
DMCA Saves Google Again—Im“Perfect” Notices Not Adequate Notice of Infringement

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In Perfect 10, Inc. v. Google, Inc., Case No. CV 04-9484 (C.D. Cal. July 26, 2010), the court issued a decision consistent with a recent line of cases¹ that generally favors online service providers that establish and implement effective policies under the Digital Millennium Copyright Act (“DMCA”), keeps the burden to police infringement on content owners, and strictly construes the DMCA in determining whether content owners meet the DMCA notice requirements.² These cases make clear that it is critical for online service providers to develop and implement effective DMCA policies and for content owners to follow precisely the DMCA notice requirements. This advisory addresses key aspects of effective policies and notices based on rulings in the Perfect 10, Inc. v. Google, Inc. case.

Key Takeaways

The decision in *Perfect 10* touches on many aspects of the DMCA and provides guidance on what online service providers’ policies and content owners’ notices are DMCA compliant. The key takeaways of *Perfect 10* include the following:

¹ See, e.g., *Viacom Int'l v. YouTube, Inc.*, Nos. 07 Civ. 2103(LLS), 07 Civ. 3582(LLS), 2010 WL 2532404 (S.D.N.Y. June 23, 2010); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

² Although not at issue in this case, it is also critical for content owners to ensure that their notices are well grounded, because the DMCA subjects a content owner to liability if they are not. See *Online Policy Group v. Diebold Inc.*, 337 F. Supp. 2d 1195, 1204-05 (N.D. Cal. Sept. 30, 2004) (holding that the content owner knowingly materially misrepresented infringement of its copyright interests in its DMCA notices in violation of 17 U.S.C. § 512(f) and imposing liability for damages, including costs and attorneys’ fees, incurred by the alleged infringers – the content owner settled shortly thereafter for \$125,000); *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (denying motion to dismiss claim under 17 U.S.C. §512(f) where copyright owner did not consider “fair use” before sending DMCA takedown notice).

- For online service providers (DMCA Policy Issues):
 - A “three strikes” termination of repeat infringers policy may be reasonable.³
 - Processing DMCA-compliant notices within two weeks of receipt may be reasonable in fulfilling the safe harbor requirement to “expeditiously” remove or disable access to the allegedly infringing material.⁴
 - Online service providers who otherwise implement a reasonable system for receiving and processing notices will meet the termination of repeat infringers requirement where there are no subscribers or account holders of the service to terminate.⁵
 - It is not necessary to log and process “non-compliant” notices (i.e., notices that do not meet the DMCA requirements).
 - It is not necessary to track users in a particular way (e.g., by requiring actual names).⁶
- For content owners (DMCA Notice Issues):
 - DMCA notices should strictly comply with the requirements of the DMCA. Defective notices do not provide actual notice of infringement to the service provider and do not trigger an obligation for the service provider to process the notice. Some specific lessons from the im“perfect” notices in this case, include:
 1. Notices must be sent to the registered agent designated by the service provider.
 2. Notices must specifically identify the infringed copyrighted work.⁷
 3. Notices must include complete URLs and/or image-specific URLs where applicable.
 4. Notices must include all of the DMCA required information in a *single* written communication.
 5. Additional supporting evidence (e.g., screenshots) may be included (separately), but the essential elements of a notice must be in a *single* written communication.

³ The Court held as reasonable Google’s policy of terminating account holders on its Blogger service after receiving *three* valid DMCA notices of infringement

⁴ The Court suggests that, in this case, processing DMCA notices within two weeks of receipt may be reasonable in fulfilling the safe harbor requirement to “expeditiously ... remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.” See 17 U.S.C. § 512(d)(3). As articulated in the legislative history, Congress used the undefined term “expeditiously” in 17 U.S.C. § 512 rather than a fixed time period “[b]ecause the factual circumstances and technical parameters may vary from case to case, it is not possible to identify a uniform time limit for expeditious action.” S. Rep. No. 105-190, at 44 (1998).

⁵ One of the three threshold conditions required for online service provider eligibility for the safe harbor provisions of 17 U.S.C. § 512 is that the service provider must have “adopted and reasonably implemented, and inform[ed] subscribers and account holders of the service provider’s system or network of 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.” 17 U.S.C. § 512(i)(1). The Court found that because there were no subscribers or account holders for certain services at issue, the failure to terminate any users did not preclude DMCA protection for these services.

⁶ The Court held that tracking only the email addresses of users and not their actual names was a reasonable policy.

⁷ Some of Perfect 10’s (“P10”) notices were found deficient for not specifically identifying which copyrighted works were infringed. Instead, P10 sent DVDs and hard drives with thousands of images.

6. For notices relating to cached content (under § 512(b)), identifying a web page may not be sufficient notice to identify the cached page as well.⁸
 - Evidence of notices provided by other copyright holders may be relevant and admissible to challenge the reasonableness of a service provider's DMCA policy and compliance.⁹

Procedural Background

P10 creates and sells pictures of nude models through a password-protected subscription website. P10 sued Google in November 2004, alleging several causes of action, including direct, contributory, and vicarious copyright infringement. P10 alleged that Google infringed its copyrights by, among other things, (i) linking to third-party websites that host images that infringe P10's copyrights, (ii) caching portions of websites that host infringing images, and (iii) hosting infringing images on its own servers that have been uploaded by users of its "Blogger" service.

Google moved for partial summary judgment that it is entitled to immunity under three different safe harbor provisions of the DMCA. Specifically, Google sought protection under 17 U.S.C. § 512(d) for its web and image searches, under 17 U.S.C. § 512(b) for its caching feature, and under 17 U.S.C. § 512(c) for its Blogger service. The Court granted in part Google's motion under 17 U.S.C. § 512(d) for its web and image search features and its caching feature (without separately assessing entitlement under 17 U.S.C. § 512(b)); and under 17 U.S.C. § 512(c) for its Blogger feature.

Facts

Google's Services at Issue

Google operates an Internet search engine by using an automated software program, known as a web crawler or the "Googlebot," to obtain copies of publicly available webpages for use in its search index ("Web Search"). For images, Google's search engine compiles an index of the text associated with each image crawled, which is associated with a particular "thumbnail" image ("Image Search").

Google also provides Web Search users with the option of selecting a link to a "cached copy" of the webpages that appear in its search results ("Caching Feature"). The cached copy is an archival copy that Google stores on its servers until the next time its Googlebot visits that particular webpage. In most cases, the cached copy is stored only for a few weeks, and all of the copies are replaced within 18 months.

In addition, Google provides a service, known as "Blogger," that allows Blogger account holders to create their own blogs hosted on Google's servers. Blogger account holders may display images on their blogs—in some cases the images are uploaded onto Google's servers and in other cases a user hyperlinks to content hosted on other servers.

⁸ The Court held that P10's DMCA-compliant notices failed to identify any specific material in Google's cache pages as infringing, despite P10's argument that a notice identifying a web page necessarily identifies the cached page as well. No images are stored in Google's cache, only the text; however, any images displayed on a cached page are delivered from their original source, if they still exist at that source.

⁹ The Court held that such third-party notices may be relevant in determining DMCA compliance by the online service provider, but because P10 did not timely identify this evidence, the judge refused to consider such evidence here on procedural grounds.

Google's DMCA Policies

Google has a DMCA policy for each of these services, entailing the following steps:

- Google requires a complainant to send a DMCA notice to Google's designated agent that includes the following three points:¹⁰
 1. the copyrighted work infringed (including how to locate it),
 2. the complete URL at which the infringing material is located, and
 3. the Web Search query that links to the web page.
- Google processes compliant notices to determine whether the copyrighted work is infringed, and, if so, it blocks the infringing URL from appearing in Google search results.
- Google allows the operator of the infringing website to file a counter-notification, and, upon receipt of a counter-notification, unblocks the URL, unless the complainant files a lawsuit within 10 days.
- With respect to its Blogger service, Google terminates an account holder if it receives three valid DMCA notices indicating infringement by the account holder.

P10's Notices

P10 sent Google 83 notices from 2001 to when the summary judgment motion papers were filed. The parties sorted these notices into three groups: the 17 Group A notices sent in 2001; the 48 Group B "spreadsheet" notices sent between May 31, 2004 and April 24, 2007; and the 18 Group C "DVD and hard drive notices" sent in or after December 2005. Google did not process any of the Group A notices. The parties disputed whether Google processed all of the Group B notices. Google processed a fraction of the Group C notices beginning in 2007, but it did not process the majority of the notices.

Legal Analysis

Threshold Requirements for Safe Harbor Under All Three DMCA Sections

The Court articulated the three threshold conditions required for online service provider eligibility for each of the three DMCA safe harbors asserted by Google:

First, the party must be a service provider as defined under 17 U.S.C. § 512(k)(1)(B). Second, the party must have "adopted and reasonably implemented, and inform[] subscribers and account holders of the service provider's system or network of 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." 17 U.S.C. § 512(i)(1). Third, the party must "accommodate[] and . . . not interfere with standard technical measures" used by copyright owners to identify or protect copyrighted works. 17 U.S.C. §§ 512(i)(1)-(2).

¹⁰Google requires the same notice requirements for its Web Search feature and its cache. However, its notice requirements differ slightly for its Image Search feature (requiring copyright holders to include the "image URL" for each image) and for its Blogger service (requiring copyright holders to include the "post URL" for each post and to send their notices to the DMCA agent for its blogger site).

Perfect 10, Inc. v. Google, Inc., Case No. CV 04-9484, at *6.

P10 did not dispute that Google met the first and third threshold requirements (service provider status and non-interference with standard technical measures), but argued that there were genuine issues of material fact as to whether Google implemented a suitable repeat infringer policy.

In analyzing the “repeat infringer” requirement under 512(i), the Court turned to a prior case involving P10, and stated:

In [*Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007)], the Ninth Circuit set forth the standard for evaluating termination policies under the DMCA:

[A] service provider “implements” a policy if it has a working notification system, a procedure for dealing with DMCA-compliant notifications, and if it does not actively prevent copyright owners from collecting information needed to issue such notifications.... The statute permits service providers to implement a variety of procedures, but an implementation is reasonable if, under “appropriate circumstances,” the service provider terminates users who repeatedly or blatantly infringe copyright.

CCBill, 488 F.3d at 1109 (citations omitted). See also *Corbis Corp. [v. Amazon.com, Inc.]*, 351 F. Supp. 2d 1090, 1104 (W.D. Wash. 2004)] (“Because it does not have an affirmative duty to police its users, failure to properly implement an infringement policy requires a showing of instances where a service provider fails 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.”) ...

Id. at *6-7 (quoting *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1117 (C.D. Cal. 2009)).

The Court found that Google met the “repeat infringer” requirement for its Web Search, Image Search, and the Caching Feature, in part, because there were no subscribers or account holders to terminate for those services.¹¹ After noting that Google provided evidence that it had a system for receiving and processing notices, the Court stated:

Moreover, Google points out—and P10 does not dispute—that Web Search, Image Search, and the caching feature do not have account holders or subscribers. P10 does not contend that Google must, or even can, have a repeat infringer policy for those services. See 17 U.S.C. § 512(i)(1)(A) (requiring a repeat infringer policy for those services with “subscribers and account holders”).

Id. at *7 (internal citations omitted).

Regarding Google’s Blogger service, the Court sided with Google’s practice of only logging and processing DMCA-compliant notices and agreed that the DMCA does not impose any requirement that Google must track users in a particular way. With respect to the compliant notices issue, the Court stated:

... Google provides clear evidence that it terminates Blogger users who repeatedly or blatantly infringe copyright. P10 nevertheless makes several unavailing arguments that Google’s repeat infringer policy is deficient. It argues that Google has not removed many of the links that P10 complained about or placed on its DMCA log. In response, Google counters that it is required to record

¹¹In essence, these were largely “back-end” services that Google operated to support other features, but there were no users who subscribed to these “back-end” services.

into its log only notices that are DMCA compliant, *CCBill*, 488 F.3d at 1113-14, and that all of the notices that were not recorded were within Group C, in the form of DVDs or hard drives. Google has offered evidence that all the notices that did comply with the DMCA were recorded in its logs. P10 next argues that the DMCA logs contain too few entries to be truly comprehensive. However, this argument suffers from the same deficiency—that Google was required to record only DMCA compliant notices.

Id. at *7-8 (internal citations omitted).

As for tracking users, the Court stated:

P10 also argues that Google could not have had an effective repeat offender policy because it tracks only email addresses, not the actual names of users. However, the DMCA does not impose an obligation on service providers to track their users in any particular way. In *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1144 (N.D. Cal. 2008), the court did not require the service provider to verify or track actual identities because “the hypothetical possibility that a rogue user might reappear under a different user name and identity does not raise a genuine fact issue as to the implementation of” the service provider’s repeat infringer policy. This Court agrees.

Id. at *8 (internal citations omitted).

P10 also offered declarations from other copyright holders complaining about Google’s processing of their DMCA notices. The Court found that evidence of notices provided by others may be relevant in determining DMCA compliance by the online service provider, but because P10 did not timely identify these other copyright holders, the judge refused to consider such evidence here on procedural grounds.¹²

Safe Harbor for Web Search and Image Search Under Section 512(d) (“Information Location Tools”)

The Court next analyzed whether Google proved it met the safe harbor requirements for its Web Search and Image Search services under 17 U.S.C. § 512(d), which is applicable to information location tools. The Court also reasoned that to the extent Google’s Blogger service and Web Search and Caching Feature function as information location tools (e.g., by linking users to content hosted on third-party websites, rather than to content hosted by Google), this § 512(d) analysis would apply to those tools as well.¹³

Section 512(d) provides a safe harbor from copyright infringement liability for a service provider “referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link”—provided that the provider:

- (1) (A) does not have actual knowledge that the material or activity is infringing;

¹²The Court reasoned:

The Ninth Circuit has held that evidence of notices provided by a party other than the plaintiff may be relevant in determining whether a service provider has “implemented its repeat infringer policy in an unreasonable manner.” *CCBill*, 488 F.3d at 1113. However, as Google notes, P10 did not identify any of these individuals in its Rule 26 disclosures. ... Thus, the Court will not consider these declarations on this motion for partial summary judgment.

P10 v. Google, Case No. CV 04-9484, at *8 (internal citations omitted).

¹³Google offered evidence, which was undisputed by P10, that no images found in Google’s cache are stored on Google’s servers. Thus, the Court held that any claims for copyright infringement based on images “found in” Google’s cache are actually claims for infringement based on linking users to content hosted on third-party websites, and therefore the § 512(d) safe harbor applied to these claims.

- (B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
 - (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to the material;
- (2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- (3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

17 U.S.C. § 512(d).

P10 argued that Google acquired the requisite knowledge of infringement upon receiving P10's notices of infringement and that once Google had this knowledge, it did not act expeditiously to suppress the infringing links.¹⁴

Google asserted that it met all of the requirements to qualify for the section 512(d) safe harbor for Web Search and Image Search. It countered P10's arguments that Google had knowledge of infringement by asserting that P10's notices were defective for a multitude of reasons and that Google nonetheless expeditiously processed numerous notices in circumstances where it was feasible to do so.

For a notice from a claimant to be effective, it must include:

- (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
- (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
- (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
- (v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

¹⁴With respect to the infringing links, P10 did not argue that Google received a direct financial benefit from the infringing activity or that it had the right and ability to control such activity.

- (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

17 U.S.C. § 512(c)(3).

1. The Group A and Group C Notices Were All Defective

a. The Group A Notices—Defective Because Not Properly Addressed and Substantively Deficient

The Court ruled against Google on two procedural issues,¹⁵ but found that there was no genuine dispute of material fact that the Group A notices were inadequate to provide notice under the DMCA:

Google has offered undisputed evidence that all of the Group A notices were sent by email to “webmaster@google.com” instead of to the address of Google’s designated agent listed at the Copyright Office. In addition, the notices are substantively deficient. They uniformly do not identify specifically which copyrighted works were infringed as required by 17 U.S.C. § 512(c)(3)(A)(ii).

P10 v. Google, Case No. CV 04-9484, at *12 (internal citations omitted).

b. The Group C Notices

(i) Defective For Failure to Specifically Identify Copyrighted Work

The Court found the Group C notices defective for several reasons, including failure to identify the copyrighted work required by section 512(c)(3)(A)(ii):

As Google has demonstrated, the Group C notices ... require the service provider to move back and forth between several different files in order to determine that a given URL was infringing (in the instances where the URLs were provided, which was not always the case). The Group C notices generally consist of a cover letter, a spreadsheet, and a hard drive or DVDs containing electronic files. Where P10 provided spreadsheets, the spreadsheets do not identify the infringing URL, but merely the top-level URL for the entire website. P10 evidently expected Google to comb through hundreds of nested electronic folders containing over 70,000 distinct files, including raw image files such as JPEG files and screen shots of Google search results, in order to find which link was allegedly infringing. In many cases, the file containing the allegedly infringing image does not even include a URL, or the URL was truncated. The spreadsheets also do not identify the copyrighted work that was allegedly infringed. Instead, the cover letters contain a statement similar or identical to the following:

If you wish to examine the copyrighted images of Perfect 10 which correspond to these infringing images, I have previously sent to you all of the images on our website, as of June,

¹⁵The Court ruled that the Group A notices were not timebarred because the infringement was ongoing. *P10 v. Google*, Case No. CV 04-9484, at *12 (citing *Roley v. New World Pictures*, 19 F.3d 479, 481 (9th Cir. 1994) (“In a case of continuing copyright infringements, an action may be brought for all acts that accrued within the three years preceding the filing of the suit.”)). Google also argued that because P10 had not answered Google’s requests for admission pertaining to the Group A notices, P10 cannot rely on these notices as evidence of Google’s knowledge. Google based this argument on Fed. R. Civ. P. 26 and 37, but the Court held that these rules “merely allow the court discretion to prohibit a party who disobeys a discovery order or a request for discovery from introducing the related evidence.” *Id.* at *12. The Court found that P10’s conduct with respect to the Group A notices did not rise to a level that would justify their exclusion from consideration.

2007. [sic] Also, as I have previously advised you, if you would like a free subscription to Perfect 10's website, please let me know and I will provide a user name and password for you.

P10 then expected Google to search through a separate electronic folder—attached only to the June 28, 2007 DMCA notice—containing all of the more than 15,000 images that appeared on P10's website as of June 2007, in order to identify the copyrighted work that was infringed.

... To refer Google to more than 15,000 images appearing on the entirety of P10's website falls far short of identifying what may have been infringed. Nor is a reference to the totality of the P10 image collection "a representative list" of "multiple copyrighted works" appearing without authorization at a single infringing site. See 17 U.S.C. § 512(c)(3). Thus, all of P10's Group C notices lack the identification of the copyrighted work required by section 512(c)(3)(A)(ii).¹⁶

Id. at *15-16 (internal citations omitted).

**(ii) Defective For Not Including All the Required Elements
in a Single Communication**

The Court also ruled the Group C notices defective for not containing all of the required notice information in a single written communication. After quoting *CCBill*, holding that "separate communications" are inadequate because "[p]ermitt[ing] a copyright holder to cobble together adequate notice from separately defective notices . . . unduly burdens service providers" and that "the text of § 512(c)(3) requires that the notice be 'a written communication,'" *CCBill*, 488 F.3d at 1113 (emphasis added), the Court explained:

[T]he thousands of separate electronic files on each disk that P10 sent to Google are the functional equivalent of separate notices. Unlike certain of the Group B notices that contain all of the statutorily required information in a single spreadsheet, no single document in any of the Group C notices contains all of the information required in a valid DMCA notification. Instead, in order to process a Group C notice, Google would be required to examine thousands of separate files in order to determine which URLs might be infringing and which copyrighted images are alleged to be infringed. This would impermissibly "shift a substantial burden from the copyright owner to the provider."

P10 v. Google, Case No. CV 04-9484, at *17 (internal citations omitted).

In response to P10's concerns that the "Court's ruling would prevent it from including collections of infringing images as supporting evidence for otherwise valid DMCA notices," the Court held that a content owner may submit supportive evidence with its notice, but for the notice to be valid it must contain what is required by the DMCA in a single written communication. The Court stated:

P10 remains free to include additional supporting evidence, such as screenshots, with the material it submits to a service provider. However, at a minimum, the essential elements of notification—the

¹⁶P10 argued at the hearing that if an allegedly infringing photo included in the thousands of website screenshot files sent to Google contains a P10 copyright notice, that copyright notice should satisfy the requirement that P10 "identify . . . the copyrighted work claimed to have been infringed." 17 U.S.C. § 512(c)(3)(A)(ii). However, the Court ruled that such a copyright notice on a screenshot taken from an infringing website does not identify the copyrighted work. At best, the notice merely serves to identify someone claiming to own the image, whereas it would contain the necessary identification if it also showed the URL on the P10 website or the volume and page number of *Perfect10* magazine at which the original copyrighted image appears. In any event, the Court held that Google is not obligated to comb through tens of thousands of images to determine which ones contain copyright notices, which would impermissibly shift a substantial burden from the copyright owner to the provider.

copyright owner's attestations of ownership, nonlicensed use, and veracity of the notice; contact information for the complainant; identification of the copyrighted work; and identification of the infringing material (including the location of that material and if necessary, a specific link under section 512(d))—must be included in a single written communication. Because the Group C notices fail to provide all of this information in one place, they do not impute knowledge to Google. Perfect 10 has therefore not raised a genuine issue of material fact as to whether Google is eligible for safe harbor under § 512(d).

Id. at *24-25 (internal citations omitted).

2. The Group B Notices

a. Some Found Defective For Lack of Specific Reference

The Court held that Google met its burden of showing there is no dispute of material fact as to whether some of the Group B notices were non-compliant, stating:

Each notice contains references to dozens or even hundreds of alleged infringing links. Google argues that these notices are invalid in their entirety because the majority of the references are invalid. Google is correct that many of the references do contain incomplete URLs, lack image-specific URLs, or do not reference the copyrighted work with specificity. References having these deficiencies do not confer adequate notice under the DMCA. The DMCA requires a notification to include “[i]dentification of the copyrighted work claimed to be infringed,” 17 U.S.C. § 512(c)(3)(A)(ii), and “identification of the reference or link, to material claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link,” 17 U.S.C. § 512(d)(3). Of course, Google was not required to act to remove any entry that did not meet the DMCA requirements.

Id. at *13 (internal citations omitted).

However, the Court ruled that certain Group B notices met the DMCA requirements, stating:

P10 does point to some notices that *do* meet all of the requirements of the DMCA. For example, in its May 31, 2004 notice, P10 provided Google with the complete URL “http://pix.alronix.net/Photo_Scans/Tits/Monika_Zsibrita/pic00076.htm” along with the volume, issue, and page number of *Perfect 10 Magazine* in which the image originally appeared. These individual references sufficed to confer notice of infringement for those particular URLs, despite the fact that other URL references within the notices were insufficient.

Id.

The Court distinguished the facts concerning these notices from *CCBill*, finding:

Unlike in *CCBill*, where the service provider would have to refer back and forth between different files, here the Group B notices enabled Google to scan the entries to determine their compliance with the DMCA. This is not an undue burden. Therefore, P10 has demonstrated that at least some of those notices were valid under the DMCA.

Id. at *14 (internal citations omitted).

b. Factual Issues Regarding Processing and Timeliness.

The Court then analyzed whether Google processed all of the adequate Group B notices, and whether they did so “expeditiously” as required by the DMCA. The Court ruled that Google did not meet its burden, as the moving party, to show that there is no genuine issue of material fact as to whether it is entitled to DMCA safe harbor for the Group B notices and thus entitled to judgment as a matter of law on this issue, stating:

Google offers evidence that it began processing P10’s Group B notices immediately upon receipt and completed processing the majority of the notices within one-to-two weeks of receipt. However, P10 offers other evidence that sometimes Google waited between four and seventeen months to process a number of the Group B notices, as well as evidence that some notices were not processed at all. This factual dispute as to how long the processing took precludes summary judgment for Google for the Group B notices.

Id.

In ruling that certain of the Group B notices are not ripe for summary judgment, the Court confirmed that issues relating to processing notices is a factual issue, not a legal one, and highlighted the fact that because the facts and circumstances differ from case to case, it is not possible to have a uniform timeline for processing notices. *Id.* (citing the legislative history of the safe harbor provisions, S. Rep. No. 105-190, at 44 (1998) (“Because the factual circumstances and technical parameters may vary from case to case, it is not possible to identify a uniform time limit for expeditious action.”)).

Safe Harbor for Caching Feature Under Section 512(b)

Google also moved for summary judgment that it is entitled to safe harbor under 17 U.S.C. § 512(b) for its Caching Feature. It was undisputed that Google’s servers did not store images from its cached web pages. Rather, the images displayed on a cached page were made available to a viewer from their original source, if they still existed at that source. Thus, the Court held that P10’s claims for infringement based on images “located in” Google’s cache are really claims based on Google’s linking to outside infringing content, and the § 512(d) analysis applies. That Court’s analysis concluded that Google was entitled to the § 512(d) safe harbor with respect to linking to outside infringement for all of the Group A, all of the Group C, and some of the Group B notices.¹⁷ The Court stated:

Google demonstrated that nowhere in any of the Group B notices did P10 identify any specific material in Google’s cache as infringing. P10 merely cited to one Group B notice that mentioned in passing that “Jerkengine.com has thousands of Perfect 10 infringements available by clicking on the Google cache link and dainews.nu has many as well.”¹⁸ However, the spreadsheet attached to that notice does not cite to any Google cache pages as infringing, and the mere reference to “thousands of Perfect 10 infringements” could not reasonably be deemed to confer notice of infringement as to these cache pages on Google. Thus, the Court has been presented with no evidence that any portion of the Group B notices for which the availability of safe harbor is still at issue contains a valid notification

¹⁷ Although certain Group B notices were deemed sufficient under the DMCA, P10 could not rely on them at least on procedural grounds, and the Court granted Google’s motion for partial summary judgment for its Caching Feature.

¹⁸ In its response, P10 argued – without any statutory or case law support – that a notice identifying a web page necessarily identifies the cached page as well. In support, P10 cites to Google’s practice to automatically remove a cached link when it suppresses the corresponding live web page URL. The Court found Google’s policy in responding to a notice irrelevant to the question of whether that notice identified a cached web page in the first place.

of infringement for a Google cache page. As a result, the Court GRANTS Google's motion for partial summary judgment for its caching feature.

Id. at *25-26 (internal citations omitted).

Safe Harbor for Google's Blogger Service Under Section 512(c)

Because Google's Blogger service allows account holders to create their own blogs, which in some cases include allegedly infringing images that are uploaded onto Google's own servers, the Court analyzed the availability of a safe harbor under 17 U.S.C. § 512(c), which addresses service providers that store material on their systems at the direction of users. A service provider that stores such material is entitled to safe harbor under 17 U.S.C. § 512(c)(1) if it:

- (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
 - (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
 - (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

17 U.S.C. § 512(c)(1).

The Court ruled that although some Group B notices could be considered adequate for imparting notice under the DMCA, P10 did not contend (either in its opposition papers or in oral argument) that Google failed to expeditiously process even a single Blogger URL within that group of notices, although P10 did include one such page in a binder it handed up in court. Thus, the Court ruled that Google is entitled to safe harbor under § 512(c) for its Blogger service for the links identified only in the Group B notices, with the possible exception of the 23 supposedly infringing URLs that were included in that single page.

The Court held that the Group C notices that list Blogger URLs are inadequate, however, as they each had the same deficiencies as the rest of the Group C notices. The Court stated:

The requirements for a copyright holder are slightly less stringent under § 512(c) than under § 512(d) in that the former does not explicitly require the copyright holder to provide what the latter does: a specific "identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled." 17 U.S.C. § 512(d)(3). Section 512(c) merely requires the copyright holder to provide "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). Google has a tenable argument that a copyright holder would need to provide the post-URL of a particular Blogger post in order to include information "reasonably sufficient" to permit the location of the material. However, the Court need not address this argument now, since the other

manifest deficiencies in the Group C notices—including their lack of specific identification of the copyrighted material and their inexplicably complicated organization—prevent them from imparting knowledge under the statute. Thus, Google need not show that it acted expeditiously on the Group C Blogger notices in order to be eligible for safe harbor under § 512(c).

P10 v. Google, Case No. CV 04-9484, at *28 (internal citations omitted).

The Court then addressed the other requirement Google must meet to be eligible for safe harbor under § 512(c), that it “does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.”

The Court found P10’s argument unavailing as a matter of law. P10 argued that Google has a right and ability to control infringing activity on Blogger because the infringing material is on Google’s servers and Google can take it down after it has been uploaded by users. The Court stated: “The mere ability of a service provider to remove content after it has been uploaded is insufficient as a matter of law to establish the right and ability to control the infringing activity required by § 512(c)(1)(B).” *Id.* at *28-29 (citing *UMG Recordings*, 665 F. Supp. 2d at 1112-13). “Thus, the Court need not consider whether Google receives a financial benefit from the alleged infringement because it already meets the criteria for safe harbor under 17 U.S.C. § 512(c)(1)(B).” *Id.* at *29.

Therefore, the Court held that Google demonstrated that it is entitled to safe harbor for its Blogger service under 17 U.S.C. § 512(c) as a matter of law.

Conclusion

This decision, along with other recent DMCA decisions, provides further guidance on how service providers should establish and implement policies and how content owners should provide notice of infringement to the service providers. With the ever-growing amount of online content, it will continue to be important for companies to pay careful attention to these issues.

If you have any questions about the content of this white paper, please contact the Pillsbury attorney with whom you regularly work or the authors below.

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