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19 November 2018

Committee Secretary  
Senate Standing Committee on Environment and Communications  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600  
By email: ec.sen@aph.gov.au

Dear Secretary

## **Response to the Copyright Amendment (Online Infringement) Bill 2018**

Google LLC (**Google**), as the owner and operator of Google Search, welcomes the opportunity to provide the following initial comments on the Copyright Amendment (Online Infringement) Bill 2018 (the **Extended Site Blocking Bill**), which contain proposed amendments to the existing website blocking scheme under section 115A of the Copyright Act (Cth) 1968 (the **Site Blocking Scheme**).

### **Executive summary**

The internet has enabled people worldwide to connect, create, and distribute new works of art like never before in human history. Google continues to be a key part of that growth and success by enabling legitimate distribution of all kinds of content, and by investing heavily in fighting piracy.

While Google supports effective industry led measures to fight piracy<sup>1</sup>, Google does not support the proposed amendments foreshadowed in the Extended Site Blocking Bill. In particular, Google opposes Section 115(2B)(a)(ii) and (b)(ii) of the Bill, which would have the effect of removing the direct oversight of the Federal Court over the site blocking process and instead leave it to commercial entities to decide which websites Australian users may access.

Google is concerned the bill is being rushed forward despite no substantive evidence that the current legislation is deficient. Google is also concerned that there has not been a thorough, comprehensive and independent review of the extent of the alleged problems

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<sup>1</sup> For a full discussion on the range of measures that Google employs to fight piracy and the successes it has achieved see our 2018 How Google Fights Piracy report (**How Google Fights Piracy**)

<<https://blog.google/outreach-initiatives/public-policy/protecting-what-we-love-about-internet-or-efforts-stop-online-piracy/>>

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that the bill is seeking to address and the likely effectiveness of the proposed changes in addressing them.

Google is not aware of any instances where the Federal Court has refused to make site blocking orders because of the current formulation of the law. Google is not aware of any evidence that follow-on orders are slow or expensive to obtain. In fact in *Foxtel Management Pty Ltd v TPG Internet Pty Ltd & Ors* NSD 241 of 2016 (the **Foxtel case**), Justice Nicholas noted that “[i]n the case of a variation to an existing injunction, the Court may be willing to act on very little in the way of further evidence.”

Further, Google is not aware of any cogent evidence that extending the Site Blocking Scheme to an ever increasing number of sites will have any material impact on the rate of piracy amongst Australians, which continues to decrease year-on-year according to the Government’s own estimates.<sup>2</sup> A report commissioned by the Australian Screen Association suggests the usage of the top 50 piracy sites in Australia has decreased by 35 per cent since the introduction of the site blocking laws. The report also states “a major proportion of the piracy landscape in Australia can be attributed to a small number of ... popular sites, and ... this has been the case for some time.”<sup>3</sup>

Google also notes that the proposal to extend the Site Blocking Scheme to search engines has not been adopted by any other country in the world. Presumably this is because other countries have long recognised that there is no utility in extending site blocking schemes beyond ISPs to other online service providers.

The fact that most rightholders did not support changes to the Site Blocking Scheme at the time of the Government’s consultation earlier this year further supports Google’s view that there is presently no reasonable policy basis for these amendments. For example, the Australian Recording Industry of Australia noted “it is [our] view that it would be **premature** to make any further changes to this site blocking regime”<sup>4</sup> (emphasis added). Music Rights Australia stated “the music industry suggests that it is **too early** to call for amendments to the site blocking regime”<sup>5</sup> (emphasis added). The Phonographic

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<sup>2</sup> Dr Katie Roe, *Consumer survey on online copyright infringement 2018*, prepared for the Department of Communications and the Arts, June 2018, 4  
<<https://www.communications.gov.au/departmental-news/new-online-copyright-research-released-2018>>

<sup>3</sup> INCORPRO, *Site Blocking Efficacy Australia*, May 2017, Australian Screen Association, 18  
<<https://www.mpa-i.org/wp-content/uploads/2015/04/Australian-Site-Blocking-Efficacy-Report-Final-v.2.pdf>>

<sup>4</sup> Australian Recording Industry Association, Submission to the Department of Communications and the Arts, *Review of the Copyright Online Infringement Amendment*, 16 March 2018, 3.

<sup>5</sup> Music Rights Australia, Submission to the Department of Communications and the Arts, *Review of the Copyright Online Infringement Amendment*, 16 March 2018, 5.

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Performance Corporation of Australia stated “any proposed amendments to the legislation **should be deferred** for at least 18 months to enable a more conclusive assessment of the long-term effectiveness of the Online Infringement Amendment to be completed”<sup>6</sup> (emphasis added). APRA AMCOS also noted that further “consideration of any changes ... **ought to be deferred** for at least 18 months to allow for more conclusive and long-term assessment of the effectiveness of the legislation”<sup>7</sup> (emphasis added).

### Google’s efforts to fight piracy

Google takes the challenge of fighting online piracy seriously—investing significant resources in tools to report and manage copyrighted material and working with other industry leaders to set the standard for how tech companies fight piracy. Copyright owners regularly use our takedown process to request that Google remove content from its search index. Google has developed both a streamlined submission process built around an online webform that copyright owners can use to submit removal notices for nearly all of Google’s services and a bulk submission tool for our most active submitters.

Google’s Trusted Copyright Removal Program (**TCRP**) further streamlines the submission process for copyright owners with a proven track record of submitting accurate notices and a consistent need to submit thousands of webpages each day. It allows copyright owners—or their enforcement agents—to submit large volumes of webpages on a consistent basis.<sup>8</sup> As of 2017, there are more than 178 TCRP partners, who together submit the vast majority of notices we receive.<sup>9</sup>

Since launching these submission tools for copyright owners and their agents, we have removed over 3 billion URLs from search that copyright owners identified as infringing.<sup>10</sup> We process more takedown notices, and do so faster, than any other search engine. In 2017 alone, about 882 million webpages were requested to be removed.<sup>11</sup>

While Google processes takedown notices for a large number of URLs every year, a large portion of those URLs have never appeared in Google Search results. In an effort to prevent these URLs from appearing in the future, Google accepts notices even for URLs that are not in our index at the time of submission.<sup>12</sup> Google will still proactively block the URL from appearing in our search results and apply all of Google’s other policies for

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<sup>6</sup> Phonographic Performance Company of Australia, Submission to the Department of Communications and the Arts, *Review of the Copyright Online Infringement Amendment*, 16 March 2018, 2.

<sup>7</sup> APRA AMCOS, Submission to the Department of Communications and the Arts, *Review of the Copyright Online Infringement Amendment*, 22 March 2018, 2.

<sup>8</sup> How Google Fights Piracy, 38.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid., 47.

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removed URLs.<sup>13</sup> Some reporting organizations submit a substantial number of “not-in-index” URLs.<sup>14</sup> In one sample, around 82% of the URLs we delisted were not in our index.<sup>15</sup>

Google has magnified the power of these takedown notices to Google Search, leveraging this steady stream of data from our rightsholder partners to better fight piracy. For example, our ad networks automatically disqualify any page we have removed from Search Results from carrying Google ads going forward.

In addition, Google factors in the number of valid copyright removal notices we receive for any given site as one signal among the hundreds that we take into account when ranking search results. Consequently, sites for which Google has received a large number of valid removal notices appear much lower in search results. This process has proven extremely effective. Immediately upon launching improvements to the demotion signal in 2014, a major torrent site saw traffic from search engines drop by 50% within a week.<sup>16</sup> In May 2016, we found that sites demoted by Google lost an average of 89% of their traffic from Search.<sup>17</sup> In addition, this may have contributed to the 9% decrease in the number of URLs listed in takedown notices from 2016 to 2017.<sup>18</sup> Google continues to improve and refine its demotion signal. To date, it has led to the demotion of more than 65,000 websites.<sup>19</sup> By the end of 2017, we demoted an average of 500 websites in search results every week, and those demotions apply globally.<sup>20</sup> We have also made it much harder for operators of demoted sites to evade demotion by redirecting people to new domains, by removing the ability of new sites to inherit whatever positive ranking signals demoted sites had in Search. This in turn substantially reduces the ability of those new domains to rank highly in Search.

The nature of the copyrighted work may further amplify the demotion signal. For example, recently we made further changes to the demotion signal, for content such as titles of films identified by content partners as still-in theater or being prepared for commercial release. We have also taken steps to prevent terms closely associated with piracy from appearing in Autocomplete and Related Search and continue to work on refining these efforts.

While we do demote entire websites in search results, we do not remove entire websites from search results. Even for websites for which we have received the largest numbers of notices, the number of pages for which we have received notices is often only a tiny fraction of the total number of pages on the site.

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> How Google Fights Piracy, 39.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

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The good news is that copyright piracy is on the downturn. A 2018 Screen Australia report shows that the number of video on demand users who indicated they had watched pirated content had fallen to 17%, down from 43% in 2014.<sup>21</sup> A key factor leading to the downward trend in the consumption of pirated content was the proliferation of lawful online content providers (and therefore the increased availability of legitimate content alternatives for users).

### **There is no utility of including 'search engines' in the Site Blocking Scheme**

All Australians access the internet via an ISP like Telstra or iiNet. Even Australians who go to a library or school to access the internet are doing so via an ISP. Once a user has an initial connection to the internet, they can find and access websites online using a variety of methods. For example, users can search in online forums, access a site directly by typing the URL into their browser or use saved online bookmarks. They can of course also search via a search engine.

In Australia, users attempting to access a blocked site through whatever means receive an error message and the website remains blocked regardless of how the address was located. As such, to the extent that the address for a blocked site continues to appear in a search index, the website itself remains inaccessible. Google submits that by efficiently cutting off access to a website at the ISP level, there is no additional utility provided by extending the Site Blocking Scheme to search engines. This was presumably the same logic that informed the existing scheme when it was first introduced. There have been no technical changes to the internet in that time that would cause any change in that approach.

According to the Motion Picture Association of Canada, there are now at least 42 countries that have either adopted, implemented, or are legally obliged to adopt and implement, measures to ensure that ISPs take steps to disable access to copyright infringing websites.<sup>22</sup> However, not one of those countries has thought it necessary or desirable to extend ISP site blocking to other online service providers such as search engines.

On that basis, it is entirely unclear how expanding Australia's existing Site Blocking Scheme to search engines would be of any practical assistance in the fight against piracy. It would

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<sup>21</sup> Screen Australia, *Online & On Demand 2017 - Trends in Australian online viewing habits*, at 27 February 2018, 25.

<sup>22</sup> Motion Picture Association of Canada, *In the Matter of an Application pursuant to Sections 24, 24.1, 36 and 70(1)(a) of the Telecommunications Act, 1993 to disable on-line access to piracy sites*, 29 March 2018, at 3. Available at <https://torrentfreak.com/images/mpa-can.pdf>.

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however result in additional regulatory burden for new participants and as such would appear to go against the Government's stated deregulation agenda.

### **Court specified methods of identifying new domain names**

As noted above, Google is not aware of any evidence that follow-on orders are slow or expensive to obtain. As noted in the Foxtel case, Justice Nicholas stated that “[i]n the case of a variation to an existing injunction, the Court may be willing to act on very little in the way of further evidence.” In fact in the recent case of Roadshow Films Pty Limited & ors v Telstra Limited & ors NSD1925 of 2017, Justice Nicholas made an order on 27 April 2018 that specifically addressed the issue that the Extended Site Blocking Bill is said to address. Namely, the order provides a very simple and effective method for the applicants to get site blocking orders in respect of websites that begin to operate from a different Domain Name, IP Address or URL after the date of the initial order. It is hard to conceive of a simpler process that maintained proper oversight than the one formulated by his Honour Justice Nicholas.

In this context, Google is strongly opposed to Sections 115(2B)(a)(ii) and (b)(ii) of the Extended Site Blocking Bill.

### **Addition of the “primary effect” test**

Google does not support the addition of a primary effect test as contained in the Extended Site Blocking Bill. Google is not aware of any cases where an applicant has failed to have a site blocked because of the current formulation of the test. Not a single hypothetical example of such a site has been put forward by those seeking the amendments. This can only be explained by the fact that either no such examples exist, or that such examples do exist, but those seeking the amendments are concerned that the Australian public would oppose the amendments if those sites were revealed. Either way, the situation is wholly unsatisfactory.

If at some later point in time it can be demonstrated with actual evidence that the existing Site Blocking scheme is inadequate in achieving its objectives because of the formulation of the test, then in Google's respectful opinion, that is the appropriate time at which the Parliament may wish to consider whether a change is appropriate.

### **Expansion of the safe harbour scheme**

Australia has an existing system for dealing with online infringement - it is called the safe harbour scheme, where rights holders can quickly, cheaply and effectively have content removed from websites hosted by ISPs. If Australian rights holders want a quick, cheap and

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effective enforcement mechanism to have infringing online content removed from the internet, they should support the expansion of the safe harbour scheme to all online service providers, to ensure the most efficient way to deal with online infringement.

If despite this submission the Parliament decides to proceed with its proposal to include search engines in the Site Blocking Scheme there would remain no defensible reason why it does not at the same time amend Australia's safe harbour scheme to at least include online search engines. Consequently, should this Senate committee recommend that Parliament proceed to enact the Extended Site Blocking Bill, Google requests that the Committee also recommend that the safe harbour scheme be amended so as to also apply to search engines.

## **Conclusion**

Google supports constructive, efficient and meaningful attempts to combat online piracy. However, the current laws as they apply to ISPs sufficiently block Australian users trying to gain access to sites that are the subject of site blocking orders. Further, applicants already have a streamlined process under which they can obtain follow on orders against blocked sites. As such, and for the reasons set out in detail above, it is unnecessary to expand the existing Site Blocking Scheme to search engines in the manner proposed.

Yours faithfully,

Derek Slater  
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