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Dear Sir/Madam



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Review of Copyright Online Infringement Amendment

Thank you for the opportunity to make a submission on the Review of the Copyright Online Infringement Amendment paper dated February 2018. Foxtel wishes to respond to each of the questions in the paper.

Foxtel is pleased to report that the site blocking power introduced under section 115A of the Copyright Act 1968 (Cth) (the **Copyright Act**) operates as well as, if not better than, had been anticipated and in its two years of operation has had a material impact on piracy in Australia, as supported by international and local precedent and evidence. Most significantly, usage in Australia of sites blocked under the Copyright Online Infringement Amendment (the **Amendment**) has reduced by 53.4% since the site blocking regime commenced.¹

Given the effectiveness of the Amendment, Foxtel continues to strongly support the operation of s115A and believes that amendments to s115A will further enhance its operation and effectiveness. In summary, Foxtel proposes amendments which:

- Broaden the application of site blocking from carriage service providers to service providers;
- Remove the requirement that the infringing online location must be located outside Australia; and
- Lower the primary purpose threshold to a substantial purpose or effect.

A more detailed examination of these suggestions and our positive experience of Australia's site blocking power is provided below, as well as our responses to each of the questions listed in the paper.

1. How effective and efficient is the mechanism introduced by the Online Infringement Amendment?

Effectiveness of site blocking in Australia

The power introduced by the Amendment has been widely used since its introduction in 2015. Following the first site blocking orders in Australia in December 2016, the Federal Court has ordered 65 piracy sites and over 380

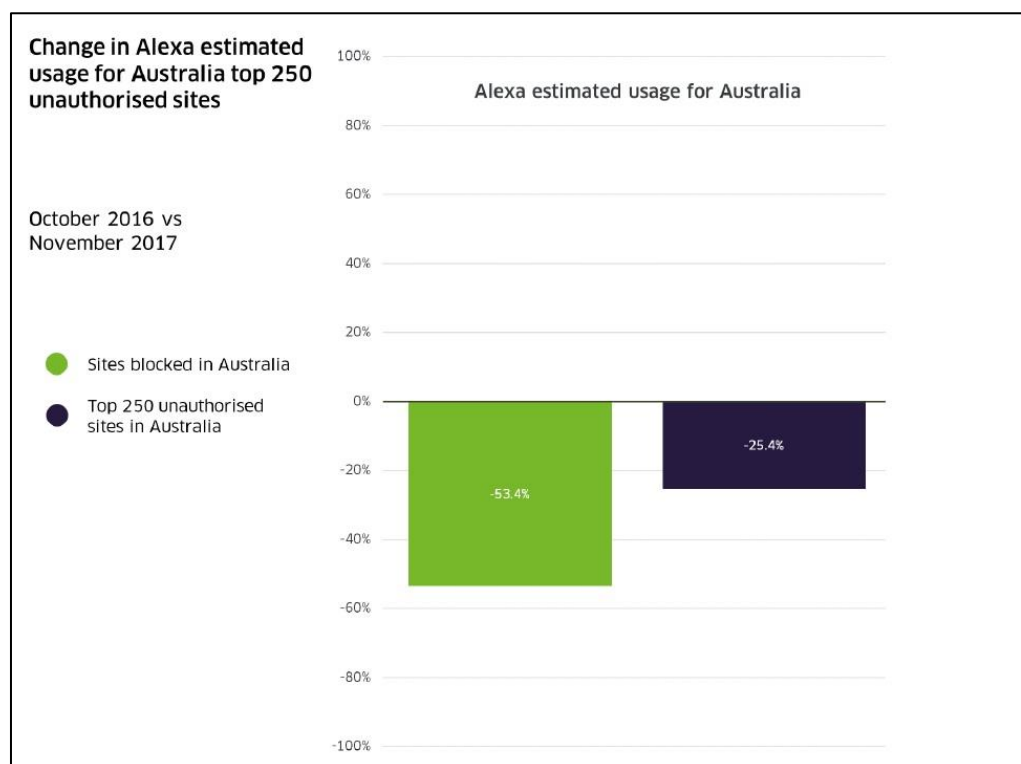
¹ Incopro, Site Blocking Efficacy – Key Findings, February 2018, 1.

domains to be blocked² and usage in Australia of sites blocked under s115A has reduced by 53.4%.³

Foxtel's experience of the mechanism introduced by the Amendment is that it is both highly efficient and highly powerful in achieving its fundamental goal of reducing copyright infringement.⁴ This assertion is supported by an abundance of evidence relating to the reduction of traffic to sites subject to blocking orders as well as the increasingly efficient manner in which blocking claims are being considered and dealt with by the Federal Court.

A correlation can be drawn between the number of sites blocked by the Federal Court and rates of piracy, since the site blocking regime began. Research by Incopro reports that by February 2018 traffic to the top 50 piracy sites in Australia decreased by 35.1% since October 2016, and that this is a 25.5% further decrease than the 10.6% decrease reported in September 2017.⁵ Per the below graph Incopro also reports that overall usage in Australia of the top 250 unauthorised sites has decreased by 25.4% over the period from October 2016 to November 2017.⁶

Graph 1



Source: Incopro, Site Blocking Efficacy – Key Findings, February 2018, page 2

Incopro's findings are supported by research prepared for the Department of Communications and the Arts by Kantar. That research found a continuing downward trend in those consuming 100% of their TV content for free from 76% in 2015, to 61% in 2016, and 53% in 2017.⁷ Likewise, a corresponding decline in those consuming 100% free movie content was observed – down from 58% in 2015 to

² <https://www.creativecontentaustralia.org.au/research/2018>

³ Incopro, above n 1, p 1.

⁴ Revised EM to the Copyright Amendment (Online Infringement) Bill 2015, p 2
http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5446_ems_87ada78b-8836-421e-bc2f-96cfc19d1f81/upload_pdf/503027%20Revised%20EM.pdf;fileType=application%2Fpdf.

⁵ Incopro, above n 1, p 2.

⁶ Incopro, above n 1, p 2.

⁷ Kantar Public, Consumer Survey on Online Copyright Infringement 2017, June 2017, p 28.



39% in 2016 and 35% in 2017.⁸ Similarly, Screen Australia's 2017 Online & On Demand report reported a substantial decline in content piracy amongst VOD viewers, with a 60% reduction in respondents indicating that they had used illegal streams or downloads - down from 43% in 2014 to 17% in 2017.⁹

We acknowledge that the increasing availability of legal streaming services such as Foxtel Now, Stan and Netflix is a factor in declining piracy rates.¹⁰ However site blocking has also directly impacted the viability and operation of piracy sites and arguably contributed to an increase in paid online content. The number of users paying for online movies has increased from 42% in 2015 to 62% in 2017.¹¹

Further, estimated usage of the blocked sites through proxies has decreased by 48.2% since October 2016.¹² The Pirate Bay, which was identified in Foxtel's second site blocking application, is responsible for a significant amount of proxy usage. However usage of dedicated Pirate Bay proxies was at its lowest in November 2017¹³ and is expected to further decrease following further proxy site orders granted on 8 February this year.

Positive local experience of site blocking is supported by and consistent with overseas precedent. Research conducted by Carnegie Mellon University's Initiative for Digital Entertainment Analytics found that blocking orders in the UK have been highly effective. Crucially, the research found that in April 2016 the blocking of 53 piracy websites in the UK in November 2014 caused a 90% drop in visits to the blocked sites and there was no reciprocal increase in usage of the unblocked sites.¹⁴

Efficiency of site blocking powers in Australia

In its capacity as a rights holder Foxtel has had two primary applications and four secondary applications heard by the Federal Court, thus far resulting in the blocking so far of 21 sites and over 250 domains.¹⁵

Foxtel's experience in these matters is that not only is the Amendment operating effectively for rights holders and ISPs, but that its operation is consistently improving in achieving its intended outcomes efficiently. The time period between application, hearing and the making of orders is decreasing, as is the time between proxy site applications and proxy site orders, demonstrating an improvement in both the Court's familiarity with these matters, as well as enhanced ISP cooperation.

For example, Foxtel's first application under the new site blocking power was heard on 23-24 June 2016, before orders were made a further 6 months later in December of that year. In direct contrast, the time between the hearing and granting of orders in Foxtel's second application was 10 days. Whilst the time between application and hearing remains relatively consistent (approximately 2.5-3 months), it is clear that once an application is heard, the Federal Court's increasing familiarity with these matters means that the time between hearing and orders is lessening.

⁸ Ibid.

⁹ Screen Australia, Online & On Demand 2017: Trends in Australian online viewing habits, <https://www.screenaustralia.gov.au/getmedia/f06697b8-07be-4a27-aa8b-bc3ad365238c/online-on-demand-2017>, 25.

¹⁰ Kantar, above n 7, p 25.

¹¹ Venture Insights, Site Blocking and Digital Piracy, December 2017, p 2.

¹² Incopro, above n 1, p 6.

¹³ Incopro, above n 1, p 7.

¹⁴ Brett Danaher, Michael D Smith and Rahul Telang, 'Website Blocking Revisited: The Effect of the UK November 2015 Blocks on Consumer Behaviour' page 2.

¹⁵ *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2016] FCA 1503 (NSD241/2016); *Foxtel Management Pty Limited v TPG Internet Pty Ltd* [2017] FCA 1041 (NSD 663/2017).



Similarly, periods between hearing and orders for proxy blocking applications have also reduced. Whereas the time between application and orders for Foxtel's first proxy application was 3.5 months (and the making of these orders was held up in other issues), this has greatly improved and in two of Foxtel's most recent applications the time between application and orders was a mere two weeks.

However, while the current proxy process is reasonably efficient for TV and movie pirate sites, Foxtel expects that the current processes will require adaptation if they are to operate effectively and efficiently for live sport services, as discussed further below.

2. Is the application process working well for parties and are injunctions operating well, once granted?

As stated above, it is Foxtel's experience in the two matters which it has brought before the Federal Court under s115A that the application process is working well for parties and that once granted, injunctions are operating effectively.

Foxtel is also satisfied with the process by which secondary applications are heard and granted. As described above, this process is not only becoming quicker in the hearing to orders phase, but critically it is also becoming more efficient in the granting of injunctions regarding secondary sites.

Furthermore, following the first cases in 2016, there has been a high level of ISP cooperation on this issue which Foxtel has been satisfied with.

It is worth noting however that each of the applications considered by the Court to date have focussed on TV and movie pirate sites and that the Court is yet to consider an application focussed on live sport. Foxtel's experience with unauthorised streaming of live sporting events is that the location of the unauthorised streams change frequently and that for a particular event, the precise location of the stream may not be known until just prior to the commencement of the event. Moreover, the unauthorised stream may be hosted on a remote server which is directly accessible by an illicit streaming device, meaning domain name blocking will not be effective in preventing access by the illicit device to such streams.

In the UK, the above issues have been addressed through site blocking orders which enable IP address blocking by way of "live blocking", whereby the location of the stream is notified to ISPs on a rolling basis without formal involvement of the Court.¹⁶ For site blocking to be effective in Australia in respect of live sport streaming sites which frequently change location, Foxtel anticipates that a similar process will ultimately be required to be implemented.

Foxtel also anticipates that injunctions under s115A will inevitably need to be sought on an urgent interlocutory basis, to enable an application to be determined in an effective timeframe for live sport. Foxtel does not see any impediment under the current legislation that would prevent a Court from making such orders on an urgent interlocutory basis. However, due to the high value of live sports rights and the fact that there is no proper policy basis for distinguishing between live and non-live content, Foxtel would be very concerned if a Court were to find that the making of urgent interlocutory orders under s115A was not possible.

3. Are any amendments required to improve the operation of the Online Infringement Amendment?

Foxtel considers that there are a few amendments which would assist in ensuring that the effective operation of the Amendment continues and that its effectiveness is further enhanced.

¹⁶ *The Football Association Premier League Limited v British Telecommunications PLC & Ors* [2017] EWCH 480 (Ch).



It is clear that whilst the site blocking power has been effective in decreasing rates of piracy, piracy remains a key issue for the creative industries and it is clear that no single strategy will be a panacea to this problem. Consumer behaviours are improving, however there is still some way to go. When asked how they would behave when they encountered a blocked site, 49% of consumers responded that they would 'simply give up' and 43% said that they would look for a lawful alternative. However, 10% said that they would try and bypass the blocked website (50% of those would do so via a VPN).¹⁷

Foxtel therefore asserts there are three amendments which would improve the operation of the Online Infringement Amendment. These are outlined below.

a) Broaden provision from CSP to service providers

A change which Foxtel believes would improve the operation of s115A is the extension of the scope of s115A from 'carriage service providers' to 'service providers', so that a broader class of conduits to infringing sites are captured, enhancing the operation of s115A. Search providers is a technologically neutral term which we believe would include search engines such as Google.

Search is still the most used source via which people access piracy sites, both in overseas jurisdictions and in Australia. Data prepared for rights holders including Foxtel showed that in February 2018 Google search accounted for 22.79% of traffic to the copyright landing page, where users searching for domains blocked by Optus and Foxtel in Australia are automatically redirected.

In a discussion paper prepared by British MP and then Intellectual property Adviser to the Prime Minister Mike Weatherley, it was found that, "search engines play an important role in inadvertently guiding consumers towards illegal content and are well placed to be part of the solution."¹⁸ In the UK in 2014, blocked sites mp3skull.com and mp3juices.com were reported to derive 45% and 43.5% of their traffic from search engines respectively.¹⁹

Similarly in Australia, research prepared for the Department of Communications and the Arts found analogous behavioural concerns in Australia, finding that 20% of all adults and 50% of active pirates responded with "Search engine" when asked how they find out where to access pirated movies and TV shows.²⁰ Foxtel strongly believes that extending the site blocking powers to search engines so that they must remove copyright infringing sites from search results would have a substantial impact on reducing piracy in Australia.

Overseas regulatory developments support this approach. For example, last year in the UK, search engines Google and Bing agreed to a voluntary code of practice with the UK creative industries which sets targets for reducing the visibility of infringing content in search results by 1 June 2017.²¹ The code is not legally binding, however, if its objectives are not met then the Intellectual Property Office can recommend a formal legislative response.²²

Meanwhile in Canada, the Canadian Supreme Court held in *Google Inc. v. Equustek Solutions Inc.*²³ that the Court had jurisdiction to grant injunctions with

¹⁷ Kantar, above n 7, p 67-68.

¹⁸ Mike Weatherley, 'Search engines and Piracy: A Paper by 8 Mike Weatherley MP, Intellectual Property Adviser to the Prime Minister' (2014), 1.

¹⁹ Weatherley, above n24, p 13.

²⁰ Sycamore, Project Harrison: Australian Piracy Behaviours and Attitudes 2017 Wave, page 26, <https://www.creativecontentaustralia.org.au/research/2018>.

²¹ <https://www.gov.uk/government/news/search-engines-and-creative-industries-sign-anti-piracy-agreement>.

²² DLA Piper, 'UK: Search engines agree to demote pirate sites in search result listings' (7 March 2017) <https://www.lexology.com/library/detail.aspx?g=05ebdcb9-d13f-48c9-a879-864b2f933607>.

²³ [2017] SCC 34.



extraterritorial effect against parties who facilitate wrongdoing, and that Google can be ordered, pending trial of action, to globally de-index websites of a distributor which, in breach of several court orders, is using those websites to unlawfully sell intellectual property of another company.²⁴ Although the circumstances of the case are limited, the decision outlines the scope of that court's power to make global de-indexing orders against search engines such as Google, and more so the willingness of the Court to exercise those powers.

Furthermore, search engines already remove URLs from site indexes to comply with local laws and product community standards and therefore, technologically Foxtel understands it would be a relatively simple exercise for search engines to comply with Australian blocking orders. For example, search engines currently de-index URLs for purposes including national security, violation of defamation and privacy and security laws, and can remove that content at the request of governments and in some cases individuals. We note that where search engines remove content in line with their product community standards this is done on a voluntary basis, rather than being compelled to do so by law, adding further weight to the argument that removal of content by search engines is relatively easy.

Per the table in Attachment A, reasons cited by Governments for content removal from Google most often relate to national security, but also relate to other matters including privacy, obscenity and drug abuse.

An example of active delisting by search engines following requests by individuals is the so-called "right to be forgotten" rule. Following the introduction of the rule by a 2014 European Court of Justice privacy ruling, search engines can be required to remove data which is "*irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.*"²⁵ In accordance with that decision, Europeans can ask search engines to delist such information about themselves where it is found by search queries containing the individual's name.²⁶ Between 2014 and 2017 Google received requests to delist content in relation to 2.4 million URLs and of those URLs 43% were delisted from Google Search.²⁷ This process has been streamlined by Google and after 1 January 2017 a request relating to a URL takes a median of 4 days to process.²⁸

Therefore these highly developed and frequently used processes demonstrate that a local Australian law which requires search engines to block/remove sites that are the subject of local injunctions is unlikely to be an onerous or foreign task.

Ultimately, Foxtel considers that capturing search engines under the site blocking powers is a powerful regulatory advancement through which would place Australia at the forefront of piracy action.

b) Remove overseas location requirement

Section 115A's restricted application to online locations based outside Australia is a key limitation of its operation.

The apparent basis of this restriction is that "*...it is possible to bring an action directly against the host of a website located in Australia, but more difficult to*

²⁴ *Google Inc v Equustek Solutions Inc* [2017] SCC 34.

²⁵ *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (C-131/12)

<http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0131&lang1=en&type=TEXT&ancre=>

²⁶ <https://www.blog.google/topics/google-europe/updating-our-right-be-forgotten-transparency-report/>.

²⁷ *Ibid.*

²⁸ Google, Three Years of the Right to be Forgotten (Draft Google research paper), page 7 <https://drive.google.com/file/d/1H4MKNwf5MgezG7OnJRnI3ym3glT3HUK/view>.



*bring an action against a site hosted offshore.*²⁹ However Foxtel believes that the removal of this requirement and extension of s115A to locally based sites would increase the effectiveness of site blocking in reducing piracy in Australia and that this would result in a positive public policy outcome. As site blocking is deemed an efficient and effective way to reduce online copyright infringement,³⁰ it is difficult to understand why this avenue is limited to overseas based online locations only and does not extend to local locations.

Where a site is infringing copyright and indeed has the primary purpose of infringing or facilitating copyright infringement, as a matter of public policy a rights holder should be able to seek to have that site blocked. Section 115A provides a “no fault” remedy against a CSP and the entitlement for relief does not depend upon establishing that the CSP has committed an infringement of copyright.³¹ A site blocking remedy ought to be pursued in conjunction with or as an alternative to, pursuing the site itself for breach of copyright, and there is no compelling reason why one should exclude the other. Ultimately rights holders would clearly benefit from being able to pursue an effective and efficient injunctive remedy first and then also, if desired, pursue sites individually for infringing the Copyright Act.

This change would also assist to reduce the significant evidentiary burden borne by applicants to show sites are located overseas. Applicants must review individual domain locations and IP addresses and put on evidence relating to these matters to ensure that the location of the sites is established. This evidence, which we consider to be unnecessary, is produced at significant time and cost, all of which is borne by the rights holders.

The Amendment’s exclusion of local sites is also an anomaly in terms of overseas site blocking models with models in the UK and Singapore not containing any such limitation.

The UK regime provides that:

- 1) *The High Court... shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.*³²

Under the Singaporean Copyright Act, a site blocking application is granted:

- 1) *Where the High Court is satisfied, on an application made by the owner or exclusive licensee of copyright in a material against a network service provider, that —*
 - a) *the services of the network service provider have been or are being used to access an online location, which is the subject of the application, to commit or facilitate infringement of copyright in that material; and*
 - b) *the online location is a flagrantly infringing online location,*³³

Based on the above drafting alone, it is clear that Australia is out of step with overseas models.

²⁹ Revised EM to the Copyright Amendment (Online Infringement) Bill 2015, p 5
[http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5446_ems_87ada78b-8836-421e-bc2f-](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5446_ems_87ada78b-8836-421e-bc2f-96cfc19d1f81/upload_pdf/503027%20Revised%20EM.pdf;fileType=application%2Fpdf)

[96cfc19d1f81/upload_pdf/503027%20Revised%20EM.pdf;fileType=application%2Fpdf.](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5446_ems_87ada78b-8836-421e-bc2f-96cfc19d1f81/upload_pdf/503027%20Revised%20EM.pdf;fileType=application%2Fpdf)

³⁰ Foxtel, Response to Productivity Commission Draft Report, June 16, p 9
[https://www.pc.gov.au/data/assets/pdf_file/0017/201626/subdr550-intellectual-property.pdf.](https://www.pc.gov.au/data/assets/pdf_file/0017/201626/subdr550-intellectual-property.pdf)

³¹ *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2016] FCA 1503, at para 30.

³² *Copyright, Designs and Patents Act 1988* (UK) c6, s 97A.

³³ *Copyright Act* (Singapore, cap 63), s193DDA.

c) Lower the primary purpose threshold


It is currently a threshold requirement of a rights holder obtaining relief under s115A in respect of an online location that *"the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia)"*. This is a very high threshold.

While Foxtel has successfully established this threshold requirement in respect of each online location it has targeted in its applications to date, the online locations that Foxtel has selected have been deliberately chosen because, in Foxtel's view, it has been abundantly clear that each online location has clearly met this threshold requirement. However, there are a substantial number of piracy sites which are currently accessed by a large number of Australians for which it is less clear that the site in question would meet this threshold requirement; for example, hosting and cyberlocker type sites that may appear on their face to be legitimate sites but in fact are predominantly used to remotely store infringing files that are then accessed by pirate services.

Foxtel submits that amending s115A(1)(c) to refer to "a substantial purpose or effect" rather than "the primary purpose" would assist in ensuring such sites are undoubtedly able to be targeted under s115A and therefore significantly contribute to the overall effectiveness of Australia's site blocking regime.

Thank you for the opportunity to comment on these matters.

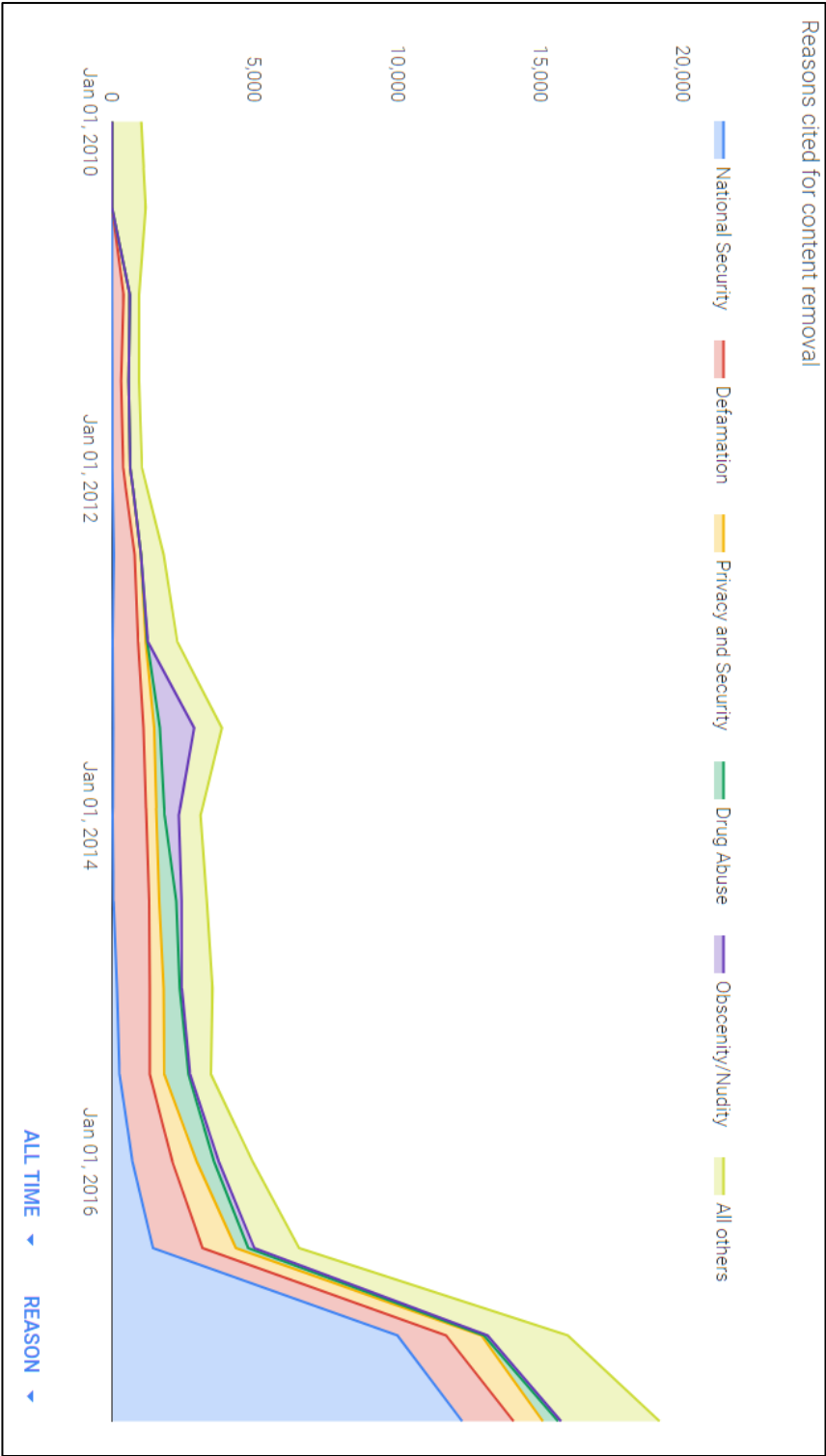
Yours Sincerely,



Lynette Ireland
Chief General Counsel

APPENDIX A – Reasons cited by Governments for content removal from Google

Source: https://transparencyreport.google.com/government-removals/overview?removal_requests=group_by:reasons&lu=removal_requests



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