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10
11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 PERFECT 10, INC., a California
14 Corporation

15 Plaintiff,

16 vs.

17 GOOGLE INC., a corporation; and
18 DOES 1 through 100, inclusive

19 Defendant.

20 Case No. CV04-9484 AHM (SHx)

21 **GOOGLE'S OPPOSITION TO**
22 **PERFECT 10'S MOTION FOR**
23 **PRELIMINARY INJUNCTION**

24 Date: November 7, 2005
25 Time: 10:00 a.m.
26 Location: Courtroom 14

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28
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5894

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I. INTRODUCTION

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

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

II. FACTUAL BACKGROUND

A. GOOGLE'S SEARCH ENGINE AND RELATED ACTIVITIES

1. Web And Image Search Engine

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

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

1 a staple educational resource. See Levine Dec. ¶14; Declaration of Andrew P. Bridges
2 (“Bridges Dec.”) ¶2 and Ex. C.¹

3 Google delivers search results at no charge to either users or providers of
4 information. Google does not require accounts or subscriptions for its general public
5 search engine use that is at issue in this litigation. Declaration of Alexander
6 Macgillivray (“Macgillivray Dec.”) ¶4. Like a number of other media, Google’s
7 search engine is primarily advertising-supported, as described below.

8 When the Google Web Search engine receives a query, it searches its index for
9 pages relevant to the query. It then returns Web page links with snippets of relevant
10 text. It also provides a link to Google’s “cached” copy of the text portion of the Web
11 page. By clicking on the “cached” link, the user will cause the cached page to appear.
12 While it may seem that the cached page contains images, in fact the images are not
13 from the Web Search cache; in fact, a user’s web browser fetches any images from
14 their original location and not from Google’s servers.² Macgillivray Dec. ¶2; Levine
15 Dec. ¶21. Google also provides a link for a version of the cached page that will
16 disable this browser function. Macgillivray Dec. ¶2.

17 When the Google Image Search engine responds to a query, it searches its index
18 for image files (stored in an index apart from the index for Web page files) that are
19 relevant to the query based on the text of their associated Web pages. (Google does
20 not have a technology that is able to translate the pixels of an image into a searchable
21

22 ¹ In addition to its research functions, the Google search engine has a news reporting
23 function as it updates its search results to reflect the current status of the Web. Google
24 Alerts delivers updated search results to a user. See www.google.com/alerts?hl=en
(copy attached as Ex. B to Bridges Dec.). In addition, Google’s ranking of search
25 results and its assignment of “PageRank” scores to pages gives Google’s opinion of
26 the significance and relevance of pages and files on the Web. See *Search King, Inc. v.*
Google Technology, Inc., 2003 WL 21464568 at *4 (W.D. Okla. May 27, 2003); see
27 also H. Davis, *Building Research Tools with Google for Dummies* (2005), pg. 47 (Ex.
28 C to Bridges Dec.). (“Research Tools”).

² In the HTML programming customary for Web pages, images are not part of the
page itself. Instead, the HTML code for a Web page identifies a separate file where
the image is stored. When a browser shows a Web page with images, the browser
obtains the text and images from different locations and knits them together into a
single display. Levine Dec. ¶16.

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

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

18 2. Google's Advertising Programs

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

21 Through Google's AdWords program, advertisers purchase advertising

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

1 placement on Google's pages, including its search engine, Gmail web-based email
2 service and other services, or on third party Web sites. Macgillivray Dec. ¶9.

3 Google's AdSense program is available to third-party Web publishers. AdSense
4 allows third-party sites to carry Google-sponsored advertising and share revenue that
5 flows from the advertising displays and click-throughs (advertising derived from the
6 "clickthrough" referral from one site to another). AdSense advertising is related to
7 text in the AdSense participant's Web site or search key words.⁴ Macgillivray Dec.
8 ¶10.

9 The Google AdSense Program Policies specifically exclude sites with Image
10 Results from participating in the AdSense program. The Policy states: "Copyrighted
11 Material: In order to avoid associations with copyright claims, website publishers
12 may not display Google ads on web pages with MP3, Video, News Groups, and Image
13 Results." In addition, it is Google's intention to exclude sites with pornography, adult,
14 or mature content, along with certain other categories of content, such as gambling
15 and profanity, from its AdSense program. Macgillivray Dec. ¶11 and Ex. B (Google
16 AdSense Program Policies).⁵ The Google AdSense Terms and Conditions, execution
17 of which is a prerequisite to participating in the AdSense program, state that "You
18 represent and warrant that . . . each Site and any material displayed therein: (i) comply
19 with all applicable laws, statutes, ordinances and regulations; (ii) do not breach and
20 have not breached any duty toward or rights of any person or entity including, without
21 limitation, rights of intellectual property, publicity or privacy . . . (iii) are not
22 pornographic, hate-related or otherwise violent in content." Macgillivray Dec. ¶12
23 and Ex. C (AdSense Terms and Conditions). Perfect 10 asserts that certain AdSense

24 ⁴ To participate, a Web site publisher places code on its site that asks Google's servers
25 to algorithmically select relevant advertisements when a user loads the Web page. A
26 Web site publisher identifies its site and receives a token and javascript from Google
27 that the Web site publisher can then use on a page to receive targeted advertising.
28 Google does not control the location of javascript placement. Macgillivray Dec. ¶10

⁵ Despite the fact that the current version of Google's AdSense Program Policies is
posted on Google's Web site, Dr. Zada attached a dated version of the Policies that he
printed on September 14, 2004, and does not reflect the current language. See Zada
Dec. ¶25 (quoting from year old version of Google's AdSense Program Policies).

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

8 3. Google's Copyright Policy

9 It is Google's policy diligently to respond to notices of alleged infringement that
10 comply with Section 512(c)(3) of the Digital Millennium Copyright Act, 17 U.S.C.
11 § 512(c)(3). Macgillivray Dec. ¶14. Google provides a detailed explanation of its
12 policy in response to notices of alleged infringement at its google.com Web site. *Id.*
13 and Ex. D (Google's Terms of Service and DMCA policy).

14 Google receives thousands of inquiries daily concerning search results,
15 including notices about search results that link to allegedly improper content. Those
16 notices concern various issues, including claims that third-party Web sites have
17 infringed the senders' copyright, trademark or other rights. Google has several
18 departments involved in handling notices of alleged infringement. Macgillivray Dec.
19 ¶15.

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

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

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

3 **B. PERFECT 10'S BUSINESS ACTIVITIES**

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

12 **C. GOOGLE'S INTERACTIONS WITH PERFECT 10**

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

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

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

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

6 On October 11, 2004 (a month before this lawsuit was filed), in response to
7 Google's requests, Dr. Zada finally provided notices in a format that identified Perfect
8 10 magazine issue and page numbers of images whose copyright Dr. Zada claimed to
9 have been infringed, at least for some of the listed URLs. Macgillivray Dec. ¶21, Ex.
10 G (notices Google received from Dr. Zada from October 11, 2004 through June 19,
11 2005).⁶ Even though those notices were deficient, beginning on October 11, 2004,
12 Google promptly processed Dr. Zada's notices that Google could confirm identified
13 URLs that did in fact contain images of semi-naked or naked women that looked like
14 they might have been Perfect 10 images and were indexed by Google,⁷ and suppressed
15 those showing up in response to user queries in Web Search. Macgillivray Dec. ¶21,
16 Ex. F. **Despite the difficulties with, and size of, Dr. Zada's notices, with only four**
17 **exceptions⁸ Google processed Dr. Zada's October 11, 2004 notice and later**
18

19 ⁶ One communication from Dr. Zada on July 7, 2004 partially identified some
20 information but that communication was itself noncompliant with section 512(c)(3).
21 Although Google processed Dr. Zada's notifications, they did not comply with the
22 DMCA's requirements that a notice must identify "the copyrighted work claimed to
23 have been infringed, or, if multiple copyrighted works at a single online site are
24 covered by a single notification, a representative list of such works at that site" and
25 "identification of the material that is claimed to be infringing or to be the subject of
26 infringing activity and that is to be removed or access to which is to be disabled, and
27 information reasonably sufficient to permit the service provider to locate the
28 material." *See* 17 U.S.C. 512(c)(3)(ii) and (iii). Moreover, many of Dr. Zada's notices
did not comply with the Section 512(c)(3)'s requirement that notifications must be
"provided to the designated agent of a service provider." Macgillivray Dec. ¶21.
⁸ The four exceptions involve Exs. 58, 66, 67, and 68 of Dr. Zada's Declaration.
Google processed the notice attached as Ex. 68 in 19 days. Google has not, to its
knowledge, received the notices attached as Exs. 66 and 67. Through their inclusion
as exhibits, Google now has them and Exs. 66 and 67 are now being processed. Due
to miscommunication, Google did not complete processing of Ex. 58. Once the
mistake was discovered, Google restarted processing this "notice," which will be
reflected in Google search results shortly. Macgillivray Dec. ¶22.

1 notices within two weeks of receipt, often within one week.⁹ Macgillivray Dec.
2 ¶22.

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

17 Google analyzed the 470 URLs identified by Dr. Zada in his Exhibit 81. Of
18 those 470 URLs, before Perfect 10 filed this motion, Google had already processed
19 414 of them to block them from appearing in response to a Google Web Search. Of
20 the 56 remaining URLs, 21 are not true URLs, but rather end in ellipses and are not
21 fully qualified URLs. Macgillivray Dec. ¶25. Of the 35 remaining URLs, nine are
22 either inactive or do not contain any images of women, other than images that have no
23 connection to rights asserted by Perfect 10. Declaration of Susan E. Lee, ¶2.

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

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

3 **III. ARGUMENT**

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

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

19 “The plaintiff's burden of showing a likelihood of success on the merits
20 includes the burden of showing a likelihood that it would prevail against any
21 affirmative defenses¹⁰ raised by the defendant.” *Dr. Seuss Enterprises, L.P. v.*
22 *Penguin Books USA, Inc.*, 924 F. Supp. 1559, 1562 (S.D. Cal. 1996), *aff'd*, 109 F.3d
23 1394 (9th Cir. 1997) (citing *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832,
24 837 (Fed. Cir. 1992)); *Religious Tech Ctr. v. Netcom On-Line Comm'n Servs.*, 923 F.
25 Supp. 1231, 1242 n. 12 (N.D. Cal. 1995) (“*Netcom*”).

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

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

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

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

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

7 The fair use doctrine helps to fulfill, and is not in derogation of, the objectives
8 of copyright law. See P. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105,
9 1107 (1990) (“Leval”); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569,
10 575 (1994). Copyright’s constitutional purpose is to “promote Progress of Science
11 and the Useful Arts,” U.S. Const. art. I, §8, cl. 8, and the nonexclusive statutory
12 factors in 17 U.S.C. §107 are to be considered “in light of the objectives of copyright
13 law,” *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).

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

25 **a. The Purpose And Character Of The Use**

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

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

2 The purpose and character of each of the Google search engine's challenged
3 operations¹¹ weigh overwhelmingly in favor of fair use. **Google's purpose and use**
4 **are not to exploit Perfect 10's works.** They are (1) to index as broadly as reasonably
5 possible the universe of information on the World Wide Web and (2) to locate,
6 identify, and rank pointers to information relevant to users' research. Google is one of
7 the most important research tools in the world, improving access to information on the
8 Web, and it also has a significant role in news reporting and commentary.

9 Courts have recognized that intermediate copying may be required to achieve
10 lawful purposes, and they recognize some intermediate copying as fair use. *See Sony*
11 *Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 602-03 (9th Cir.
12 2000). Fair use can be based on unauthorized copies. *See NXIVM Corp. v. The Ross*
13 *Inst.*, 364 F.3d 471, 477-80, 482 (2d Cir. 2004).

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

19
20 ¹¹ Perfect 10 alleges the following are direct infringements: (1) Google's "caching," or
21 storage, of copies of Web pages and files as the foundation of its search engine index;
22 (2) Google's presentation of reduced-size "thumbnail" images in response to user
23 searches; (3) Google's providing a link from thumbnails to the underlying Web pages;
24 and (4) "framing," the triggering of a Web browser function to display both Google's
25 search result and the underlying Web page in adjoining windows on the browser's
26 interface. Perfect 10 alleges these violate its rights of reproduction, "distribution,"
27 and display under 17 U.S.C. §106. The so-called "distribution" right is not implicated
28 here. The specific right identified in the Copyright Act is "to distribute copies or
phonorecords of a copyrighted work to the public by sale or other transfer of
ownership, or by rental, lease, or lending." 17 U.S.C. §106(3). "Copies" and
"phonorecords" are both defined in 17 U.S.C. §101 as "material objects." There is no
suggestion that Google either engages in or assists in the distribution of any material
objects, and without that there is no valid distribution claim. *See Agee v. Paramount*
Comm'ns, 59 F.3d 317, 325-26 (2d Cir. 1995). Moreover, there is no allegation that
Google has engaged in "sale or other transfer of ownership, or . . . rental, lease, or
lending" of copies as required by section 107. The direct infringement claim must
therefore be limited to assertion of the reproduction and display rights.

