67-68.

them. SER17; SER145-150; SER412. P10 also argues that Google copies and forwards P10 notices to Chilling Effects without processing them. AOB, 75-76. But the record shows that Google removed access to the allegedly infringing material identified by P10. SER88-144; *compare* ER20198-200, ER30045-67. In any event, Chilling Effects' research and analysis of the DMCA notices ISPs receive is furthered irrespective of whether Google was able to remove the material.

Nature of the Work. P10 does not dispute this factor weighs only slightly in favor of P10 because P10's images were previously published. AOB, 74 n.11.

Amount Used. The district court did not abuse its discretion in finding that "whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole are reasonable in relation to the purpose of the copying" was neutral. *Amazon.com*, 508 F.3d at 1167. Where use of an entire image is reasonable in light of the purpose of the use, that the entire work was used does not preclude fair use. *Id.* at 1167-68 (the use of an entire photographic image in search engine thumbnails was reasonable in light of the purpose of a search engine); *see also Bill Graham Archives*, 448 F.3d at 613 ("copying the entirety of a work is sometimes necessary to make a fair use of the image"). Because Google forwards DMCA notices so Chilling Effects can research and provide commentary on them, Google necessarily sends the whole notice because sending only partial or

altered ones would limit the effectiveness of Chilling Effects' work. SER20; SER145-150; SER331; SER412; SER440.

Effect on the Market. The district court did not clearly err in not crediting P10's speculation that Google's sending DMCA notices to Chilling Effects is likely to affect the potential market for P10's images. SER20-21 (citing *Amazon.com*, 508 F.3d at 1168). Highly transformative works do not give rise to a presumption of market harm. 508 F.3d at 1168. And neither evidence nor common sense supports that visitors to Chilling Effects use P10's DMCA notices as substitutes for viewing crisp, full-sized images in P10's interactive environment. Accordingly, the district court did not abuse its discretion in finding that this factor favors Google. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) ("a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create").⁴

P10 also contends Google's conduct prevents P10 from issuing further DMCA notices, which it implies harms the market for its images. AOB, 79. This

⁴ P10 argues its June 2007 notice included 1.1 million images, which, if forwarded to Chilling Effects, it could display. AOB, at 79. This has not occurred and is implausible. That notice included a several-hundred gigabyte hard drive. SER403-404; SER1237-1255. There is no evidence Google copied or forwarded that hard drive or that Chilling Effects somehow published those 1.1 million images.

is counter-factual. Not only has P10 continued to send notices to Google after the district court's rulings, but it can entirely stop the "harm" it complains about by following Google's instructions and *not* including screenshots. SER424-427; SER1771-1812; ER20194-197.

The district court did not abuse its discretion in balancing the fair use factors and finding Google is likely to prove this defense.

B. P10 Is Unlikely To Succeed On Its Right Of Publicity Claim.

The district court properly exercised its discretion in finding P10 is unlikely to succeed on the merits of its publicity claim, which requires proving that Google *knowingly* used the models' identity; appropriation of the models' names or likenesses to Google's advantage, commercially or otherwise; lack of consent; and resulting injury. Cal. Civ. Code § 3344; *Fleet v. CBS, Inc.*, 50 Cal.App.4th 1911, 1918 (Ct. App. 1996); SER21-22. The district court properly found P10 unlikely to prove that Google is inappropriately using the models' likeness and rejected P10's theory that Google "contributes" to third-parties' violations of its models' publicity rights. SER22.

P10 does not dispute the correctness of the legal conclusion that Google, and not a third-party website, must use the models' likeness; instead, it argues that Google uses them by allowing ads to be placed around their images. *See* AOB, 83-

84. This strict liability argument wholly ignores the “knowing” element of the claim and therefore fails.

The district court did not address P10’s evidence of damage to models because it was improperly submitted for the first time on reply. *DocuSign*, 468 F.Supp.2d at 1307. It is also substantively irrelevant, as it consists of the self-serving declaration of P10’s president attaching screenshots of Image Search results, several of which show models who are not even at issue. AOB, 83 (citing ER20091-92, ER20173-78); *Compare* ER20174-17 with SER2241. P10’s failure to show a likelihood of success on either of these elements compels affirming the ruling below. *Fleet*, 50 Cal.App.4th at 1918.

Alternatively, the ruling can be affirmed because P10 has not shown it is likely to prove that it holds exclusive publicity rights for the nine models at issue. *Quinn*, 620 F.3d at 1010 n.3. [REDACTED]

[REDACTED] “[I]t is unlikely that a non-exclusive licensee could assert” the right of publicity. *Upper Deck Authenticated, Ltd. v. CPG Direct*, 971 F.Supp. 1337, 1349 (S.D. Cal. 1997).

Although the district court did not need to reach it, Google’s affirmative defense of preemption by the Communications Decency Act (“CDA”) additionally compels affirming the denial of P10’s motion. *Quinn*, 620 F.3d at 1010 n.3. Section 230 of the CDA provides that, apart from intellectual property laws: “No

provider or user of an interactive computer service shall be treated as the publisher or speaker of any information *provided by another information content provider*” and “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(c)(1), § 230(e)(2), § 230(e)(3) (emphasis added). P10’s publicity claim, alleging Google provides links to content on *third-party websites* and displays ads in response to users’ queries for model names, falls squarely within the CDA’s protection. *See CCBill*, 488 F.3d at 1119 (publicity claim preempted by CDA); *Stayart v. Yahoo! Inc.*, 651 F.Supp.2d 873, 885 (E.D. Wis. 2009) (same); *Parker v. Google, Inc.*, 422 F.Supp.2d 492, 501 (E.D. Pa. 2006) (Google entitled to CDA immunity on state law claims, including right of privacy, because it did nothing more than archive, cache, or provide access to content created by a third party); *Goddard v. Google, Inc.*, 640 F.Supp.2d 1193, 1197-98 (N.D. Cal. July 30, 2009) (AdWords and the keyword suggestion tool were neutral tools that entitled Google to CDA immunity); *Jurin v. Google Inc.*, 695 F.Supp.2d 1117, 1123 (E.D. Cal. 2010) (same). P10 cannot dispute that the content at issue is provided by third parties or any other elements of the defense.

III. THE DISTRICT COURT PROPERLY HELD THAT P10’S NOTICES DID NOT COMPLY WITH THE DMCA

As discussed above in Section II.A.1.c, the district court did not abuse its discretion in finding P10 unlikely to succeed on the merits of its contributory

infringement claims because P10 failed to show Google had knowledge of ongoing specific infringing acts. This finding was based in part upon the district court's earlier summary judgment ruling, which properly evaluated P10's notices consistent with the language and policy of the DMCA and the controlling decisions construing it. SER35-55.

The DMCA reflects Congress' careful balancing of the rights of copyright holders with the rights of citizen-consumers. *See* 144 Cong. Rec. 108, H7092 (1998) (SER233-247); H.R. Rep. 105-796, at 72 (1998). Crafted to "updat[e] the copyright laws for the digital age and prepar[e] a sizable portion of our economy for the next century," the DMCA curtailed secondary liability for copyright infringement. 144 Cong. Rec. 61, S4887-88 (1998) (SER221-231). Congress had recognized that the looming threat of such infringement claims jeopardized the very "infrastructure of the Internet," both in terms of developing innovative products and protecting the free exchange of ideas. *Id.*; *see also id.* at S4889 (acknowledging potentially disastrous consequences if search engines become subject to civil liability by "categoriz[ing] [web pages] for a directory" or developing other "true consumer-oriented products"); 144 Cong. Rec. 108, H7095. ("[I]f America's service providers are subject to litigation for the acts of third parties at the drop of a hat, they will lack the incentive to provide quick and sufficient access to the Internet."); S. Rep. 105-190, at 8 ("the DMCA ensures that

the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand”). Accordingly, Congress structured the DMCA to protect speech by not giving ISPs “either an incentive or an excuse to censor” and to give ISPs the necessary protection to innovate, which was “critical to unlock the potential for the Internet.” 144 Cong. Rec. 108, H7092.

To achieve its policy objectives, Congress created four “safe harbors” that “protect[] qualifying Internet service providers from liability for all monetary relief for direct, vicarious and contributory infringement.” *Hendrickson*, 165 F.Supp.2d at 1088 (quoting S. Rep. No. 105-190, at 20); *see also* 17 U.S.C. § 512; *CCBill*, 488 F.3d at 1109; *Ellison*, 357 F.3d at 1076-77. To qualify for these safe harbors, the DMCA specified that “a service provider need not monitor its service or affirmatively seek facts indicating infringing activity.” *CCBill*, 488 F.3d at 1111 ; 17 U.S.C. § 512(m).

As part of the burden on copyright owners to provide proper notice to ISPs, they must review each alleged infringement, make a good faith determination regarding what is infringing (considering the possibility of fair use), and submit a DMCA-compliant notice. *See CCBill*, 488 F.3d at 1113; *Lenz v. Universal Music Corp.*, 572 F.Supp.2d 1150, 1155-56 (N.D. Cal. 2008). Absent proper notice or

actual knowledge of specific infringement, ISPs are under no obligation to respond in any fashion. 17 U.S.C. §512(c)(3)(B)(i); *CCBill*, 488 F.3d at 1113.

To escape the district court's proper application of the DMCA's express statutory language to the undisputed facts, P10 asks this Court to rewrite the DMCA, transforming it from a cooperative communications tool into a bludgeon for copyright holders. P10's proposed requirements for safe harbor would cripple free speech and free enterprise on the Internet—the very things the DMCA was enacted to protect—by forcing ISPs affirmatively to police copyright infringement and remove non-infringing content. To the extent “necessary to ensure meaningful review” of the denial of P10's Second PI Motion, the district court's thoughtful application of the statute's actual requirements and its rejection of P10's proposed revisions should be affirmed. *Campbell*, 138 F.3d at 778.

A. The Group A Notices Did Not Comply With The DMCA.

The district court properly found that the Group A Notices were deficient because they do not identify the copyrighted images allegedly infringed as Section 512(c)(3)(A)(iii) requires. SER38; SER248-328. P10 points to no contrary evidence. AOB, 49-50.

P10's argument that a screenshot of an allegedly infringing webpage showing a P10 Magazine cover identifies the copyrighted image infringed (AOB, 50) is mistaken. The DMCA nowhere suggests that identification of the allegedly

infringing material also satisfies the separate requirement of identifying the image allegedly infringed. 17 U.S.C. § 512(c)(3)(A). Although P10 employees might understand what allegedly copyrighted images are infringed by material on a particular webpage, ISPs like Google have no way of knowing that without proper notice. SER413.

B. Most of the Group B Notices Did Not Comply With The DMCA.

The district court properly found that many “notifications” within the Group B Notices failed to adequately identify the copyrighted image or the infringing material. SER39-40.

1. The Group B Notices Failed To Identify The Copyrighted Image Allegedly Infringed.

The district court properly found that most references in the Group B Notices “do not reference the copyrighted work with specificity” sufficient to satisfy 17 U.S.C. § 512(c)(3)(A)(ii). SER39. The majority of references in the Group B Notices either did not identify an image at all or identified an entire website like “perfect10.com”—or websites for which P10 does not purport to own all of the images—without specifying which of the hundreds or thousands of images on those sites were allegedly infringed. SER420; SER549-1214. Most of the remaining references cited to multiple-page ranges in one or more P10 Magazine issues. *Id.* Such sweeping references do not comply with the DMCA.

See CCBill, 488 F.3d at 1113. The single statement in the legislative history P10 relies upon (AOB, 49) does not waive the DMCA’s requirements.

P10 waived its new argument that identifying the copyrighted image infringed is unnecessary (AOB, 36-41) by not making it below. *See, e.g., Cold Mountain*, 375 F.3d at 891; *U.S. v. Kitsap Physicians Service*, 314 F.3d 995, 999 (9th Cir. 2002) (failure to present evidence to the district court in opposition to motion for summary judgment results in waiver of the argument on appeal). That argument is also flatly contradicted by 17 U.S.C. § 512(c)(3)(A)(ii).

2. Most Of The Group B Notices Failed To Identify The Allegedly Infringing Material.

The district court properly found that Group B Notices that “contain incomplete URLs” and “lack image-specific URLs” do not confer adequate notice under the DMCA, which requires identification of “the material that is claimed to be infringing ... and information reasonably sufficient to permit the service provider to locate the material.” 17 U.S.C. § 512(c)(3)(A)(iii); SER39; SER549-1214.

The undisputed record shows that Google needs image-specific URLs to locate and remove allegedly infringing images from its Image Search results and complete URLs to locate and remove allegedly infringing links from Web Search, Image Search or Cache—which P10 knew. SER330-333; SER336-396; SER411-415, SER424-427; SER1771-1812. P10’s citation to general legislative history

(AOB, 49) cannot overcome the statutory requirement that the notice be “reasonably sufficient to permit the service provider to locate the material.” 17 U.S.C. § 512(c)(3)(A)(iii).

3. The District Court’s Order Was Sufficiently Detailed.

P10’s complaint that the district court did not provide a list of the alleged infringements and copyrighted works for which Google was granted partial summary judgment of safe harbor (AOB, 49) does not justify reversal. The district court was not required to comb through 10,000+ references in the 48 Group B Notices, URL by URL. *See In re Oracle Corp. Securities Litigation*, --- F.3d ----, 2010 WL 4608794 at *4 (9th Cir. Nov. 16, 2010) (“It behooves litigants, particularly in a case with a record of this magnitude, to resist the temptation to treat judges as if they were pigs sniffing for truffles.”); *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988) (“The district judge is not required to comb the record to find some reason to deny a motion for summary judgment.”). P10’s complaint is particularly unreasonable given P10’s consistent refusal to provide discovery responses or pleadings that might have facilitated such a finely-parsed order. *See, e.g.*, SER11; SER2225; SER2229-2232.

C. The Group C Notices Did Not Comply With The DMCA.

After years of sending notices to Google in hard-copy, spreadsheet form, which, although defective and burdensome, allowed Google to check identified

URLs and process the majority of the notices within one to two weeks of receipt, P10 overhauled the form and content of its notices. SER430-432. These new notices, the Group C Notices, “identified” vast collections of images rather than specific infringed images and consisted of such complex nested folders, subfolders, and cross references that they were not “reasonably sufficient to permit [Google] to locate the material” claimed to be infringing. 17 U.S.C. § 512(c)(3)(A)(iii). The district court properly held that that for these reasons they uniformly failed to provide Google with knowledge of infringement. SER41-51.

To defend the Group C Notices, P10 obfuscates their form and content. Although P10 complains the district court failed to analyze each notice (AOB, 24-25) and seeks *de novo* review of the adequacy of its notices, P10 failed to provide this Court with the actual notices. SER421-22; SER1220-1681. Instead, P10 included only *excerpts* of the massive DVDs and hard drive which accompanied the Group C Notices. For example, P10 points to one excerpt of a Group C Notice (AOB, 34-35; ER70207-216), but does not disclose how to find the example in the notice—which was apparently buried in the accompanying hard drive containing multiple layers of folders of electronic files, including one containing 46,187 pages and another containing 367 subfolders. SER403-404; SER1255. P10’s needles must be evaluated in the context of the haystack in which they were sent. *See Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 669 (7th Cir. 2003) (relying on

snippets of evidence rather than introducing evidence as a whole violates best evidence rule and rule of completeness, Fed. R. Evid. 106, as it allows party to take evidence out of its proper context).

P10 also relies on its post-summary judgment notices in arguing the Group C Notices are DMCA-compliant. These notices must be ignored because they were not part of the summary judgment record. P10 cannot shoehorn new notices into the record after the summary judgment motions were taken under submission. *See e.g., Carmen v. San Francisco Unified School District*, 237 F.3d 1026, 1029 (9th Cir. 2001) (appellate court need not and should not consider post-submission evidence); *see Perfect 10, Inc. v. Amazon.com, Inc.*, 2009 WL 1334364, *5 (C.D. Cal. May 12, 2009) (notice sent to A9.com’s copyright agent during litigation, plus notices produced in discovery, were “legally irrelevant”). In any event, these notices were processed as appropriate and are therefore irrelevant to P10’s Second PI Motion because there is no conduct to enjoin.

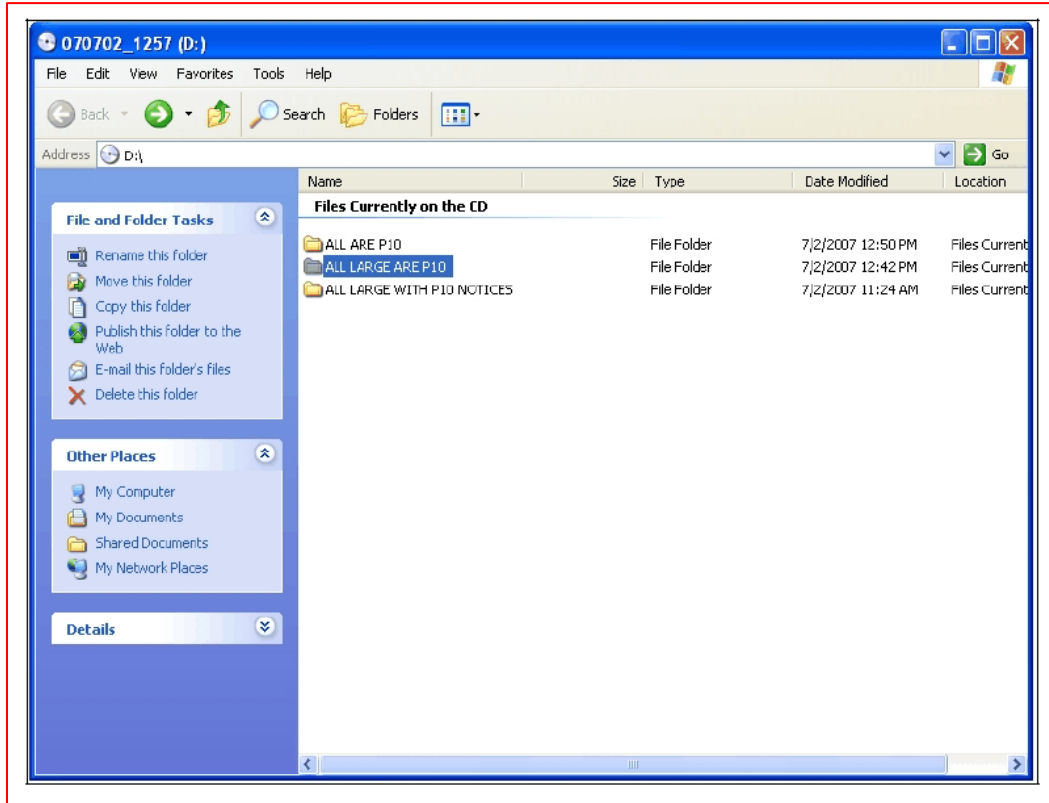
P10 also contends that it sent different Group C Notices for Blogger, Image Search and Web Search and multiple “types” of Group C Notices. AOB, 24-36. This is not revealed by the notices, and having failed to argue this point below, P10 waived it. *See e.g., Cold Mountain*, 375 F.3d at 891; *Kitsap*, 314 F.3d at 999.

Review of the actual Group C Notices leaves no doubt they were designed to burden Google in the hope of furthering litigation objectives rather than assist in

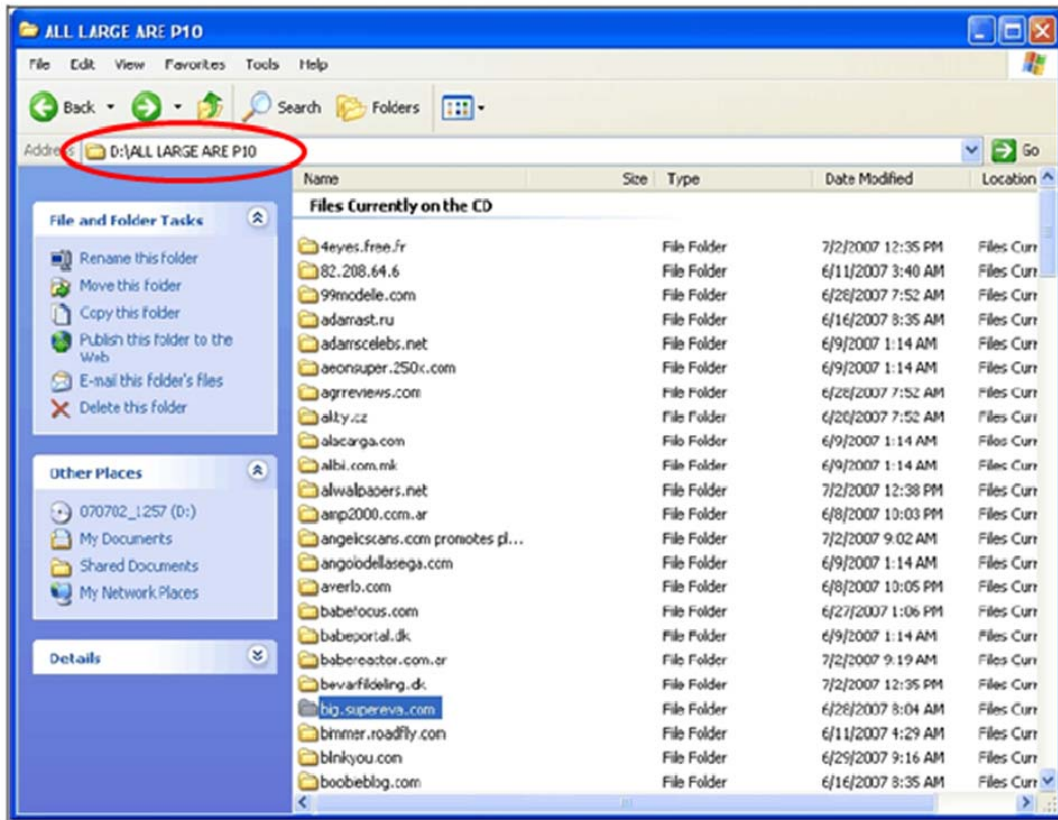
the removal of allegedly infringing material. For example, P10's July 2, 2007 notice was comprised of a cover letter, spreadsheet, and two DVDs. SER1256-1271. The spreadsheet listed top-level domain names of allegedly infringing websites, rather than exact locations of allegedly infringing material, and directed Google to electronic folders or subfolders on the two DVDs:

INFRINGING WEBSITE	LOCATION OF IMAGES	FOLDER OR SUBFOLDER
4eyes.free.fr	DISK I	ALL LARGE ARE P10
82.208.64.6	DISK I	ALL LARGE ARE P10
99modelle.com	DISK I	ALL LARGE ARE P10
abshell.net	DISK I	ALL ARE P10
adamast.ru	DISK I	ALL LARGE ARE P10
adamscelebs.net	DISK I	ALL LARGE ARE P10

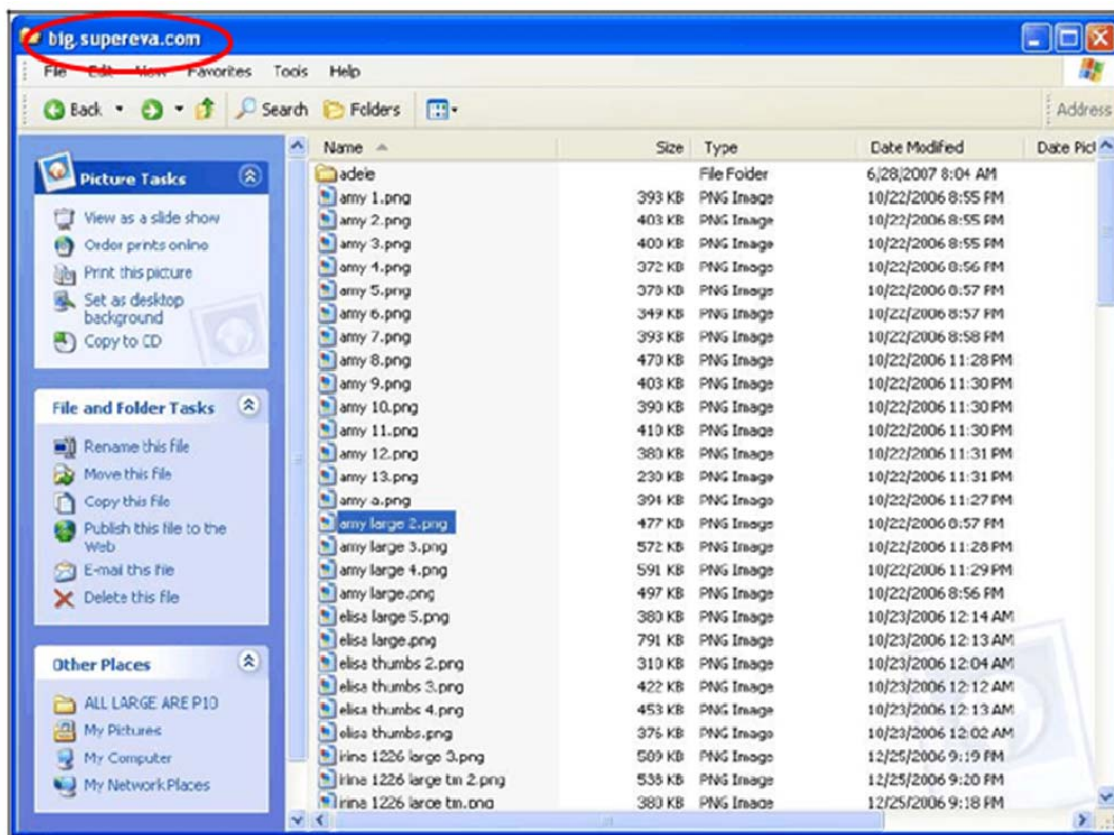
(SER1260). One of the DVDs accompanying that notice had three top-level folders:



(SER1270) (cited at SER45). The “ALL LARGE ARE P10” folder on this DVD consisted of 167 subfolders, a portion of which are shown below:



(SER1270) (cited at SER46) (annotations added); SER405. Each of those subfolders contained hundreds or thousands of pages of material, for example:



(SER1270) (cited at SER47) (annotations added); SER405. In total, the “ALL LARGE ARE P10” top-level folder contained 9,046 pages. Together, the two DVDs accompanying the July 2, 2007 notice contained more than 26,000 pages. SER405.

1. The Group C Notices Were Too Burdensome To Convey Knowledge Of Infringement.

The district court properly held that the immense burden imposed by the Group C Notices rendered them deficient and rejected P10’s attempts to shift the burden to Google to identify infringing material and the infringed images. SER50. This result is compelled by this Court’s precedent, which recognizes that the DMCA puts “the burden of policing copyright infringement . . . *squarely on the*

owners of the copyright,” and rejects P10’s attempts to use the heavily-criticized *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir. 2001) to rewrite the DMCA. *CCBill*, 488 F.3d at 1113 (emphasis added), 1112, n.3; AOB, 27.⁵

P10’s attempt to negate the district court’s burden analysis by characterizing it as limited to one “atypical” notice (AOB, 46) is unavailing. P10 fails to explain why creating a notice with Snagit creates any relevant atypical quality. *Id.* P10 also “defends” its failure to specify a link to the infringing content displayed in the court’s order on the grounds it could not. *Id.* But Google can only disable access to content to which it links. SER330-331; SER410-418. P10’s argument regarding Google’s processing of “display notices” (AOB, 46-47) fails for the same reason. Google never provided links to the material at issue in the “display notices,” so there is nothing for Google to remove. SER330-331.

Further, P10’s arguments do not diminish the burden demonstrated by the district court’s seven-page explanation of this notice, even if it is “atypical.” Nor does P10 dispute that the other Group C Notices were equally burdensome.

⁵ See, e.g. 3 Nimmer on Copyright § 12B.04[B][4][a] (2008); Raphael Gutierrez, Save the Slip for the Service Providers: Courts Should Not Give Short Shrift to the Safe Harbors of the Digital Millennium Copyright Act, 36 U. San Francisco L.R. 933-935 (2002); T. Reese, Wading Through The Muddy Waters: The Courts’ Misapplication Of Section 512(c) Of The Digital Millennium Copyright Act, 34 SW. U. L.R. 287, 313 (2004).

P10's arguments about the "ease" of processing the Group C Notices (AOB, 44-45) likewise fail. P10's reliance on Adobe's "copy link" function (AOB, 45) ignores the many steps required to identify which URLs on screenshots jumbled in nested folders contain infringing material. SER50; SER198-200. P10's arguments that Google could rewrite P10's notices or send all the images to third-party websites and ask them to remove them (AOB, 45) improperly ask Google to police infringement on the Internet. *CCBill*, 488 F.3d at 1111; 17 U.S.C. § 512(m). P10's arguments that Google should take steps beyond disabling links—such as creating a special procedure for P10, contacting paysites directly even though Google does not link to password-protected content, and cutting *all* links to websites with *any* infringing content (AOB, 45)—go far beyond the DMCA safe harbor requirements and would inevitably disable links to non-infringing content. 17 U.S.C. § 512(c)(3).

Finally, P10 charges the district court with creating a "single document" requirement. AOB, 41-44. The district court did not "create" the requirement that all of the elements of a notice of claimed infringement must be included in "a written communication." SER51. That language comes directly from the DMCA. 17 U.S.C. § 512(c)(3)(A). As this Court has held, Section 512(c)(3)'s requirement "that the notice be 'a written communication' ... is not a mere technicality" because it protects ISPs from improper attempts "to shift a substantial burden from

the copyright owner to the provider.” *CCBill*, 488 F.3d at 1113. “Permitting a copyright holder to cobble together adequate notice from separate defective notices [would] unduly burden[] service providers.” *Id.* (rejecting sufficiency of P10’s notices because they required “substantial time to piece together the relevant information for each instance of claimed infringement”).

The district court correctly found that processing the Group C Notices would be “even more onerous than the situation in *CCBill*.” *Compare SER50 with CCBill*, 488 F.3d at 1113. P10’s disingenuous argument that the summary judgment order requires P10 to send millions of separate notices (AOB, 42) is belied by the holding that some references within the Group B Notices, which each listed multiple alleged infringements, were compliant (SER39), and the order’s recognition that P10 was not prohibited from attaching additional documentation to its notices. SER50. To the extent that the findings in *Arista Records, Inc. v. Mp3Board, Inc.*, 2002 WL 1997918 (S.D.N.Y. August 29, 2002) can be applied to P10’s notices, they do not trump this Court’s later, binding holding in *CCBill*.

P10’s reliance on [REDACTED] an excerpt of the district court’s unpublished and unproduced *tentative* order in the *Amazon* litigation [REDACTED] [REDACTED] (AOB, 43) is procedurally improper. *Thomas v. Housing Authority of Los Angeles*, 2005 WL 6133692, *1 (C.D. Cal. June 3, 2005) (“The tentative order binds neither the court nor the parties”); *see also* Motion to Strike

Portions of P10's Excerpts of Record, filed herewith. Moreover, P10's reliance on only two pages of a tentative order to show the absence of an issue in the entire order—to which Google does not have access—is untestable and improper. *See id.*

2. The Group C Notices Failed To Identify The Copyrighted Image.

P10 does not dispute that the district court properly found that the Group C Notices failed to identify the copyrighted image infringed. SER42; AOB, 38 (arguing the requirement is “pointless” and that P10 needs only to identify the infringing material). Rather, P10 concocts another straw man argument and contends the district court required P10 to identify the “exact location” of the copyrighted images. AOB, 36. The district court never used those words or mandated such a requirement. Rather, in the course of explaining that P10 is not permitted to conflate identification of the infringed image with identification of the allegedly infringing material (even content that may contain a copyright notice), the district court pointed to “the URL on the P10 website or the volume and page number of *Perfect 10* magazine at which the original copyrighted image appears” as an example of how P10 could identify the copyrighted image infringed. SER42(n.7).

On appeal, P10 continues to ignore that the DMCA requires identification of both the copyrighted image infringed *and* the infringing material. 17 U.S.C. §512(c)(3)(A)(ii)-(iii). The district court properly held that these separate

requirements could not be satisfied by printing hordes of webpages and shipping them to Google to “figure it out.” SER42. As this Court held in *CCBill*, forcing a search engine to examine tens of thousands of printouts and determine what content might be copyrighted imposes an impermissible burden. *CCBill*, 488 F.3d at 1111; 17 U.S.C. § 512(m). Because the district court did not impose an “exact location” requirement and P10 does not dispute it failed to identify the copyrighted image infringed in the Group C Notices, P10’s myriad of arguments concerning the non-existent requirement are irrelevant to Google’s knowledge of infringement. 17 U.S.C. § 512(c)(3)(B); *CCBill*, 488 F.3d at 1113.

P10 also contends that the DMCA permits copyright owners to identify a “representative list” of copyrighted images allegedly infringed. AOB, 27. P10 does not cite any precedent holding that identifying a collection of 15,000 images meets this standard. The district court properly upheld the DMCA’s careful compromise intended to give both ISPs and copyright holders incentive to cooperate in taking down infringing material. SER42. Holding that 15,000 images can be a “representative list” would undermine this compromise and impermissibly burden ISPs. *See, e.g.*, 144 Cong. Rec. 108, H7092; *CCBill*, 488 F.3d at 1113.

3. Notices To Third-Party ISPs And From Third Parties Are Irrelevant.

P10 also tries to defend its Group C Notices based on what other ISPs do in response to other notices, which P10 concedes are “smaller” than the Group C

Notices. AOB, 29; SER69-71. P10 further argues that the district court needs to justify its holdings based on certain notices from third parties. AOB, 39-40. However, P10 does not cite any authority that its seven examples—which were not part of the summary judgment record, which concern entirely different types of works, and which P10 does not contend complied with the DMCA or allowed Google to remove the allegedly infringing content—are relevant to whether *P10's* notices comply with the DMCA.

IV. THE DISTRICT COURT'S SUMMARY JUDGMENT FINDING REGARDING GOOGLE'S REPEAT INFRINGER POLICY IS NOT APPEALABLE AT THIS TIME, BUT WAS PROPER

The order partially granting Google's partial summary judgment motions is not a final order that can be appealed. 28 U.S.C. §1291; *e.g.*, *Cheng*, 878 F.2d at 309 (“It is axiomatic that orders granting partial summary judgment, because they do not dispose of all claims, are not final appealable orders.”). Recognizing that, P10 asserts this Court has pendent jurisdiction. AOB, 2. However, such jurisdiction is limited to reviewing holdings that are “necessary to ensure meaningful review” of the only order independently ripe for appeal—the denial of the preliminary injunction. *Campbell*, 138 F.3d at 778. “Given the Supreme Court's criticism of pendent appellate jurisdiction,” the exception for exercising jurisdiction over issues “inextricably intertwined” with a properly appealed order “should be narrowly construed.” *Id.* at 778-9.

Unlike the district court's determination that the majority of P10's notices are not DMCA-compliant (which is potentially relevant to whether P10 is likely to succeed on its contributory infringement claims), review of the district court's ruling that Google has a reasonably implemented repeat infringer policy is not "necessary to ensure meaningful review" of the Second PI Order. *Campbell*, 138 F.3d at 778. Accordingly, this Court lacks jurisdiction over the repeat infringer policy determination. *Id.* The cases P10 relies on (AOB, 2) are factually inapposite. *See Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984) ("The salient issues on review of this injunction are the potential hardship to the parties and whether [plaintiff] has a fair chance of success on the merits. Review of the summary judgment motion, in contrast, would call for conclusive resolution of the merits."). In an abundance of caution, however, Google responds to P10's arguments.

The district court correctly found that P10 failed to identify evidence disputing that Google had "adopted and reasonably implemented ... a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers." SER35; 17 U.S.C. § 512(i)(1); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *CCBill*, 488 F.3d at 1109. The district court properly relied on Google's

designation of a DMCA agent and adoption of a detailed procedure for assisting copyright holders in providing DMCA-compliant notice. *Id.*; SER33; SER410-418.

P10's argument that "Google's general policy is to not respond to DMCA notices" (AOB, 67) was not raised below and therefore waived. *See, e.g., Kitsap*, 314 F.3d at 999. P10's argument is also belied by the record below.⁶ P10's arguments regarding various Google products similarly fail.

1. Web Search, Image Search, And Cache Do Not Have Account Holders Or Subscribers.

The district court properly found that Web and Image Search and Cache "do not have account holders or subscribers" and "P10 does not contend that Google must, or even can, have a repeat infringer policy for those services." SER33. Unable to refute this conclusion, P10 attempts to cloud the record with irrelevant and unsupported factual assertions.

The Hoffman, Newton, Schwartz and Eden Declarations were properly stricken. The district court properly exercised its discretion in striking the declarations of individuals P10 never disclosed before Google sought summary

⁶ The page on which P10 relies (ER60079-60082) links to Google's DMCA policies and states, "It is our policy to respond to notices of alleged infringement that comply with the Digital Millennium Copyright Act. For directions and more information, please click here." *See* http://web.archive.org/web/20070406203252/http://www.google.com/terms_of_service.html (last accessed 12/13/2010). Moreover, there is no dispute Google has processed [REDACTED] DMCA notices. SER1919.

judgment. *See* Fed. R. Civ. P. 37(c)(1) (“If a party fails to . . . identify a witness as required by Rule 26(a) or 26(e), the party is not allowed to use that . . . witness to supply evidence on a motion . . . unless the failure was substantially justified or is harmless.”); *Guang Dong Light Headgear Factory Co. v. ACI Intern., Inc.*, 2008 WL 53665 at *1 (D. Kan. Jan. 2, 2008) (striking summary judgment affidavit because witness’s identity and testimony were not disclosed under Rule 26); *Oracle Corp. Securities Litigation*, 2010 WL 4608794 at *3 (exclusion of evidence reviewed for abuse of discretion).

P10 arguments to the contrary are flawed. AOB, 61-62. Because P10 did not disclose its witnesses in time for Google to depose them before the briefs were submitted, P10’s failure was not harmless. Nor was it “substantially justified” given that P10 has failed to explain why five years was insufficient to identify witnesses. Additionally, these third-party declarations threatened to create a “case within a case” and could have been stricken for that reason alone. *See Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1193-94 (10th Cir. 1997); *Jefferson v. Vickers, Inc.*, 102 F.3d 960, 963 (8th Cir. 1996).

The unverified screenshots attached to Mr. Mausner’s declaration were properly disregarded. The district court acted within its discretion in rejecting as hearsay the unverified screenshots P10’s attorney happened upon while surfing the Web. *See* Fed. R. Civ. P. 56(c)(4) (“An affidavit or declaration used to support or

oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated”); *Oracle Corp. Securities Litigation*, 2010 WL 4608794 at *3; *Rossi v. Trans World Airlines, Inc.*, 507 F.2d 404, 406 (9th Cir. 1974) (affidavit based on “inadmissible hearsay [] was properly disregarded by the trial court”). P10 has not explained why it should have been exempted from the rules.

P10’s photographs are not repeat infringers. The district court properly rejected P10’s argument that Google must remove “the same repeatedly identified infringing P10 Image” to reasonably implement a repeat infringer policy. AOB, 71. The DMCA’s repeat infringer requirement targets repeat *infringers*, not repeatedly infringed *content*. 17 U.S.C. § 512(i).

2. Google Reasonably Implemented A Repeat Infringer Policy For Blogger.

The district court properly held that Google presented “clear evidence that it terminates Blogger users who repeatedly or blatantly infringe copyright.” SER33. P10 pointed to no contrary evidence, but made a vague, unsupported argument that Google’s method of tracking Blogger accounts in its Blogger processing spreadsheet rendered Google ineligible for DMCA safe harbor. AOB, 70. The district court properly rejected this argument. SER34. The DMCA imposes no obligation on ISPs to register subscribers for their services in any particular way,

or using any particular information [REDACTED]

[REDACTED]. See *IO Group, Inc. v. Veoh Networks, Inc.*, 586 F.Supp.2d 1132, 1145 (N.D. Cal. 2008) (“section 512(i) does not require service providers to track users in a particular way”); *CCBill*, 488 F.3d at 1110 (holding that a DMCA log can track infringement complaints by the email addresses of account holders).

Moreover, Google tracked “strikes” against Blogger account holders with the spreadsheets P10 references *and* with an internal account management system. SER417; SER486-518; SER1919. If a blog was the subject of [REDACTED] DMCA notices, [REDACTED] the entire blog account was terminated. SER417. P10 presented no evidence that Google’s internal system lacks whatever additional identifying information P10 believes the DMCA requires—which it has not specified—nor did P10 address Google’s internal system. AOB, 70.

P10’s only other arguments regarding Blogger’s repeat infringer policy are that [REDACTED] [REDACTED] and that Google allows the same infringing image hosted on blogger.com “to be identified by an unlimited number of URLs.” AOB, 70-71. P10 waived both arguments by not making them in the summary

judgment record. *See, e.g., Kitsap*, 314 F.3d at 999. Substantively, P10's arguments also fail.⁷

3. P10's Arguments Regarding Other Google Products Do Not Create A Material Dispute.

P10's remaining repeat infringer arguments concern products not at issue in the summary judgment order: AdSense, AdWords and Google Groups. Logically, Google's repeat infringer policies for these products are irrelevant to the propriety of granting partial summary judgment concerning Web Search, Image Search, Cache, and Blogger.

Moreover, because P10 did not raise most of these new arguments below, they provide no basis for overturning the summary judgment order. *See, e.g.,*

⁷ Dr. Zada has no personal knowledge of Google's Blogger processing procedures, record-keeping, or the notices Google received. *See FTC v. Publ'g Clearing House*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact."). His declaration does not allege the URLs at issue contained infringing material or were included in DMCA notices sent to Google. ER20258. P10's argument that Google should prevent the "same image" from being uploaded at multiple URLs again confuses the requirements of the DMCA; similar (or even exactly identical) images are not account holders or repeat infringers. 17 U.S.C. § 512(i). Furthermore, this evidence does not show that Google failed "to terminate a user even though it has sufficient evidence to create actual knowledge of that user's blatant, repeat infringement of a willful and commercial nature." *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1104 (W.D. Wash. 2004) (granting summary judgment on implementation of service provider's repeat infringer policy based on declaration describing policy); *see also CCBill*, 488 F.3d at 1113; SER33; SER2237 (summary judgment for defendant appropriate where plaintiff "provided no evidence of [defendant's] knowledge of any specific repeat or blatant infringer of copyrights among its subscribers or account holders.").

Kitsap, 314 F.3d at 999. Even if relevant to the DMCA Motions and not waived, P10's arguments regarding repeat infringer policies for other products are insufficient to raise a material dispute because they lack evidentiary support:

- P10 argues Google “created” alleged “options for [the] Google Chrome Browser which allowed Google users to download infringing materials” from rapidshare.com, megaupload.com and filetube.com (AOB, 63), but as the screenshots themselves reflect, the alleged “options” were created by third-party developers. ER20103-109.
- P10 argues that Google had notice of AdSense infringements by webpages affiliated with rapidshare.com, megaupload.com and filetube.com (AOB, 63), but the notices at issue concerned Blogger pages, not AdSense infringements. ER20080. P10 points to no evidence they were not processed properly.
- P10 argues that its notices identified AdSense repeat infringers, but pointed to no evidence that the webpages it identified displayed AdSense advertisements. AOB, 64, ER40143-148.
- P10 argues that Google had notice of a repeat infringer on Google Groups, but failed to identify any notices or other evidence regarding alleged infringement by that account holder. AOB, 65.

- P10 argues that Google will not respond to AdWords DMCA notices regarding allegedly infringing webpages (AOB, 66-67), but the DMCA policy for AdWords specifically asks for identification of ads that link to allegedly infringing material on other webpages. ER40240-41.
- P10 argues that Google's processing records for AdSense and AdWords notices are incomplete, but does not point to a single valid DMCA notice received by Google that is not included in the processing records Google produced. AOB, 68-70.

Thus, P10 provides no reason to reverse the district court's repeat infringer policy partial summary judgment ruling, even if it were properly on appeal.

CONCLUSION

For the reasons stated above, the Preliminary Injunction Order and the portions of the summary judgment order relied on therein should be affirmed.

Dated: December 14, 2010

Respectfully submitted,

By  _____

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STATEMENT OF RELATED CASES

Google is not aware of any “related case” as defined in Circuit Rule 28-2.6 that was not already identified by P10.

Dated: December 14, 2010

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,988 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14-point font.

Dated: December 14, 2010

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REQUEST FOR ORAL ARGUMENT

Google respectfully requests that the Court hear oral argument in this case.

Dated: December 14, 2010

Respectfully submitted,



By _____

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