



*Kiwi sport and  
entertainment fans  
are at the heart of our  
business.  
They love great  
content, and so do we.  
We have to protect it.*

## SKY SUBMISSION: REVIEW OF THE COPYRIGHT ACT 1994 - ISSUES PAPER



## Introduction

We welcome the Government's review of the Copyright Act, beginning with this Issues Paper, and thank you for the opportunity to submit.

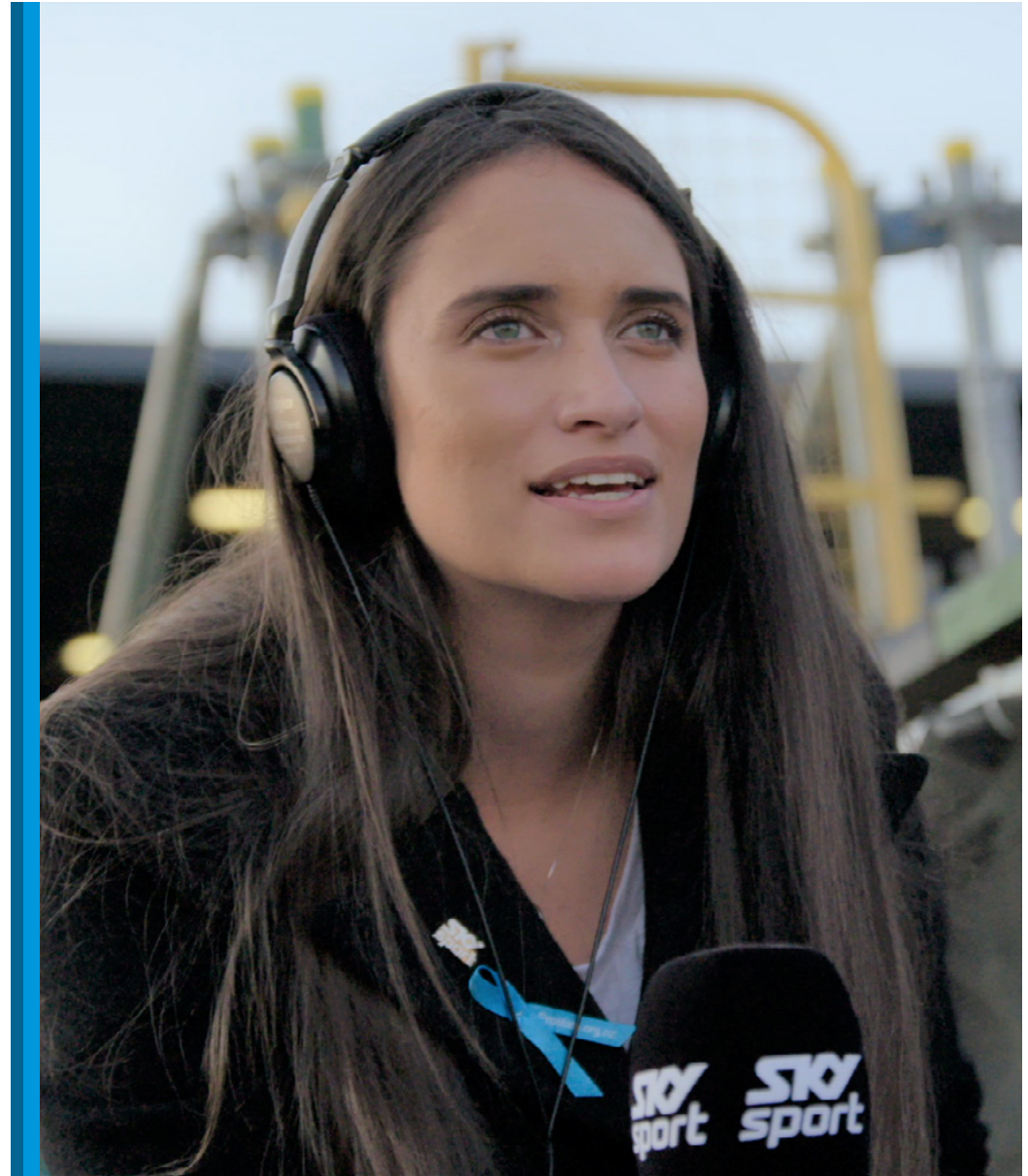
Copyright is at the heart of Sky's business as a content purchaser, producer and distributor. It lets us bring great sports and entertainment content to hundreds of thousands of Kiwis every day.

Whether it's behind the camera or on the field, we are passionate about investing in and showcasing great talent, and we think this contributes to our economy, our cultural identity and our national wellbeing.

For these reasons, we are believers in strong copyright. We support an Act that incentivises and safeguards creative activity, including by:

- Providing effective enforcement measures that combat piracy in line with international best practice, particularly site blocking injunctions;
- Ensuring online platforms play their part in combatting piracy;
- Keeping exceptions clear and certain, consistent with our international obligations; and
- As far as possible, keeping our Act close to its common law counterparts, to ensure we can continue to draw on their case law.

We look forward to working with the Government and other stakeholders to achieve this.



## Structure

This submission is in four parts:

### BACKGROUND



This background section;

### ISSUES PAPER



Answers to the questions in the Issues Paper (in numerical order for ease of reference);

### DIGITAL PIRACY IN NEW ZEALAND

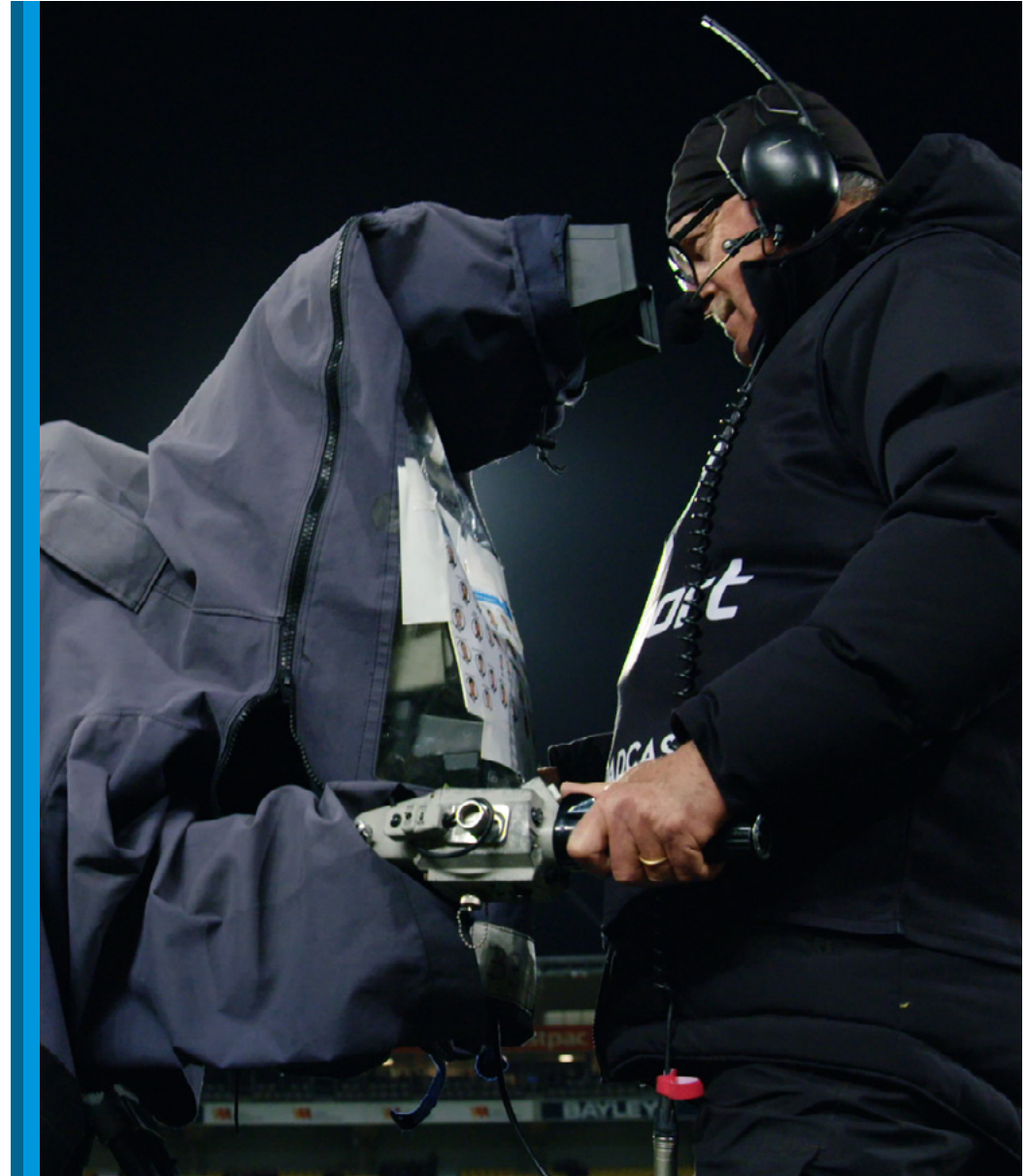


Attachment A – a report commissioned by Sky from The Navigators, titled Digital Piracy in New Zealand (11 September 2018), which gives some data on the scale of digital piracy in New Zealand; and

### ANTI-PIRACY PROGRAMME



Confidential Attachment B – a confidential summary of Sky's anti-piracy programme, which illustrates the challenges of dealing with online piracy, and the costs/resources involved for Sky.



## About SKY

Sky began broadcasting in 1990 and has grown to be New Zealand's leading media and entertainment company, serving more than 750,000 customers throughout New Zealand. We employ more than 1,100 permanent staff and more than 500 contractors around the country.

We provide great content to our customers via satellite and online, including with streaming services Sky Go, Fan Pass for sport, and NEON.

We broadcast more than 115 channels of live sport, movies, news, documentaries, dramas, nationwide free-to-air channels and pay-per-view channels. 20 of these channels are owned and operated by Sky, including free-to-air channel Prime.

Sky is heavily involved in producing and curating sport in New Zealand and our team is renowned for its sport production and support for all levels of sport, from grassroots to international competitions.

Sky's premium entertainment offering is a result of core content partnerships with the world's premier programming and movie suppliers including HBO, CBS, BBC, Discovery, NBCUniversal, Twentieth Century Fox, Warner Bros and Paramount.

We are also a proud producer and supporter of local drama, factual series, and documentaries, often working together with NZ on Air to tell New Zealand stories on Prime.



## SKY and sport

Sky is passionate about bringing sports content to Kiwis. Nearly all of the local sports events that we show are produced by Sky. Our production crews filmed and televised over 400 New Zealand sports events last year, including live rugby, netball, cricket, tennis, fishing, golf, V8s, boxing, to name a few. We are proud of the quality and breadth of our sports coverage and the contribution it makes to Kiwi culture and identity.

The fees Sky pays to sports bodies are critical to support the operation and development of the sports codes – the money from sports broadcasting directly helps support our top athletes as well as building and supporting the grassroots. In particular:

- Sky has invested over \$1 billion in sports broadcast fees and production in the last 10 years.
- A significant percentage of NZ Rugby's revenue comes from broadcast fees. That funding is critical to supporting the operation and development of rugby at all levels and supports the retention of influential players.
- The Super Rugby and ANZ Netball Premiership competitions were created for, and funded by, pay television.
- Revenues from pay-per-view events like boxing and MMA also support fighters, including Kiwi stars like Joseph Parker.

As a commercial, publicly owned business, we can only continue to support NZ sport in this way if we can effectively monetise the television and media rights that we pay for.

## SKY and copyright

Like all media companies, the success of our business relies on having a system that lets us protect and commercialise the content we produce and the rights we purchase from other producers (especially as technology changes), but also that allows fair dealing in that content in appropriate circumstances. It is crucial to the viability of our business that:

- New Zealand's copyright regime is fair and balanced (we are both a rightsholder and a copyright user); and
- Our copyright regime is clear and certain, so that we can make decisions confidently.

This is an industry issue. One of the biggest threats that the wider media industry faces currently is internet piracy. If we cannot meaningfully prevent unauthorised use of content, then companies like Sky do not have the revenue to pay sports bodies, distributors, and creators to produce new creative material. This means that the whole sector misses out and ultimately, less original content is made and fewer great stories get told by New Zealand creators.

Measuring piracy is not an easy task given that it is not a behaviour that people are always willing to admit to, nor does it lend itself to a ready approximation of its direct costs.

We do know that:

- One in ten New Zealanders admit to “normally” streaming content from pirate websites.
- Three in ten New Zealanders pirate at least twice per year.
- 8% of New Zealanders (equating to around 300,000 people) regularly stream pirated live sports.
- 3% of New Zealanders admit to regularly using illicit streaming devices like “Kodi boxes”.<sup>1</sup>

1. For more information, please see the attached 2018 study by The Navigators into digital piracy in New Zealand (commissioned by Sky).



Mindful of MBIE's request for as much evidence as possible, we explored whether we could extrapolate the 'cost of piracy' from reported piracy behaviour. Could we, for example, ask in what ways people would access content if piracy was not an available option, and approximate a 'lost value' from the choices they opted for. Unfortunately, what survey respondents say they will do in a hypothetical (and impracticable) scenario is rarely robust, and we therefore have not attempted to apply a dollar value to the reported behaviour.

We would welcome further engagement with MBIE on ways to quantify the lost economic value associated with piracy activity in New Zealand.

We have tried a number of positive measures to reduce piracy, such as making content available on the same day as its US screening, putting more content online on demand, and launching online-only services. Since 2014, we have also had a dedicated in-house programme focussing on monitoring and taking down pirate streams of key sports content that Sky has exclusive rights to. A confidential summary of our anti-piracy programme, the resources involved and what we have learned from running it is provided in Confidential Attachment B. However, despite all of this we are not seeing significant reductions in overall piracy levels, and it is clear to us that more is required.

We agree with the submission made by the New Zealand Film & TV Bodies that a multi-pronged approach is needed to address piracy, combining timely and affordable access to content, with education and enforcement. The materials cited in that submission, together with the attached report from The Navigators, support this.

2. Compared to one year ago, New Zealanders' pirating appears to be only slightly declining. Some are doing it more often but slightly more people are doing it less often. See The Navigators, *Digital Piracy in New Zealand* (11 September 2018), page 8. Commissioned by Sky and attached in Attachment A.



## The Current Act doesn't do the job anymore

The technology that is used to give unauthorised access to content is constantly changing, and the tools currently available under the Act for dealing with piracy do not do the job anymore. For example:

- As we licence much of our content from overseas copyright owners, we have difficulty proving standing to sue for infringement in New Zealand. This makes copyright infringement litigation extremely expensive and rarely justified for us.
- The “three strikes” regime for peer-to-peer file sharing is of no use to us, as most of the damage to us comes from streaming, not downloading. The quality of streaming available on pirate websites can be as good as our own content (including often being available in HD).
- It is cost-prohibitive and nearly impossible to bring direct copyright infringement lawsuits against pirate streaming websites that are hosted overseas under false names and addresses.
- In the UK, Australia and many other countries, there are now express rights to apply for an injunction that would require ISPs to block pirate websites, but not in New Zealand. We know that site blocking works – studies overseas have shown that blocking a “critical mass” of major piracy sites and/or streaming services causes meaningful reductions in total piracy and, due to greater awareness of the problem of piracy, leads to increased use of legitimate services.<sup>3</sup>
- We do not have tools to easily prevent distribution of so-called “loaded Kodi boxes”, like we would in the UK and other jurisdictions.<sup>4</sup> These boxes connect users with pirated content on their TVs completely seamlessly, and look so professional that customers may not even know the content they are accessing is illegitimate. We have successfully brought action against two such distributors (Fibre TV and My Box) but we did this under the Fair Trading Act 1986 rather than the Copyright Act, due to issues with overall cost, proving standing, and the complexity of copyright proceedings. This affected the nature of the remedies we were able to get against the distributors.

We urgently need more up-to-date, certain and cost-effective tools for dealing with piracy before it does irreversible harm to the film and TV sector, our local content creators, and NZ sport.

3. The effectiveness of site blocking orders are discussed at length in *FAPL v BT* [2017] EWHC 480. See particularly [48]-[53] and the academic research referred to therein.  
4. See *Stichting Brein v Wullems* European Court of Justice C-527/15, EU:C:2017:300, 26 April 2017, about the illegality of pre-loaded Kodi Boxes.



## REVIEW OF THE COPYRIGHT ACT 1994 – ISSUES PAPER

### PART 2 – RESPONSES TO ISSUES PAPER QUESTIONS

#### OBJECTIVES

- 1. Are the above objectives the right ones for New Zealand's copyright regime? How well do you think the copyright system is achieving these objectives?**

As a business operating in a fast paced and competitive environment, where copyright is at the heart of everything we do, achieving certainty is by far the most important objective to us. Generally speaking, we think the basic framework of the Copyright Act achieves this objective, but clarifications are required in some areas where things have changed since the existing provisions were drafted.

- 2. Are there other objectives that we should be aiming to achieve? For example, do you think adaptability or resilience to future technological change should be included as an objective and, if so, do you think that would be achievable without reducing certainty and clarity?**

While we can see why adaptability is desirable, to us certainty and clarity are much more important than adaptability.

We are a business based on acquiring, using and distributing copyright works, so it's important to know what rights and obligations we, our licensors, customers and competitors have, so that we can make business decisions and investments with confidence. We are concerned that trying to achieve adaptability as an end in itself will necessarily make the Act more vague, and that we would need to rely more on Courts to clarify the law.

It's already very expensive to go to Court over copyright issues – copyright law is complex, it's hard to establish standing, and damages awards are relatively low. We do not have a large body of domestic case law. Because of this, we currently rely quite heavily on copyright decisions in other common law jurisdictions (especially the UK), but our ability to do this relies on us having similar legislation to those jurisdictions. For all these reasons, we urge the Ministry to prioritise clarity and certainty (including via consistency with other common law countries where at all possible).

The Issues Paper suggests that part of its review might involve adding a purpose to the Act, and we know other parties have asked for this. We do not think a purpose provision is necessary or desirable - no other common law jurisdictions have a purpose provision in their legislation, and it might make an already complex exercise of statutory interpretation more difficult. However, if it is decided that a purpose provision is to be included, we think it needs to be simple and completely neutral. This may not be easy to achieve, as there are so many different stakeholders interested in copyright and their interests are not aligned. The purpose provision in the Patents Act 2013 is a good example of a purpose provision that has had to balance similar issues.

We would be very concerned if the "proposed objectives" listed in the Issues Paper were copied directly into a purpose provision for the Act – for example, the reference to whether "*copyright is the most efficient mechanism to [provide incentives for the creation and dissemination of works]*" implies an economic/policy question, which could make interpreting other provisions of the Act really difficult.



**3. Should sub-objectives or different objectives for any parts of the Act be considered (eg for moral rights or performers' rights)? Please be specific in your answer.**

See question 2 above. We think adding sub-objectives, and different objectives for other parts of the Act, adds unnecessary work and room for argument, for little or no benefit. This approach would risk adding uncertainty and cost to those who seek to understand and rely on the Act.

**4. What weighting (if any) should be given to each objective?**

See question 2 above – from Sky's perspective, providing certainty and clarity is the most important outcome, and we think this helps bring about the other objectives mentioned at point 3 of paragraph 103 of the Issues Paper. In other words, certainty and clarity helps to promote competitive markets, minimise transaction costs, and maintain integrity and respect for the law.

**RIGHTS – WHAT DOES COPYRIGHT PROTECT AND WHO GETS THE RIGHTS?**

**5. What are the problems (or advantages) with the way the Copyright Act categorises works?**

As a general comment, Sky has no real issue with the current regime in this area – the current categories of works are broadly consistent with other common law jurisdictions and reflect different groups of creators and authors, and these link in to certain permitted acts (which in some cases apply differently to different types of works).

**6. Is it clear what 'skill, effort and judgement' means as a test as to whether a work is protected by copyright? Does this test make copyright protection apply too widely? If it does, what are the implications, and what changes should be considered?**

From Sky's point of view, the current originality test is acceptable, and it makes sense to have a low threshold. The test is also generally in line with other common law jurisdictions. We have always thought that the "banality" issue referred to in the Issues Paper is dealt with by concepts like implied licences, and it has not created problems for us, or as far as we can tell, others.

**8. What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?**

Sky has not experienced any particular problems with the current default rules, but it is important to us to be able to modify them by contract (eg when a contractor performs services for us, it's important that we can specify in our contract who owns the copyright in their work product, as it can vary depending on the context, the contractor and the type of work involved).

**RIGHTS: WHAT ACTIONS DOES COPYRIGHT RESERVE FOR COPYRIGHT OWNERS?**

**15. Do you think there are any problems with (or benefits arising from) the exclusive rights or how they are expressed? What changes (if any) should be considered?**

Sky has found the way the exclusive right to authorise other exclusive rights is expressed in s 16(1)(i) is limiting Sky's ability to hold online pirates accountable for infringement in New Zealand.

The New Zealand position on authorisation is out of step with the UK in this regard.

### ***New Zealand position on authorisation***

The section reads that "The owner of the copyright in a work has the exclusive right to do, in accordance with ss 30 to 34, the following acts *in New Zealand*:... (i) to authorise another person to do any of the acts referred to in any of paragraphs (a) to (h)." As the Issues Paper rightly points out, this wording means that authorisation is currently limited to acts of authorisation that happen *in New Zealand*, and so creates a jurisdictional barrier for anyone wanting to enforce their rights against parties located overseas who authorise the copying of works within New Zealand.<sup>1</sup>

Accordingly, in New Zealand copyright in a work is directly infringed only by a person who, without the consent of the owner, authorises another to do in New Zealand one of the acts set out in ss 16(1)(a) to (h). "Authorisation" is a separate act of infringement from the act that is itself infringing. As a result of the *Inverness* decision, the act of authorising must occur in New Zealand. This is different from the position applying in the UK which was in part the model for the New Zealand provision.

### ***UK position on authorisation***

Authorisation is dealt with in s 16 of the UK Act, which states:

- 16 The acts restricted by copyright in a work
- (1) The owner of the copyright in a work has, in accordance with the following provisions in this Chapter, the exclusive right to do the following acts in the United Kingdom:
- ...
- (2) Copyright in a work is infringed by a person who without the licence of the copyright owner, does or authorises another to do, any of the acts restricted by the copyright.

So, the act of "authorising" is not included as one of the acts restricted by the copyright and in respect of which the owner of the copyright has the exclusive right in the United Kingdom. Instead, the act of "authorising" is dealt with separately in s 16(2), and the territorial restriction does not apply. This means that in the UK the act of authorising can occur anywhere in the world, and still amount to being a statutory tort.<sup>2</sup>

### ***The problem for Sky and other rights holders***

In the United Kingdom operators of torrent sites outside the UK have been found liable for "authorising" users' infringing acts of copying and communication to the public located in the UK. In addition, the Court of Justice of the European Union (CJEU) has ruled that the well-known torrent site The Pirate Bay is directly infringing copyright itself by "communicating to the public".<sup>3</sup>

In New Zealand the territorial limitation on the act of authorising leads to anomalies, particularly in relation to possible action against infringing file-sharing websites and streaming sites.

<sup>1</sup> The territorial restriction in s 16(1)(i) has been confirmed by Woodhouse J in *Inverness Medical Innovations Inc. v MDS Diagnostics Ltd* 93 IPR 14 at [250]–[251].

<sup>2</sup> In *ABKCO Music & Records Inc. v Music Collection International Ltd*, [1995] RPC 657, the UK Court of Appeal rejected the argument that s 16(2) had no extra territorial effect and that, hence, it could not apply to a licence granted outside the UK.

<sup>3</sup> Case C-610/15 *Stichting Brein v Ziggo BV*.

Online infringement is a massive problem for businesses like Sky. In the 2018 study by The Navigators into the digital piracy problem in New Zealand, commissioned by Sky and attached as Attachment A, it was revealed that 21-25% of adults have pirated (streamed or downloaded) movies or TV shows at some point, and 14-18% do so at least every 6 months. Furthermore, 11% of adults have streamed a live sports event. See our answers to questions 59, 60, 69, 81, 82 – 88 and our Introduction to this submission for more information about the effects of online infringement.

In order to trigger s 92B it is necessary to establish that a person (A) is infringing copyright in a work or works without the consent of the copyright owners by using the services of ISPs – the “triggering act”.

Person (A) could be:

- (a) The users of pirate sites in New Zealand who are account holders of a New Zealand ISP; or
- (b) The operators of the pirate sites.

Without exception, operators of large pirate sites do not host these on servers in New Zealand. Therefore, on the clear and plain meaning of s 16, at present it would also not be possible to rely on authorisation on the part of the operator of an off-shore website as being the “triggering act” under s 92B.<sup>4</sup>

New Zealand is out of step with the UK and is failing to provide effective enforcement against those who authorise (from off-shore) infringing acts in New Zealand. This anomaly needs urgent attention and could easily be solved by re-drafting s 16 of the Copyright Act to match the UK provision. Sky submits that the authorisation provision should be redrafted in this way.

**16. Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?**

The examples of secondary liability in the Issues Paper (selling pirated DVDs, etc) show that the current secondary liability provisions are largely geared towards old forms of piracy that involved physical media. Piracy is mainly online today, and the so-called “whack a mole” problem of taking down individual files or streams of infringing content means that we need new and effective remedies against those that aggregate and provide access to large quantities of pirated content or otherwise facilitate this. This includes parties that sell media boxes with software that indexes and accesses libraries of infringing material (see further explanation in response to questions 77 and 81).

Better secondary liability provisions could help with these issues. For example, we do not see why importing or selling “loaded Kodi boxes” should not constitute secondary infringement in the same way as importing and selling a pirated DVD, particularly when those boxes have a greater negative impact. We submit that providing a product or service primarily designed or adapted to provide access to infringing content should be treated the same way as providing an “object” designed or adapted to make infringing copies. We understand that Singapore has recently voted for reform in this area, including the introduction of civil and criminal penalties for importing illicit streaming devices.<sup>5</sup>

<sup>4</sup> It is possible that a “communication to the public” by the operators of the pirate sites is a valid triggering act, based on the *Stichting Brein* reasoning.

<sup>5</sup> See

<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Press%20Release/Singapore%20Copyright%20Review%20Report%202019/Annex%20A%20-%20Copyright%20Review%20Report%2016%20Jan%202019.pdf>.

Another issue that we face has to do with the ease of access to information about how to create and access pirated content. It is clear that normal law-abiding people do not feel as guilty about accessing or distributing pirated content as they would feel about taking a physical copy of that content from a shop without paying for it. We think part of this has to do with how easy it is to find information about how to make pirated content and how to get it.<sup>6</sup> For example, when The Pirate Bay launched streaming services in 2016, the New Zealand Herald published an article titled "*Torrent Site Pirate Bay to offer streaming*".<sup>7</sup> The page led with an iconic picture from the HBO series *Game of Thrones* and the first two paragraphs of that article read as follows:

*Do you use torrent websites to download film and television shows not freely available?*

*If so, things are about to get even easier with an infamous torrent website transforming itself into the world's largest video-on-demand streaming site.*

We think this contributes to the normalisation of piracy which is not a place we want to be.

**17. What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?**

See question 15 above for specific comments on the jurisdiction issue. We believe that authorisation liability is key to our ability to bring action for online infringement and so we strongly recommend that authorisation liability remains a heading of primary liability, and that its ambit stays broad.

**18. What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?**

Generally speaking, we are happy with this right and we support keeping it broad. As it covers many forms of online distribution, it is important in relation to current modes of legitimate content distribution and piracy.

The Issues Paper raises a question as to whether a communication "to the public" would include communication of a work on an "on demand" basis (ie one-to-one transmission, in response to an individual request by a viewer). This is relevant to Sky because our services encompass broadcasts, live internet streaming, and on demand streaming content (on demand streaming is a "one-to-one" transmission). The same question was raised in *Munwha Broadcasting Corporation v Young International 2009 Ltd* (HC Auckland CIV2010-404-000203), where it was held that enabling a one-to-one communication infringed copyright.

We submit that this decision was correct – it is right that an on-demand transmission of a TV show should be as much of a "communication to the public" as a broadcast or a live stream of that same show, regardless of whether the communication is one-to-one or one-to-many.

This is supported by article 8 of the WIPO Copyright Treaty (**WCT**), which (in requiring contracting parties to protect the right of communication to the public), expressly includes "*the making available to the public of [copyright] works in such a way that members of the public may access these works from a place and at a time individually chosen by them*".

<sup>6</sup> According to the attached Navigators report, 29% of New Zealand adults engage in regular digital piracy (at least 6 monthly) – see page 7.

<sup>7</sup> [https://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=11587822](https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11587822)

**19. What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?**

We support continuing protections for communication works, so that all of our transmissions of content are protected in the same way – ie we think it is right that a transmission of a rugby game on Sky GO or FAN PASS is protected in the same way as that same transmission via our satellite and DTT services. As we see it, if someone is pirating our signal, we are best placed to (and should be able to) bring action to stop that as the owner of the copyright in the signal, and it should not matter whether that signal is live, on demand, online or delivered by traditional broadcast technology.

**20. What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?**

This is a good question, given the Court of Appeal's decision in the *Megaupload* case.<sup>8</sup> In that decision the Court held that for the purposes of ss 12(2), 36 and 131(1) an "object" can take any material form whether tangible or digital.<sup>9</sup> It is understood that this decision may be appealed to the Supreme Court.

The *Megaupload* decision (and the fact that it is being appealed) shows that what is meant by the word "object" is not entirely clear. Underlying that uncertainty is the fact that in some places the word was clearly intended to have its natural meaning (ie to describe a physical item or goods), and in other places applying that natural meaning results in a potential gap in the Act.

***Where there is a potential gap***

There are a number of provisions in the Act which should apply to all kinds of works (whether in a tangible or digital form) but the word "object" is used. This creates an issue, because if the natural meaning of "object" is used in these provisions, then it would result in a gap in the sense that the provision is limited to tangible items only. The provisions where there seems to be this type of gap are ss 12(2), 35, 36, 37, 122, 131 and 134, in that it seems as though these sections should apply to tangible and digital formats and copies. One solution to this is to interpret "object" more broadly, as the Court of Appeal did in relation to ss 12(2), 36 and 131(1). However, that approach is undesirable since:

- (a) it is not clear that the Court of Appeal's interpretation of "object" will stand (since the Court of Appeal's decision may be appealed); and
- (b) this results in uncertainty about the meaning of other provisions in the Act where the natural meaning of "object" is the right one (see below).

***Where the natural meaning of "object" is needed***

In a number of provisions of the Act the natural meaning of "object" is needed to reflect the intent of Parliament and ensure that the relevant provision is workable, makes sense and/or does not have unintended consequences. Some of these are obvious: see ss 8(3), 74, 75 and 80.

One provision in this category that needs further explanation is s 12(5A), which permits the parallel import of objects. In this provision the word "object" must be limited to a physical item because:

<sup>8</sup> *Ortmann & Orrs v United States of America* [2018] NZCA 233(CA).

<sup>9</sup> At [301].

- (a) Parliament intended to permit the parallel import of goods, which implies a physical item or a thing in three dimension;<sup>10</sup>
- (b) the s 12(5A) exception applies to an "object that a person imports or proposes to import into New Zealand". The phrase implies physical importation. This is quite different from "communicating" or "transmitting" content;<sup>11</sup> and
- (c) a wider meaning of object in s 12(5A) so that it applies to digital files would:
  - (i) be contrary to the exhaustion of rights doctrine and conflict with international treaties; and
  - (ii) have other problems as outlined below.

### ***Exhaustion of Rights and Parallel Importing***

The Issues Paper correctly makes the connection between the exhaustion of rights doctrine and parallel importing.<sup>12</sup> However, the exhaustion of rights doctrine applies to the sale of physical items rather than copies of works. This limitation of the doctrine is:

- (a) recognised in the WCT. Article 6 of the WCT (as clarified by the accompanying Agreed Statements) applies only to tangible objects.<sup>13</sup> New Zealand is required to accede to the WCT in order to meet its obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**);<sup>14</sup> and
- (b) recognised in a number of overseas cases. The Court of Justice of the European Union (**CJEU**) in the *Allposters* case<sup>15</sup> comprehensively dealt with the nature of the copy that is subject to the exhaustion doctrine. The CJEU, quoting the relevant provisions of the WCT pointed out that the right of distribution applies to "*tangible articles*" as *objects* and that consequently, the "first sale in the [European Union] of the original of a work or copies thereof by the rights holder or with his consent exhausts the right to control resale of *that object*" (emphasis added, see paragraphs 34-37).

To apply the exception in s 12(5A) beyond tangible objects would cause major issues, including the following:

- (a) it would interfere with a copyright owner's exclusive right to control communication to the public;
- (b) it may conflict with the TPM regime, and would put into question whether the New Zealand Government was authorising interference with legitimate access controls;
- (c) it would ignore the fact that many online services are geographically limited by contract;
- (d) it would ignore the practical differences between tangible items (which are customarily sold to an end user and which can be used and on-sold without infringing the underlying copyright in the item)

<sup>10</sup> Peter Dengate-Thrush "Parallel Importation Rules Relaxed" (1998) NZLJ 194 at 196.

<sup>11</sup> See *J Albert & Sons v Fletcher Construction Co Ltd* [1974] 2 NZLR 107 at 113.

<sup>12</sup> Issues Paper, paragraphs 192 to 194.

<sup>13</sup> See paragraph (2) of article 6 of the WCT, and the accompanying Agreed Statements that states the expressions "copies" and "original and copies" as used in Articles 6 and 7 of WCT "refer exclusively to fixed copies that can be put into circulation as tangible objects".

<sup>14</sup> Paragraph 2 of Article 18.7 of the CPTPP requires each party to ratify or accede to the WCT.

<sup>15</sup> Judgement of the CJEU on 22 January 2015 in *Allposters v Pictoright* (Case C-419/13).

and digital copies (which are customarily only licensed, rather than sold, to the end user, and which are often reproduced and/or communicated as part of normal use); and

(e) it would conflict with the WCT (see above).

If a wider definition of "object" is introduced, this should not be done in a way that creates greater uncertainty about the meaning of some provisions (e.g. s 12(5A)). The scope of all provisions using "object" should be checked and clarified as appropriate.

**21. Do you have any concerns about the implications of the Supreme Court's decision in *Dixon v R*? Please explain.**

The Supreme Court's decision in the *Dixon* case<sup>16</sup> held that the word "property" in s 249(1)(a) of the Crimes Act 1961 includes both tangible and intangible property. This seems unremarkable, and entirely consistent with the Copyright Act. Copyright itself is an intangible right, and is clearly property.<sup>17</sup>

In paragraph 218 of the Issues Paper it is suggested that the *Dixon* decision may conflict with the idea v expression principle.<sup>18</sup> However, this does not seem a real concern. The footage in the *Dixon* case was clearly more than an idea (and also more than "pure information"); it was a film (being a compilation of sequenced images from the bar's CCTV system) recorded in digital format, and was something of value that was capable of being owned and transferred. So the *Dixon* case did not decide that ideas by themselves are property.

In any case, the normal copyright principles can and should still apply as to whether something attracts copyright (including by applying the idea v expression principle), and as a result, whether that "something" is property. In other words the *Dixon* case is entirely consistent with the Copyright Act, and there is no issue to address.

**22. What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?**

Sky does not see any issues with the way the Act applies to user generated content (**UGC**). We do not think there is anything particularly unique about UGC. A creator of UGC should have the same protections over their works as any other creator. Equally, the same rules should apply to creators of UGC as any other creators – if they use a third party copyright work, they should do so under licence or pursuant to a permitted act. There are various licensing services available to facilitate this.<sup>19</sup>

**RIGHTS: MORAL RIGHTS, PERFORMERS' RIGHTS AND TECHNOLOGICAL PROTECTION MEASURES**

**28. What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?**

***How Sky uses TPMs***

TPMs are fundamental to pay TV – they make it possible to monetise the copyright licences that we purchase, and ensure that we only transmit our content within the rules set by the relevant copyright

<sup>16</sup> *Dixon v R* [2015] NZSC 147.

<sup>17</sup> Section 14(1) of the Copyright Act states that "Copyright is a property right...". See also s 113(1) that states that "Copyright is transmissible, as personal or moveable property...".

<sup>18</sup> As discussed in paragraph 58 of the Issues Paper, copyright protects the expression of an idea but not the idea itself.

<sup>19</sup> See for example [apraamcos.co.nz/music-customers/licence-types/using-music-in-content-you-create/](http://apraamcos.co.nz/music-customers/licence-types/using-music-in-content-you-create/).

owner. We use so-called "access control" and "copy control" TPMs. We also rely on TPMs used on third party services. Here are some examples:

*Examples of copy control TPMs:*

- Our online streaming services (Sky GO, NEON and FAN PASS) use TPMs that stop the viewer from copying/downloading the video stream to their device. This is to prevent the user from downloading content and then redistributing infringing copies to others. In addition, we sometimes only purchase streaming rights from the content owner,<sup>20</sup> so if we let customers download, then we would breach our licence.

*Examples of access control TPMs:*

- We use encryption in our satellite signals, and paywalls on our online services, so that only paid subscribers can access our content.
- We have a low-cost version of our online sports service (called FAN PASS Mobile) that works on mobile devices only. FAN PASS Mobile uses TPMs to stop the content being viewed on other devices (eg TVs or via Chromecast). If people want to view on the big screen, they buy the standard FAN PASS. This lets us make different features of FAN PASS available at different price points, to give customers choice and meet market demand.
- We use TPMs to manage the number of devices that can access Sky GO, NEON and FAN PASS, and the number of streams that can be playing at any one time. At the moment this is driven by our rights agreements, but we are looking at negotiating more flexibility with rights holders so that we can deliver different device and streaming options at different pricing tiers, to cater for larger and smaller households, for example.
- We use geoblocking to prevent our online services from access by users outside New Zealand. This is because we generally only pay for the right to communicate our content to the public in New Zealand, and our rights agreements require us to geoblock. If we were to freely distribute our content in other countries, we could potentially be in breach of our licence and vulnerable to a copyright infringement claim by our licensors (and, potentially, licensees in those other countries).

*Examples of third party TPMs that we rely on:*

- We rely on the geoblocking TPMs that overseas streaming services like BBC iPlayer, Netflix USA and Hulu use, to make sure their content cannot be accessed by viewers in NZ. This protects the investment we make in buying exclusive NZ licences to content. We do not agree with suggestions that geo-unblocking should be legitimate. Take Netflix USA, for example. It shows some content that Netflix USA has not purchased the NZ rights for, and therefore is geoblocked. If it is made available in NZ through geo-unblocking, the US company is making additional profit from NZ consumers without paying anything for the rights, and in so doing, will harm local businesses who have paid for the NZ rights to the relevant shows. To protect the investment local businesses have made to secure general entertainment programming for online services in NZ (such as Sky's NEON product and TVNZ OnDemand), geo-unblocking needs to be prevented. If geo-unblocking were to

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<sup>20</sup> We do purchase some time-restricted downloading rights for Sky GO that allow us to let the viewer download to their device, but only for a limited time – we offer these via our "download to go" feature, which uses another TPM to automatically remove the content from the user's device at the end of their viewing period.



be allowed, it would mean that global players without any connection to NZ or its economy could simply get a free-ride on rights they have not secured for this market to the detriment of such local players and employers in NZ.

### ***"Access control" and "copy control" TPMs – unhelpful distinction***

The Issues Paper interprets the current definition of "technological protection measure" as not applying to any access control TPMs. However, many of the access control TPMs that we use are closely related to copyright because, although they control "access" rather than "copying", they ensure that we do not communicate content to the public in a way that is prohibited by our copyright licences (ie they stop infringing communications to the public *by Sky*). Both access control and copy control TPMs are closely connected to copyright because they link to the author's right to control how their works are communicated to the public.

Sometimes achieving "copy control" also involves the application of multiple technologies, not all of which are aimed squarely at the act of "copying", but it seems artificial to distinguish between components in an overall system that is aimed at preventing infringement. Similarly, even where a TPM doesn't prevent copying itself, removing an access control TPM makes a copyright work extremely vulnerable to further exploitation (whether by copying or otherwise).

In this sense, we think that many access control TPMs can count as a "process, treatment, mechanism, device, or system that in the normal course of its operation *prevents or inhibits the infringement of copyright* in a TPM work", and it is somewhat simplistic to argue for a distinction between TPMs that control "access" and "copying".

However, we do believe that the Act could be clearer on this aspect. We think the answer is to make the definition of TPM in the Act broader so that it applies the same protections to "access control" and "copy control" TPMs – each kind of TPM is equally important and equally connected to the proper use of the work. This is consistent with the WIPO Copyright Treaty, which does not distinguish between access control and copy control, and instead focusses on whether a TPM restricts acts that are not properly authorised.

### ***No prohibition on the act of circumvention***

The current Act does not prohibit the act of circumventing a TPM, although the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Amendment Act 2018 would have introduced a limited prohibition on circumventing an access control TPM. We submit that the act of circumvention of any TPM should be expressly prohibited by the Act, and this is consistent with the WIPO Copyright Treaty (article 11).

### ***Computer crimes provisions don't effectively protect TPMs***

Although some access control TPMs may arguably be protected by the computer crimes provisions in the Crimes Act, these are not an effective remedy and we do not think they remove the need for effective TPM measures in the Copyright Act. They create criminal offences, and we know the Police have limited resources and that enforcement of these crimes may not be a priority. Certainly, we are not aware of there being any prosecutions related to TPMs under these provisions so far. A private prosecution quickly becomes difficult and expensive, due to the increased burden of proof. We really need effective civil remedies in this area so that we can take self-help steps.

### **Standing issues**

It's also important that we have standing to object where a TPM circumvention device or service is used in relation to a third party TPM, but in a way that interferes with our rights.

For example, the "Global Mode" service was a commercial service that circumvented geoblocking used by overseas services like BBC iPlayer, Hulu and Netflix USA. Sky, TVNZ, MediaWorks and Spark's Lightbox brought legal proceedings to try to stop this service, which eventually settled. Although, from the plaintiffs' perspective, the main "wrong" associated with Global Mode (and the thing that caused us loss by interfering with the exclusive rights that we had purchased) was the circumvention of a TPM, we had to base our claim on other grounds because we did not have standing under ss 226A and 226B. This was because we were not the "issuer" of the TPM work - the "issuer" was BBC, Netflix USA, Hulu, etc. Of course, the TPM issuers were located overseas and were not motivated to take action, as Global Mode basically gave them a new "free" customer base (ie they got extra revenue from NZ customers without needing to pay for NZ rights). This was extremely worrying for the NZ broadcasters, who had paid millions and millions of dollars for exclusive NZ rights to content that was now no longer exclusive. The inability to obtain relief under the current TPMs provision was extremely frustrating.

Similarly, while we acknowledge that many VPNs have legitimate uses (e.g. for security and privacy), some VPNs and similar services are specifically adapted to avoid geoblocks, and are heavily advertised for that purpose. We object to the promotion of these services for such illegitimate purposes, which freeloader off overseas content services that don't have the right to distribute in NZ and don't contribute to the NZ economy.

### **Summary**

To summarise our comments above, we think that the TPMs regime needs to provide:

- equivalent protections for access control TPMs and copy control TPMs, including a prohibition on the act of circumvention;
- a definition of "technological protection measure" that reflects the fact that TPMs can be used to prevent or inhibit infringement of copyright by either the person accessing or using the TPM work *or the TPM issuer*; and
- standing to bring action for the provision of TPM circumvention devices and services by any person that suffers loss as a result of the TPM circumvention device or service interfering with the legitimate exploitation of that person's rights.

Although some of these issues would have been addressed under the Trans-Pacific Partnership Agreement Amendment Act 2016, there were a number of problems with the final drafting of the TPM provisions in that Act. In this regard we support submissions prepared by RMNZ and Andrew Brown QC, which we have had the benefit of reviewing.

### **EXCEPTIONS AND LIMITATIONS: EXCEPTIONS THAT FACILITATE PARTICULAR DESIRABLE USES**

- 30. Do you have examples of activities or uses that have been impeded by the current framing and interpretation of the exceptions for criticism, review, news reporting and research or study? Is it because of a lack of certainty? How do you assess any risk relating to the use?**

**Have you ever been threatened with, or involved in, legal action? Are there any other barriers?**

Sky operates as both a creator and licensor of content and also a reporter of news. As such, we are both a rights holder and a user, and we continue to experience both sides of this equation.

For example, in relation to use of footage for reporting on sports events, Sky was the core content provider in New Zealand for the 2015 Rugby World Cup, and 2016 Olympics, but did not have rights to the 2018 Commonwealth Games, and will not have rights to the 2019 Rugby World Cup.

Because of our extensive industry experience, we know it is essential that fair dealing exceptions are clear and certain. Certainty as to rights to use and exploit footage allows for efficient and fair reporting, without unreasonable impediment, delay or cost, which benefits the industry players and society as a whole.

Sky is in a unique position in that it has been involved in two instances of litigation regarding fair dealing. The relevant interlocutory decisions are *MediaWorks NZ Ltd v Sky Network Television Ltd* HC CIV-2007-404-5674, 12 September 2007, and *Sky Network Television Ltd v Fairfax* [2016] NZHC 1883, 12 August 2016. These were well publicised in New Zealand, and both related to the use of sports footage for reporting on sporting events. It is worth noting that each case was settled before trial. In one case, Sky was the user, and in the other we were the rights holder.

Sky believes that the current fair dealing exceptions are working well. In our experience:

- **The current framing and interpretation of the fair dealing exceptions have not impeded Sky's activities or footage use:** Sky regularly uses third party footage in reliance on fair dealing for the purpose of criticism, review and news reporting. Sky is reasonably confident about the boundaries of these exceptions and when in doubt about whether a use is permitted, it tends to approach the relevant rights holder for a licence. We have not experienced difficulty in obtaining such licenses on reasonable commercial terms.
- **The legal principles that underpin the current fair dealing exceptions are sufficiently certain, which results in efficiency and fairness in the market:** Since the Copyright Act came into force, as far as we are aware, there have only been two instances of litigation arising in relation to fair dealing for news reporting (and we have been involved in both). To Sky, this indicates relative certainty in relation to the "qualitative" legal principles that apply to fair dealing in New Zealand. For example, in normal circumstances we think it is relatively clear and well understood whether something is "for the purposes of reporting the news" and whether a use is qualitatively "fair". In both the *Mediaworks* case and the *Fairfax* case, the parties accepted that some use of sports footage for the purpose of news reporting was within the ambit of the current exception. While there was broad agreement between the parties as to the conceptual and structural scope of the exception, the disagreement was largely about what, in the particular circumstances, should amount to a reasonable amount of use for news reporting of the particular event(s).
- **Any uncertainty and disputes generally relate to quantity of use (rather than the nature of the use):** Deciding exactly how much of the original work can be used in any given situation is necessarily difficult and fact specific. For example, in the context of using audio-visual clips for the purposes of news reporting, there is a question about how many seconds of footage of a

particular event it is fair to use. So in a sports context, a party might use 20 seconds of footage of an important netball match in reporting on the sport. The rights owner of that footage may object on the basis that up to 15 seconds of footage would have been fair, but 20 seconds was inappropriate. In this case, neither party is objecting to the principle that use of footage is allowed for news reporting. Moreover, both parties face natural cost, resource and business focus disincentives for further escalation to court proceedings.

- **The market is best equipped to address the "quantitative" question on a case by case basis, and with final recourse to the Courts:** We don't think it is realistic for legislation to give a quantitative answer to how much of an underlying work can be used as part of "fair dealing" in any given circumstance (eg to say whether 15 seconds or 20 seconds of a netball game is the appropriate amount to use). At least in the media and content sector, the market is competitive and has relatively knowledgeable and experienced participants who are well placed to assess risk, and many participants are both rights holders and content users. Any legal disputes are likely to arise around the fringes of what is considered fair dealing, and in those situations our experience is that parties usually raise the issue directly and try to come to a commercial solution. Where the parties cannot resolve things between them, the Courts are able to provide guidance on a case-by-case basis.

As far as Sky is aware, there has been no New Zealand litigation about the boundaries of fair dealing for reporting current events on *television* since the 2007 *MediaWorks* case, yet footage of sports events appears each day in television news. Sky's litigation with Fairfax and other media entities related to the media entities' internet use of sports footage for their news platforms, and was resolved in early 2018. Since that confidential resolution, there has been no suggestion that media are unable to effectively report the sports news online, and, in any event, Sky is open to working with the wider industry to reach agreement on industry guidelines for use of sports clips in news content.

All of this suggests that current fair dealing provisions are working acceptably well, and achieve the goal of providing reasonable qualitative certainty. The scope of the exceptions is well understood and has the added benefit of being largely consistent with other countries with similar copyright systems, such as the UK and Australia. Any uncertainty around "quantitative" factors can generally be resolved at the market level with final recourse to the Courts.

### **Broad "fair use" defence is not appropriate for New Zealand**

Sky is aware that others have suggested New Zealand move away from the current fair dealing provisions to a broader US-style "fair use" exception on the basis that it would be more flexible. Sky does not support this, and we don't believe that it is warranted.

A move away from fair dealing to a broad fair use right would jeopardise the work that Sky and other media have been undertaking to understand and implement practices regarding what amounts to fair dealing. For example, what is "fair" for news reporting, is unlikely to be the same as what is "fair" for criticism of a work – by conflating the concepts, the result is less certainty and a potential chilling effect, where people don't know what can be legitimately used, but can't justify going to Court over it. This is detrimental to content creators, reporters, and ultimately the public/consumer experience.

There are already at least 25 exceptions to copyright infringement in the current Copyright Act set out between ss 41 and 92E that are relevant to specific situations and provide for use of a work in those situations.

While it is true that a list of exceptions may not cater to every eventuality, we believe that any additional flexibility offered by “fair use” comes at the cost of consistency and predictability which is fundamental to the effective working of the industry, as explained above. It is also contrary to the proposed objectives of New Zealand's copyright regime as stated in the Issues Paper, and given the lack of clarity in what would constitute a “fair use”, it is unlikely that a fair use based exemption would meet the Berne Convention requirement that any exception to copyright protection be limited to certain special cases.

Sky considers there to be scope for some change to what constitutes fair dealing in other areas (discussed elsewhere in this submission), but these changes should be precise and defined – there is no need for a more drastic change like the introduction of “fair use”, which would bring with it far too much uncertainty with no added societal benefit. The comparison between the fair use and fair dealing options, along with analysis of both exceptions, has been canvassed in the submissions of RMNZ which Sky has had the benefit of considering and supports.

**31. What are the problems (or benefits) with how any of the criticism, review, news reporting and research or study exceptions operate in practice? Under what circumstances, if any, should someone be able to use these exceptions for a commercial outcome? What changes (if any) should be considered?**

#### ***Commercial outcome***

The motive of the user is one of many factors to be considered in assessing whether a use is fair (*TCN Channel Nice Pty Ltd v Network Ten Pty Ltd* [2001] FCA 108). In the media market where use of third party footage in reliance on fair dealing for news reporting is common, that reliance also has a commercial benefit to the person using the footage. This commercial benefit is merely a factor to take into account, but is not by itself determinative of fairness.

Sky considers that the scope of fair dealing for research and private study should not apply to commercial research. Commercial entities are well placed to purchase or acquire a licence to use copyright works for commercial research as required, as they do for newspapers and magazines under the licensing scheme operated by Copyright Licensing New Zealand. Lack of an exception for commercial research is unlikely to stymie commercial research.

#### ***Other changes - requiring acknowledgement***

Industry practice when using footage for the purpose of news reporting is to acknowledge the source of that footage. This is done as part of a consideration in making the use “fair”, by giving due recognition to the owner of the work. This practice should be included in the fair dealing requirements for use for the purpose of news reporting. The wording could be similar to that of s 42(1) by adding “if such fair dealing is accompanied by a sufficient acknowledgment” to the end of what is currently s 42(2). This could be followed by a limitation on the requirement as included in the UK Act to take into account situations where acknowledgement is not possible, either as a further addition to s 42(2) using the wording “unless this would be impossible for reasons of practicality or otherwise”, or as a new subsection as included in s 30(3) of the UK Act which states “No acknowledgement is required in connection with the reporting of current

events by means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise”.

These additions could codify common practice.

For further comments, see response to question 30.

**32. What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?**

Sky does not view the exclusion of photographs from the exception for news reporting as a problem. Sky considers the exception benefits photographers, and that the exception should be retained, not changed.

Photographs for news reporting do not warrant inclusion in the scope of fair dealing for news reporting. Including photographs within this exception would necessarily interfere with the ability of the copyright owner to exploit their work. The majority of news reporting entities employ photographers and use photographs that the entity owns. Photographs are also available for news reporting for a reasonable licence fee where an appropriate owned photograph is not available.

A crucial part of fair dealing is the concept that the taking of a whole of a work is very unlikely to be “fair”. In the context of a photograph, the inclusion of the whole of a work would almost be an expectation. There is also an expectation that in order to be “fair”, use will not interfere with the usual exploitation of a work. The ability to use a photograph for news reporting would interfere with the photographer’s ability to license that image.

The current exception for photographs follows the principle of fair dealing and supports the author/creator of a work being able to monetise their creation when used as a whole. Including photographs in the news reporting exception is unnecessary and unwarranted.

For further comments see response to question 30.

**33. What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?**

See response to question 30.

**34. What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?**

The exception for incidental copying has not caused any problems for Sky and we believe that the exception is working well and no changes are needed in this area.

Sky's general position on exceptions is that the addition of any new exceptions, or any amendment of the existing ones, needs to be backed by an obvious and indisputable need for change in the market. This is backed by the "three-step test" requirement in the Berne Convention, which requires that exceptions and limitations can only be permitted:

- (1) in certain special cases;
- (2) that do not conflict with a normal exploitation of the work; and

- (3) that do not unreasonably prejudice the legitimate interests of the author.<sup>21</sup>

Exceptions need to be drafted very carefully, and narrowly, to avoid any unintended consequences. In addition, they must be clear and easy to understand, otherwise both rights holders and users can be disadvantaged. Users may avoid relying on a loosely drafted exception because of the risk that their use does not fall within the behaviour intended under the exception. Alternatively, an exception may usher in a new raft of uses that were not expected or intended, and rights holders will be forced to litigate to get an answer about whether or not they must permit this free use of their works. Importantly, parties should always have the ability to contract out of the exceptions if they choose (we discuss this further in our answer to question 58).

**35. What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?**

The exception for transient reproductions of works has not, to date, created a problem for Sky, but we are concerned that the wording of the section has not been explored by the courts and that it could have unintended effects.

The wording of s 43A is as follows:

A reproduction of a work does not infringe copyright in the work if the reproduction—

(a) is transient or incidental; and

(b) is an integral and essential part of a technological process for—

(i) making or receiving a communication that does not infringe copyright; or

(ii) enabling the lawful use of, or lawful dealing in, the work; and

(c) has no independent economic significance.

The effect of s 43A(b)(ii) is ambiguous, particularly given that it is separated from s 43A(b)(i) by "or" which suggests that "lawful use" is different from not infringing copyright. In general, we note that s 43A differs from the equivalent sections in a number of other jurisdictions, in that it lacks certainty and is unduly broad.

We are unsure what is meant by "lawful use" in this context. The phrase also appears in the UK Act at s 28A, which contains an exception for making a temporary copy of a work which is transient or incidental (the section is worded differently to our section, however). Based on commentary available on the UK section,<sup>22</sup> it seems possible that the phrase is intended only to make it clear that the act contemplated by s 43A is lawful where the person doing the act has been licenced the right to do so by the owner, and similarly that if the person is entitled to make a copy of the work under another permitted act then making a copy as contemplated by s 43A is also lawful.

If this is the case, then the inclusion of the phrase "lawful use" is there for clarity only.

The International Federation of the Phonographic Industry (IFPI) has identified other issues with the wording of the section, including the absence of the word "temporary" in relation to incidental copies and the ambiguity created by including the phrase "or lawful dealing". Sky agrees that these issues further

<sup>21</sup> Berne Convention, article 9(2).

<sup>22</sup> WA Copinger and others *Copinger and Skone James on copyright* (17th ed, Sweet and Maxwell, London, 2016) at [9-27].

confuse the intended effect of the section. Please refer to IFPI's submission for further details on these points.

We would support a review of the wording of s 43A to tighten up the drafting for the purposes of clarity.

**36. What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?**

While we are aware of some concern that the current exceptions in the Copyright Act do not adequately allow for cloud computing, we do not agree with this, or see a need for a new specific exception.

The reason for this is that we believe the 'issue' is actually being solved day to day via licensing the necessary rights from the copyright owner. A further exception is not justified if licensing arrangements already address this type of use. Also, a new exception would inevitably introduce more uncertainty (ie as to the scope and application of the exception) and could unreasonably interfere with a copyright owners legitimate rights (with real potential for material unintended consequences).<sup>23</sup>

Sky itself recently faced the limitations of the existing exceptions when it sought to introduce a cloud-based personal video recorder (PVR) for its customers. Because Sky is not the copyright owner of much of its content (which is the case for many of the big-name TV series and movies, which Sky licenses from major international studios), if it wants to provide customers with a cloud based recording service, it needs to either rely on an exception to make copies and store them in the cloud or get permission from the rights holders. The exception in s 84, for example, allows an individual to make a recording of a work for the purposes of watching it later, but this does not allow Sky to make copies of the work for storage in the cloud (even though the purpose of doing so is so that customers can choose to watch a show at a later time if they wish). See our further comments about the time-shifting exception at question 53.

When Sky faced this issue, the solution was to seek the appropriate additional licence from the owners to store copies of the content in the cloud for the purposes of time-shifting. This was successful and we were able to licence the extra rights needed without issue.

In many ways, this solution was better than relying on an exception:

- The owners of the content have an opportunity to be fairly remunerated for the additional uses made of their works. It's worth noting that a lot of film and TV content is made available via subscriptions to online streaming services, for example Sky's service NEON where subscribers pay a monthly fee for access. These services make available content on demand, meaning there is no need to store personal copies. If people were entitled to store personal copies of content accessible through their subscription services, this would cut across the need to continue to subscribe and undermine the rights holder's ability to licence content on a subscription basis at an accessible price point.

<sup>23</sup> See *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No.2)* [2012] FCA 34 and, on appeal, *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCAFC 59. These cases both involved a large company (Singtel Optus) seeking to rely on the time shifting exception in the Australian Copyright Act to provide a new cloud-based recording service to the public which allowed users of the service to watch delayed coverage of National Rugby League (NRL) matches. Singtel Optus was not a licensee of, and had not paid the sports body to use and benefit from, the NRL matches. In fact, Telstra (a competitor of Singtel Optus) had acquired the exclusive right to communicate broadcasts of NRL matches via the internet and mobile telephony devices. Singtel Optus was successful in the first case, but on appeal, the Federal Court of Australia unanimously found in favour of the NRL. While this result was welcomed by the NRL (as the copyright owner of the NRL matches) a huge amount of time and cost was involved in achieving this outcome.



- The licensing approach means there is direct communication between the parties about the situation, achieving clarity and understanding. This in turn fosters better commercial relationships and ultimately improves the dissemination of works. If Sky had decided to try and rely on an exception to use the cloud as part of its service, some of the major rights holders may have felt the need to test this use in court, or may have been less keen to licence other content to us in the future (and any court action would have been costly and time consuming).
- It gave content owners the ability to impose suitable limitations and security requirements, to protect their copyright from misuse. This is important, because a cloud exception has real risks in terms of loss of control of the copyright work, and hence destroying the work or its value.
- Whether an exception applies to a particular situation is often a grey area, particularly where the situation in question involves a technology that did not even exist when the exception was first introduced. It is sometimes easier to obtain a licence for a particular scenario, than to test the waters of an exception and risk ending up in court. The certainty of a licence allows investment decisions to be made, and new services based on that investment to be introduced.
- Exceptions can have unintended consequences, such as opening the door to uses that were not conceivable at the time the exception is formulated, resulting in loss to rights holders.<sup>24</sup> Licensing is more adaptable in that sense, and the market is able to adapt to change quicker than a piece of legislation.
- There is also the concern that giving individuals the power to store personal copies of other people's copyright works in the cloud puts those works at a greater risk of being pirated or shared unlawfully.

For these reasons, we think that certain technical uses like cloud computing and data-mining (covered below at question 38) are best left to agreement or permission from the rights holder and not specific exceptions.

As discussed in our answer to question 34 above, Sky's general position on exceptions is that new exceptions should only be introduced where there is an obvious and indisputable need for change in the market, and this should be backed by hard evidence. As stated, we believe that licensing arrangements exist for cloud based services, and our experience is evidence of that.

We think there is no evidence that a specific cloud-computing exception is required and therefore submit that no changes to the Copyright Act are needed at this stage to account for cloud computing.

**37. Are there any other current or emerging technological processes we should be considering for the purposes of the review?**

In line with our answer to question 36 above, we don't believe there is any identifiable need for addressing other emerging technological processes. We're seeing more and more new and exciting ways to access and share content emerging on the market, and we've found that the market finds a way to accommodate these within the current copyright regime while also fairly remunerating those involved for their efforts, whether these be the copyright owners or the team behind the development of a new platform.

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<sup>24</sup> See the *Singtel Optus* case, above n 23, and the *Tixdaq* case discussed at question 40.

**38. What problems (or benefits) are there with copying of works for non-expressive uses like data-mining. What changes, if any, should be considered?**

In our answer to question 36 above, we explained our view that licensing is the better solution to deal with certain technical uses of copyright works.

As with uses for cloud computing, the first step should be to consider whether licensing could solve any problems emerging in the market for non-expressive uses of copyright works, before the addition of any purpose-built exceptions is considered.

We submit that no changes are needed at this stage to account for non-expressive uses of copyright works.

We would not object to tightly defined exceptions that are clear and easy to follow, and avoid the need for litigation, but *only* where exceptions are genuinely needed. We would be open to considering the UK style exceptions for data-mining in s 29A of the UK Act, which allows the making of copies for text and data analysis for non-commercial research. We maintain there is no evidence that we need an exception at this stage.

**39. What do problems (or benefits) arising from the Copyright Act not having an express exception for parody and satire? What about the absence of an exception for caricature and pastiche?**

While Sky has not itself faced problems from the lack of a parody and satire exception, we do not object to the addition of an exception for fair dealing for the purposes of parody or satire, provided it is clear in scope.

Sky has had the benefit of reviewing RMNZ's submissions in relation to parody and satire and supports RMNZ's submissions. An exception for fair dealing for the purposes of parody and satire should be principle-based and the Australian exceptions can be used as a base for adding a parody and satire exception in New Zealand.

To the extent that caricature and pastiche should be allowed, they are already included within the scope of parody and satire. Separate exceptions for caricature and pastiche are therefore unnecessary and unwarranted.

***Benefits of a parody and satire exception***

Parody and satire are often creative works in their own right. However, these works require a base or existing work to exaggerate or comment on. The ability to use existing works as a base for further comment is limited by the lack of a parody or satire exception. Including an exception for fair dealing for the purposes of parody and satire would recognise the value and creativity that these works have, and the positive impact of these works as a means of humorous discourse.

In the internet age the use and availability of parody and satirical works has exploded. Content is often used for comedic purposes; in the television context an example of this is the program *Seven Days*. In *Seven Days*, content is parodied to comment on cultural and political issues, but the use of the content would not necessarily fall within the exception for criticism, review or news reporting as the show itself can be purely comedy based.

The existence of parody and satire exceptions elsewhere puts creatives in New Zealand at a disadvantage compared to their global competitors who can use content for a broader range of purposes. This includes competitors in the US, UK and Australia where parody and satire exceptions are in place.

Financially, the beneficiaries of a parody and satire exception are likely to be comedians/ entertainers, comedy producers and content providers. There will also be increased freedom of expression.

### ***Scope of a parody and satire exception***

Based on the Australian exception for parody and satire, as well as general principles from the US and UK, to fall within the scope of a fair dealing for the purposes of parody and satire exception in New Zealand, Sky considers a work should:

- Display an original character/have originality itself;
- Be displayed in such a manner that the parody/satire cannot reasonably be ascribed to the author of the original work;
- Be humorous or mocking whether or not any criticism expressed applied to the original work or something/someone else;
- Not use a greater quantity of elements from the original work than is necessary to parody that work; and
- Include an attribution to the original work.

### ***Potential problems with a parody and satire exception***

There is an inevitable tension between an exception allowing parody and satire and an author's right not to have their work be made subject to derogatory treatment. Sky considers this issue can be assessed as part of the question of the fairness of the use. As a starting point, Sky considers the expectation should be that many parodies or satires would not amount to derogatory treatment of a work. The inclusion of a parody and satire exception would sit alongside the moral rights of the author. An author who felt their moral rights were infringed could object to the use on that basis.

Parody and satire exceptions currently co-exist with moral rights in a range of jurisdictions, including various EU countries where the scope of moral rights granted is broader than those in New Zealand.

While the addition of a parody and satire exception may initially cause uncertainty with regard to scope, as with other exceptions, the market can and will develop its own understanding of what uses are acceptable. These uses will form a common practice in the market. In the meantime, while a common practice for New Zealand develops, overseas decisions and practices can provide an indicator of what fair dealing for parody or satire would look like. This is another reason why we would support a provision similar to the Australian exception.

### ***Exceptions for caricature and pastiche are unnecessary***

Sky does not support additional exceptions for caricature or pastiche, or including references to caricature or pastiche as part of an exception for parody and satire.

Caricature is one form of parody and satire (eg: an exaggeration for comic effect can be parody). Caricature can also exist outside of parody and satire. A separate exception for caricature is unnecessary if parody and satire exceptions will be added.

An exception for pastiche would allow for imitation without a comic/humorous/exaggerated requirement. The social utility of such an extension for pastiche is questionable, or at least significantly less clear. Without the requirement for exaggeration or humour, there would be significant risk of a pastiche work being mistaken for the original. This could impact the original author's ability to realise the value in their work. An extension to allow pastiche would essentially be an acceptance of imitation or passing off works.

To allow New Zealand based authors to compete with overseas authors, and to encourage freedom of expression, an exception for parody and satire is sufficient. The further addition of exceptions for caricature and pastiche is unnecessary.

**40. What problems (or benefit) are there with the use of quotations or extracts taken from copyright works? What changes, if any, should be considered?**

In some circumstances, the use of quotations or extracts from copyright works can be a beneficial and harmless practice, where the use has no effect on the owner's ability to monetise their work.

However, Sky has concerns about the way in which extracts from film-based works are used. Essentially, a quotation from a film-based work is a clip. Clips are sometimes highly valued material, especially in relation to sports broadcasts. Sky's commitment to providing sports coverage to New Zealand is discussed in detail in our introductory statement.

The use of sports clips by third parties has been the subject of litigation both here and overseas:

- Sky brought proceedings against Fairfax New Zealand Limited in 2016 in relation to Fairfax's use of clips of Sky's exclusive broadcast footage of the 2016 Rio Olympic Games (see our answer to question 30 for more about Sky's involvement in fair dealing cases).<sup>25</sup>
- The High Court in *England And Wales Cricket Board Ltd v Tixdaq Ltd* [2016] EWHC 575 (Ch) ("*Tixdaq*") considered an operation where a website and mobile app enables users to upload and share 8-second clips of 'near live' footage from sporting events. The owners of the copyright in the broadcasts were able to bring action against the operators of the website for copyright infringement.

In these decisions, the defendants raised a defence of fair dealing with a work for the purposes of news reporting. The cases tend to turn on whether or not something is genuinely for the purposes of "news reporting" or not. In the *Tixdaq* decision, the court decided that the main purpose of using the clips was to facilitate the sharing of clips amongst users, which was a purely commercial use. Uses like these detract from the value of the owner's work, as people can watch the highlights without having to pay the broadcaster, causing direct interference with the broadcaster's ability to monetise its creation.

Without the need to show the use of a clip was for some beneficial purpose (like news reporting), there would be little standing in the way of uses like the ones in *Tixdaq*. We are concerned that the introduction of any general exception for quotations and extracts will strip away the need for users to have a beneficial purpose behind the use. Rights holders might be forced to allocate out even more time and resources to

<sup>25</sup> *Sky Network Television Ltd v Fairfax* [2016] NZHC 1883.

enforce their rights against users attempting to rely on new exceptions and, at least in Sky's case, simultaneously losing revenue from people who view the clips instead of paying for a subscription. This concern relates to the first of MBIE's proposed objectives for the copyright regime, that copyright should provide incentives for the creation and dissemination of works.

We would argue that the current exceptions in the Copyright Act provide enough ability for use of quotations and extracts in the appropriate situations, in particular the exceptions for criticism and review and news reporting in s 42, and for educational purposes in ss 44 to 49.

Our general position is that new exceptions should be introduced only as a last resort, and they should be narrowly defined, clear and easy to understand. We think a general quotation exception is likely to be broad and have unintended consequences that affect the commercial value of works.

We would argue against the introduction of any additional exceptions to allow for quotation, as the current fair dealing exceptions for criticism and review and news reporting already provide sufficient ability to use quotations and extracts of copyright works, and are working well (see our answer to question 30).

**42. Does the Copyright Act provide enough flexibility for libraries and archives to copy, archive and make available to the public digital content published over the internet? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?**

We think libraries and archives play an important part in our community, and we generally support their ability to copy and archive content, and make it available to the public. However, we do not view flexibility as a helpful or sensible approach to exceptions. As canvassed above in our answers relating to other permitted acts and exceptions, certainty is the most beneficial approach to exceptions. Without certainty, both the owners and the users are left in doubt about whether particular uses are permitted.

In addition, we do not consider there is any need to allow libraries and archives to make digital copies publicly available over the internet. There are many options for the public to access copyright works at their chosen time using licenced services (for example services provided by Sky such as NEON, and other services like Spotify, iTunes, TVNZ OnDemand and Netflix) and to provide specific exceptions to libraries and archives would cut across these legitimate services in an unjustified manner.

Any changes to the current exceptions should be considered only where there is an identifiable need, and should be kept narrowly defined.

**47. Does the Copyright Act provide enough flexibility to enable teachers, pupils and educational institutions to benefit from new technologies? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?**

In line with our answer to question 42 above in relation to libraries and archives, we support the important role that teachers and educational institutions play in New Zealand and agree that educational use of copyright works deserves to be recognised within the Copyright Act.

We maintain that exceptions to copyright must remain narrowly drafted. There are concerns within the industry that widening the educational exceptions any further can lead to unintended uses outside the purpose of furthering education. For example, we would not support an exception to allow teachers to

show films or play sound recordings on the internet, rather than just at the school, university or other establishment. This risks the film or sound recording being viewed or played by people other than students (while a teacher has control over who attends their class, they cannot control what students do, or who they give access to, outside of the classroom).

As such, we would be cautious about any widening of the current educational exceptions.

## **EXCEPTIONS AND LIMITATIONS: EXCEPTIONS RELATING TO THE USE OF PARTICULAR CATEGORIES OF WORKS**

### **51. What are the problems (or advantages) with the free public playing exceptions in sections 81, 87 and 87A of the Copyright Act? What changes (if any) should be considered?**

The advantage of the free public playing exceptions in NZ is that they benefit small businesses across New Zealand, in particular pubs and restaurants, that play free-to-air or pay TV in their premises to the public. This is because these exceptions allow these types of businesses, which are often run by small owner-operators, to provide their patrons with the broadcasts without needing to obtain additional licences, which reduces the businesses' compliance costs and makes it considerably easier and more straightforward for businesses to make use of free and pay TV for the benefit of their customers. In this way, the exceptions are furthering the dissemination of copyright works in New Zealand and, as such, can be seen to be working well in their current form.

### **52. What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?**

As explained in our answer to question 34 above, we think any new exceptions should be a last resort, and existing exceptions should remain tightly defined, clear and easy to understand. The current format-shifting exception in s 81A is limited to sound recordings and we think it should not be extended any further. In particular, it should not be amended to allow format shifting of video works because of the way the market has developed in this area.

Sky allows its subscribers to watch content at home on their television via their set top box, on a computer at home via Sky GO, or on the go on their phone or tablet using the Sky GO App. In addition, FAN PASS allows users to stream live sport to their devices. The ability to offer this range to our customers is built into our licensing arrangements with the many international studios we deal with.

To permit format shifting for video works would cut across legitimate services already in existence, and undermine the efforts of Sky and other content providers in New Zealand to make content available across a number of devices.

### **53. What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?**

We think the current time shifting exception works well for film-based works, as it achieves what it was intended for, and has not to our knowledge led to any problematic unintended uses or consequences in New Zealand. It has also adapted to changing technologies. Individuals can use their latest generation digital recorders to make a digital recording at home in the same way that they used to put a blank tape in the videocassette recorder and make a recording.

As explained in our answer to question 36 above, the time shifting exception did not extend to allow Sky to provide a cloud based PVR. However, we think a commercial service like a cloud based PVR service should always fall outside the exception. Sky (as a commercial user of the copyright) was able to license the necessary rights from the copyright owners concerned. To try and expand the time shifting exception to a cloud based service would be very problematic and would risk creating major unintended consequences that could undermine and interfere with the rights of copyright owners and their licensees.<sup>26</sup>

The time shifting exception has, and will increasingly, become less relevant as viewership continues to shift from linear channels (where time shifting recording is helpful to the user) to on-demand streamed services (where there is no need for time shifting, since the user can watch on-demand).

Based on our experience, we think this exception should stay as it is (and not be expanded in any way).

**54. What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?**

Sky is not aware of any particular problems caused by this exception, other than the fact that the use of the term "cable programme service" in the section means its scope is too narrow (that term "cable programme service" is now out of date given the changes in communication technologies and should be updated). Although service providers like Sky could rely on the exception to provide cable services to its customers, the reality is that today's customers expect a more advanced user interface and features (that need additional data and/or images), and so service providers who are interested in retransmitting broadcasts will, inevitably, have to approach the broadcaster anyway for other retransmission rights. As such, Sky does not directly rely on the exception in its current form and does not wish to propose any alternative as it looks to continue to enjoy the benefit of its agreements with free-to-air broadcasters in NZ.

**55. What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?**

We have not experienced any particular problems with the other exceptions that relate to communication works. We are also not aware of any particular need for change in the market and in the way communication works are being copied and used. The exceptions are narrowly drafted and apply only to very specific circumstances, and we think they should remain as they are for this reason.

**EXCEPTIONS AND LIMITATIONS: CONTRACTING OUT OF EXCEPTIONS**

**58. What problems (or benefits) are there in allowing copyright owners to limit or modify a person's ability to use the existing exceptions through contract? What changes (if any) should be considered?**

Sky is not aware of any problems resulting from the ability to contract out of or limit the exceptions, and we strongly support keeping it. We think the ability to contract out of the exceptions is fundamental as it backs the principles that a copyright owner should have control over their work and that parties should have freedom to contract. From a practical perspective, it also encourages the development of licensing solutions instead of relying on exceptions which are at times uncertain.

As we explored above in relation to cloud computing (question 36), often it is preferable for the market to resolve issues around use of copyright works, and this can depend on the parties' ability to agree between

<sup>26</sup> See the *Singtel Optus* case above n 23 and the *Tixdaq* case discussed at question 40.

themselves that they cannot rely on a particular exception, in exchange for expressly granting certain usage rights. For example, a news clips licence might give a news agency the right to use clips from a library of content made available by the copyright owner for news reporting, in exchange for a fee. The licence might require the user to waive their fair dealing rights in relation to the licensed content (on the basis that the licence specifies how the news agency can use the clips provided).

The ability to contract is a key right of a copyright owner and allows them to monetise their property. It also helps provide certainty, avoid disputes, and can benefit the user as well as the copyright owner (eg by facilitating easier access to the copyright work). Using the news clips example, the copyright owner might not be willing to make the same clip library available to news agencies if the agency could not waive their fair dealing rights in relation to those clips.

We support the continuation of allowing copyright owners to limit or modify a person's ability to use the existing exceptions through contract, and we strongly resist any changes to this regime.

## **EXCEPTIONS AND LIMITATIONS: INTERNET SERVICE PROVIDER LIABILITY**

### **59. What are problems (or benefits) with the ISP definition? What changes, if any should be considered?**

Sky submits that the current definition of ISP (and the associated protections granted by the safe harbours in the Act) is too broad.

It seems appropriate to extend protection to the entities that provide the "pipes" that make the internet operate (but have no control over the content that is available to users). However, the second part of the definition goes too far.

Parties that "*host material on websites or other electronic retrieval systems that can be accessed by a user*" could arguably include large overseas businesses that profit from infringing activities, and that are actively involved in bringing infringing material to users' attention, like Google, Facebook and YouTube. These parties have the ability to make infringing content more or less visible to users (including by targeting content), and they derive revenue from users viewing that content. For example, as the New Zealand Film & TV Bodies point out in their submission, search engines are one of the most popular ways to find infringing content, Google publishes advertisements for infringing sites, and Facebook micro-targets advertisements to people based on an interest in pirated content. This is of no benefit to New Zealand and we don't think these businesses should have safe harbour protection.

Other hosts are pirate sites themselves, such as VIP Box TV, which posts links to infringing live coverage of a huge range of sports, including nearly all NZ rugby coverage.<sup>27</sup>

The fact that hosts benefit from safe harbour protection also disincentivises those parties from making it easy to remove infringing content – as we describe further in Confidential Attachment B, the onus is often on us to search through the various platforms and find all the content that infringe Sky's exclusive rights. Then (except on the few platforms where a more sophisticated rights management tool is available) we need to file individual take-down requests using the platform's online form for each such URL. There can be a huge number of these, and it is incredibly time consuming. The volumes are so high that we need to employ a dedicated team of people during sports events to find infringing content and submit take-down

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<sup>27</sup> See vipboxtv.se.



requests. Where rights management tools are available, these still have reliability issues and are prone to miss infringing materials. We never manage to remove all the streams that are out there (or even close to it), and plenty more are back online the next day.

Sports content is particularly difficult to protect, because most of the value of the content is in the live transmission. So when a platform is slow to cooperate in relation to a live sport event (for example, where takedowns aren't processed until after the event in question has finished), we feel the effects particularly keenly. We explain this further in response to question 69. We think that if platforms that host infringing content did not have safe harbour protection, then they would be more motivated to cooperate.

We understand that the New Zealand Film & TV Bodies have suggested that digital platforms be bound by a prescribed code setting out steps that each platform must take to prevent online infringement, and remove infringing content. If the platform does not comply with the code then they are treated as having authorised infringement. We are generally supportive of this idea and would be happy to work with Government and ISPs to develop such a code.

**60. Are there any problems (or benefit) with the absence of an explicit exception for linking to copyright material and not having a safe harbour for providers of search tools (eg search engines)? What changes (if any) should be considered?**

Search engines are one of the main ways that users get access to infringing material. They are actively involved in bringing infringing material to users' attention, by deciding how infringing material is ranked in search results. They also profit from advertising infringing content. As explained above, we do not think this justifies safe harbour protection. We submit that search tools and search engines should have to take greater steps to address the infringement that they facilitate.

Similarly, we do not believe that there should be an exception for linking to copyright material. Aggregator sites play a huge role in piracy and we think they should be liable for authorising copyright infringement or communicating infringing material to the public in appropriate circumstances.

**61. Do the safe harbour provisions in the Copyright Act affect the commercial relationship between online platforms and copyright owners? Please be specific about who is, and how they are, affected.**

See response to question 60.

**62. What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?**

See response to question 60.

## **TRANSACTIONS**

**69. What are the advantages of social media platforms or other communication tools to disseminate and monetise their works? What are the disadvantages? What changes to the Copyright Act (if any) should be considered?**

We would like to discuss the main disadvantages Sky has faced with the social media platform Facebook and the way it allows the easy and wide dissemination of works. We think this provides a good example of the issues faced with social media platforms generally. Please also refer to Confidential Attachment B,

where we provide further detail and case studies of Sky's anti-piracy programme, which provides further details about the scale of the piracy problem Sky is encountering on social media.

Facebook has undermined Sky's exclusive rights to broadcast certain sporting events to the people of New Zealand in two key ways:

1. Facebook Live allows users to live stream sports events to their followers, by either filming the broadcast off their television or filming the event from the stands.
2. Facebook creates an easy way for people to discuss and share ways to access pirated live streams of sporting events, originating from overseas.

Introduced in 2015, Facebook Live allows users to video-record and simultaneously broadcast the material in real time to viewers via the Facebook platform. Other Facebook users can watch the live stream, share it on their own Facebook pages and comment on it. After the live stream has finished, the footage remains on the person's Facebook account (indefinitely, unless it is actively removed) where it can be viewed as a video clip.

Around the same time, Sky was engaged in providing pay-per-view coverage of Joseph Parker's heavyweight boxing fights to the New Zealand audience, including fights against Carlos Takam, Solomon Haumono and Andy Ruiz. Sky discovered that some New Zealand Facebook users were purchasing the PPV fight on their Sky account and then using the camera on their mobile phone and the Facebook Live function to live-stream Sky's broadcast of the match on Facebook, enabling free viewing by other Facebook users. Sky also became aware that some individuals were physically attending the fight and filming and live-streaming it to their Facebook followers from the stands.

The nature of heavyweight boxing means that the value in the broadcast reduces considerably after the event has taken place (anticipation of the result of the fight playing a large part in the excitement). Facebook provided the ideal platform for users to provide live access to other users for free, leaving Sky scrambling to shut down the streams during the event. As is often the case with online infringement, we found ourselves faced with a whack-a-mole situation where live streams would pop up and we would cut the streamer's access to the broadcast or take steps to have the streams removed. Nevertheless, there was little that could be done to remove the impression created that these fights were available for free, so why pay? Even a Stuff article "Joseph Parker fight illegally broadcast to more than 100,000 viewers" posted on the website [stuff.co.nz](http://stuff.co.nz) on 22 May 2016 shows how news spreads, with one reader leaving a comment under the article: *"Thx for the tip. Next time I'll be tuning in for the free view"*. As is apparent from this example, the live streaming functionality, and the ease with which others can tune in via Facebook or find links to international streams, causes a direct interference with Sky's ability to monetise its works.

The links to illegal streams that are accessible from overseas websites and shared around Facebook are particularly damaging, as they are ripped from an overseas broadcaster's coverage (and so are of professional quality), and often accessed by thousands of viewers. This illegal sharing affects not only Sky but, in this instance, Joseph Parker himself, as he shared in the revenue obtained from the PPV sales.

Sky eventually took a number of local live streamers to the District Court for copyright infringement. Sky sought injunctions, nominal damages of \$100 and legal costs from the defendants. The main purpose of the litigation was not to recover lost profits (which would be extremely difficult to calculate and prove) but

to send a clear educational message to future live-streamers. We would have preferred litigation to be a last resort, and it is always our preference to pursue the facilitators of piracy rather than individual Kiwis, some of whom may not always know that their actions are unlawful. As is always the case with litigation, it is costly and time-consuming, and there was very little recoument of costs to be had from the defendants in these proceedings.

As illustrated above, social media platforms are a contributing factor to the proliferation of infringing live streams, and links to infringing live streams hosted elsewhere. Sky and other rights holders need better enforcement tools to deal with these types of online infringement, without resorting to litigation on a case-by-case basis. We also think that if social media platforms could not claim protection from the safe harbours, they would be more incentivised to help fix these problems..

## **ENFORCEMENT OF COPYRIGHT**

### **76. How difficult is it for copyright owners to establish before the courts that copyright exists in a work and they are the copyright owners? What changes (if any) should be considered to help copyright owners take legal action to enforce their copyright?**

Although we agree that this is not always straightforward, Sky is mostly concerned with films (which benefit from presumptions in s 128) and communication works, but see related comments regarding difficulty of proving standing in response to question 77 below.

### **77. What are the problems (or advantages) with reserving legal action to copyright owners and their exclusive licensees? What changes (if any) should be considered?**

Reserving legal action to copyright owners and exclusive licensees is out of touch with the realities of licensing film and TV content. Proving that we are an "exclusive licensee" in relation to the content we offer (even where we have purchased what are effectively "exclusive rights") is often cost-prohibitive.

#### ***Cost issues – Kodi box example***

Sky recently took action against two distributors of "loaded Kodi boxes" (Fibre TV and My Box), as described further in our answer to question 81.

We initially investigated bringing action against Fibre TV and My Box under the Copyright Act. In order to establish standing under the Act to bring action against the distributors of the boxes, we would arguably have needed to prove that we were the "exclusive licensee" of copyright for each individual piece of pirated content that we wanted to complain about. There were hundreds (if not thousands) of these titles, and more being added all the time. It would also have been necessary to join the copyright owners (nearly all of which were overseas and many of which were major Hollywood studios likely to have some reluctance about engaging in litigation in New Zealand) in the proceedings, or get leave of the Court not to join them. Self-evidently, joinder would have made the whole process far more complex, resulting in a multiplicity of parties and added cost and delay for all concerned, including the Court.

Fibre TV and My Box were profiting from a product clearly based on piracy, and taking advantage of the consumer in the process, but there were too many hoops to jump through before we could apply for a meaningful remedy under the Act.

In the end, it was quicker and more efficient for Sky to bring the proceedings under the Fair Trading Act (FTA). Although we were ultimately successful, the defendants were able to drag out proceedings over 18

months. The injunctions granted under the FTA prevent the defendants from marketing the boxes as a lawful way to access Sky's content, but does not stop their importation into, and sale in, New Zealand (relief that arguably is only available under the Copyright Act).

### **Definition of "exclusive licence" out of touch with current licensing conventions**

The current definition of "exclusive licence" is a licence in writing, signed by or on behalf of a *copyright owner*, authorising the licensee, *to the exclusion of all other persons (including the copyright owner)* to exercise a right *that would otherwise be exercisable exclusively by the copyright owner*. Although most of the sports, movie and TV rights that we purchase are effectively exclusive (in the normal sense of the word), some of our rights agreements might not meet this definition.<sup>28</sup> For example:

- Some of our licences may not be "signed by the copyright owner" – we acquire various rights by sublicense, from a global or regional distributor. For example, our pay TV licence for Warner Bros movies (eg *The LEGO Movie*, *Sherlock Holmes*) is with an Australian distributor, Roadshow Films. Even if our licences are signed by someone purporting to be the copyright owner, it could be an exercise to prove such ownership and that the licence was valid (especially if the name on our agreement did not align with the presumptions as to ownership set out in the Copyright Act). The copyright owners/distributors may also not be particularly interested in helping us by providing evidence of ownership and chain of title given the size of our market and the costs involved.
- Some of our licences may not expressly say that the copyright owner cannot exercise the rights licensed itself, ie our rights are not necessarily granted *"to the exclusion of ...the copyright owner"*. This is because the copyright owner (eg a sports body) might not be in the business of broadcasting or streaming content (in which case there is no commercial need to say this in the contract).
- Nearly all of our licences are only for NZ rights, and only for certain distribution methods, eg pay TV, free TV, online streaming, etc. Sometimes we only have an "exclusive" right to transmit something like *"live pay TV coverage of [a sports event] in NZ"* (ie we are not licenced to show delayed coverage, or online coverage). This may create issues of standing, for example, in relation to pirated *online* coverage of the same event that originates from a server in Romania.

We do not see why standing should be limited to such a narrow group of people. We think that any licensee or sub-licensee should have standing where they are directly affected by the infringement of copyright, and that there should be presumptions that written licences are valid and grant the rights described in the licence, where there is no evidence to the contrary.

### **Joining copyright owners is not always justified**

While in some cases (eg where the nature and validity of the licence is challenged), bringing action as a licensee may require joinder of the owner or other licensees as "necessary" parties, in many cases this would not be necessary in order to address the merits of the infringement claim. For example, in the European Court of Justice case *Stichting Brein v Wullems*,<sup>29</sup> the action for a declaration was brought by Stichting Brein, which is a foundation that protects the interests of copyright holders.

<sup>28</sup> Note that most rights agreements that we sign are based on the licensor's template agreement, and we have very little ability to negotiate them. Most include very specific licence grants, paired with broader "hold backs", which are separate commitments by the licensor not to offer certain rights to anybody else in our territory.

<sup>29</sup> *Stichting Brein v Wullems* European Court of Justice C-527/15, EU:C:2017:300, 26 April 2017, about the illegality of pre-loaded Kodi Boxes.

As a separate but related point, if the rights are conferred on the exclusive licensee to the exclusion of the owner (as required by the definition of "exclusive licence"), then it seems unnecessary for the owner to be joined. The nature of those exclusive rights should simply be a matter of proof in the usual way.

**79. Does the cost of enforcement have an impact on copyright owners' enforcement decisions? Please be specific about how decisions are affected and the impact of those decisions. What changes (if any) should be considered?**

Cost and complexity have a major impact on our decisions. We generally find litigation very expensive and extremely time consuming, it draws attention away from our core business, and even if we're successful we never fully recover our costs. Cost and complexity also go up quickly where: (a) there are a larger number of parties (eg where we are taking action as exclusive licensee and need to join copyright owners); (b) where there are offshore elements; (c) where our legislation is untested and different from overseas, or (d) where the matter is defended and strategic points are taken (eg the other party challenges copyright ownership or standing).

Our proceedings against Fibre TV and My Box described in response to question 81 are examples of a situation where it was not worth the cost of bringing copyright proceedings. Although it was more cost effective to bring proceedings under the Fair Trading Act, this impacted what remedies were available, and getting to a judgement took 18 months and over \$230,000 in legal fees. It would have undoubtedly taken longer and been even more expensive had we brought proceedings under the Copyright Act.

We accept that this is a challenging area, and this is why we support as much clarity and certainty in the Act as possible, so that we do not have to litigate. It also helps to be able to draw on case law from other jurisdictions where we are lacking local precedents - this relies on the NZ Act staying in line with the UK. We also support new low-cost enforcement methods, such as improved border protection measures discussed in response to question 81, although see our comments in response to question 83 regarding the peer-to-peer filesharing regime. We would also support better resourcing of law enforcement agencies in this area, to act as a deterrent, and reflect the national economic and social interests that copyright supports, similar to the Police Intellectual Property Crimes Unit in the UK.<sup>30</sup>

**80. Are groundless threats of legal action for infringing copyright being made in New Zealand by copyright owners? If so, how wide spread do you think the practice is and what impact is the practice having on recipients of such threats?**

We are not aware of groundless threats being made. Groundless threats would breach the Fair Trading Act, and potentially amount to blackmail. Because there are already adequate legal prohibitions in place, we don't think there is need for specific prohibitions to be inserted in the Copyright Act.

**81. Is the requirement to pay the \$5,000 bond to Customs deterring right holders from using the border protection measures to prevent the importation of infringing works? Are there any issues with the border protection measures that should be addressed? Please describe these issues and their impact.**

<sup>30</sup> See for example <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/default.aspx> .

The border protection measures in the Copyright Act currently prevent the importation of infringing copies, but in today's digital climate rights holders are faced with challenges beyond the traditional "infringing copy".

### **Current border protection measures**

At present, the border protection measures allow a copyright owner to lodge a notice with Customs requesting the detention of any pirated copies that pass through Customs' control. In addition, the Copyright Act has been amended recently by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Amendment Act 2018, giving Customs officers powers to detain items suspected of being pirated copies on their own initiative.

Customs officers can also detain imported goods on their own initiative if there is reason to believe that the goods are evidence of, or are of significant relevance to the investigation of, an offence against various sections in the Copyright Act. The relevant offences under the Act are importing an object that is, and that the person knows is, an infringing copy of a copyright work under s 131(1)(b), importing a specified recording (such as an illicit recording) under s 198(1)(b) and importing a TPM circumvention device under s 226C(1).

### **The Kodi box problem**

While the above are useful tools for dealing with certain types of copyright infringement, they offer no protection against the importation of IPTV streaming devices pre-loaded with software that allows a user to stream pirated content straight to their TV. These devices are often called "Kodi boxes", a reference to the open-source software add-on that searches the internet and locates thousands of infringing video streams based on user search queries.

Sky recently brought proceedings against two NZ-based sellers of these devices, in the High Court against My Box NZ Limited, a New Zealand company importing these devices from China and selling them to the New Zealand public, and against defendants Sarah Frances Claire Pullan and John James Campbell who operated a similar business under the trading name Fibre TV.<sup>31</sup> The statement below is an example of how the devices were marketed to the public on the My Box website:

*NEVER PAY FOR Sky AGAIN!!! Stream your favourite movies, TV shows, and live Sky sporting events online without ever leaving your home or paying another dollar again including FREEVIEW HD on this box.*

The ease with which a user can access and stream pirated content via these boxes presents a significant threat to Sky's business, and the other businesses that produce and/or provide access to content in New Zealand.

As Sky pleaded in the My Box proceeding, the My Box service was marketed in a way that was intended to enable, and has enabled, users of the service to avoid paying for relevant content, including Sky's content. In an interview with the NBR, My Box's founder claimed that 95% of My Box customers are ex-Sky subscribers. Sky calculates the damage suffered as a result to be at least \$1,444,000 as at 14 July

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<sup>31</sup> *Sky Network Television Ltd v My Box NZ Ltd* [2018] NZHC 2768; *Sky Network Television Ltd v Pullan* [2018] NZDC 12918.

2017 (with the final figure likely to be far higher due to the ongoing nature of the infringement). The defendants claimed to have sold 10,000 devices by that date.

Sky obtained an injunction from the High Court preventing My Box and its founder Krishneil Von Roy Reddy from marketing the boxes as a lawful way to access Sky's exclusive content.

Sky similarly obtained an injunction against the owners of Fibre TV and an order for an enquiry into damages.

Although Sky's decision to pursue My Box and Fibre TV in court was successful in this regard, as discussed above, the injunction does not stop the importation and sale of these devices in New Zealand.

What's more, the process involved in obtaining these judgments was lengthy and very costly for Sky:

- The Fibre TV proceedings began with a cease and desist letter sent to the defendant in December 2016. Proceedings were launched in the District Court on 9 March 2017, and eventually a hearing took place on 15 May 2018. Judgment was finally entered in Sky's favour on 3 July 2018, some 18 months after Sky first sought to prevent the defendant's behaviour.
- The My Box proceedings also began with a cease and desist letter, in April 2017. Sky launched proceedings in the High Court on 14 July 2017. A hearing was held on 5 March 2018, and judgment issued in Sky's favour on 25 October 2018. Again, it was over 18 months before Sky had access to a remedy.
- The legal costs of pursuing these proceedings were in the vicinity of NZ\$230,000 (ex GST). Only a small percentage of this figure will be recovered from the defendants.

Sky is committed to producing live sports broadcasts of the highest quality and providing access to these broadcasts and other entertainment to the whole of New Zealand. The work that goes into making this happen is significant. The availability of loaded IPTV devices to the New Zealand public significantly undermines the efforts made by Sky and other businesses to provide legitimate means of access to the movies, TV shows and sports New Zealanders love. This conflicts with the first of MBIE's proposed objectives, namely that New Zealand's copyright regime should "provide incentives for the creation and dissemination of works...".

In the 2018 study by The Navigators into the digital piracy problem in New Zealand, commissioned by Sky, it was revealed that 5% of New Zealanders have used Kodi boxes or similar devices to access pirated content, and 3% do so regularly.<sup>32</sup> Those figures represent around 150,000 New Zealanders, which is very alarming when you consider that these devices are in their nascent stage compared to other methods of accessing pirated content.

### ***Why consider enhanced border protection measures?***

The ability to detain "Kodi boxes" (at least those that are pre-loaded with the software that is designed to access pirated content) at the border would be a convenient and cost-effective means of enforcement, for a number of reasons:

- It is impractical to expect businesses like Sky to enforce their rights against the individual users of these boxes. Approaching the problem this way can be likened to the infringing file-sharing

<sup>32</sup> The Navigators "Digital Piracy in New Zealand – Summary of Research Report " 11 September 2018, attached in Attachment A.

problem: it is impossible (in terms of cost versus benefit) to take every streamer to court for copyright infringement. The pirate websites providing access to the infringing material are the real concern, but these are almost always based overseas and often nearly impossible to locate and serve. Addressing the Kodi box problem at the border, before the boxes reach the consumer, would provide a far more efficient means of enforcement than bringing proceedings against individual users. For one, it would reduce court time (which benefits the taxpayer). It would also reduce the cost to businesses (including legal fees and the allocation of staffing resources). Also, catching the devices at the border would reduce harm to the individual users who might otherwise be subjected to legal proceedings.

- Although box re-sellers are New Zealand-based businesses, many of the devices coming into New Zealand are purchased from overseas companies by individuals, and delivered directly to their door. Jurisdictional barriers further complicate the ability to hold someone responsible for supplying these devices, leaving New Zealand businesses with no effective remedy.
- A key problem underpinning the pervasiveness of these devices is that streaming infringing content has become normal for many New Zealanders, with Sky's commissioned research revealing that one in ten New Zealanders say they "normally" stream content from pirate websites, and three in ten New Zealanders pirate at least twice per year. They expect little to no repercussions for doing so.<sup>33</sup> This conflicts with the second of MBIE's proposed objectives for New Zealand's copyright regime, namely that the copyright regime should be effective and efficient, including maintaining integrity and respect for the law. Stopping these devices at the border sends a clear message to New Zealand consumers (some of whom may not even know that the content accessed via the device is infringing).<sup>34</sup>
- Customs officers are already equipped to deal with the importation of TPM circumvention devices on their own initiative, and IPTV streaming devices are in a similar category (more on this below).

The current border protection measures are not wide enough to prevent the entry of pre-loaded devices into New Zealand:

- Sky cannot lodge a notice with Customs regarding the devices under s 136, because the devices are not, and do not contain any, "pirated copies" of an "item" in which Sky owns the copyright.<sup>35</sup> The definition of pirated copy in s 135 essentially means a copy of a copyright work. The devices enable access to unauthorised copies via streaming, but the language of these sections is not designed to extend to such devices.

<sup>33</sup> The Navigators report shows that New Zealanders who access pirated content tend to believe piracy is theft (but to a much lesser extent than non-pirates), are more likely to believe they will not get caught, believe it is easy to pirate and know lots of people who also pirate.

<sup>34</sup> We note that other jurisdictions are able to allocate police resources to deal with the Kodi box problem in their jurisdiction. For example, the Police Intellectual Property Crime Unit (PIPCU) established in the UK in 2013 has the responsibility to investigate and deter serious and organised intellectual property crime in the United Kingdom (see [here](#) for more information). The PIPCU has been helping to curb the use of Kodi boxes, and the recent publication by the UK Intellectual property office "[UK Government response to the call for views regarding illicit IPTV streaming devices](#)" (2018) explains (at page 2) the PIPCU will continue to prioritise resources in this area, taking appropriate action against those traders who seek to encourage copyright infringement through the sale of IPTV boxes. Without similar resources in New Zealand, we need other tools to combat the problem

<sup>35</sup> The fact that Sky needs to "own the copyright" under this section is also a barrier to enforcement. See our submission on question 77 for a discussion about the issues Sky faces with standing under the copyright regime.



- Customs officers cannot detain the boxes on their own initiative on suspicion that they are pirated copies (for the reasons set out above) or evidence of, or of significant relevance to the investigation of, an offence against ss 131(1)(b), 198(1)(b), or 226C(1):
  - Section 131(1)(b) relates to importing an object that is, and that the person knows is, an infringing copy of a copyright work. With some exceptions, an object that a person proposes to import into New Zealand is an "infringing copy" if the making of the object constituted an infringement of the copyright in the work in question in the country in which the object was made (s 12(3)(a)). As with the "pirated copy" definition, this offence is not relevant to pre-loaded devices because copyright in a work was not infringed by making *the devices*, rather *the devices are used to access/view infringing copies*.
  - Section 226C(1) applies to a person who, in the course of business, makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, a TPM circumvention device that applies to a technological protection measure if the person knows that it will, or is likely to, be used to infringe copyright in a TPM work. Although TPM circumvention devices and pre-loaded IPTV devices are often used for similar end goals (ie they allow the user to access copyright works unlawfully), an IPTV device is not a TPM circumvention device because an IPTV device does not need to circumvent any technological protection measures in order to stream content. The content is already accessible online (made available by unlawful means, often in an overseas jurisdiction, where it is hard to locate or take action against) and the device merely hooks in to the publicly available unauthorised streams. As such, Customs officers cannot detain the devices using the offence in s 226C(1).

### **Summary**

We would support a review of the current border protection measures in Part 7 of the Copyright Act to explore the ways in which this regime can help businesses like Sky fight the ongoing digital piracy problem.

At least, we think the border protection measures in Part 7 of the Act should allow for the detention of pre-loaded Kodi boxes by Customs.

This could result in a more efficient and cost-effective solution for both the Crown and businesses.

### **82. Are peer-to-peer filing sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?**

It is clear that P2P technologies are being used for infringement. For information about the scale of infringement, please see the attached report from The Navigators as well as information supplied in the submissions from RMNZ and the New Zealand Film & TV Bodies.

In terms of impact, we feel it through lost subscriptions and increased legal and anti-piracy costs. However, we believe that damage is increasingly caused by live streaming and P2P streaming, rather than traditional downloading.

### **83. Why do you think the infringing filing sharing regime is not being used to address copyright infringements that occur over peer-to peer file sharing technologies?**

In theory, the infringing file sharing regime in ss 122A-U of the Copyright Act is an example of an enforcement tool that gives rights holders the power to prevent online infringement and enforce their rights without resorting to litigation. In reality, Sky does not use the regime. Other rights holders that *have* used it have found it ineffective and prohibitively expensive. Please refer to the submission by RMNZ, which we have had the opportunity to consult, and which extensively covers their difficulties in using the regime.

Based on the experiences of RMNZ, Sky decided not to commit its time and resources to using the regime. In fact, one of the biggest problems Sky has with the infringing file-sharing regime is that it does not address the bigger problems caused by streaming and live content. Ultimately, Sky believes that the online piracy issue is never going to be reduced significantly through pursuing the individual end-users. Sky and other rights holders need tools to prevent the end-users even having the option to access pirated content in the first place.

Sky is open to a review of the infringing file sharing regime, in line with RMNZ's experiences and suggestions for reform, to make the regime a more effective and efficient tool against online piracy.

**85. What are the problems (or advantages) with the existing measures copyright owners have to address online infringements? What changes (if any) should be considered?**

The problem is that existing measures are ineffective against online piracy.

The Copyright Act should be amended so it is crystal clear that the Court can grant no-fault orders requiring ISPs and online platforms to block access to pirate websites.

We elaborate on this position below and in our answers to the questions 86 and 87.

Online piracy is an existential threat to creative industries.<sup>36</sup>

Pirate sites are in the business of monetising their infringement through pop-up advertising and malware introduced into visiting consumers' computers. Places like The Pirate Bay are amongst the most popular online locations in New Zealand. This well-known site, blocked in many countries around the world, eclipses legitimate products like Spark's Lightbox service.<sup>37</sup>

As we have noted elsewhere in this submission, survey data tells us that many New Zealanders are undertaking copyright infringement and probably not really thinking about it: 10% admit they "normally" stream content from pirate websites, while 30% say they use online pirate sites many times a year.<sup>38</sup>

Enforcement through existing measures does not work because pirate sites are invariably based beyond the New Zealand jurisdiction. That means that, on existing measures, the only options are to pursue individual end-users uploading, downloading or streaming pirated content through either:

- the Copyright Act's Part 6 Infringing File Sharing regime (the "Part 6 regime"); or
- Court proceedings seeking an injunction and/or damages.

But neither of these options are any good for at least five reasons:

<sup>36</sup> Culture, Media and Sport Committee "Supporting the creative economy" (Vol 1, HC674, Third report of 2013–2014) at [24].

<sup>37</sup> ThePirateBay.org is currently the 58<sup>th</sup> most visited site in New Zealand down, at the moment from a high of 24<sup>th</sup> last year. Even at its current level this nefarious site blocked in dozens of countries around the world receives more New Zealand visits than sites Apple.com and Airnewzealand.co.nz: <https://www.alexa.com/topsites/countries:2/NZ>.

<sup>38</sup> The Navigators "Digital Piracy in New Zealand – Summary of Research Report", commissioned for Sky (11 September 2018), attached in Attachment A.

- As with the pirate sites themselves, most users uploading content are based offshore, which puts them beyond the reach of the New Zealand courts.
- Piracy increasingly occurs through streaming, with the Part 6 regime restricted to uploading and downloading unauthorised content (and again, only where those acts occur in New Zealand).
- Having the Copyright Tribunal or a court tell one user at a time not to infringe copyright cannot even register as a response to online piracy given the breadth of the problem.
- The Part 6 regime is expensive and cumbersome: rights holders must move through three different notifications, each with their own stand down periods, and then catch the infringer continuing to infringe after each notice. And at the end of this extended process the content owner can only seek up to \$15,000 in costs and an order that the user's internet account be suspended for up to 6 months.<sup>39</sup> But of course, as a practical matter, costs are impossible to recover and the actual awards go nowhere near the statutory thresholds, let alone result in account suspension.<sup>40</sup> So they serve as no deterrent at all.
- While the Part 6 regime is inefficient and expensive enough, legal proceedings are in a whole different world with cost recovery levels under the High Court Rules nowhere near an applicant's transaction costs (leaving aside that copyright infringers are rarely good for the money anyway). In our experience, this lopsided cost/benefit equation emboldens infringers who seem to have no fear of being sued. By way of example, one individual who streamed a Joseph Parker fight on Facebook stated that he was a "modern day Robin Hood...".

Existing measures do not and/or cannot target the source of online infringement. That means there are no available changes to existing measures that would allow New Zealand to take effective action against online piracy. Only new measures will do.

#### **86. Should ISPs be required to assist copyright owners enforce their rights? Why / why not?**

Yes, as evidenced in a number of comparable jurisdictions around the world, ISPs do have a role to play given that ISPs are uniquely and best-placed to help curb piracy based on a clear jurisdiction for site-blocking orders and an appropriate associated costs regime.

On question 85 we explained that the only effective means to curb online infringement is to target the source of the pirated content. However, without site-blocking, the only way to tackle a piracy operation is to:

- frustrate access to the site by seizing the top level domain name like "gomovies.sc", which is the site's internet address;
- locate the server(s) which host the site and initiate legal action to remove the infringing content in the country where the server is based; or
- find the individual or group behind the operation and take legal action against him, her or them in their place of domicile.

<sup>39</sup> Copyright Act 1994, ss 1220 and 122P.

<sup>40</sup> See, for example, <https://www.justice.govt.nz/assets/Documents/Decisions/Recorded-Music-NZ-Limited-v-Telecom-NZ-6806-24-December-2014-NZCOP-4.pdf> and <https://www.justice.govt.nz/assets/Documents/Decisions/Recorded-Music-NZ-v-VOD02014-D-R-9488397-4-August-2014-NZCOP-2.pdf>.

But, to our knowledge, none of these options have worked to curb piracy for the following reasons:

- Rights holders cannot seize the domain names because the domains are invariably registered in places like the Seychelles or the Reunion Islands where it is simply impossible to take action for practical reasons.
- In a similar vein, the servers that host pirate sites are consistently located in jurisdictions like the Ukraine or Russia where rights holders can do nothing.
- And, of course, pirate sites are notoriously hard to track down. There is the odd high-profile exception.<sup>41</sup> But, generally speaking pirates operate in the dark web and evade rights holders and law enforcement.

With rights holders typically unable to take direct action against pirates, global experience is that ISPs and online platforms are the only actors in the copyright eco-system able to take effective action to control online piracy. To that end dozens of countries have turned to site-blocking orders which are common place in the UK, Australia, Singapore, across the EU and throughout Asia.<sup>42</sup>

It is important to understand what site blocking is - a court order against an ISP/online platform requiring that entity to block, or attempt to block, access by its customers to specified domains and proxy sites. An ISP complies with the order where it uses any effective means of its choice including, but not limited to, DNS blocking, IP and URL blocking.

The key thing to note with site blocking is that the application for the orders makes no suggestion that the ISPs have done anything wrong. The application simply seeks the ISPs' assistance where the Court is satisfied that, upon reading affidavit evidence, the target sites are communicating the content in question without permission from the copyright owner. That content traditionally comprised popular film and television shows with largely static addresses. Increasingly, however, pirates focus on intercepting and re-routing live sporting events to make their money. To meet that reality, the English High Court regularly grants site-blocking orders requiring ISPs to block access to nominated streaming servers in real time.<sup>43</sup> Such orders remain in place for the (short) duration of the event.

We believe that it is critical that New Zealand rights holders have that same ability to not only protect film and television content but valuable sports content that Sky and many others produce. It is also crucial that rights holders have access to "dynamic" site-blocking orders. By that we mean a regime where the rights holder monitors the blocked websites and can have other proxies or mirror sites of the original site blocked without needing to apply again to the Court. Both the UK and Singapore have already implemented these dynamic site-blocking orders,<sup>44</sup> and Australia's Government has introduced legislation following suit.<sup>45</sup>

There is much evidence that site-blocking orders work. Taking the Australian experience: one recent study found that within 11 months of the first site-blocking orders being implemented:<sup>46</sup>

<sup>41</sup> <https://www.theguardian.com/technology/2016/jul/21/worlds-biggest-online-pirate-faces-charges-over-1bn-of-illegal-copying>.

<sup>42</sup> For a review of site-blocking developments worldwide see "The Normalization of Website Blocking Around the World in the Fight Against Piracy Online" by the Information Technology and Innovation Foundation: <https://itif.org/publications/2018/06/12/normalization-website-blocking-around-world-fight-against-piracy-online>.

<sup>43</sup> See, for example, *The Football Assn Premier League Limited v British Sky Broadcasting Limited* [2017] EWHC 480.

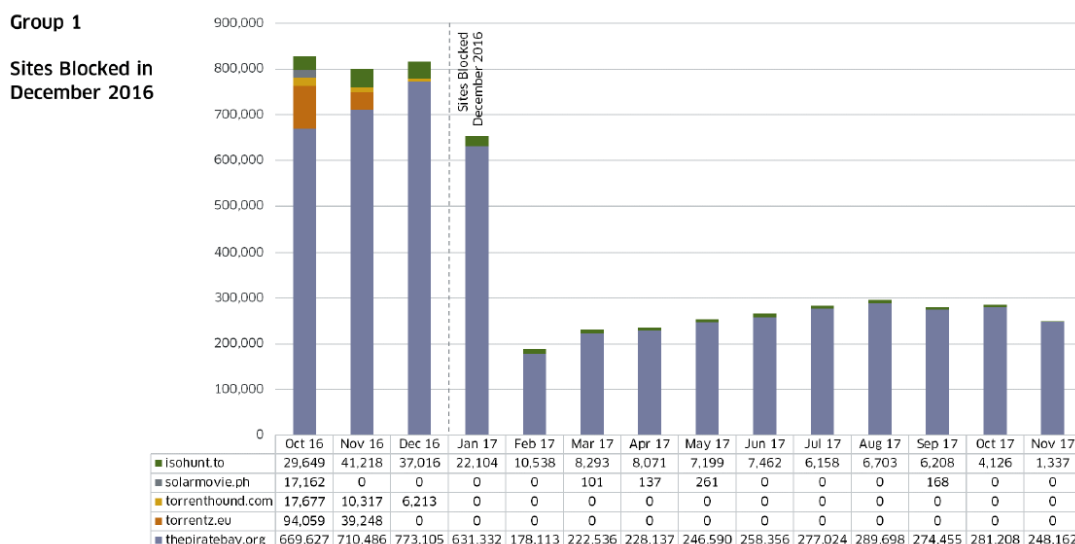
<sup>44</sup> *The Football Assn Premier League Limited v British Sky Broadcasting Limited* [2017] EWHC 480 at [25]; *Disney Enterprises, Inc v M1 Ltd* [2018] SGHC 206 at [38]–[40].

<sup>45</sup> Copyright Amendment (Online Infringement) Bill 2018 (Cth).

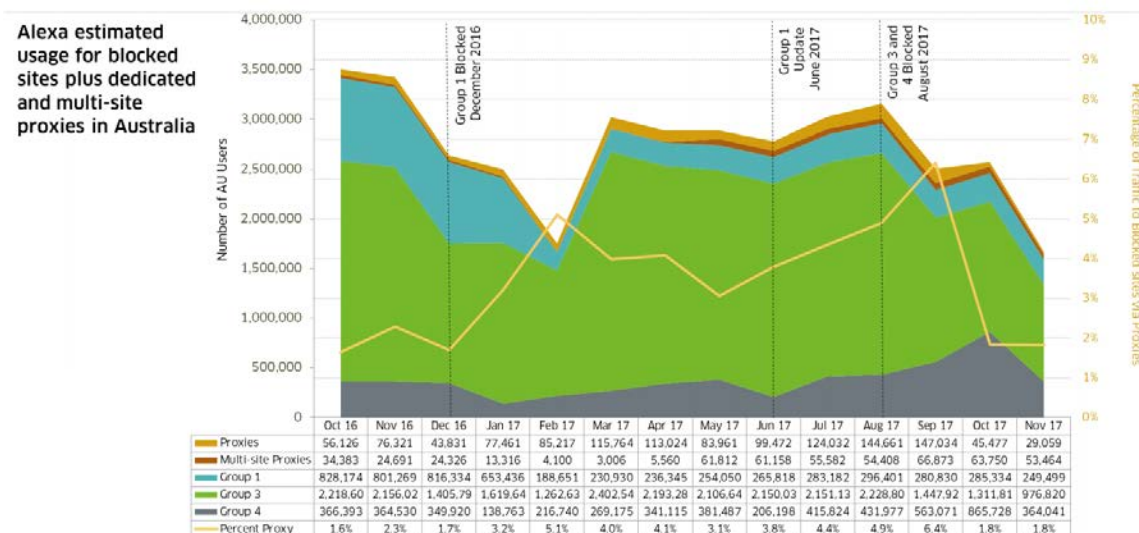
<sup>46</sup> Incopro, "Site Blocking Efficacy: Australia" (February 2018).

- there was a 53.4% reduction in use of the 347 blocked sites; and
- the use of the top 50 infringing sites dropped by 35.1%.

The study also found that site-blocking orders had an immediate effect. Within a month of the first site-blocking orders being implemented, which targeted five pirate websites, there was a significant fall in Australians who viewed the targeted sites as shown in the study's graphic below:



While proxies can circumvent the initial site block, dynamic orders soon close the loop and contain the illegally activity. The Australian experience showed that after three site-blocking orders, usage of blocked pirate sites, proxies and multi-site proxies decreased by 52.3% over the course of a single-year as shown below in the study's graphic:<sup>47</sup>



Blocking access to pirate sites is important to reduce piracy and to educate people and drive responsible content consumption. A further Australian study found that when confronted by a blocked site:

- 57% of respondents said they would give up looking for pirated content; and

<sup>47</sup> Incopro, "Site Blocking Efficacy: Australia" (February 2018).

- 34% of respondents said they would seek an alternative legal platform for the content.

This benefit of site blocking in re-educating the public cannot be understated. Unfortunately, due to the lack of any meaningful measures to address online piracy, over the last two decades people have grown up with the sense that online piracy is somehow morally acceptable and that they are entitled to pirate content unless the content is made available cheaply or on their terms.<sup>48</sup> Site blocking, when part of a package of other measures, can reshape the public's understanding of copyright and piracy.

We believe the New Zealand High Court currently has jurisdiction to grant site-blocking orders under:

- s 92B of the Copyright Act; and
- its inherent jurisdiction to grant relief to protect property rights and economic interests following the UK Supreme Court's approach in *Cartier International*.<sup>49</sup>

In saying that, we acknowledge that comparable jurisdictions like the UK, Australia and Singapore have provisions in their copyright acts that are more prescriptive than s 92B of the New Zealand legislation.<sup>50</sup>

We are also aware that online platforms may say they would prefer to see clearer legislative jurisdiction for site-blocking than that in s 92B. To that end, we strongly encourage immediate amendment of the Copyright Act to capture the UK and Australia position. We suggest a new provision which could read something like this:

**Injunctions against ISP providing access to online locations**

- (1) On the application by the copyright owner or exclusive licensee, the High Court can grant an injunction requiring an ISP to take reasonable steps to disable access to online locations if the Court is satisfied that:
  - (a) the ISP provides access to the online location;
  - (b) the online location infringes, or facilitates the infringement of, a copyright work; and
  - (c) the primary purpose of the online location is to infringe, or facilitate the infringement of, copyright (whether or not in New Zealand);
- (2) Without limiting subs (1), the Court may require the ISP to take reasonable steps to block domains, URLs and IP addresses, which are specified in the injunction or are notified to the ISP after the injunction is made, that provide access to the online location.
- (3) The application under subs (1) is made by way of originating application.
- (4) The parties to an action under subs (1) are:
  - (a) the owner or exclusive licensee of the copyright; and
  - (b) the ISP; and

<sup>48</sup> The Navigators "Digital Piracy in New Zealand – Summary of Research Report" (11 September 2018), attached in Attachment A.

<sup>49</sup> *Cartier International AG v British Telecommunications Plc and another* [2018] UKSC 28; [2018] 1 WLR 3259.

<sup>50</sup> Copyright, Designs and Patents Act 1988 (UK), s 97A; Copyright Act 1968 (Cth), s 115A; Copyright Act (Sing), s 193DA

- (c) the operator of the online location, but only if that person applies to be joined as a party to the proceeding.
- (5) In deciding whether to grant the injunction, the Court may take the following matters into account:
- (a) whether the operator of the online location demonstrates a disregard for copyright generally;
- (b) whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright; and
- (c) whether disabling access to the online location is a proportionate response in the circumstances.
- (6) The Court may rescind or vary an injunction granted under this section.

### 87. Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?

Who pays the ISPs' costs will significantly determine whether site-blocking orders are used – and thus whether they are effective measures against online infringement.

If rights holders have to pay significant costs not only in seeking the site-blocking orders, but also in having respondent ISPs implement the orders, site-blocking will become an uneconomic solution resorted to only in the rarest of circumstances. Research shows that for site-blocking orders to be effective in reducing piracy and promoting the use of legitimate sites, site-blocking orders have to target multiple sites rather than a single site.<sup>51</sup>

The consistent international approach is that ISPs meet the costs of the site-blocking system, apart from, in some cases, the small administration costs of inputting and updating the block. For example:

- In the United Kingdom, the courts have consistently required the ISPs to bear the costs of acquiring and upgrading any hardware or software required to block the pirate sites as well as the costs of managing the blocking system including network and systems management.<sup>52</sup> The only difference in judicial opinion being over who should bear the administrative costs of processing the orders and configuring the ISPs' blocking systems, updating the block over the lifetime of the orders, and the costs and liabilities if the blocking malfunctions. The Courts have held that: for action brought under the UK's legislation, ISPs should bear those costs;<sup>53</sup> while under site blocking applications made under the common law to protect trade marks the rights holders should pay these costs provided they are reasonable and are not "such as to impair the [rights holder]'s practical ability to enforce their [rights]".<sup>54</sup>

<sup>51</sup> B Danaher, M Smith and R Telang "The Effect of Piracy Website Blocking on Consumer Behaviour" (2015, Carnegie Mellon University)

<https://www.researchgate.net/publication/314471814> The Effect of Piracy Website Blocking on Consumer Behavior.

<sup>52</sup> *Cartier International AG v British Telecommunications Plc* [2018] UKSC 28, [2018] 1 WLR 3259 at [5]; *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2011] EWHC 2714, [2012] 1 All ER 869 at [32].

<sup>53</sup> *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2011] EWHC 2714, [2012] 1 All ER 869 at [32].

<sup>54</sup> *Cartier International AG v British Telecommunications Plc* [2018] UKSC 28, [2018] 1 WLR 3259 at [36].

- In Australia, the courts have settled on rights holders paying the ISPs' compliance costs of either AU\$50 per domain to be blocked or AU\$1,500 for all domains. At the same time, Australian ISPs must bear all the other costs for implementing the orders because those are the "costs of carrying on business" and are costs that ISPs would at some stage have had to incur.<sup>55</sup> Australian ISPs report that they are content with the situation and that the system is working well.<sup>56</sup>

Sky sees no reason to adopt a different path in New Zealand.

### ***Legislating the costs position***

The above said, we think it best to settle the costs question through legislation. That approach maximises certainty and efficiency for all involved.

To that end, Sky suggests:

- the site-blocking regime in the Copyright Act include a provision that fixes a reasonable cost payable to ISPs for implementing each site-blocking order they receive, noting the position reached in the Australian context.<sup>57</sup>
- ISPs should otherwise be able to claim costs for filing a notice of appearance and appearing at a hearing to be heard on ancillary matters about the scope of the orders under Schedule 3 of High Court Rules 2016.

### **88. Are there any problems with the types of criminal offences or size of the penalties under the Copyright Act? What changes (if any) should be considered?**

In response to question 20, we explain that certain provisions in the Act should be updated so that they apply to both "objects" and digital formats. This includes the criminal provisions. If expanded to encompass digital formats, we believe that the types of criminal offences and the size of the penalties for criminally infringing copyright are satisfactory.

Criminal liability for copyright infringement is reserved for intentional copyright infringement done for commercial benefit, or at least not for a private purpose.<sup>58</sup> Given that copyright is personal property, just having criminal liability for copyright infringement pursued for profit sets a high bar. Similar criminal offending relating to private property, like dishonestly dealing with another's property,<sup>59</sup> does not depend on why the offending occurred, just that it did.<sup>60</sup>

With such a high bar for criminal liability, there is no need to try to make the bar any higher. And there is no basis for trying to abolish the offences given that the TRIPS Agreement requires signatories, like New Zealand, to have such an offence on the books.<sup>61</sup>

While the penalties for criminal copyright infringement are low compared to our international counterparts like the UK or Canada,<sup>62</sup> Sky sees no present need to increase them. But given how low penalties are, there is no basis at all for reducing them further.

<sup>55</sup> *Roadshow Films Pty Ltd v Telstra Corp Ltd* [2016] FCA 1503 at [144]–[149].

<sup>56</sup> <https://www.communications.gov.au/have-your-say/review-copyright-online-infringement-amendment>.

<sup>57</sup> *Roadshow Films Pty Ltd v Telstra Corp Ltd* [2016] FCA 1503 at [149].

<sup>58</sup> Copyright Act 1994, s 131.

<sup>59</sup> *Wang v Police* HC Auckland CRI-2004-404-476, 23 March 2005 at [39].

<sup>60</sup> Crimes Act 1961, s 219.

<sup>61</sup> TRIPS Agreement, article 61.

<sup>62</sup> Copyright, Designs and Patents Act 1988 (UK), s 107; Copyright Act 1985 (RSC), s 42.



## **OTHER ISSUES: COPYRIGHT AND THE WAI 262 INQUIRY**

### **Other comments**

We note that taonga works and taonga-derived works sometimes form a part of what Sky covers as part of another event (eg sports) and as a result these works are included in other copyright works (films) that get protection under the Copyright Act.

The most obvious example is where the All Blacks have performed pre-match haka, *Kapa o Pango* or *Ka Mate*, and Sky has filmed and broadcast the much-loved performance to New Zealand as part its coverage of the match. Sky receives copyright protection for the broadcast as a "communication work", but this does not affect the underlying ownership of the haka. We take immense pride in being able to help bring moments like these to the people of New Zealand.

We are open to MBIE's proposed approach to exploring the Waitangi Tribunal's recommendations for a new legal regime for taonga works and mātauranga Māori, and will be interested to see what emerges at the options stage of the Copyright Act review.

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Digital Piracy in New Zealand  
Summary of research report  
11 September 2018

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# Project background

**Purpose:** To better understand the problem of digital piracy to enable the development of an effective strategy to combat it.

**Research objectives:** To provide updated local data and understand:

- ✦ Who is pirating?
- ✦ What is being pirated?
- ✦ How is it happening?
- ✦ Why is it happening?
- ✦ How do pirates and non-pirates view the behaviour and attempts to mitigate it?

**Research approach:** Online survey of 1,009 New Zealand adults over the age of 18 years.

- ✦ Sourced from the Research Now public research panel.
- ✦ Conducted between 17th to 20th May 2018.
- ✦ Data was weighted to make it representative of the New Zealand general public by age, gender and region.
- ✦ Sample provides a margin of error of +/- 3% at the 95% confidence interval. This means that 95% of the time, our sample measure will be within 3% of the actual measure that would occur if we asked the question of the entire population.
- ✦ A balanced 6-point scale was used to measure attitudes. To make it easier to analyse differences and identify the relative importance of issues and attitudes, the data has been presented to reflect top 2 box scores (i.e. the total score for those who “agree” or “strongly agree”). To show overall sentiment we have also provided a net positive score (that is, a top 3 box score which is total score for those who “somewhat agree”, “agree” and “strongly agree”).

# Research summary: Who, how and why?

## Who are the pirates?

- **One in ten** New Zealanders say they “normally” stream content from pirate websites.
- **Three in ten** New Zealanders pirate at least twice per year (i.e. either weekly, 1-2 times a month, every 2-3 months or every 6 months).
- (For the purposes of defining an active pirate, we have excluded viewing content on YouTube or Facebook that a person thought may have been pirated.)

## How are they pirating? Core pirating behaviours include:

- **Stream or download movies or TV shows** (21-25% of adults have done this “ever” and 14-18% do so at least every 6 months).
- **Streaming of live sports events** (11% of adults have done this ever and 8% do so at least every 6 months).
- **Using VPNs to avoid paying in NZ** (10% of adults have done this ever and 7% do so at least every 6 months).
- **Using Kodi boxes** or similar devices/software (5% of adults have done this ever and 3% do so at least every 6 months).

## Why are people pirating?

- Because they **don’t want to pay** or they find it **more convenient** than subscribing to a service. Or that content is **not available** or is **delayed** in New Zealand.
- Non-pirates believe others do it to **avoid paying for content** or because of a **disregard for the law** (they are less likely to believe it’s due to content not being available or being delayed).

# Research summary: Is pirating bad and should it be regulated?

## Pirating impacts:

- ✦ Most pirates acknowledge that piracy can cause damage and losses, though they acknowledge it to a lesser extent than non-pirates.
- ✦ However, even non-pirates are not strongly aware of the impacts of piracy (especially the impact on sports).

## Perceptions of acceptability, ease and risk:

- ✦ Non-pirates believe:
  - ✦ piracy is theft (58% agree or strongly agree; 82% overall agreement).
  - ✦ piracy is a serious and growing problem and more should be done to stop it (33-36% agree or strongly agree; 60-64% overall agreement).
- ✦ Pirates:
  - ✦ also tend to believe piracy is theft (but to a much lesser extent than pirates).
  - ✦ are more likely to believe they will not get caught.
  - ✦ believe it is easy to pirate.
  - ✦ know lots of people who also pirate (unlike non-pirates).

## Pirating regulation:

- ✦ Weak support for personal prosecution of individual pirates. Stronger support for blocking access to pirate websites at ISP level via court orders.
- ✦ Non-pirates are supportive of blocking websites.

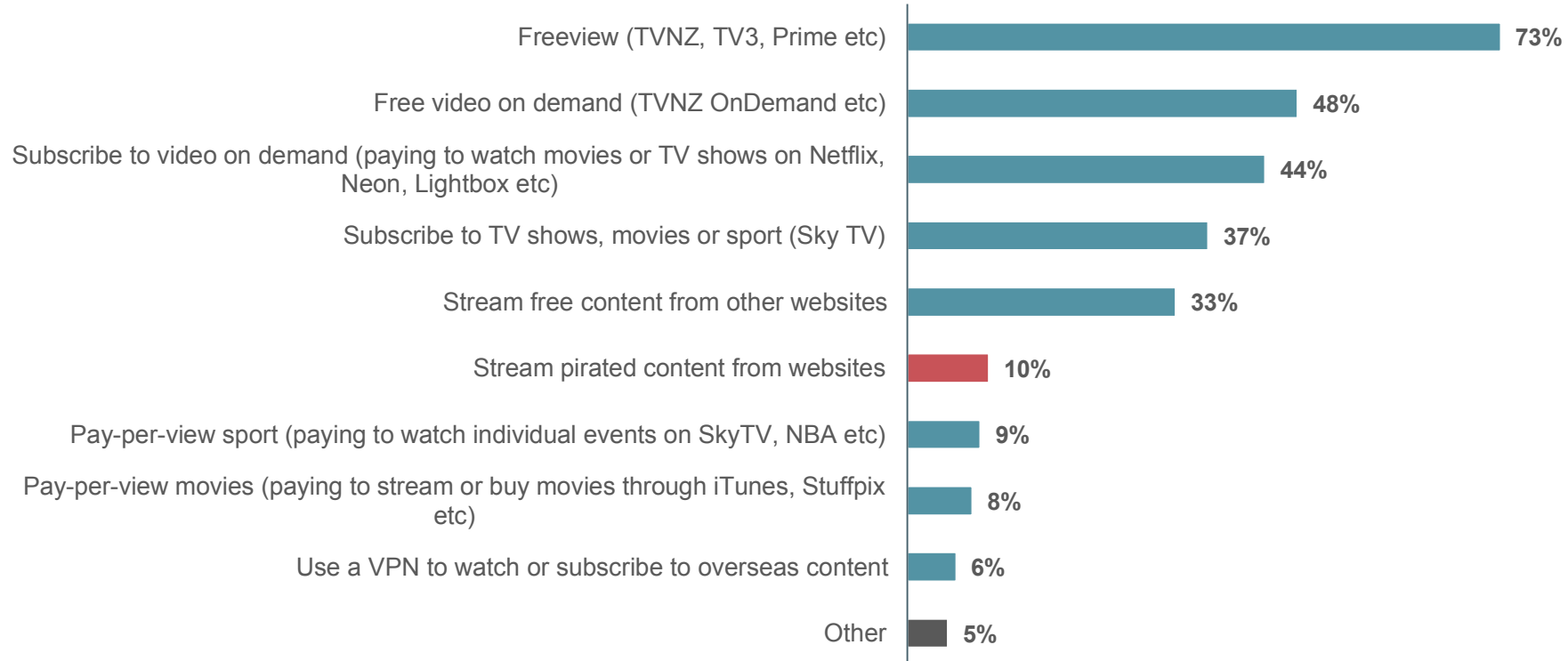


## SUMMARY OF FINDINGS

# One in 10 New Zealand adults say they “normally” stream pirated content from websites.

Q1. Please select all the ways you would normally watch movies, TV shows or sporting events:

## Normally watch:

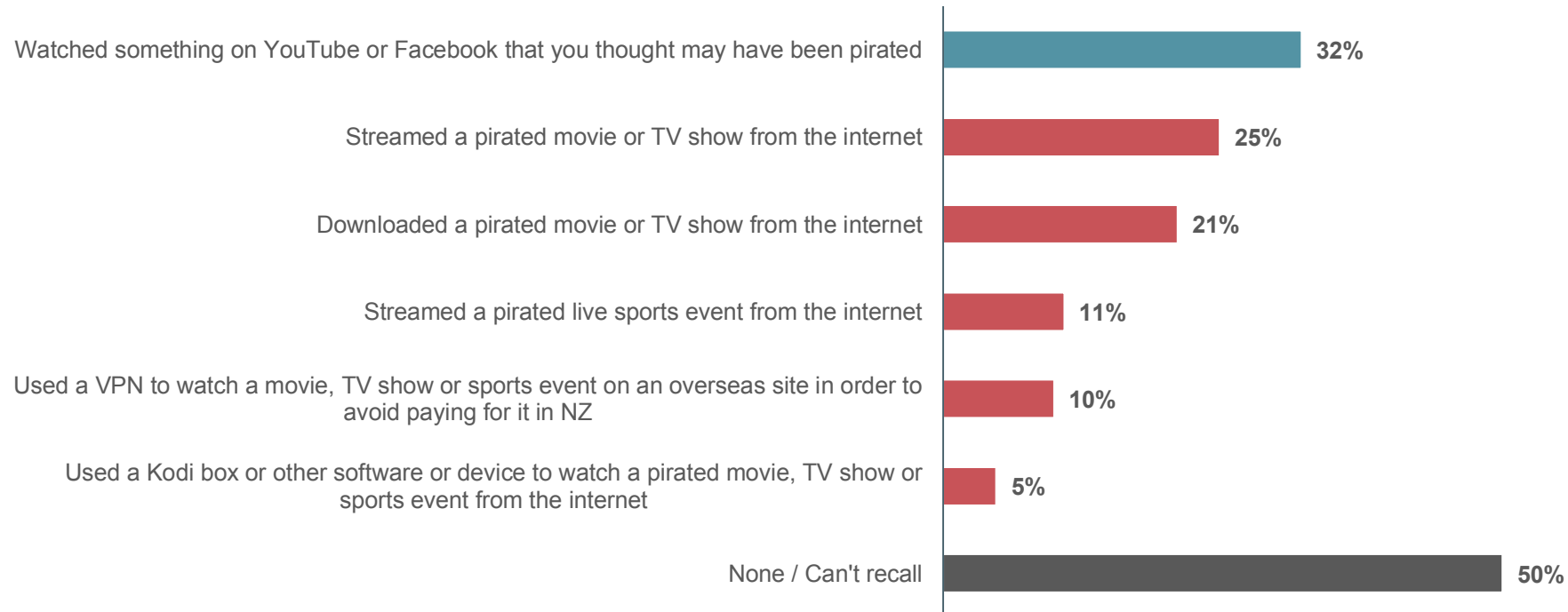


Base: n=1,009

# When presented with a list of piracy methods, 50% of New Zealanders say they have viewed pirated content at some time in the past.

Q2. We are interested to know if you have ever watched something over the internet for free that you would otherwise have needed to pay for (i.e. a pirated movie or TV show or sporting event) or watched something from an overseas provider rather than buying it from a New Zealand one. Which of the following have you ever done?

## Piracy behaviours “ever done”:



Base: n=1,009

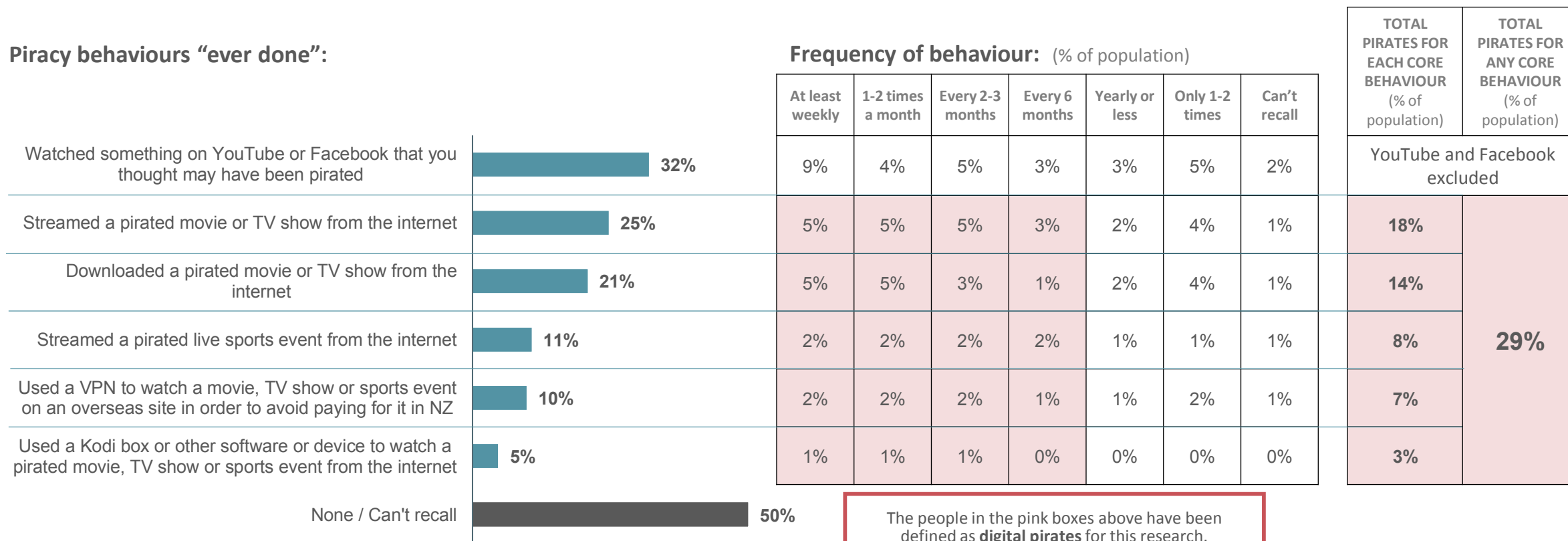
Over half of all New Zealand adults have undertaken at least one of the listed piracy behaviours in the past. Streaming pirated movies or TV shows from the internet is the most common activity.



# 29% of New Zealand adults undertake regular digital piracy (at least 6-monthly).

Q2. We are interested to know if you have ever watched something over the internet for free that you would otherwise have needed to pay for (i.e. a pirated movie or TV show or sporting event) or watched something from an overseas provider rather than buying it from a New Zealand one. Which of the following have you ever done? Q3. How often would you typically do each of these...?

## Piracy behaviours “ever done”:



Base: n=1,009

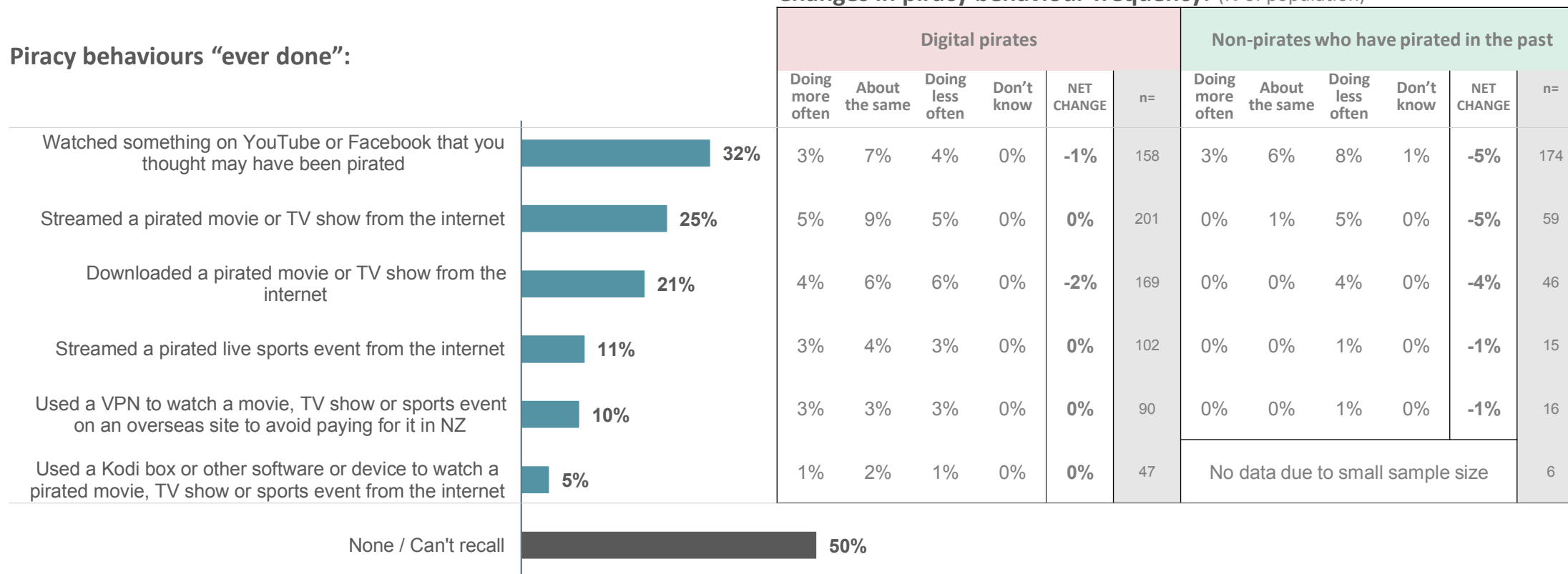
Looking at the frequency of each type of piracy behaviour, 18% of New Zealanders stream a pirated movie or TV show from the internet at least every 6 months (with 5% doing so at least weekly, 5% doing so 1-2 times a month, 5% every 2-3 months and 3% every 6 months). Looking at the proportion of the population who've undertaken any of the core pirating behaviours (excluding via YouTube or Facebook) at least every 6 months, we would class 29% as pirates.

# Compared to one year ago, New Zealanders' pirating appears to be only slightly declining. Some are doing it more often but slightly more people are doing it less often.

Q4. And overall are you doing this more or less often than you were a year ago?

Changes in piracy behaviour frequency: (% of population)

## Piracy behaviours "ever done":

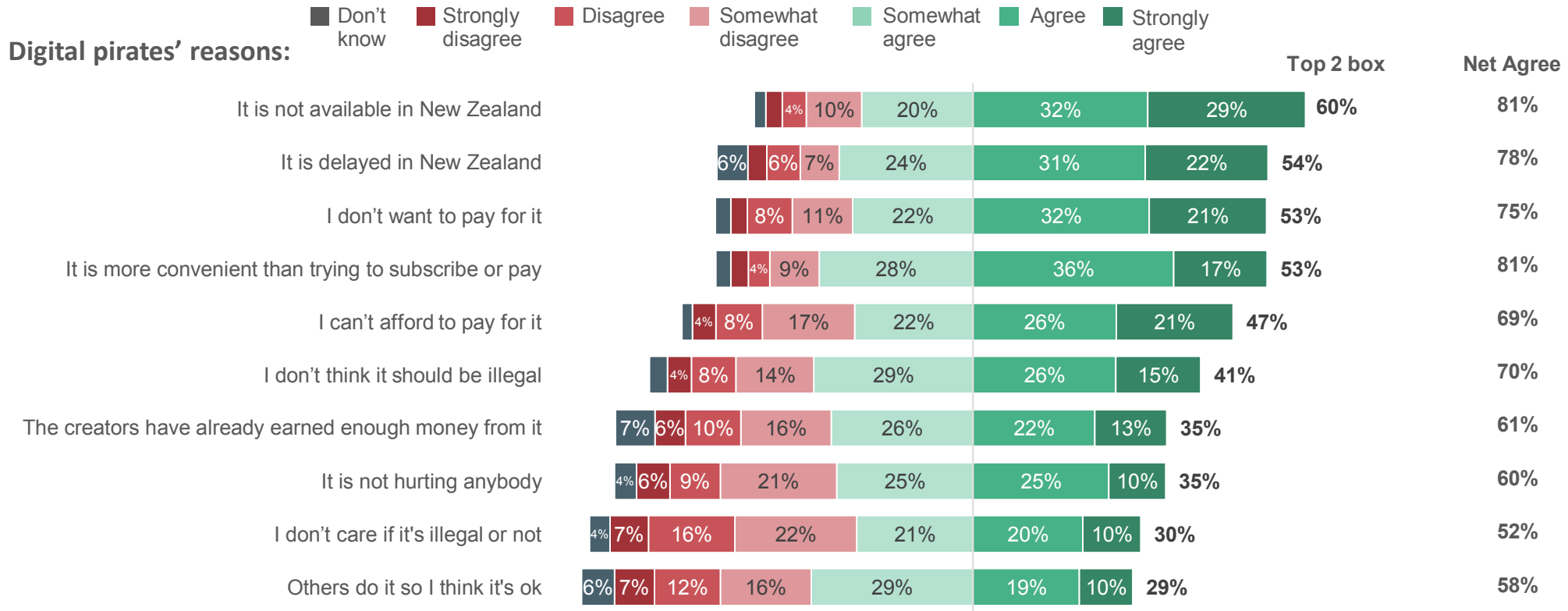


Base: n=1,009

Looking at the net change in the different digital pirating behaviours, digital pirates are pirating the same amount or less often, and non-pirates (but who have undertaken some type of pirating in the past) are pirating less often. This suggests that on balance, pirating behaviour is slightly declining, mainly due to a decrease in downloading.

# Pirates say they are motivated by content access/delays, cost and convenience.

Q5a. Which of the following are reasons why you watch pirated content (movies, TV shows or sport)? I watch pirated content because...

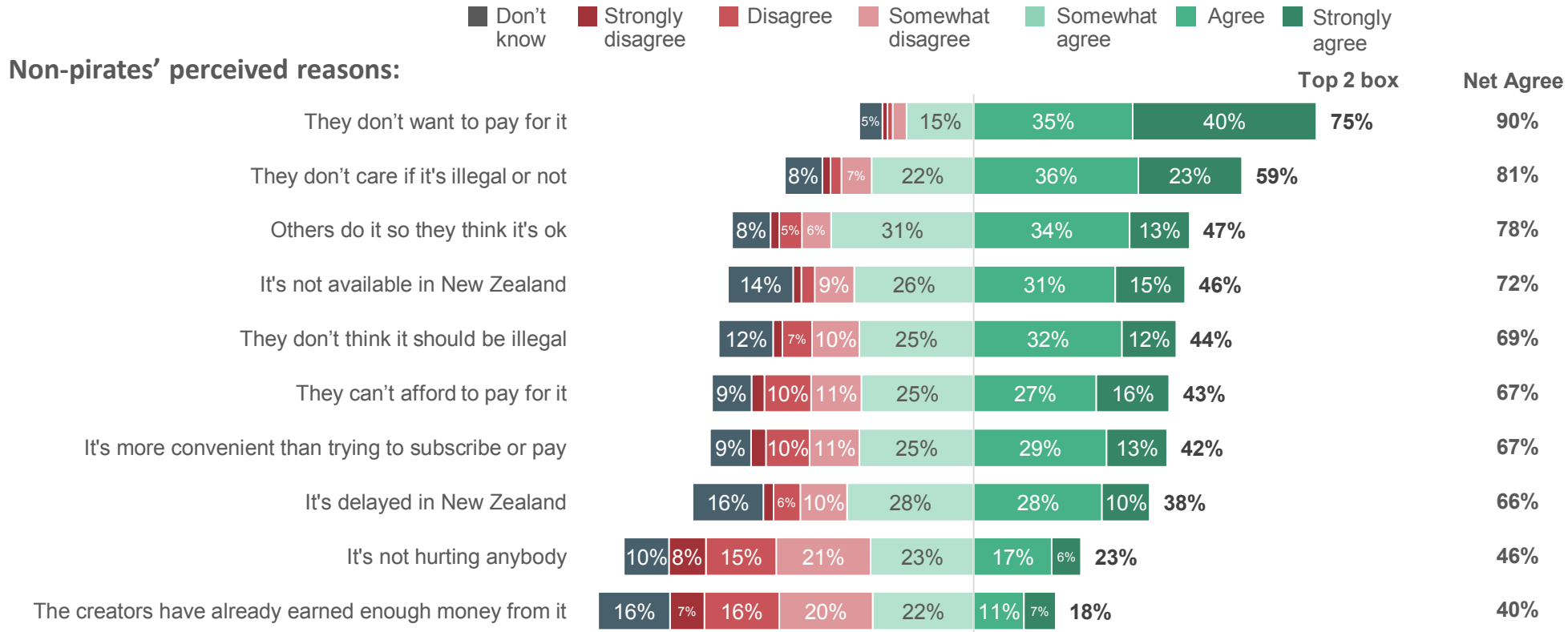


Base: Digital pirates n=302

Digital pirates (those who undertake a digital pirating behaviour at least every 6 months, excluding via Facebook and YouTube) state that their key reasons for doing so are because the content is not available in New Zealand, the content is delayed in arriving to New Zealand, they don't want to pay for the content or they find it more convenient to watch pirated content than to subscribe and pay for legal content.

# Non-pirates believe others pirate to avoid paying and due to their disregard for the law.

Q5b. Which of the following do you think are reasons why other people might watch pirated content? People watch pirated content because...



Base: Non-pirates (never pirated) n=485

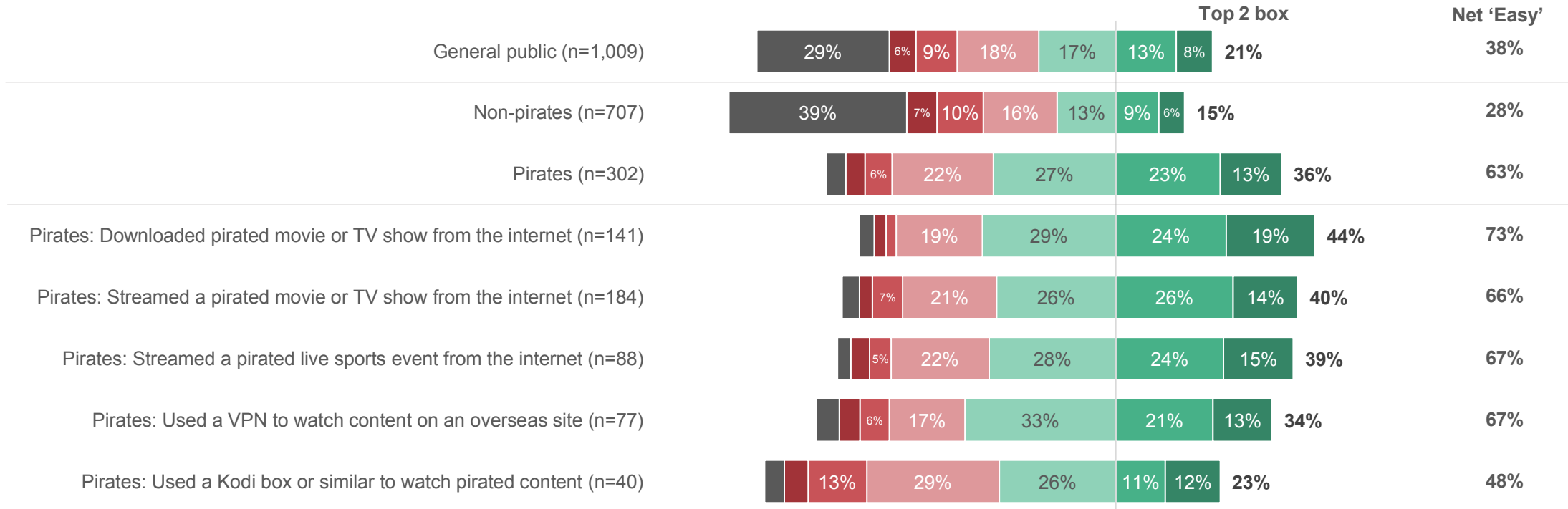
Non-pirates believe that piracy is motivated by people not wanting to pay. They are less likely to accept the other factors pirates say they're motivated by, i.e. content being unavailable in New Zealand, content being delayed in New Zealand and pirating being more convenient than trying to subscribe or pay for content.

# Most people (even pirates) do not find it easy or very easy to identify pirated content.

Q6a. How easy or difficult is it to know if you are watching pirated content (movies, TV shows, sport)?

## Recognition of pirated content (by population groups):

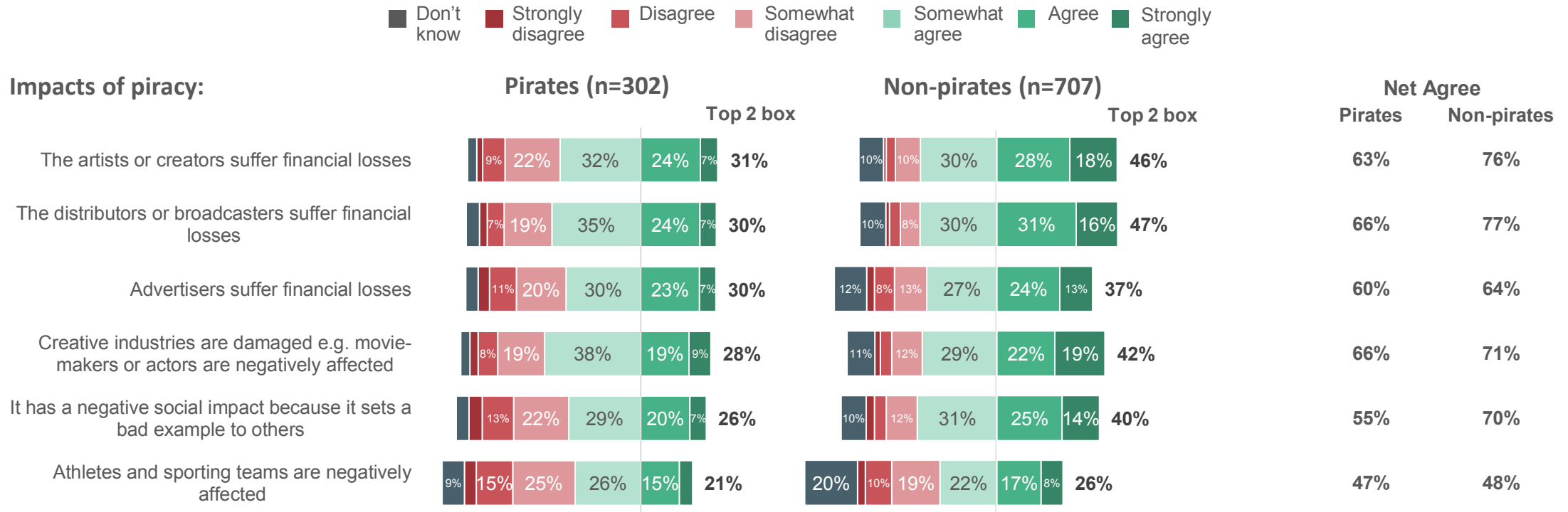
Don't know
  Very difficult to tell
  Difficult
  Somewhat difficult
  Somewhat easy
  Easy
  Very easy to tell



Only two-fifths of the general public find it easy or very easy to know when they are watching pirated content. Pirates are more confident about knowing than non-pirates, but even then, only approximately one-third of pirates feel it's easy or very easy. Pirates who download pirated movies or TV shows from the internet are more confident about identifying pirated content than those who use a Kodi box or similar software/device.

# Non-pirates are more likely to agree there are negative impacts of digital piracy, particularly that distributors, broadcasters, artists and creators suffer financial losses.

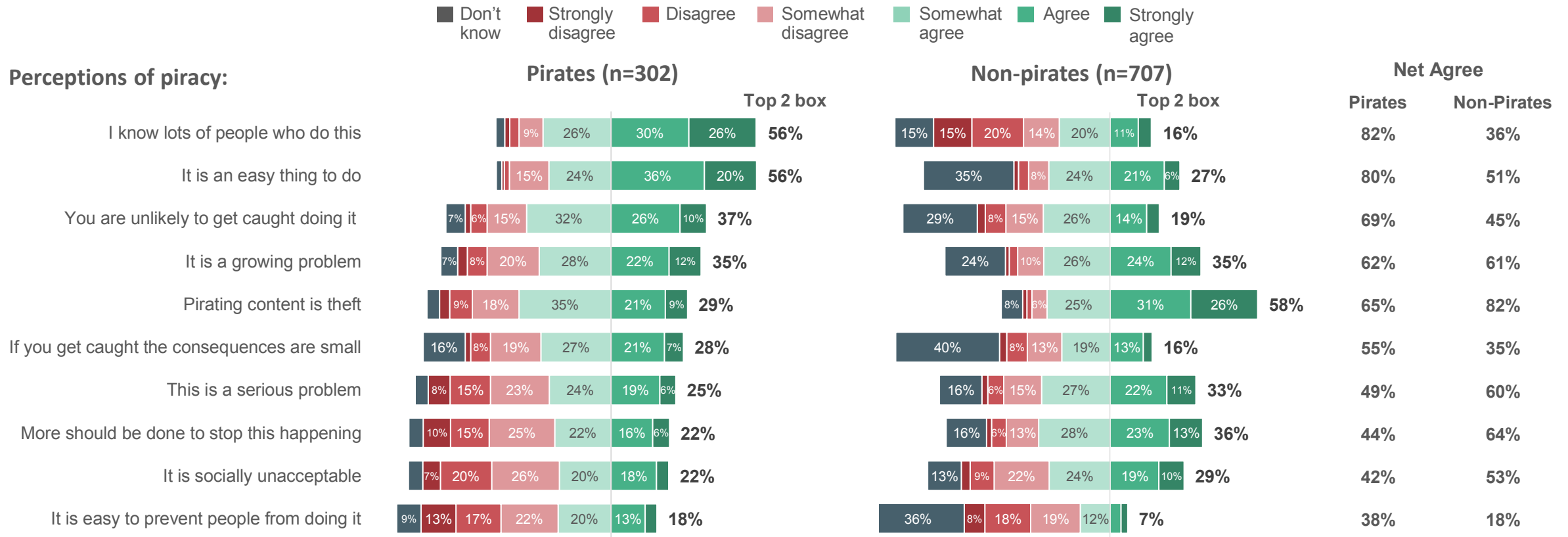
Q7. When people do watch pirated movies, TV shows or sporting events, to what extent do you agree or disagree that the following happens...



Approximately one-third of pirates and almost half of non-pirates agree or strongly agree that distributors, broadcasters, artists or creators suffer financial losses when people watch pirated content. The remaining pirates and non-pirates either weakly agree (i.e. somewhat agree), disagree or don't know. Compared to non-pirates, pirates are more likely to disagree with the suggested impacts of digital piracy. Two-fifths of non-pirates don't know if athletes and sporting teams are negatively affected by digital piracy.

# Most pirates know others who watch pirated content and feel it's an easy thing to do. By contrast, most non-pirates don't know many people who pirate, and see it as theft.

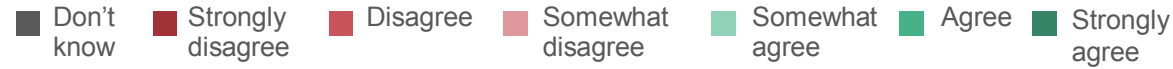
Q8. Again thinking about people watching pirated movies, TV shows or sporting events, to what extent do you agree or disagree with the following statements...



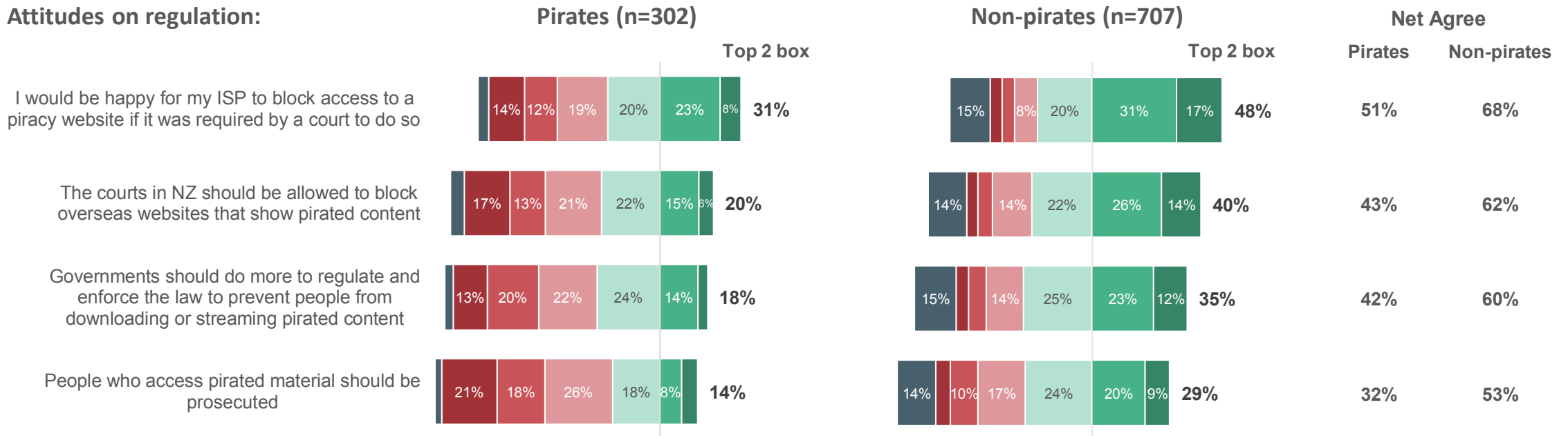
Pirates tend to 'justify their actions' by claiming that: other people they know do it, it solves an access and timing problem, and it is easy for them (and convenient). The majority of the non-pirating public see it as theft and as a growing and serious problem that is also unlikely to affect people they know (they don't know many pirates).

# Pirates would rather their ISP blocked access to piracy websites than they be personally prosecuted.

Q9. To what extent do you agree or disagree with the following statements...



## Attitudes on regulation:



The majority of non-pirates agree that they would be happy for their ISP to block access to a piracy website if it was required by the court to do this (68%). Even people who pirate agree (to some extent) on this course of action (51% net agreement). There is much stronger support for blocking pirate websites than individual pirates being personally prosecuted.



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Contact:

Matt Benson - Director

027 290 5010

*[matt.benson@thenavigators.co.nz](mailto:matt.benson@thenavigators.co.nz)*

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