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Committee Secretary
Senate Standing Committee on Environment and Communications
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Copyright Amendment (Online Infringement) Bill 2018

This submission is made by the Digital Industry Group, Inc (**DIGI**). DIGI is a non-profit advocacy body representing the digital industry in Australia. DIGI members include Facebook, Google, Oath, Redbubble and Twitter. DIGI members collectively provide various digital services to Australians, from Internet search engines to digital communications platforms. These services and platforms facilitate new distribution platforms, as well as additional marketing and revenue generation channels for Australian content creators and businesses. DIGI members are driving fundamental changes to the way that business is conducted, as well as the manner in which content is created and distributed in Australia and across the globe.

DIGI supports the goal of ensuring Australian rights holders are supported in dealing with online copyright infringement. To this end, our members spend thousands of hours and millions of dollars in developing technology based solutions to fighting online infringement, from deprioritizing search results, to hash based solutions, to developing better ways of processing take down notices. However, DIGI submits that the changes to the site blocking scheme contained in the *Copyright Amendment (Online Infringement) Bill 2018* (the **Bill**) expand the scheme far beyond what is reasonable, and are not supported by any evidence that the changes are required.

DIGI wishes to highlight five significant problems with the Bill:

1. Problem 1 - there is no demonstrated need for the amendments in the Bill;
2. Problem 2 - the Bill makes the operation of the site blocking scheme too broad, risking applying the scheme to legitimate websites;

3. Problem 3 - expanding site blocking laws to search engines is unprecedented and unnecessary;
4. Problem 4 - any expansion of the site blocking scheme must be matched with an expansion of the safe harbour scheme;
5. Problem 5 - removing Federal Court oversight from the site blocking scheme is highly problematic and should be rejected.

Problem 1 - there is no demonstrated need for the amendments in the Bill

DIGI members are not aware of any site blocking applications that have been rejected by the Federal Court of Australia on the basis that the site in question did not meet the 'primary purpose' test. This point was also made by the Law Society of New South Wales in its submission to the Departments' review of the site blocking scheme, noting that:

> *It appears from the published data that … all of the s 115A cases that have been decided to date have been successful.* [1]

Significant evidence was submitted to the 2018 Department of Communications and the Arts *Review of the Copyright Online Infringement Amendment* that proved the site blocking scheme is working well, and has had an important impact in combating copyright infringement. For example, the Australian Copyright Council stated that the "site blocking scheme has had a material and effective impact on the level of access to copyright infringement".[2] Further, the majority of rights holder organisations that submitted to the Departmental Review (including APRA/AMCOS, ARIA, Music Rights Australia and PPCA) ***specifically requested that no changes be made to the scheme at this time***.[3]

The Government's decision to expand the site blocking scheme also ignores rights holders' own evidence that the site blocking laws have been effective in reducing piracy in Australia. 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.[4] The report also states "a major proportion of the piracy landscape in Australia can be attributed to a small number of ... popular sites, and that this has been the case for some time." On that basis it is entirely unclear how expanding Australia's existing scheme to a potentially limitless number of sites would be of practical assistance.

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[1] The Law Society of New South Wales, *Review of Copyright Infringement Amendment*, 20 March 2018, p1
[2] Australian Copyright Council, *Submission in Response to the Copyright Online Infringement*, March 2018, p1
[3]Submissions are available at:
https://www.communications.gov.au/have-your-say/review-copyright-online-infringement-amendment
[4] INCORPRO *Site Blocking Efficacy Australia*, May 2017, Australian Screen Association
http://www.incoproip.com/wp-content/uploads/2017/08/Australian-Site-Blocking-Efficacy-Report-Final-v.2.pdf

DIGI cannot understand the need for the allegedly urgent amendments contained in this Bill, when the evidence suggests that the scheme is currently working well, and the majority of copyright holders did not support any changes to the scheme at this time.

Problem 2 - the Bill makes the site blocking scheme overly broad

In considering the site blocking laws, it is critical to draw a distinction between websites hosted outside of Australia (**offshore infringement**) and websites hosted in Australia (**onshore infringement**). Australia's copyright laws deal with offshore and onshore infringement in very different ways.

Onshore infringement is dealt with at a systemic level by allowing rights holders access to a simple, cheap and effective scheme which enables take down notices to be sent to have content removed from onshore sites. This scheme is contained in the safe harbours in Division 2AA of Part V of the Copyright Act 1968 (**the safe harbour scheme**). Rights holders also have access to Australian courts to address local infringement, including by seeking injunctions.

The site blocking laws were introduced to enable *offshore* infringement to be dealt with at a systemic level by enabling rights holders to obtain site blocking injunctions to block access to websites hosted overseas, and thus outside of the ordinary remedies available for sites hosted onshore (**the site blocking scheme**).

Blocking websites at the ISP level is a significant step, with potentially serious consequences for Australian consumers and businesses that would be impacted if the site blocking scheme operated too broadly, or care was not taken so that site blocking orders did not inadvertently capture legitimate websites. Significant consultation was undertaken, resulting in safeguards built into the site blocking scheme to ensure that "the power is only as broad as it needs to be to achieve its objectives and no broader".[5] The Explanatory Memorandum to the legislation introducing the site blocking scheme stated that it sets "an intentionally high threshold" to limit the operation of the scheme to "online locations which flagrantly disregard the rights of copyright owners".[6]

The 'primary purpose' test was critical to the intended operation of the site blocking laws. As noted in the Bill's debate, this test is key to ensuring that the site blocking scheme targets only the 'worst of the worst' piracy websites:

> *That test - the primary purpose test - and the range of factors the court is asked to consider are key. Those features of the Bill make it clear that it is aimed at a very specific mischief; the power it confers is intended to be exercised very carefully and in*

[5] The Hon Paul Fletcher MP, Second Reading Speech, 16 June 2015
[6] Revised Explanatory Memorandum, *Copyright Infringement (Online Infringement) Bill 2015*, p6.

> *limited circumstances. The Bill is directed, essentially, at the worst of the worst. It is intended to give rights holders a remedy against a category of websites which deliberately and flagrantly flout copyright laws and operate as havens for pirate activity ".* [7]

Widening the primary purpose test to enable site blocking injunctions to apply to any online location with a 'primary effect of infringement, or facilitating infringement' would expand the scope of the site blocking laws well beyond those 'worst of the worst' havens for flagrant pirate activity. Making site blocking orders applicable to sites that may have the 'primary effect' of facilitating infringement would arguably apply to a variety of legitimate and socially beneficial websites, applications and services especially in a digital world where many of the online activities undertaken by millions of Australians every day involve potential infringement of copyright. This is particularly the case in a jurisdiction like Australia which does not have a flexible copyright exception to cover every day digital uses that may result in technical infringements. This was recognised by the Australian Law Reform Commission in its *Copyright and the Digital Economy* report[8] and the Australian Productivity Commission in its recent inquiry into Australia's intellectual property arrangements.[9] It was also recognised as recently as March of this year by the Department of Communications and the Arts that certain uses of copyright material such as through indexing or caching is required as part of the normal operations of many online service providers.[10] Such services could very well be said to have the "primary effect of facilitating infringement", although they could not reasonably be said to have the "primary purpose of facilitating infringement".

As the ACCC noted in its submission concerning the introduction of the site blocking scheme in 2015:

> *The ACCC would be concerned if copyright owners were able to inappropriately threaten use of the powers set out in this Bill to intimidate consumers and businesses and prevent them accessing legitimate goods from other jurisdictions. One way to address this is to ensure that a definition of infringing content does not apply to content authorised by owners in other jurisdictions.*[11]

It is highly inappropriate to expand the potential scope of the site blocking scheme beyond the 'worst of the worst' websites, to everyday legitimate websites, platforms, applications and services that may have the primary effect of facilitating copyright infringements, but are no way involved in the type of flagrant online piracy that the site blocking scheme is designed to

[7] The Hon Mark Dreyfus QC MP, Second Reading Debate, 16 June 2015
[8] Australian Law Reform Commission, *Copyright and the Digital Economy*, ALRC report 122, February 2014.
[9] Productivity Commission, Intellectual Property Arrangements, Final Report, December 2016.
[10] Department of Communications and the Arts, *Copyright modernisation consultation paper*, March 2018, 10.
[11] Australian Competition and Consumer Commission, Submission 40 to the Senate Legal and Constitutional Affairs Committee inquiry into the *Copyright Amendment (Online Infringement) Bill 2015*, p2

address. To do so risks undermining the access of ordinary Australians to digital services that are central to modern life.

DIGI members are very concerned that the Bill in its current form moves Australia's site blocking scheme away from its intended purpose of assisting copyright to address commercial scale online piracy, to potentially targeting perfectly legitimate online businesses that are lawful in their home country, but infringing in Australia due to Australia's antiquated copyright laws. For example, the Australian government's own regulatory stocktake for cloud computing highlights that the legality of cloud computing under the *Copyright Act 1968* (**the Act**) is unclear,[12] potentially meaning that common cloud services such as Dropbox, Flickr, iCloud etc would have the primary effect of copyright infringement if operated in Australia and would be vulnerable to a site blocking order under the proposed amendment.

It is essential that the site blocking scheme remains narrowly targeted to the 'worst of the worst' pirate websites, ie those that actually have the primary purpose of copyright infringement. DIGI submits that the Committee should recommend the deletion of the words "or the primary effect" from proposed s.115A(1)(b) [item 2 of Schedule 1 of the Bill].

In the alternative, if the Committee believes retention of the words "primary effect" is essential, DIGI submits that the Committee should ensure that site blocking orders continue to only apply to the 'worst of the worst' infringing websites and not capture other legitimate websites by ensuring that site blocking orders are confined to sites that have the primary purpose or effect of flagrant copyright piracy (i.e. piracy), not merely copyright infringement.

Section 132AC of the Act contains an offence for copyright infringement conducted on a commercial scale, which causes substantial prejudice to copyright owners. The language of this offence is targeted specifically to the 'worst of the worst' copyright infringements, and would provide useful guidance to the Federal Court as to the type of flagrant copyright infringements the site blocking scheme is designed to target.

DIGI submits that the following amendments to proposed s.115A(1)(b) would be an alternative approach to ensuring that the site blocking scheme is not overly broad and continues to only target the 'worst of the worst' infringing sites:

Application for an injunction

(1) The owner of copyright may apply for an injunction to the Federal Court of Australia to grant an injunction … to disable access to an online location outside Australia that:

a) infringes, or facilitates an infringement of the copyright; and

[12] Department of Communications and the Arts, *Cloud Computing Regulatory Stocktake Report*, 2014, pp16-17.

b) has the primary purpose or the primary effect of infringing, or facilitating an infringement of copyright ...., where:

i) the infringement or infringements have a substantial prejudicial impact on the owner of the copyright; and

ii) the infringement or infringements occur on a commercial scale.

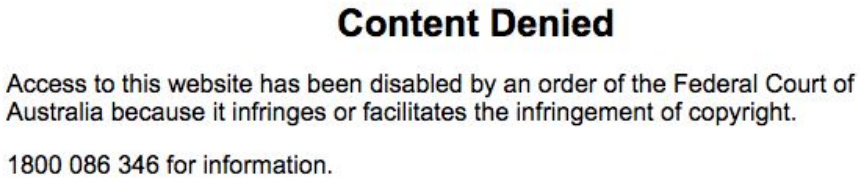
Problem 3 - expanding site blocking laws to search engines is unprecedented and unnecessary

DIGI members are not aware of any other country in the world that has extended a site blocking scheme to search engines. This unprecedented and unnecessary proposal has been introduced into Parliament without any public consultation, or detailed consideration of the potential impacts on Australian internet users.

DIGI submits that there is no technical need to extend the site blocking scheme to search engines. All Australian internet users receive their internet services via an ISP. Once connected to the internet, they can then find websites either via a search engine, or by directly typing a URL into a web browser.

If an offshore site is subject to a site blocking order in Australia, it will be blocked at the ISP level irrespective of whether the internet user found the website via a search engine or typed in the address of the site themselves.

For example, any Australian user attempting to obtain access to the blocked site www.thepiratebay.se from home, school or a library would receive the following error message:



As such, imposing site blocking obligations would impose additional cost and regulatory burden ***with no corresponding practical benefit to rights holders.***

Displaying this message to consumers also plays an important educative role by alerting consumers to the fact that certain websites they are seeking to access infringe copyright. This may discourage them from attempting to access similar sites. However, consumers will be less likely to see such messages if these websites' URLs are removed from search results.

If the government is concerned about online copyright infringements occurring onshore, the most effective approach to solving this problem would be to expand the safe harbour scheme to include all online service providers, including search engines (see below).

DIGI submits the Committee should recommend the repeal of proposed sections 115A(2) and 115A(2B)(b) of the Bill to remove search engines from the site blocking scheme.

Problem 4 - Any expansion of the site blocking scheme must be matched with an expansion of the safe harbour scheme

Australian online businesses (including search engines) are already at a disadvantage to their competitors in countries such as the United States, Canada, the EU, Singapore, the UK and Japan which include online businesses in their safe harbour schemes. This is an untenable situation, as excluding technology companies from the safe harbour scheme unnecessarily raises the risk of doing business in Australia for technology companies, but also means that online companies cannot participate in a well functioning and effective scheme that is designed to assist copyright owners in dealing with onshore online copyright infringements.

As noted above, DIGI is strongly opposed to the expansion of the site blocking scheme to search engines. However, if the Parliament decides to proceed with this reform, it is absolutely critical that any expansion of the site blocking scheme to include search must be accompanied by a corresponding expansion to the safe harbour scheme to include online service providers (which would include search engines).

It is essential that any additional regulatory obligations imposed under the site blocking scheme are matched by the necessary legal protections under the safe harbour scheme. Failure to do so will materially increase the risks of operating technology firms in Australia, in circumstances where Australia is already out of step with global norms in failing to provide safe harbour protections to its technology industry.

DIGI submits that the Committee recommend that the safe harbour scheme in the Act be extended to apply to all forms of online service provider.

Problem 5 - removing Federal Court oversight from the site blocking scheme is highly problematic and should be rejected

DIGI members strongly oppose proposed sections 115A(2B)(a)(ii) and 115A(2B)(b)(ii) of the Bill which would remove existing judicial oversight of the scope of site blocking injunctions, and leave the question of what websites should be blocked under the scheme to negotiations between commercial entities. These proposed provisions remove critical consumer and public interest protections from the site blocking scheme, and significantly raise the risk that site blocking orders may be made against an inappropriately wide category of websites.

This proposal would also remove critical checks and balances from the site blocking scheme, as well as removing the day to day operation of the site blocking scheme from the public scrutiny possible when courts manage the process.

DIGI respectfully requests that the Committee should recommend the deletion of proposed sections 115A(2B)(a)(ii) and 115A(2B)(b)(ii) from the Bill.

DIGI would be pleased to address any questions about the issues raised in this submission.