No. 10-56316

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PERFECT 10, INC.,
Plaintiff-Appellant,

v.

GOOGLE INC.,
Defendant-Appellee.

Appeal from the United States District Court for the
Central District of California, No. CV 04-9484 AHM (SHx)

The Honorable A. Howard Matz, District Judge

BRIEF OF AMICI CURIAE CHILLING EFFECTS CLEARINGHOUSE LEADERS IN SUPPORT OF APPELLEE

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Near v. Minnesota ex rel. Olson,
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S. Rep. No. 105-190 (1998).....5, 7

Statement of Gigi B. Sohn, President, Public Knowledge, before the House Committee on Energy and Commerce Subcommittee On Commerce, Trade, and Consumer Protection, Oversight Hearing, "Fair Use: Its Effects on Consumers and Industry" (Nov, 16, 2005).....18

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Other Authorities

Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*,
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Center for Democracy and Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (October 12, 2010) 18

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Pursuant to FRAP 29(a), all parties have consented to the filing of this brief by *amici curiae*.

IDENTITY AND INTEREST OF AMICI CURIAE

Amici are the founders of Chilling Effects Clearinghouse, the Electronic Frontier Foundation, and other leaders of the project, including the directors of several of the law school clinics which participate in the project. Chilling Effects Clearinghouse is a joint project of the Electronic Frontier Foundation and Harvard, Stanford, Berkeley, University of San Francisco, University of Maine, George Washington School of Law, and Santa Clara University School of Law clinics.

Wendy Seltzer founded and developed the Chilling Effects Clearinghouse. She is a Fellow with Princeton University's Center for Information Technology Policy and with the Berkman Center for Internet & Society at Harvard University.

The Electronic Frontier Foundation ("EFF") is a nonprofit civil liberties organization that has worked for more than twenty years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 14,000 dues-paying members have a strong interest in helping the courts and policy-makers in striking the appropriate balance between intellectual property and the public interest.

Jonathan Zittrain is Professor of Law at Harvard Law School and Professor of Computer Science, Harvard School of Engineering and Applied Sciences. He is

Co-Founder and Faculty Co-Director of the Berkman Center for Internet & Society, where he co-founded the Chilling Effects project.

Jason M. Schultz and Jennifer M. Urban are Assistant Clinical Professors of Law and Co-Directors of the Samuelson Law, Technology & Public Policy Clinic at the UC Berkeley School of Law (Boalt Hall).

Phillip R. Malone is a Clinical Professor of Law and Director of the Cyberlaw Clinic at Harvard Law School and the Berkman Center for Internet & Society.

The Citizen Media Law Project ("CMLP") provides legal assistance, education, and resources for individuals and organizations involved in online and citizen media. CMLP is an unincorporated association hosted at Harvard Law School. CMLP contributes to Chilling Effects and uses Chilling Effects data in CMLP's reporting on legal issues impacting digital media and in its database of legal threats directed at online publishers.

David Abrams contributes to Chilling Effects as a Fellow with Harvard's Berkman Center for Internet and Society. He is Program Director for the Problem Solving Workshop at Harvard Law School.

The individual amici appear in their individual capacities, and not on behalf of their institutions.

Amici submit this brief to provide context to the Court regarding the purpose

and activities of Chilling Effects Clearinghouse and the important interests that internet users, online service providers, and copyright holders have in the DMCA safe-harbor scheme.

PRELIMINARY STATEMENT

In 2000, Universal Studios released a movie titled *U-571*, about intrigue on a World War II-era German submarine. In 2003, Universal sent a DMCA takedown notice to a service provider stating that it had located infringing copies of the film on a website hosted by that provider, the Internet Archive.[1]

The material of which Universal sought removal was stored under the filename 19571.mpg. That file contains a 1948 educational film, titled *Pattern for Smartness*, about sewing one's own clothing.[2] It is in the public domain, and has nothing to do with submarines.

The world only learned about this error after the DMCA notice had been submitted to and analyzed by Chilling Effects Clearinghouse. Because both the identity of the allegedly infringed work and the location of the alleged infringement had been set forth specifically in the notice, both the Internet Archive and the public could quickly discern that Universal had simply alleged infringement of any file with "571" in the file name.[3]

If the DMCA notice had remained private, Universal's tactics might never have come to light. Public posting and analysis of DMCA notices provides

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[1] http://www.chillingeffects.org/notice.cgi?NoticeID=595

[2] http://www.archive.org/details/Patternf1948

[3] http://www.chillingeffects.org/responses/notice.cgi?NoticeID=597

important information to the public about uses of the DMCA process, and is the only way that scholars can effectively study the effects of the DMCA.

Perfect 10 has suggested that Google facilitates infringement by sending DMCA notices to Chilling Effects. Blue Br. at 73. But the use of copyrighted works "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107. Chilling Effects' scholarly, research-based use of the DMCA notices, and Google's facilitation of that use, is squarely within the boundaries of fair use, even when the DMCA notice includes creative copyrighted works such as the photographs of women at issue here.

The goal of the DMCA is to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education." S. Rep. No. 105-190 (1998) at 1-2. Chilling Effects serves the purposes of the DMCA by facilitating research and education about online copyright policy, and by making possible an evaluation of the extent to which Congress's goals for the DMCA are being met in practice.

ARGUMENT

I. CHILLING EFFECTS CLEARINGHOUSE COLLECTS AND STUDIES DMCA NOTICES IN FURTHERANCE OF ACADEMIC AND PUBLIC POLICY GOALS.

Chilling Effects Clearinghouse is a public resource providing information

about and analysis of notices sent pursuant to the Digital Millennium Copyright Act and other "cease-and-desist" communications sent regarding Internet content. Chilling Effects gathers submissions from online service providers, users of online services, and copyright holders and makes those submissions available for review and study by scholars and interested members of the general public through its website, www.chillingeffects.org. It also provides basic information on relevant laws to the public through its "Frequently Asked Questions" feature at http://www.chillingeffects.org/dmca512/faq.cgi, and through a subset of submitted notices with links to relevant information in the FAQs. *See, e.g.*, http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=1284 (providing analysis and annotation of a Perfect 10 notice). These features of the Chilling Effects website have been widely cited as key resources on the DMCA.[4]

By making available copyright enforcement communications that would otherwise be largely hidden from public view, Chilling Effects serves a critical function in the DMCA scheme. Section 512 was intended to "balance the need for rapid response to potential infringement with the end-users legitimate interests in

[4] *See, e.g.*, United States Commercial Service, *Piracy and IPR in the Publishing Industry*, *at* http://www.export.gov/static/Pirarcy%20and%20IPR_Latest_eg_main_022822.pdf; Congressional-Executive Commission on China, *Freedom of Expression Resources*, *at* http://www.cecc.gov/pages/virtualAcad/exp/expresources.php; National Film Preservation Board, *Copyright and Licensing Resources*, *at* http://www.loc.gov/film/copyrite.html.

not having material removed without recourse." S. Rep. No. 105-190 (1998) at 21. To determine whether that balance is being achieved, the public needs information about how the safe harbors are working.

The public debate on copyright issues is robust and vibrant, in part because the stuff of copyright disputes—such as the documents filed by parties in litigation and the decisions of the judges before whom the disputes are placed—is publicly available. The DMCA takedown process, by contrast, can occur in private, with no public notice: a copyright holder can send a letter to an online service provider, the online service provider can make a private determination whether to comply with the request, and material can be silently removed from public view. Without a publicly accessible archive, the public might never find out that search results, blog comments, or other content had been suppressed, and scholars could not study the effect of the DMCA.

Since 2002, Chilling Effects has been that archive, collecting and making available more than 12,000 notices for public review and study, some of which were contributed by Google. By contributing to this archive, Google assists scholars and members of the public in assessing the impact of the DMCA, in both specific and general terms. Through the Chilling Effects archive, individuals can find information about particular blogs they can no longer reach or search results no longer available; they can see the volume of complaints and the overall impact

of the notice-and-takedown process; and they can learn the basics of copyright law and its application online. By contributing to the archive and by providing the public with notice of its actions in response to DMCA notices, Google is not infringing copyright or contributing to infringement; instead, Google is making available information which helps the public understand the § 512 takedown process and stimulates study, legal analysis, and public policy debate.

II. CHILLING EFFECTS IS A CRITICAL RESOURCE

A. **Chilling Effects data is of great utility and importance to scholars.**

Chilling Effects Clearinghouse provides the empirical basis for much of the legal scholarship to date on the notice-and-takedown provisions of the DMCA.

The scholarly importance of Chilling Effects is illustrated by a 2006 law review article by Jennifer Urban (who is among *amici*) and Laura Quilter. *See* Jennifer Urban and Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006). That article analyzed the 876 notices submitted to Chilling Effects between the inception of the project and August, 2005. Urban and Quilter's analysis revealed striking trends: nearly 30% of DMCA notices sent to Google over the observed time period sought removal of material based on flawed or highly questionable copyright claims, and almost 10% of all notices analyzed included significant statutory flaws that rendered the notice

unusable (for example, failing to adequately identify infringing material). *Id.* at 667, 674.

By analyzing the sources and targets of DMCA notices, Urban and Quilter were able to discern trends that suggested the motivations behind many of the notices. For example, 55% of notices sent to Google to target search engine links were sent by businesses targeting apparent competitors, raising concerns about misuse of the law. *Id.* at 651. And a number of notices sent by the software and game industries improperly alleged that "cheats" for games infringed copyright. *Id*. at 651, 677. *Cf. MDY Indus., LLC v. Blizzard Ent'mt, Inc.*, ___ F.3d ___, No. 09-15932 (9th Cir. Dec. 14, 2010) (holding that "cheats" for games do not infringe copyright). Urban and Quilter's study could not have been conducted without the data provided by Chilling Effects Clearinghouse.

In 2005, the Brennan Center for Justice at New York University published its own study of Chilling Effects data. *See* Marjorie Heins and Tricia Beckels, *The "Curse of the Avatar" and Other Controversies from the Chilling Effects Clearinghouse*, in WILL FAIR USE SURVIVE? 29 (2005), *available at* http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf. The Brennan Center study analyzed the 245 notices submitted to Chilling Effects during 2004. It found that there were 153 of those notices—62%—"that either targeted material

with a fair use/First Amendment defense or that stated a weak IP claim." *Id.* at 35. Chilling Effects data was a critical resource for the researchers, who noted:

> The more than 1,000 letters that have been deposited with Chilling Effects provide information about what kinds of copyright or trademark infringement claims are made, the number of those claims that are legally weak or even frivolous, and the number that target Web pages or newsgroup postings which might be considered fair use or have a First Amendment defense. Following up on the information in the Clearinghouse can both amplify these findings and tell us how often cease and desist or take-down letters have a chilling effect, how often they are resisted, and what factors contribute to the different outcomes.

Id. at 29. The only way that the Brennan Center researchers were able to evaluate the strength of the claims made in the DMCA notices was by analyzing the particular material identified as infringing in the notices. Had the notices been redacted to remove that information, the researchers' work would have been rendered impossible.

Other academics have used Chilling Effects data not to compile a broad view of DMCA takedowns, but to focus attention on those notices which give rise to particularly grave First Amendment concerns. In a forthcoming article in the Harvard Journal of Law and Technology, Wendy Seltzer—who founded Chilling Effects Clearing house and who is among *amici*—argues for greater constitutional scrutiny of the DMCA's private notice-and-takedown process. Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA*

on the First Amendment, 24 HARV. J.L. & TECH. ___ (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577785. Seltzer argues that "the copyright notice-and-takedown regime operates in the shadow of the law, doing through private intermediaries what government could not to silence speech," and asks, "In the wake of *Citizens United v. FEC*, why can copyright remove political videos when campaign finance law must not?" *Id.* at 2.

Because of Chilling Effects' archive of DMCA notices, Seltzer was able to support her argument with concrete examples. For example, the New York College Republican State Committee used a DMCA notice to seek the deletion of content on a blog which revealed infighting within that organization. *Id.* at 41 (citing http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=2174). And the graphic designer for a Democratic politician in Arkansas sent a DMCA notice seeking removal of that candidate's campaign logo from a conservative website which was using it to criticize the candidate's views. *Id.* (citing http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=2455). Seltzer expresses concern that political campaigns may soon adopt the tactics of sharp-elbowed website owners who, seeking ever higher search-engine rankings, send pretextual DMCA notices alleging copyright infringement on competitors' websites. *See* Seltzer at 46 (citing http://www.chillingeffects.org/dmca512/keyword.cgi?KeywordID=36).

These three studies are the tip of the iceberg. Chilling Effects data has been (and will doubtless continue to be) used by numerous other scholars in support of a wide variety of arguments and policy proposals. *See, e.g.*, Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 401 (2009) (citing takedown notice posted on Chilling Effects as support for argument that the DMCA provides public accountability); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 579-80 (2008) (citing Chilling Effects data to argue that copyright owners tend to aggressively assert their copyrights and benefit from the "chilling effects" of being aggressive litigants); Deven R. Desai & Sandra L. Rierson, *Confronting the Genericism Conundrum*, 28 CARDOZO L. REV. 1789, 1840 (2007) (using Chilling Effects data to argue that trademark holders threaten to sue in cases which would be "demonstrably frivolous"); Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 15, 34-35 (2005-06) (using Chilling Effects data to argue that the DMCA's private enforcement regime leads to over-compliance by ISPs and over-enforcement of copyrights); William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1440 n.115 (2010) (citing Chilling Effects database to argue that some content owners "seem uninterested in license fees" and seek to prevent others from making any modifications to their works); Michael Grynberg,

Trademark Litigation as Consumer Conflict, 83 N.Y.U. L. REV. 60, 96 (2008) (citing Chilling Effects data to argue that expansive trademark claims have a "chilling effect on those who would use trademarks for purposes other than source identification"); Charles W. Hazelwood, Jr., *Fair Use and the Takedown/Put Back Provisions of the Digital Millennium Copyright Act*, 50 IDEA 307, 315-26 (2010) (using examples of takedown notices from Chilling Effects website to argue that the takedown provisions of DMCA are unnecessarily broad in light of the legislative purpose of the DMCA); Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1543-44 (using Chilling Effects data to argue that modern copyright law is driven by informal copyright practices, some of which can have a chilling effect on speech); Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 417-18 (2010) (using Chilling Effects data to describe overreaching by trademark owners); Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 406 (2009) (using Chilling Effects data to argue that content owners make overly-broad claims to their works, and often fail to account for any possible fair uses); William McGeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 63 n.72 (2008) (citing Chilling Effects data to argue that the lack of clarity around the fair use defense in trademark law leads rational markholders to aggressively enforce their marks); Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility?: Lessons*

from the DMCA Applied to Online Defamation, 25 CARDOZO ARTS & ENT. L.J. 237, 259 (2007) (using Chilling Effects data to illustrate criticisms of the DMCA, and arguing that despite its flaws, the DMCA can provide a framework for changes to the Communications Decency Act); Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 233-34 (2007) (citing study conducted by Brennan Center for Justice at New York University Law School using Chilling Effects data to argue that cease and desist notices discourage lawful uses of works); Paul Ohm, *Computer Programming and the Law: A New Research Agenda*, 54 VILL. L. REV. 117, 126 (2009) (citing Chilling Effects as a source of data to support interdisciplinary research agenda); Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135, 180 (2007) (using Chilling Effects data to argue that the threat of and high costs of litigation deter legitimate fair use claims from being asserted); Miquel Peguera, *When the Cached Link is the Weakest Link: Search Engine Caches Under the Digital Millenium Copyright Act*, 56 J. COPYRIGHT SOC'Y U.S.A. 589, 639 (2009) (using data from Chilling Effects to argue that copyright owners use the DMCA to target cached copies of third party infringing websites); Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 404-05 (2008) (using Chilling Effects data to argue that the DMCA process can be misused in ways which raise First

Amendment concerns); Elizabeth A. Rowe, *Introducing a Takedown for Trade Secrets on the Internet*, 2007 WIS. L. REV. 1041, 1060-61 (2007) (using two studies conducted using Chilling Effects data to explain pitfalls of DMCA notice-and-takedown procedures); Wendy Seltzer, *International Trade and Internet Freedom*, 102 AM. SOC'Y INT'L L. PROC. 45 (2008) (using Chilling Effects data to advocate for greater transparency in government policies and laws that censor Internet speech); Christopher Soghoian, *Caveat Venditor: Technologically Protected Subsidized Goods and the Customers Who Hack Them*, 6 NW. J. TECH. & INTELL. PROP. 46, 77 (2007) (using information from Chilling Effects to argue that attempts to force webmasters to take down content leads Internet users to "engage in a modern form of civil disobedience by making copies available on their own websites"); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 515 n.104 (2004) (citing data from Chilling Effects to argue that the lack of copyright formalities increases the time and expense involved in the copyright clearance process); Hannibal Travis, *Of Blogs, eBooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1523 n.8 (2007) (using data from Chilling Effects to argue that the DMCA deters lawful speech); Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1003-04; 1003 n.77 (2008) (using data from Chilling Effects to argue that the DMCA provides an incentive for

service providers to ignore users' rights and free speech interests).

Notably, these scholars' arguments focus primarily on the volume and content of DMCA notices sent by copyright holders. Many studies focus only secondarily on the actions taken by service providers in response to those notices. Thus, even if Perfect 10 is correct in asserting that Google sent notices to Chilling Effects before processing them, that would not, as Perfect 10 argues, undermine the "assertion that Google forwarded notices to help chillingeffects.org analyze the uses of the DMCA." Blue Br. at 76.

By providing the full data, in the form of the complete takedown notices sent, Chilling Effects enables reproducible research. Subsequent scholars need neither take earlier work on faith nor reinvent its foundations, but can themselves access the same data to validate earlier results and run their own analyses. Chilling Effects makes its takedown notice data available to support research wherever it is conducted, whether in academic institutions or elsewhere. This distributed research would be hindered if, as Perfect 10 urges, Chilling Effects were prevented from publishing its full research corpus.

B. **Chilling Effects data provides important input to policymaking.**

Chilling Effects data has also been cited frequently as evidence in support of proposals before policymaking and regulatory bodies. For example, the Organisation for Economic Co-Operation and Development (OECD) recently

conducted a study on the role of "information intermediaries"—in DMCA terms, Online Service Providers—in the development of economies around the world. As part of that proceeding, comments were submitted by the Civil Society Information Society Advisory Council (CSISAC), a coalition of 82 civil society organizations from around the world, of which the Electronic Frontier Foundation is a member. CSISAC argued that "appropriately tailored frameworks for limitations on liability of Internet intermediaries are the key driver of Internet innovation and the freedom and autonomy of individuals in the Information Society." CSISAC, *Comments to OECD on Information Intermediaries* (July 14, 2009), *available at* http://csisac.org/docs/OECD_Intermediary_071409_final.pdf. To support this recommendation, CSISAC cited the Urban and Quilter study of Chilling Effects data. *Id*. at 17 n.53. Because Chilling Effects made DMCA notices available, CSISAC was able to direct the OECD to particular instances in which "[t]he U.S. copyright notice and takedown provisions in section 512 of the Copyright statute have been misused by private parties to censor legitimate criticism, rather than to protect intellectual property." *Id.* at 17.

Chilling Effects data has been frequently cited in domestic policy debates as well. For example, the president of nonprofit advocacy group Public Knowledge cited Chilling Effects in congressional testimony on the impact of fair use on consumers and industry. *See*, *e.g.*, Statement of Gigi B. Sohn, President, Public

Knowledge, before the House Committee on Energy and Commerce Subcommittee On Commerce, Trade, and Consumer Protection, Oversight Hearing, "Fair Use: Its Effects on Consumers and Industry" (Nov, 16, 2005), *available at* http://archives.energycommerce.house.gov/reparchives/108/Hearings/11162005hearing1716/Sohn.pdf. Chilling Effects was cited in support of Sohn's argument that "The DMCA's chilling effect[s] on fair use and on free speech have been well documented." *Id.* at 7. And the Center for Democracy and Technology, another nonprofit advocacy group, cited Chilling Effects in a recent report on political use of copyright takedowns. Center for Democracy and Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (October 12, 2010), *available at* http://www.cdt.org/files/pdfs/copyright_takedowns.pdf.

C. **Chilling Effects data has been used by Perfect 10 itself.**

Perhaps most tellingly, Chilling Effects data has been used by Perfect 10 itself in litigating this very case and other similar cases. As the court below noted, "Dr. Zada himself relies upon the research uses of Chilling Effects to provide evidence to support P10's motion. In order to support his argument that Rapidshare is a 'massive infringing website,' and Google should discontinue linking to it entirely, he searched Chilling Effects' database of DMCA notices to find how many copyright holders had complained against Rapidshare." *See* SER 17 n.11.

Nor is this the first case in which Perfect 10 has cited Chilling Effects data. In *Perfect 10 v. Microsoft Corp.*, Perfect 10 used as evidence numerous DMCA notices it had obtained through research on the Chilling Effects website. *See, e.g.*, Reply Declaration of Dr. Norman Zada in Support of Perfect 10's Motion for Partial Summary Judgment, Doc. 102, Case No. 2:07-cv-05156-AHM-SH (C.D. Cal. filed March 8, 2009), *available at* 2009 WL 1406166, at ¶ 10 ("Attached as pages 1 and 2 of Exhibit 37 is a document I printed from chillingeffects.org on March 1, 2009. Chillingeffect.org [sic] is a website that publishes DMCA notices on the Internet, many of which are sent to it by Google. I obtained Exhibit 37 by doing a search on chillingeffects.org for 'Microsoft.'"), ¶ 11 ("Attached as pages 1-2 of Exhibit 38 are the first two pages of a complaint from the Motion Picture Association of America ("MPAA") to Google, which I printed from chillingeffects.org on March 1, 2009."), ¶ 12 ("Attached as pages 3 and 4 of Exhibit 38 are the first two pages of a notice from the Business Software Alliance to Google, which I printed from chillingeffects.org on March 1, 2009.").

Perfect 10 submitted similar evidence in support of its motion for partial summary judgment in *Perfect 10 v. Amazon.com*. *See, e.g.*, Reply Declaration of Norman Zada in Support of Perfect 10's Motion for Partial Summary Judgment Against Amazon and Alexa, Doc. 234, Case No. 2:05-cv-04753-AHM-SH (C.D. Cal. filed Nov. 23, 2008), *available at* 2008 WL 5528958, at ¶ 10 ("Attached as

pages 3-5 of Exhibit 47 are pages of a "removeyourcontent" notice sent to Google that I printed from the website Chillingeffects.org on November 11, 2008. Pages 3 through 5 of Exhibit 47 make up a notice that is similar in content to the notices that Perfect 10 has sent to Google when we used a spreadsheet format.").

Perfect 10 uses Chilling Effects for the same purpose that scholars and policymakers do: to provide concrete information about the ways in which the DMCA takedown process is being used. If Chilling Effects did not collect DMCA notices and make them public—and if Google did not send DMCA notices to Chilling Effects—this evidence would be unavailable to Perfect 10. But even though it has been the beneficiary of Google's submissions and Chilling Effects' work, Perfect 10 nonetheless seeks to prevent those submissions, arguing that they infringe copyright.

III. SUBMISSION TO CHILLING EFFECTS IS NOT COPYRIGHT INFRINGEMENT.

When recipients submit DMCA notices to Chilling Effects, and when Chilling Effects makes those notices available on its website, neither the recipient of the notice nor Chilling Effects is infringing copyright. Most DMCA notices contain no copyrightable content; at any rate, there is generally no need to include such content in notices. And Chilling Effects' scholarly and educational mission demands that it collect and make available entire DMCA notices, in whatever form copyright holders choose to provide them.

Submission to Chilling Effects is not punishment, as Perfect 10 argues. Blue Br. at 76. It is a well-accepted practice among those who receive DMCA notices. Chilling Effects has received submissions from many providers of Internet services, including Yahoo, The Planet, Digg, Twitter, and the Internet Archive. Indeed, archivists regard submission of DMCA notices to Chilling Effects as such an important part of online archiving that they have included such submission as one of the recommended "Best Practices" for all online archivists. *See* The Oakland Archive Policy, *at* http://www2.sims.berkeley.edu/research/conferences/aps/removal-policy.html. The policy states that "Archivists will strive to make DMCA requests public via Chilling Effects, and notify searchers when requested pages have been removed." *Id.* When Google and other contributors make their DMCA requests public, they are not infringing copyright; they are contributing to an important public resource.

A. DMCA notices need not contain copyrightable content, but notices must be submitted and studied in the form in which copyright holders send them.

Most DMCA notices do not themselves contain any copyrightable material, and the question whether they may lawfully be copied does not arise. Formulaic letters from copyright lawyers, largely dictated by the statutory requirements set out in § 512, do not ordinarily rise to the level of copyrightable expression.

Indeed, in the years that Chilling Effects has been collecting and analyzing

DMCA notices, only a handful of notices have been submitted which themselves contain copyrighted works. Most of those were submitted by Perfect 10. The statute does not require or even suggest that the notice should itself contain a copy of the copyrighted work; it requires only "[i]dentification of the copyrighted work claimed to have been infringed." § 512(c)(3)(A)(ii). Many copyright holders choose to identify the work claimed to have been infringed by title. *See, e.g.*, http://chillingeffects.org/dmca512c/notice.cgi?NoticeID=51280 (identifying the allegedly infringed work, *Vampires Suck*, by title); http://chillingeffects.org/dmca512c/notice.cgi?NoticeID=51535 (identifying the allegedly infringed work, *Terror Firmer*, by title). Others identify the allegedly infringed work by identifying the web page—the URL—where the image appears on the copyright holder's website. *See, e.g.*, http://chillingeffects.org/dmca512c/notice.cgi?NoticeID=38937 (identifying the allegedly infringed work, "a digital image of a young Amish couple with infant riding in a horse drawn buggy," by URL). This normal type of identification is what the court below was referring to when it held that Perfect 10 should identify the allegedly infringed work using "the URL on the P10 website or the volume and page number of Perfect 10 magazine at which the original copyrighted image appears." SER 42 n.7.

Some of the Perfect 10 notices at issue here are especially unusual, in that they contain complete, high-resolution copies of the works alleged to have been

infringed. It is not clear why Perfect 10 chose to include full copies of the photographs at issue, as they are not necessary to identify either the allegedly infringed work or the location of the allegedly infringing website. But whatever information the copyright holder chooses to include in the DMCA notice, that information is an important subject of study, and, as set forth below, reproduction of entire notices is necessary.

B. Submission and posting of the entire notice is necessary to the purpose of Chilling Effects Clearinghouse.

As Judge Matz held, "in order for the administrators of Chilling Effects to be able to conduct and communicate their research effectively, they would need to have access and be able to comment on the notices in their original form." SER 20. This is because the nature of the allegedly *infringed* work is a frequent object of study. For example, the Brennan Center study examined multiple takedown notices from a company called MIR International Marketing, which claimed that the allegedly infringed work was the phrase "We will customize an Internet marketing program to meet your precise needs, whether you need to improve your brand visibility, find new customers, or improve your relationship with existing customers." *See* Heins and Beckels, *supra*, at 30 & n.139 (citing http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=1217). The ability to analyze the allegedly infringed work permitted the Brennan Center researchers to conclude that this use of the DMCA was improper, since "Short phrases are not

covered by copyright[.]" *Id.* at 30 n.139. Similarly, Urban and Quilter needed to review allegedly infringed works in order to determine whether notice claims were based on copyrightable subject matter and to evaluate possible fair use defenses. Urban and Quilter, *supra*, at 667.

Reasonable people can disagree about whether the original purpose of these images is to appeal to the prurient interest or to demonstrate appreciation for the female form. But the original purpose for which the images were created was certainly not to facilitate scholarship and public debate about the copyright laws. That is the highly transformative purpose for which Chilling Effects uses the notices, and that purpose militates heavily in favor of a finding of fair use. *See, e.g.*, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) ("copying the entirety of a work is sometimes necessary to make a fair use of the image"); *Kelly v. Arriba Soft Corp*., 336 F.3d 811, 821 (9th Cir. 2002) (finding fair use where entire images were copied because "it was reasonable to do so in light of Arriba's use of the images").

In the context of the DMCA notices in the Chilling Effects archive, the images in Perfect 10's DMCA notices are functional: they are intended to identify the work alleged to infringe copyright (even where they fail to do so adequately), and are necessary to researchers seeking to examine what was presented to the service provider. URLs are likewise necessary to enable individuals to find the

notice that caused removal of a particular resource, and to permit researchers to investigate such questions as the prevalence of repeat infringement by the same users, the propriety of infringement allegations, and the frequency with which new alleged infringements are found and reported.

IV. NOTICES ARCHIVED BY CHILLING EFFECTS ILLUSTRATE THE IMPORTANCE OF EACH AND EVERY NOTICE ELEMENT PRESCRIBED BY THE STATUTE.

The DMCA provides an extraordinary remedy to copyright holders: they may, merely by submitting a notice to a service provider, suppress speech. "Accusations of alleged infringement have drastic consequences: A user could have content removed, or may have his access terminated entirely. If the content infringes, justice has been done. But if it does not, speech protected under the First Amendment could be removed." *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1112 (9th Cir. 2007). Copyright holders are allowed to have content removed without any prior judicial review, much less the level of review that would normally apply in cases involving prior restraints and preliminary injunctions seeking removal of other information in response to legal claims such as defamation or obscenity. *See e.g.*, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).[5]

[5] Judicial review may take place after the fact, if a user brings a claim under § 512(f), or if a user files a counter-notice and a copyright holder files suit. But

In return, the law demands only that the copyright holder include, in a single document, the information listed in § 512(c)(3)(A). "The DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright." *CCBill*, 488 F.3d at 1113. Having to process notices which do not contain the necessary information would "shift a substantial burden from the copyright owner to the provider," and are insufficient to provide notice under the statute. *Id.* And if notices are sufficiently lacking in information, the service provider will be unable to respond at all. For this reason, understanding whether the prescribed elements are followed by notice senders, and whether they are sufficient to preserving the balance amongst copyright holders, service providers, and targets of notices, is critical to understanding whether the takedown provisions function as intended.

This Court's conclusion in *CCBill* is reinforced by Chilling Effects data. The Urban and Quilter study cited above found that almost 10% of notices analyzed did not contain all of the elements required by § 512(c)(3)(A). For example, review of notices showed a frequent "failure to identify the allegedly-infringing work; failure to identify the allegedly-infringed work; failure to provide

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after-the-fact review cannot prevent the initial suppression of speech.

a way to locate the allegedly-infringing work; or failure to provide contact information for the complainant." Urban and Quilter, *supra*, at 674. For example, many notices fail to identify with particularity the allegedly infringing material, or do not include other information required by the statute. *See, e.g.*, http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=12228 (identifying as infringing three websites generally and failing to identify any allegedly infringed work); http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=13543 (notice from non-copyright-holder alleging infringement by "[a] kid I know named Josh").

Notices that do not comply with the minimal requirements of the law impose a substantial burden on service providers, and upend the central *quid pro quo* of § 512. Copyright holders receive expeditious removal of infringing material; in return, they must provide information which permits the service provider readily to evaluate the complaint and locate the accused material.

Moreover, the failure to comply with the DMCA hurts both the creators of the improperly removed content, who are denied the full protection of the law in seeking the publication of their works, and the general public, which is denied access to those works. *See e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."). Requiring content owners to meet the simple requirements of the

DMCA helps assure the public that the suppression of creative works is not undertaken lightly.

CONCLUSION

Chilling Effects Clearinghouse serves an important role in the DMCA scheme, enabling scholars and members of the public to view and analyze the ways in which the DMCA takedown process is used by maintaining a public archive of DMCA notices. Chilling Effects does not infringe copyright by operating that public resource, and Google does not infringe copyright when it enriches that resource by submitting DMCA notices.

DATED: December 21, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 5,968 words.

DATED: December 21, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 21, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that one of the participants in the case is not a registered CM/ECF user. I have mailed the I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant:

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