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13  
14 UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA

16 PERFECT 10, INC., a California  
corporation,

17 Plaintiff,

18 v.

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

21 Defendants.

CASE NO. CV 04-9484 AHM (SHx)

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

Date: September 19, 2005

Time: 10:00 a.m.

Ctrm: The Honorable A. Howard Matz

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

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

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

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

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

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

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

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

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

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

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

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Dated: August 24, 2005

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

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

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1  
2 **PRELIMINARY STATEMENT**

3 This motion seeks to end massive ongoing copyright infringement by  
4 defendant Google, Inc. (“Google”). Under the guise of providing a “search  
5 function,” Google is *directly copying, distributing, and displaying* thousands of  
6 Perfect 10 copyrighted images despite receiving extensive notice of infringement,  
7 and is linking those images to infringing third party websites that themselves display  
8 thousands of additional Perfect 10 images.

9 Google knows that neither it, nor other websites from which it copies images,  
10 are authorized to copy, display, or distribute Perfect 10 images. Indeed, just last  
11 week, Google retreated from its much-publicized plans to copy millions of books  
12 without the permission of the publishers, instead agreeing to allow publishers the  
13 option of prohibiting copying of their works. But despite receiving *thirty-four*  
14 detailed notices of infringement from Perfect 10, Google has continued to copy,  
15 display and distribute Perfect 10’s images, in some cases for over *400 days*  
16 following notice.

17 Google’s conduct far exceeds the necessary, accepted, and lawful functions of  
18 a search engine – to direct users to legitimate websites, through text or through the  
19 use of *unmarketable*, brief excerpts of *legitimate* copies of works. It is certainly not  
20 necessary for a search engine to provide *full and complete* copies of copyrighted  
21 images, and thereby to displace the copyright owner as the only authorized source of  
22 such images. Nor is it necessary for a search engine to display or distribute  
23 *infringing copies* or to direct users to *infringing* websites that, in many cases,  
24 display Google advertisements alongside Perfect 10 images. Google has, by design,  
25 become a hub, an aggregator, and a provider of images (in fact, infringing images),  
26 selecting and copying them and then displaying Perfect 10’s images on Google’s  
27 own website, thus supplanting Perfect 10 as the source of these images.

28 The relief Perfect 10 seeks is limited to stopping Google’s giveaway of  
*specified* Perfect 10 copyrighted images. That relief will have no impact on the

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

3 **I. SUMMARY OF FACTS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued...)

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

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

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

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

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

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

