

Jeffrey N. Mausner presentation at Santa Clara School of Law, High Tech Law Institute, 15 Year Retrospective of the Digital Millennium Copyright Act, March 15, 2013.

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I was Perfect 10's outside attorney for 15 years. I'm retired now, and I am here to speak as a concerned citizen.

The DMCA safe harbor, 17 USC Section 512, was supposed to lead to cooperation between copyright owners and on-line service providers to remove infringing content from the Internet. Unfortunately, the DMCA safe harbor has been interpreted by Courts in ways which greatly favor infringers and greatly damage copyright owners. This has allowed some service providers to fail to cooperate with copyright owners, and to make billions of dollars from infringement, rather than the money going to rightful copyright owners.

For example, even though Google has knowledge, or should know, that it is providing massive quantities of infringing images via Google Image Search, and infringing songs and movies via web search and YouTube, and making billions of dollars in the process, Courts have by and large not held Google liable for such conduct. In addition, Courts have thus far allowed companies like Google to allow anonymous infringers to post billions of dollars of obviously copyrighted works onto Google's servers, and allow Google to make money from those infringing works.

Operators like Google, which benefit from widespread copyright infringement, are greatly damaging our country's intellectual property, and using a misguided interpretation of the DMCA safe harbor to do so.

Google's business model is to make money off other people's intellectual property. Google owns virtually none of the billions of dollars in copyrighted content it makes available to its users. The DMCA safe harbor acts as a shield for that. Users love Google, because it provides them with massive quantities of free, valuable content belonging to others. Support for this is very short sighted, and will lead to fewer and fewer creative works over time.

Google's power is unprecedented in American history. Compare it to the railroads, or Standard Oil, or U.S. Steel during the time of the robber barons. Not only does Google have unlimited money to fight litigation and to influence our political system, but it can also directly reach and control anyone with a computer to try to directly influence them. Look at what Google did with the Stop Online Piracy Act (SOPA) and Protect IP Act (PIPA). Here is what Congressman Lamar Smith, Chairman of the House Judiciary Committee, said about Google's opposition to these bills: [See Mausner Slides, page 2.]

In contrast, another one of the companies represented here today has sought to obstruct the Committee's consideration of bipartisan legislation.

Perhaps this should come as no surprise given that Google just settled a federal criminal investigation into the company's active promotion of rogue websites that pushed illegal prescription and counterfeit drugs on American consumers.

In announcing a half billion dollar forfeiture of illegal profits, the U.S. Attorney, Peter Neronha [of the district of Rhode Island], who led the investigation stated, "Suffice it to say that this is not two or three rogue employees at the customer service level doing this... This was a corporate decision to engage in this conduct."

[Over several years, Google ignored repeated warnings from the National Association of Boards of Pharmacy and the National Center on Addiction and Substance Abuse at Columbia University that the company was violating federal law.]

[The company also disregarded requests to block advertisements from rogue pharmacies, screen such sites from searches and provide warnings about buying drugs over the Internet.]

The Wall Street Journal reports Mr. Neronha characterized Google's efforts to appear to control unlawful advertisements as "window-

“dressing” since “it allowed Google to continue earning revenues from the allegedly illicit ad sales even as it professed to be taking action against them.”

Given Google’s record, their objection to authorizing a court to order a search engine to not steer consumers to foreign rogue sites is more easily understood.

Again, that’s from Lamar Smith, the Chairman at the time of the House Judiciary Committee.

Here’s what the 9th Circuit Court of Appeals said about Google. This is from the Perfect 10 v. Amazon.com, Google case, 508 F.3d at 1172 (9th Cir. 2007).

[See Mausner Slides, page 3.]

There is no dispute that Google substantially assists websites to distribute their infringing copies to a worldwide market and assists a worldwide audience of users to access infringing materials. We cannot discount the effect of such a service on copyright owners, even though Google's assistance is available to all websites, not just infringing ones. Applying our test, Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such steps.

Google knows, or should know, that infringing material is available on a massive scale, using its search engine. Nevertheless, Google continues to provide its users with these infringements. And it is the DMCA safe harbor that allows this.

Google facilitates infringement in several ways. Three of the main ways are:

1. Helping its users to locate infringing materials, through its search engine, and supporting infringing websites by directing web traffic to them. [See Mausner Slides, page 4.]

This is from the website allaboutgoogle.org. As can be seen, Google provides vastly more links to infringing websites (for example, 10,600,000 links to thepiratebay.se), than it does to legitimate websites (for example, only 1,370 links to universalstudios.com). For a more detailed discussion of this, you can look at the website allaboutgoogle.org.

2. Google also facilitates infringement by placing Google ads around infringing materials. By placing Google ads next to infringing materials, Google not only profits from the infringement, Google also helps support infringing websites so that they can continue to be a source of infringing materials. Google and the infringing websites share the revenues from the advertisements. This is also discussed on the allaboutgoogle.org website. This is similar to what Google did with illegal pharmaceuticals - it placed money-generating ads on and sponsored links for websites that offered the illegal drugs. Google has admitted to this, and has paid one of the largest fines ever for this conduct. But Google has yet to face serious liability or fine for its similar conduct regarding copyright infringement.
3. Google also facilitates infringement by allowing infringers to anonymously create infringing websites hosted by Google. These websites are stored on Google's blogger or blogspot servers. In this way, Google provides near-complete immunity to infringers. Google makes money from this because these infringing websites display Google ads, which Google gets revenue from.

When copyright owners try to get infringing materials removed from Google's system, Google uses the DMCA to make it difficult or effectively impossible to do so. Rather than remove *all* instances of the infringement by using image recognition or other obvious technology that Google has, Google may remove one instance of that infringement at a specific location, but allow that same infringement to appear over and over at different locations. Google allows this because it makes a fortune from these infringements. And courts' interpretation of the DMCA has allowed Google to continue to do this.

Google knows that it is making available many copyrighted works that the posters have no right to post. If you do a Google search on site:youtube.com “I do not own,” you get 1.6 billion results. [See Mausner Slides, page 8.]

These are search results where, for the most part, the poster directly admits that he does not own the content. But Google will simply not act on its knowledge and do the right thing and remove such obvious infringements.

Google also changes its DMCA notice requirements, so that it does not have to remove infringing content. For example, Google’s DMCA agent, in our case, ultimately claimed that Perfect 10 had to describe its images using *text* – that a copy of the image that was sent to Google with the DMCA takedown notice wasn’t good enough to describe the image that was being infringed. Google’s response to such DMCA notices was that the *image itself* was not good enough to describe the image. A picture speaks a thousand words, but Google requires words because it creates a greater burden on copyright owners, and allows Google to avoid taking down infringing pictures.

Google’s conduct isn’t just a copyright issue. It should also be an antitrust issue. Google has gained market share against its competitors because of the amount and easy availability of infringing material. The Justice Department and European Union should look into this as part of their antitrust investigations of Google.

Google has admittedly used illegal tactics to make money and gain its market share. Google paid a half billion dollar fine to the U.S. Justice Department for facilitating the sale of illegal drugs. [See Mausner Slides, page 9.] The Federal Communications Commission recently criticized Google because, “For many months, Google deliberately impeded and delayed the Bureau’s investigation by failing to respond to requests for material information and to provide certifications and verifications of its responses.” [See Mausner Slides, page 11.] But these are just Google’s method of doing business and litigating, a small price to pay for the billions of dollars that Google makes. Pretty astounding for the company whose motto is “Don’t be evil.”

Google has gone from nothing to being worth \$270 billion in less than 20 years. Google is worth more than major movie studios and record companies, companies

that have spent decades and billions of dollars creating content that Google just makes available for free and makes money from through its advertising.

From your point of view, if the government was doing what Google does, as far as gathering information about you, you would be upset about it. The Electronic Frontier Foundation, which receives funding from Google, would be upset about it. But Google doing these things is much worse. We are the government, so we can control what the government does with information about us. But we have no control over Google and what it does with all of the information it has about us. Most of us are not upset about all of the information that Google has collected, because Google provides free pirated movies, songs, photographs, TV shows. But think about the consequences of this – the severe damage to our copyright system, the unprecedented wealth and power that Google has, the information it has collected about us. Is continued access to pirated materials worth it? Thank you.