

## **Google, Inc.: Procurer, Possessor, Distributor, Aider and Abettor in Child Pornography**

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### **Abstract**

Much has been written in the past couple of years regarding search engine companies' responsibilities associated with the delivery of content to the Internet community. This article presents the position that Google, Inc. is chargeable for their aiding and abetting of child pornography. Google procures, stores, and indexes child pornography and facilitates the completion of transactions involving the dissemination of child pornography--this makes them an aider and abettor in the commission of child pornography crimes.

Google has the ability to filter such material and chooses not to do so. Instead they allow easy access to illegal material (child pornography) and only reactively take measures to restrict the dissemination of this universally illegal content stored on, and disseminated by, their system. It is not inconceivable that Google could be charged and tried by a prosecutor for its criminal involvement in the dissemination of child pornography.

### **Introduction**

Much has been written in the past couple of years regarding search engine companies' responsibilities associated with the delivery of content to the Internet community. Google in particular has been the focus of much of this attention owing to its domestic stand against a federal subpoena to deliver search records associated with underage access to pornographic materials (Mohammed, 2006) and its international decision to filter content delivered to Internet citizens in the Peoples Republic of China (Andrew McLaughlin, 2006).

Google's domestic battle with the Department of Justice has been hailed by some as a stand for privacy rights (Ingram, 2006) (when in fact Google attempted to justify its refusal to comply with the subpoena by citing the need to protect trade secrets (Rosmarin, 2006) (Baker, 2006)) while others criticized Google for standing in the way of an investigation into children and pornography (Sandoval, 2006). Google's decision to comply with the filtering requirements of the government of the People's Republic of China in order to gain access to the Chinese market is considered a justifiable business decision by some (Thompson, 2006) and ideological relativism by others (BBC News, 2006) (probably correct in both instances).

More recently, Google was sued by a New York legislator who claimed that child pornography is an "obscenely profitable and integral part" of its business (Broache, 2006). Although the suit was later dropped, child pornography is a unique issue, both socially and legally, which calls into question the policies and practices of Google and other search engine and Internet index companies, particularly given Google's demonstrated content filtering capabilities in the Chinese Internet space.

Google, and most other similar entities, currently are passive and reactive in their policies and practices associated with child pornographic material. This is not good enough. Given the demonstrated effectiveness of current filtering technologies (the problems associated with Google's opt-in SearchSafe not withstanding (McCullagh, 2004)) and the unique and unambiguous legal status of child pornography, it is quite possible that by not taking an active and proactive role in filtering child

pornography from all search results, Google is guilty of aiding and abetting child pornographers and pedophiles in the commission of illegal acts, and may in fact be guilty of possessing and distributing child pornography (it is well documented that Google's database contains child pornographic images (Foley, 2006)).

This paper examines current child pornography law, relates the practices of Google (and other search engines/indexes) to current law, makes a case for the position that Google's current policies and practices place Google in violation of federal law, identifies and discusses social and technical issues and solutions, and suggests policies and practices that would put Google in compliance as well as address social concerns regarding privacy and law enforcement.

### **Current Law**

Child pornography is defined in 47 U.S.C. 2256 as “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where...such visual depiction involves the use of a minor...or appears to be, of a minor engaging in sexually explicit conduct<sup>1</sup>”. Further, United States law makes the knowing distribution (by any means including via computer networks), reproduction, receipt, sale, and/or possession of child pornography a crime (18 U.S.C. 2252).

Since the Internet is a primary conduit for the sale and distribution of child pornography (Foley, Technology and the Fight Against Child Porn, 2005) (Janis Wolak, 2005), 42 U.S.C. 13032 requires electronic communication services to report incidents of child pornographic activity to the National Center for Missing and Exploited Children as soon as they become “aware” of them Google reactively reports such activity once it has been reported to them by concerned Internet citizens, but doesn't appear to actively look for such activity in a proactive sense. Google has in fact reported this type of activity to the Federal Bureau of Investigation after receiving a complaint and removed the reported material from their index (Broache, Suit Accuses Google of Profiting From Child Porn, 2006) (Foley, Google's Blink Eye on Child Porn, 2006).

Current law does address the responsibilities and indemnity of an “interactive computer service” in 47 U.S.C. 230. Specifically, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” and cannot be held *civilly* liable for “any action voluntarily taken in good faith to restrict access to *or availability of* material that *the provider* or user considers to be obscene...whether or not such material is constitutionally protected”. Current United State law explicitly protects service providers such as Google from liability for any action taken to filter obscene material, whether performed in the present reactive manner, or in the possibly preferable proactive. Interactive computer service providers are further required to make information available to customers regarding “parental control protections” “at the time of entering into a service agreement”. Satisfaction of this notification requirement appears to have been interpreted by interactive computer service providers as compliance. It may be in the technical sense, however, the statute clearly gives providers such as Google the authority to do much more, and to do so under the protective umbrella of law.

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1 The full text of the law is, of course, much more descriptive. An extract is presented here in the interest of brevity, however, the authors believe the selected passages adequately present the definitional and operational intent of the statute.

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Further, 47 U.S.C. 230(e) specifically states “Nothing in this section shall be construed to impair the enforcement of section ... 110 (relating to sexual exploitation of children) of title 18, or any Federal criminal statute.” 18 U.S.C. 110(4)(A) makes any person who “knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction”...”of a minor engaging in sexually explicit conduct”. Neither section makes any provision for the exemption of an Internet service provider, search engine, or indexing function from criminal liability. The only exemption involves protection from civil liability for good faith efforts to limit public access to offensives and/or obscene materials (47 U.S.C. 230(b)(2)(A)). 47 U.S.C. 230(c)(1) explicitly exempts “an interactive computer service” from being treated as “the publisher or speaker of any information provided by another information content provider”, but does so only in subsection c: “Protection for “Good Samaritan” blocking and screening of offensive material”. The courts have chosen on occasion to treat this exemption more broadly than it is written (ex. *Stoner v. Ebay*, 2000), however the exemption specifically exempts interactive service providers from civil liability, not criminal liability. Possession of child pornographic material is an expressly criminal offense not addressed in any exemption in law for anyone, including interactive computer services. Exemption from being treated as a publisher or speaker does not, and should not, address possession or distribution. Google, and other interactive computer service providers, both possess and distribute child pornographic material. Further, Google, and others, may be guilty of aiding and abetting others in the commission of crimes associated with the distribution of child pornographic materials.

### **Discussion of aid and abet.**

To further the discussion of regarding Google’s status as an aider and abettor, the legal definition of “aid and abet” is necessary. According to Black’s Law Dictionary to “aid and abet” is to:

Help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite as to its commission. (*State v. Fetters*, Iowa, 202 N.W.2d 84, 90). It comprehends all assistance rendered by words, acts, encouragement, support, or presence, actual or constructive, to render assistance if necessary.

Black’s Law Dictionary further defines “aider and abettor” as:

One who assists another in the accomplishment of a common design or purpose; he must be aware of, and consent, to such design or purpose. (*Peats v. State*, 213 Ind 560, 12 N.E.2d 270, 277). One who advises, counsels, procures, or encourages another to commit a crime, himself being guilty of some overt act or advocacy or encouragement of his principal, actually or constructively present when crime is committed, and participating in commission thereof by some act, deed, word, or gesture (*Turner v. Commonwealth*, 268 Ky. 311, 104 S.W.2d 1085), and sharing the criminal intent of the principal. One who assists another to commit crime; maybe a principal, if present, or an accessory before or after fact of crime. The crime must usually be a felony because all parties to misdemeanor are generally principals.

Black’s Law Dictionary defines procures as:

To initiate a proceedings; to cause a thing to be done; to instigate; to contrive, bring about, effect, or cause. To persuade, induce, prevail upon, or cause a person to do something. *Rose v. Hunter*, 155 Cal.App.2d 319, 317 P.2d 1027, 1030. To obtain, as a

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prostitute, for another. Procure connotes action and means to cause, acquire, gain, get, obtain, bring about, cause to be done. *Ford v. City of Caldwell*, 79 Idaho 499, 321 P.2d 589, 593. To find or introduce;--said of a broker who obtains a customer. To bring the seller and the buyer together so that the seller has an opportunity to sell.

Google through the use of its information gathering spiders actively collects and catalogues child pornography thereby procuring the illicit material and making it available to anyone who might choose to retrieve it--simply stated they bring the two parties (publisher/distributor and acquirer/purchaser) together, creating the opportunity for the illicit transfer/transaction to transpire. Since, Google actively catalogues, and stores child pornographic material in its indexes and databases, they meet the definition of procure which is a prime ingredient in the definition of aider and abettor. Further, since Google then makes said material available to anyone who wishes to retrieve it (except of course for the citizens of the People's Republic of China) Google acts in a principal role in the illegal transaction—as an “aider and abettor”. It is a short, logical step then from aider and abettor to aiding and abetting, since all of the requirements of the definition are met. Google actively procures child pornographic material and provides the mechanism and opportunity for the transaction to occur.

Although 47 U.S.C. 230, specifically states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” and cannot be held civilly liable for “any action voluntarily taken in good faith to restrict access to *or availability of* material that *the provider* or user considers to be obscene...whether or not such material is constitutionally protected”, Google could be charged criminally as an aider and abettor of child pornography.

### **Google's Current Child Pornography Policy**

In her June 27, 2006, testimony to the United States House of Representatives, Committee on Energy and Commerce, Subcommittee on Oversight and Investigation, Nichole Wong (Associate General Counsel for Google, Inc.) succinctly summarized Google's policies and practices in “combating child exploitation online”. Wong indicated that Google combats child exploitation via the following initiatives (taken directly from the testimony transcript):

- We enforce a strict policy prohibiting any advertising related to child pornography.
- We remove child pornography immediately when we become aware of it in our search engine or in our websites. We also report it to the appropriate authorities, including the National Center for Missing and Exploited Children (NCMEC).
- We provide valuable support to law enforcement efforts, by responding to hundreds of child safety-related requests per year, as well as data preservation requests.
- We empower families to be safe online with tools like our SafeSearch filter and our support for efforts like the Wired Safety educational campaign.

Wong prefaced her elucidation of Google's approach to combating child exploitation (child pornography) by listing three underlying elements or principles:

- Strong law enforcement efforts to pursue and convict the purveyors of illegal content and activity;
- Powerful technology solutions and other resources for families to control their online experiences, according to individual values; and
- Strong industry practices that support these efforts.

### **Google's Principles and Approach – Profit Over Propriety**

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Google's policies and practices are to apparently proactively filter content only where revenue is involved. Specifically as stated by Ms. Wong in her testimony:

*We enforce our Content Policy through a screening process that combines automated and manual review. The AdWords system begins performing automated policy checks as soon as an advertiser submits an ad. Text ads entered through our online system are subject to real-time automatic screening for potentially sensitive or objectionable terms.*

Clearly Google has the technology to scan submitted ads and must be committing resources to the maintenance of a database of ever-changing “objectionable terms”. This same scanning technology could easily be applied to their index of websites. Given the illegality of child pornography, it's incomprehensible that this technology is only applied *a priori* to revenue generating content.

The processes by which “awareness” of child pornography occurs are too passive and too reactive in nature. Employees must “find” it--Ms. Wong never says whether or not automated tools are used to search for child pornography, but given the prominence of automated tools in her description of Google's advertising policy and practices, the lack of its mention in the “Reporting and Removal” section of her testimony is troubling, possibly evidentiary. Industry coalition lists are used to filter, but one must wonder how long illegal material is available online before being flagged as child pornographic by coalition members. User reporting, even in the desirable (but apparently currently non-existent) environment of automated *a priori* content filtering, will always be an important element in the battle against child pornography. Proactive technological solutions will certainly be more effective in filtering child pornography than the current passive approaches, but will not entirely eliminate all illegal content. User reporting will always be the “last line of defense”.

It is a question of “good faith”. Since Google clearly has filtering technology, is it good faith to make the filtering of universally illegal child pornographic material and “opt-in” service? Is it good faith to address child pornographic material in Google’s image database and indexes on a user-notification, reactive basis?

SafeSearch is an opt-in tool. The decision to make SafeSearch optional for the user is clearly related to Google's underlying principle that “powerful technology solutions” are “for families to control their online experiences, according to individual values” and to the requirements of federal law (47 U.S.C. 230). However, what do family values have to do with child pornography which is illegal in the United States--regardless of one's family values? Where child pornography is concerned, family values are irrelevant. If, as Ms. Wong states, “Child pornography is illegal around the world and has no place in civilized society”, why does it seemingly have a place in the homes of families who use Google whose values apparently don't object to such things, or even have a place in the homes of families that aren't technically savvy enough to effectively utilize a tool such as SafeSearch? Google's principles and practices are in direct conflict with Google's “zero-tolerance policy” as described by Ms. Wong. SafeSearch as an opt-in tool is fine for the filtering of content legal for adults but not legal for minors. There needs to be a server side SafeSearch for universally illegal material (i.e. child pornography) which is universally applied to all search queries, or better yet to Google's web spiders and database/index such that search filtration isn't even necessary—illegal material is simply not catalogued or removed from the database/index as much as is possible (i.e. a good faith effort). In fact such filtering would enable proactive notification of law enforcement of sites which are flagged by the filter. Privacy advocates concerns are overridden by the existence of code which can be inserted into any web server root which tells search spiders not to index. Choose not to use that code, you choose to get caught.

There are those, even advocates for child safety, who feel Google’s possession and retention of child pornographic material has social value in that law enforcement can use Google’s database and indexes as an investigative and evidentiary tool (Foley, Picture This: Should Google Filter Its Image Database?, 2005). While there may be some virtue to this position, there is no technological reason why Google cannot filter its database and indexes for all non-law-enforcement users. Law enforcement could easily be given unfiltered access. Google could, and probably should, create a separate database and index specifically for law enforcement use,

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which contains child pornographic materials removed from their public database and indexes by an *a priori* filtration process. Given the nature of Google's web indexing infrastructure and the activities of their web indexing spiders, it is unlikely active filtration of their public database and indexes would reduce the volume of child pornographic material procured by Google, unless child pornography publishers themselves actively took steps to avoid being indexed—and if that happened, would it represent a negative sociological outcome?

As regards sites that are not illegal which are mistakenly removed by server-side filters and therefore are not available via Google, just as some illegal content will certainly slip through automated filters, some legal content will likely be erroneously identified as illegal. 47 U.S.C. 230 specifically protects interactive computer services (i.e. Google) from civil liability for good faith action taken to restrict access to obscene materials, even those which are constitutionally protected, which child pornography is not. Google could not be held civilly liable for the misclassification of legal material as illegal so long as such misclassification was the result of a good faith effort.

All that said, Google more than any other search engine, makes the majority of its profit from “click through” advertising. Filtering child pornographic content would reduce the number of search queries and page views, which would reduce click-through revenue (Rosmarin, 2006). It is highly likely that profit motive is a major component in the formulation of Google's child pornography policy.

### Summary

Google, Inc. utilizes programmatic spiders to index and download to its databases web content of all types. Invariably some of that content is not legal for distribution by any channel. Child pornography is a unique class of content. It is not legal for any person, of any age, in any profession, to produce, possess, or distribute child pornography of any kind. A corporation such as Google is treated in United States criminal law as an artificial person with all the rights and responsibilities of a “flesh and blood” individual. Google's business classification as an Internet service provider lends some protection under the law from civil liability, but 47 U.S.C. 230(e)(1) is deliberate in its limitation of protection to the civil courts in that clearly preserves the criminality of statutes associated with child pornography.

Where child pornography is concerned, Google's opt-in policy for the utilization of their SafeSearch content filtration tool is socially irresponsible and criminally indefensible. 47 U.S.C. 230 gives Google and other search engine companies all the civil protection necessary to be far more proactive in eliminating child pornography from their indexes and databases. As such, Google's, and possibly others', reactive policies associated with the identification and removal of child pornographic content should not be considered a “good faith” effort.

Under any definition, Google, and possibly other search engine companies, are in criminal possession of child pornographic material. Google's intentionally unfiltered web spiders clearly index and download (procure) such material to Google's databases. Given Google's demonstrated ability to filter content (certainly including child pornography) in the People's Republic of China, the lack of application of the same filtration technology to universally illegal material such as child pornography in the world market is indefensible. To filter such content for the Chinese market, and to then intentionally not filter such content for the remainder of the global market, is to knowingly distribute that content—a federal crime. Google's intentionally reactive policies, and intentional non-utilization of their own filtration technologies, associated with child pornography, combined with their demonstrated ability to filter such content in a proactive, good faith, manner, raises the issue of whether or not Google is in fact aiding and abetting the crime of child pornography distribution. It would not be surprising if a District Attorney somewhere, in the not too distant future, charged Google (and possibly other search engine companies) as a co-defendant in a criminal child pornography distribution case. It would also not be surprising, if Google were found guilty of procurement, possession, distribution, and/or aiding and abetting.

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