



Draft New Zealand Government Open Access and Licensing framework (NZGOAL)

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Introduction

Purpose

- 1 The State Services Commission recognises that State Services¹ agencies' licensing of public sector copyright works for re-use on liberal terms and otherwise enabling greater access to their information and data may:
 - (a) bring about creative, social and economic benefits for the people of New Zealand; and
 - (b) foster greater transparency of government agencies' performance.
- 2 It agrees with the following statement made by the Council for the Humanities Te Whaingā Aronui when responding to a Discussion Paper released to departments and others earlier this year for feedback.

“Now more than ever is there a very present need to bring information the Government holds on behalf of its people into the public domain so that it may be used in ways that stimulate innovation, generate cultural creativity, social interaction and dialogue, while also kick starting economic growth.”
- 3 With a view to enabling the realisation of such benefits and fostering such transparency, the State Services Commission (**SSC**), in collaboration with the Information and Communications Technologies Group of the Department of Internal Affairs (**DIA**), has prepared this draft New Zealand Government Open Access and Licensing framework (**NZGOAL**). In essence, NZGOAL:
 - (a) sets out a series of open access and open licensing principles, for non-copyright information and data and copyright works, respectively;
 - (b) advocates the use of:
 - (i) clear “no known rights” statements for non-copyright information and data released for re-use; and
 - (ii) Creative Commons licences for those State Services agencies' copyright works which are appropriate for release and re-use; and
 - (c) sets out a review and release process to help guide agencies through the review of material they consider ought to be released for re-use and the manner of its release.
- 4 NZGOAL is being released as a draft because it is recognised that it:
 - (a) needs to be road-tested; and
 - (b) is likely to be improved through further feedback from agencies and members of the public.
- 5 We want to listen to what users of government information, data and copyright works have to say about the draft. Have we pitched it right? Are we meeting the needs and interests of those who wish to re-use government information and data? Is anything unclear? In what additional ways may we be able to help?

¹ For a definition of the State Services, see the SSC website at <http://www.ssc.govt.nz/glossary/#S>.

Scope

- 6 NZGOAL applies to State Services agencies. It covers both:
- (a) non-copyright information and data; and
 - (b) copyright works,
- that are held by such agencies, appropriate for release to the public or sections of the public and which those agencies are entitled to:
- (c) in the case of non-copyright information and data, release for re-use; or
 - (d) in the case of copyright works, license (or sub-license) for re-use.
- 7 NZGOAL does not limit or otherwise affect the obligations of any agency or the rights of any person under the Official Information Act 1982, the Public Records Act 2005, the Privacy Act 1993 or any other legislation. NZGOAL does not apply to personal information.
- 8 While NZGOAL does apply to datasets, it does not apply to software which, for example, an agency owns and may wish to release on open source terms. In such circumstances open source software licences are more appropriate than the NZGOAL licences.

Status

- 9 NZGOAL is recommendatory in nature. State Services agencies are strongly encouraged but not obliged to comply with it.
- 10 It is hoped that agencies will:
- (a) embrace NZGOAL;
 - (b) open up access to more of their non-copyright information and data that may be of interest to the public; and
 - (c) license more of their copyright works on liberal terms,
- bearing in mind the potential benefits of doing so for both the public and agencies alike.
- 11 Just as a cultural shift within agencies was required to give effect to SSC's Guidelines on the Treatment of Intellectual Property Rights in ICT Contracts,² so too is a cultural shift required within agencies to give effect to the letter and spirit of NZGOAL.

Audiences

- 12 NZGOAL has been prepared with a view to recognising and, where possible, meeting the needs and interests of:
- (a) the public of New Zealand;
 - (b) specific groups of society, including:
 - (i) Māori and other indigenous groups; and
 - (ii) developers in the online space; and
 - (c) State Services agencies.

² <http://www.e.govt.nz/policy/ipr/>

Additional guidance notes

- 13 It is anticipated that additional guidance notes will be released over time which:
 - (a) explore, in greater detail, some of the issues addressed or raised in this NZGOAL; and
 - (b) address operational or technical issues which arise in practice, whether on the part of State Services agencies that are implementing NZGOAL or members of the public who are re-using information, data and copyright works released in accordance with NZGOAL.
- 14 Agencies and members of the public may recommend appropriate subjects for such guidance notes by emailing nzgoal@ssc.govt.nz. Please note, however, that neither SSC nor DIA will be providing legal advice to members of the public in response to such recommendations.

Background

15 This background section summarises:

- (a) the context in which NZGOAL has been prepared;
- (b) the drivers behind NZGOAL; and
- (c) the departmental consultation process that concluded earlier this year.

Context

16 NZGOAL has been prepared within a three-fold context:

- (a) the policy context of both the Policy Framework for Government-Held Information (1997)³ and the New Zealand Government Web Standards;⁴
- (b) the legal context of copyright (Crown copyright and otherwise) in qualifying public sector works; and
- (c) the factual context of existing licensing practices across the State Services.

Policy context

17 As regards the policy context, both the Policy Framework for Government-Held Information and the Web Standards have something to say about access to and use of public sector copyright material, but they are generic and have their limits.

Legal context

18 As regards the legal context:

- (a) copyright is a property right that exists in certain original works, regulated by the Copyright Act 1994;
- (b) the categories of qualifying original works are literary works (which can include datasets and databases), dramatic works, musical works, artistic works, sound recordings, films, communication works and typographical arrangements of published editions;
- (c) generally speaking, copyright does not protect mere facts or information;
- (d) Crown copyright is a species of copyright as set out in section 26 of the Copyright Act;
- (e) “Crown” for Copyright Act purposes means Her Majesty the Queen in right of New Zealand and includes a Minister of the Crown, a government department, and an Office of Parliament; it does not include Crown entities or State owned enterprises; their qualifying original works are subject to what one might call regular copyright, not Crown copyright;
- (f) while copyright (Crown or regular) exists in most public sector original works, the Act provides that no copyright exists in certain governmental and Parliamentary materials, such as legislation, court judgments and Parliamentary debates;
- (g) it is important to distinguish between copyright in original works and licensing of works in which copyright exists; and

³ <http://www.e.govt.nz/policy/information-data/framework.html>

⁴ <http://www.webstandards.govt.nz/>

- (h) unless entitled to do so by a copyright licence or statutory provision, a person infringes copyright in a work when he or she does any of a number of “restricted acts”, the most common of which is copying the work or a substantial part of it.
- 19 It is important to emphasise at the outset that not all government held or created information and data qualifies for copyright protection. Only original works falling within the categories mentioned above and whose duration of copyright protection has not expired do. Neither agencies nor the public should assume that all the information and data held by State Services agencies is protected by copyright. That is not to say that all non-copyright material needs to be placed in the public domain, but it is to say that care needs to be taken when talking about an agency’s “copyright material”.
- 20 Both anecdotal evidence and feedback from departments suggests there is a need for greater understanding of copyright and licensing issues on the part of both agencies and members of the public who wish to re-use public sector information, data and copyright works. Some of the more fundamental features of New Zealand copyright law are set out in Appendix 2 of this draft NZGOAL.
- 21 Other relevant legal context includes the Official Information Act 1982, the Public Records Act 2005 and the Privacy Act 1993. These Acts are of general application to State Services agencies. A legal review has revealed no inconsistency between the use of Creative Commons licences and this legislation. Two points are worth noting:
- (a) Copyright works released to a person following a request under the Official Information Act do not lose their copyright protection by virtue of being so released nor does the fact of release entitle the recipient to use the works in a way which would infringe copyright. The recipient needs a licence to re-use the works in any way which would infringe copyright in the works. NZGOAL provides a framework within which licences can, at an agency’s discretion, be granted, either proactively or upon request. Indeed, to some extent NZGOAL can be seen as a logical extension of the principle of availability in section 5 of that Act.
 - (b) The second point, and one to be emphasised, is that NZGOAL does not extend to personal information. It is for this reason that no issues arise under the Privacy Act.

Factual context

- 22 As regards the factual context, there are at least three broad categories of licensing currently in place across government, from one-off bespoke licence agreements to open-ended and often loosely-worded arrangements, with each category being likely to house multiple variants.

Drivers

- 23 There are at least six drivers behind NZGOAL, some flowing from the policy and factual context, others not.⁵ Those drivers are:
- (a) current confusion, uncertainty and criticism on the part of members of the public around Crown copyright and licensing, including difficulties being experienced through the various and inconsistent licensing practices across the State Services;

⁵ The six drivers were addressed in detail in SSC’s Discussion Paper provided to departments and others on 25 March 2009 entitled “Suggested All-of-government Approach to Licensing of Public Sector Copyright Works: Discussion Paper for Public Service and Non-Public Service Departments”, available online at <http://e.govt.nz/policy/information-data/nzgoalframework.html>.

- (b) recognition that, although the Policy Framework for Government-Held Information and the Web Standards set admirable principles and expectations regarding access to public sector information and data and licensing of public sector copyright works, they are no longer adequate to deal with the tapestry of copyright and licensing issues that arise in the digital age;⁶
- (c) increasing interest on the part of certain New Zealand government agencies in the potential use of Creative Commons licences;
- (d) notable public sector information, data and copyright work initiatives across the State Services (including early adopters of Creative Commons licences)⁷ as well as, more recently, tangible and collaborative efforts on the part of the private sector to assist government in opening up certain categories of its datasets;⁸
- (e) international developments regarding the use and valuable exploitation of public sector information, data and copyright works, including automated re-use, a review of which reveals that:
 - (i) there is considerable activity at supra-national, national and state levels on issues of public sector information and data re-use;
 - (ii) heightened activity in recent times appears to be due, in part, to advances in technology and a growing body of economic research pointing to the potential advantages to be gained from open access to, and re-use of, public sector information and data; and
 - (iii) there is generally widespread support at these supra-national, national and state levels for increasing the release of public sector copyright material on liberal terms and in formats that permit and readily enable public use and re-use of that material; and
- (f) the current economic climate; to give just one example, Land Information New Zealand has commissioned a report which estimates “that by investing in making geospatial data more accessible and reducing access charges, the potential exists to boost the economy by an extra \$500 million a year”.⁹

Departmental consultation process

24 During 2008 and early 2009, SSC researched issues relating to the re-use of public sector information and conducted a review of the Creative Commons New Zealand law licences with a view to determining whether they would be appropriate for all-of-government adoption for licensing of public sector copyright works. With the transfer of Government Technology Services from SSC to DIA on 1 July 2009, that work is continuing in collaboration with DIA.

⁶ They are both expected to be updated to reflect the NZGOAL Policy Principles but neither of them can be expected to serve all the purposes of this NZGOAL.

⁷ One of the more recent examples is the Ministry for the Environment’s re-issue of the New Zealand Land Cover Database under a Creative Commons Attribution licence (<http://www.mfe.govt.nz/issues/land/land-cover-dbase/index.html>) and the leading work of Land Information New Zealand (see, e.g., <http://www.linz.govt.nz/about-linz/news-publications-and-consultations/news-and-notices/corporate/2009/0625-annual-gid-speech-summit/index.aspx>). For earlier examples, see the Discussion Paper that SSC released to departments on 25 March 2009, above n 5, paras 60-61.

⁸ The most visible of these private sector initiatives are Koordinates (<http://koordinates.com/>) and, more recently, the Open Data Catalogue, an open, independent catalogue of government and local body datasets (<http://open.org.nz/cat/>).

⁹ See “Speech by Colin MacDonald to 2nd Annual GIS Summit”, 25 June 2009, <http://www.linz.govt.nz/about-linz/news-publications-and-consultations/news-and-notices/corporate/2009/0625-annual-gid-speech-summit/index.aspx>.

- 25 On 25 March 2009, SSC provided 36 departments with a discussion paper entitled “Suggested All-of-government Approach to Licensing of Public Sector Copyright Works: Discussion Paper for Public Service and Non-Public Service Departments” (the “Discussion Paper”). The Discussion Paper was also provided to the Parliamentary Counsel Office, the Human Rights Commission, the Office of the Privacy Commissioner, the Council for the Humanities Te Whaingā Aronui and certain colleagues in Australia involved with Queensland’s Government Information Licensing Framework and Creative Commons Australia. The Discussion Paper proposed a potential all-of-government approach to opening up public sector copyright material for re-use.
- 26 SSC considered that its analysis of the six drivers referred to above suggested that there is solid collective reason for the Government to advocate all-of-government adoption of a suite of open content licences for public sector copyright material where it is appropriate for such material to be made available for re-use. It expressed the preliminary view that the suite of Creative Commons New Zealand law licences represents the most obvious candidate for potential governmental adoption, possibly in conjunction with one or more additional restrictive licences and/or indigenous licences to deal with situations for which the Creative Commons model is not appropriate.
- 27 The Discussion Paper also advocated the development and release of guidance material to assist:
- (a) the public in understanding key legal issues; and
 - (b) agencies with matters of implementation.
- 28 SSC’s preliminary view was based on consideration of each of the six Creative Commons licences and analysis of a number of legal and practical issues regarding their use.¹⁰
- 29 SSC received responses from 19 departments. Of these 19 departments, 10 departments provided substantive and sometimes substantial feedback, while 4 gave some general feedback without addressing the 18 discussion questions put to them and 5 had no comments to make. SSC also received responses from the Education Sector ICT Management Committee and the Council for the Humanities.
- 30 Overall, the feedback revealed strong support for all-of-government adoption of Creative Commons licences in conjunction with one or more restrictive licences, such adoption to be in the form of a framework and guidance material that would be recommendatory in nature and encompass the State Services.¹¹
- 31 The following sections of this NZGOAL set out:
- (a) the NZGOAL Policy Principles; and
 - (b) an explanation of the NZGOAL licences and tools; and
 - (c) the NZGOAL Review and Release Process.

¹⁰ SSC’s consideration of those legal and practical issues is set out in its Discussion Paper for departments, above n 5.

¹¹ SSC’s collation of and feedback on the responses received is contained in “Suggested All-of-government Approach to Licensing of Public Sector Copyright Works: Discussion Paper for Public Service and Non-Public Service Departments – Summary and analysis of departmental feedback”, available at: <http://e.govt.nz/policy/information-data/nzgoalframework.html>.

NZGOAL Policy Principles

Introduction

- 32 State Services agencies are strongly encouraged to apply the following principles in relation to:
- (a) enabling public access to and re-use of their non-copyright information and data; and
 - (b) licensing their copyright works for re-use.
- 33 The licences and tools referred to in this section are explained in the next section on NZGOAL licences and tools.

Open access to non-copyright information and data

- 34 Unless a restriction in paragraph 37 applies, State Services agencies should:
- (a) provide online public access to non-copyright information and data that is or may be of interest or use to people;
 - (b) allow them to copy and re-use such information and data without restriction; and
 - (c) include, at the point of release (and in the released information or data itself if practicable), the statement set out at paragraph 76 below or a statement in broadly equivalent terms
- (the “Open Access Principle”).

Open access to copyright works with Creative Commons Attribution (BY) licence as default

- 35 Unless a restriction in paragraph 37 applies, State Services agencies should make their copyright works which are or may be of interest or use to people available for re-use on the most liberal of licensing terms available within NZGOAL (the “Open Licensing Principle”).¹² The most liberal of licensing terms available within NZGOAL is the Creative Commons Attribution (BY) licence.

Ensuring copyright ownership or right to sub-licence

- 36 Agencies should only licence a copyright work for re-use by others where they:
- (a) own the copyright in the relevant work and have not exclusively licensed it to a third party; or
 - (b) to the extent they do not own the copyright, either:
 - (i) can first obtain an assignment of copyright from the relevant copyright owner(s); or
 - (ii) have or can first obtain a right to sub-licence the work (or relevant elements of the work)¹³ on the terms of the relevant Creative Commons or restrictive licence, from the relevant copyright owner(s).

¹² The Creative Commons Attribution (BY) licence is recommended as the default licence so as to promote the greatest re-use of public sector copyright works and interoperability between the different licence types.

¹³ The reference here to obtaining a right to sub-licence relevant elements of a work reflects the possibility that an agency may hold an overall work which consists of different, distinct copyright elements, some of which the agency owns, and others of which third parties own.

Restrictions

- 37 Neither the Open Access Principle nor the Open Licensing Principle applies where providing open access to and allowing re-use of information and data (in the case of non-copyright information and data) or licensing a copyright work with the Creative Commons Attribution (BY) licence (in the case of copyright works):
- (a) would or might be contrary to legislation, court order or specific government policy;
 - (b) would or might constitute a breach of contract, breach of confidence, disclosure of a trade secret or other actionable wrong;
 - (c) would be contrary to an agency's own legitimate commercial or other interests (bearing in mind, however, that, with certain exceptions, it is generally not the business of government to commercialise its information, data or copyright works);
 - (d) would result in the publication of a patentable invention for which the agency proposes or may wish to apply for a patent;¹⁴
 - (e) would be contrary to the public interest (e.g., in having a single, authoritative and non-adapted data source);
 - (f) would result in the release of incomplete information or data or an incomplete work where the agency considers, acting reasonably, that such release would be:
 - (i) materially misleading;
 - (ii) likely to cause or contribute to material error on the part of recipients or licensees; or
 - (iii) otherwise problematic;¹⁵
 - (g) would or might threaten the control over and/or integrity of Māori or other traditional knowledge or other culturally sensitive material;
 - (h) would or might jeopardise the economic or other potential to Māori or other indigenous groups of Māori or other traditional knowledge or other culturally sensitive material;¹⁶ or
 - (i) would otherwise conflict with the existence of a good reason under sections 6 or 9 of the Official Information Act for withholding release of the information, data or work if the information, data or work were requested under that Act.

Other Creative Commons licensing or restrictive licensing

- 38 Where, in the case of a copyright work, one of the above restrictions applies or appears to apply but an agency may still be able to license the copyright work on Creative Commons terms (the restrictions in paragraphs 37(c) and 37(e) being the most likely candidates), the agency should consider adopting one of the following licences for the work, taking into account the principles in paragraphs 40-41 below:

- (a) Creative Commons Attribution-Noncommercial (BY-NC);

¹⁴ In such cases, it is important that the invention not be published, as publication prior to filing a patent application will in all likelihood render the invention non-patentable. See generally the information on patents on the website of the Intellectual Property Office of New Zealand: <http://www.iponz.govt.nz/cms/patents/what-is-a-patent>

¹⁵ Note that this restriction is not intended to suggest any general prohibition on the release of incomplete information, data or works. The restriction is only relevant where such release would give rise to one of the listed situations.

¹⁶ Any agency that is in any doubt as to whether this or the previous restriction applies is advised to consult Te Puni Kokiri before release.

- (b) Creative Commons Attribution-No Derivative Works (BY-ND);
 - (c) Creative Commons Attribution-Noncommercial-No Derivative Works (BY-NC-ND);
 - (d) Creative Commons Attribution-Share Alike (BY-SA); or
 - (e) Creative Commons Attribution-Noncommercial-Share Alike (BY-NC-SA).
- 39 Where no other Creative Commons licence can be applied, the agency may wish to consider making the work available pursuant to the NZGOAL restrictive licence.

Share-alike and no derivative works restrictions

- 40 When considering whether to use a form of Creative Commons licence that either imposes an obligation on licensees to share-alike or prohibits the creation of derivative works (adaptations), agencies should take the following principles into account:
- (a) both the obligation to share-alike and the prohibition on the making of derivative works (adaptations) may have the adverse effect of stifling creativity and/or economic exploitation by licensees (the “Creativity Principle”); and
 - (b) the prohibition on the making of derivative works (adaptations) may only be objectively justifiable where there are real and not trifling concerns about the authenticity and integrity of the original work or elements of it or the reputation of the source agency or wider government (the “Authenticity Principle”).

Non-discrimination

- 41 Except where necessary to protect their own or others’ commercial or other interests, agencies should not discriminate, when selecting an NZGOAL licence, between individual, not-for-profit and commercial uses of the relevant copyright works (the “Non-Discrimination Principle”).

Trademarks and other protected names and emblems

- 42 State Services agencies enabling public access to and re-use of their non-copyright information and data, or licensing for re-use their copyright works, should take care to ensure that the relevant information, data or works:
- (a) do not contain any trademarks, the reproduction of which is unauthorised; or
 - (b) do not suggest that any names or emblems protected under the Flags, Emblems, and Names Protection Act 1981 or other legislation can be reproduced in any way that would infringe such legislation.
- 43 To the extent that such trademarks are included within information, data or works made available for re-use, State Services agencies should expressly exclude them from the scope of any:
- (a) “no known rights” statement of the kind recommended in paragraph 76 below, in the case of non-copyright information and data released for re-use; and
 - (b) licence allowing re-use, in the case of copyright works.
- 44 To the extent that such names or emblems are included within information, data or works made available for re-use, State Services agencies should state that those names or emblems may not be used in any way which infringes any provision of the Flags, Emblems, and Names Protection Act 1981.

Formats

- 45 When releasing non-copyright information and data for re-use and licensing copyright works on terms allowing re-use, agencies should:
- (a) consider the formats in which they ought to be released, taking into account, where relevant and to the extent practicable, the wishes of those who will or are likely to re-use the information, data or works; and
 - (b) to the extent practicable, release them in the formats they know or believe are best suited for interoperability and re-use.
- 46 When releasing information, data or works in proprietary formats (such as Microsoft Word), agencies should also, to the greatest extent practicable, release the information, data or works in open, non-proprietary formats (the “Open Format Principle”).

Digital rights management

- 47 State Services agencies should not:
- (a) impose digital rights management technologies on either non-copyright information and data or copyright works which they make available for re-use; or
 - (b) make non-copyright information and data or copyright works available for re-use when such information, data or works are encumbered by externally-imposed digital restrictions.¹⁷

Charging

- 48 Charging by State Services agencies for people’s use and re-use of non-copyright information and data and copyright works is generally discouraged. Before making any decision to do so, State Services agencies should take into account:
- (a) the Treasury’s “Guidelines for Setting Charges in the Public Sector” (December 2002);
 - (b) the presumption that, where the costs of dissemination are low or it is economically inefficient to put in place and administer a charging structure, recipients and licensees should not be charged; and
 - (c) whether the creativity and/or national public benefit that could arise from allowing re-use without charge could be significantly prejudiced by the imposition of a charge.
- 49 To the extent that State Services agencies do propose to impose a charge, they are encouraged:
- (a) to consider whether to allow non-commercial use without charge, by use of the Creative Commons Attribution-Noncommercial (BY-NC) licence and, if so, whether the Creative Commons Plus (CC+) protocol might offer them a convenient means of charging for commercial use;
 - (b) to limit charges to what is reasonably necessary to meet the costs of distribution;
 - (c) to use technology to reduce such costs to the extent practicable; and

¹⁷ For more information on digital rights management and trusted computing issues in governmental contexts, see the State Services Commission’s “Trusted Computing and Digital Rights Management Principles & Policies” (September 2006), available at <http://www.e.govt.nz/policy/tc-and-drm>, and “Trusted Computing and Digital Rights Management Standards and Guidelines” (July 2007), available at <http://www.e.govt.nz/policy/tc-and-drm/standards-guidelines-07>.

- (d) to seek legal advice on the most appropriate choice of NZGOAL licence, whether Creative Commons or restricted.

50 Paragraphs 48-49 are subject to any statutory, policy or commercial imperatives to the contrary.

Updating released information, data and copyright works

51 Where State Services agencies have released information, data or copyright works on terms allowing re-use, and the released information, data or copyright works are superseded by a later version or found to contain errors or other inaccuracies, agencies should use all reasonable endeavours to release the later versions or inform the public of the errors or inaccuracies, as applicable.

Procuring and preparing information, data and copyright works

52 When procuring, preparing or commissioning information, data and copyright works, State Services agencies are encouraged to consider whether such information, data and works should, in accordance with these Policy Principles, be released to the public for re-use.

53 Where such information, data and works should be released to the public for re-use, State Services agencies should, where applicable, consider the steps that may be required as part of their procurement and contracting processes to ensure they have the relevant rights to so release. Such steps may include:

- (a) ensuring the agency owns the copyright in any relevant commissioned copyright works or otherwise obtains a broad licence from the copyright owner allowing it to sub-license the works on Creative Commons terms (or more restricted terms where the Creative Commons model is not appropriate), by specifying this as a requirement in procurement documentation (if any) and drafting contractual provisions accordingly;
- (b) ensuring, where practicable and relevant, that non-copyright information and data are not subject to either confidentiality obligations owed to third parties¹⁸ or other contractual restrictions; and
- (c) ensuring that procured or commissioned information, data or copyright works are not encumbered by externally-imposed digital restrictions, by specifying this as a requirement in procurement documentation (if any) and drafting contractual provisions accordingly.¹⁹

54 Paragraphs 52-53 are subject to any statutory, policy or commercial imperatives to the contrary.

Review and Release Process

55 State Services agencies should ensure that the NZGOAL Review and Release Process has been followed prior to:

- (a) the release for re-use of information or data in which they believe there is no copyright or other intellectual property rights or restrictions; or

¹⁸ The point here is not to suggest that truly commercially sensitive or confidential material be released to the public for re-use, but to be aware that contractual confidentiality provisions can be used as a device to restrict circulation of material which may not in fact be sensitive.

¹⁹ Specimen clauses on this particular issue can be found in the “Trusted Computing and Digital Rights Management Standards and Guidelines” (July 2007), available at <http://www.e.govt.nz/policy/tc-and-drm/standards-guidelines-07>

- (b) the release for re-use of what they believe to be copyright works on the terms of either a Creative Commons or restrictive licence.
- 56 Agencies may need to consult their legal teams when undertaking the NZGOAL Review and Release Process.
- 57 State Services agencies should also take into account, before licensing copyright works on Creative Commons terms, the fact that Creative Commons licences are irrevocable.²⁰

²⁰ To avoid doubt, ordinarily the irrevocable nature of Creative Commons licences ought not to be a cause for concern. It is, however, an important consideration to take into account prior to licensing.

Explanation of NZGOAL Licences and Tools

Introduction to NZGOAL licences and tools

58 NZGOAL consists of:

- (a) 7 copyright licenses:
 - (i) the six Creative Commons New Zealand law licences; and
 - (ii) a restrictive licence for use in situations where the Creative Commons model is not appropriate; and
- (b) a Creative Commons public domain certification (i.e., “no known copyright”) tool (under development).

59 The 7 licences are expected to cover the vast majority of public sector copyright licensing requirements and, over time, to result in considerably greater consistency in licensing approaches across the State Services than currently exists.

60 The public domain certification tool is expected to enable agencies to certify that a work is in the public domain and therefore not subject to any copyright-related restrictions on re-use. It can be used for works which are not copyright works (because they are not qualifying works under the Copyright Act) or which are no longer copyright works in the sense that the relevant term of copyright protection has expired.

61 At the time of writing, Creative Commons’ new public domain certification tool had not yet been released.²¹ Communications with Creative Commons reveal that it is under active development. Its appropriateness for New Zealand’s legal environment will be assessed as soon as possible upon its release.²² Pending its release and positive evaluation, NZGOAL advocates the use of an equivalent and localised public domain statement (discussed below).

62 NZGOAL also supports use of the Creative Commons Plus (CC+) protocol for the probably rare circumstances in which a State Services agency considers a Creative Commons non-commercial licence to be appropriate and wishes to adopt a practical means by which commercial users can ascertain the separate terms for commercial use.

63 The remainder of this section explains:

- (a) the Creative Commons licences;
- (b) the restrictive licence template;
- (c) the Creative Commons public domain assertion tool (or, pending its release, the use of an equivalent and localised public domain statement); and
- (d) the Creative Commons Plus (CC+) protocol.

[Note: in addition to containing a placeholder for the Creative Commons public domain assertion tool, this draft NZGOAL also contains a placeholder for the restrictive licence template, as it too is a work-in-progress.]

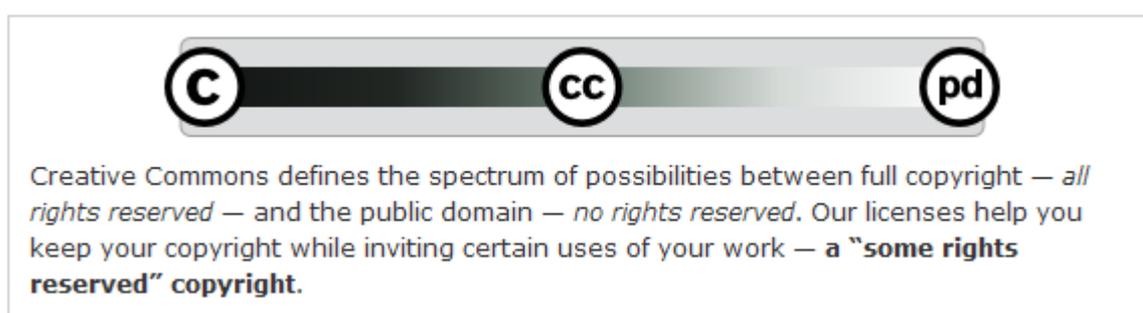
²¹ Creative Commons’ existing and partly deprecated Public Domain Certification and Dedication tool, which is based on US law and expected to be phased out entirely once the new public domain certification tool is released, is not considered appropriate for the NZGOAL.

²² For the avoidance of doubt, the Creative Commons CC0 (‘CC Zero’) tool has not been overlooked. NZGOAL does not support governmental use of that tool.

Creative Commons licences

The genesis and aim of Creative Commons

- 64 Creative Commons was founded in 2001 by Professor Lawrence Lessig, Professor of Law at Stanford Law School and proponent of reduced legal restrictions on, among other things, copyright.
- 65 As noted on the Creative Commons Aotearoa New Zealand website,²³ Creative Commons aims to establish a fair middle way between full copyright control and the uncontrolled uses of intellectual property.²⁴ It provides a range of copyright licences, freely available to the public, which allow those creating intellectual property – including authors, artists, educators and scientists – to mark their work with the freedoms they want it to carry.
- 66 The role of Creative Commons licences in the copyright-to-public-domain continuum is usefully summarised on the Creative Commons website as follows:²⁵



International standardisation

- 67 The original set of Creative Commons licences have been “ported” to the laws of multiple jurisdictions.²⁶ They are now available for the following jurisdictions: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China Mainland, Colombia, Croatia, the Czech Republic, Denmark, Ecuador, Finland, France, Germany, Greece, Guatemala, Hong Kong, Hungary, India, Israel, Italy, Japan, Luxembourg, Macedonia, Malaysia, Malta, Mexico, Netherlands, **New Zealand**, Norway, Peru, Philippines, Poland, Portugal, Puerto Rico, Romania, Serbia, Singapore, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, England and Wales, Scotland, Thailand and the United States.

The Creative Commons New Zealand law licences

- 68 The New Zealand law Creative Commons licences were released towards the end of 2007 by Creative Commons Aotearoa New Zealand, the New Zealand collaborator of Creative Commons International. Te Whāinga Aronui/the Council for the Humanities is leading the development of Creative Commons in New Zealand with, to date, generous pro-bono legal support principally from private sector and academic lawyers. SSC

²³ <http://www.creativecommons.org.nz/>

²⁴ While the Creative Commons Aotearoa New Zealand website uses the phrase “the extremes of copyright control”, it is noted that this is a phrase with which some take issue; see, e.g., “Creative Commons – the fine print”, 16 April 2008, at <http://www.copyright.org.nz/viewArticle.php?article=479> Nothing in the NZGOAL should be construed as questioning current New Zealand copyright law.

²⁵ <http://creativecommons.org/about/>

²⁶ The reference here to “porting” means ensuring the licences are compatible with a jurisdiction’s domestic law and making them subject to that law.

acknowledges and thanks both the Council for the Humanities and those supporting it for the important work they have been doing in this area.

- 69 There are six Creative Commons New Zealand law licences:
- Attribution 3.0 New Zealand (BY);
 - Attribution-Noncommercial 3.0 New Zealand (BY-NC);
 - Attribution-Noncommercial-No Derivative Works 3.0 New Zealand (BY-NC-ND);
 - Attribution-Noncommercial-Share Alike 3.0 New Zealand (BY-NC-SA);
 - Attribution-No Derivative Works 3.0 New Zealand (BY-ND); and
 - Attribution-Share Alike 3.0 New Zealand (BY-SA).
- 70 As noted on the Creative Commons Aotearoa New Zealand website,²⁷ the licences share a set of baseline rights, with each licence choice being expressed in three ways:
- Commons Deed:** A plain-language summary of the licence, with relevant icons.
 - Legal Code:** The full legal terms.
 - Digital Code:** A machine-readable translation of the licence that helps search engines and other applications identify the licensed work by its terms of use.
- 71 The existence of these three forms of expression is significant:
- the Commons Deed form makes the licences readily comprehensible for the public;
 - the Legal Code is required to ensure the licences are legally sound; and
 - the Digital Code²⁸ facilitates the distribution and discoverability of the licensed works; such distribution and discoverability is increasingly significant in the digital age as it facilitates, among other things, machine-based indexing and searching of Creative Commons-licensed works by reference to the Digital Code’s metadata.
- 72 The tables that follow summarise the terms of each of the licences. A summary table is followed by a table setting out the précis for each licence found on the Creative Commons Aotearoa New Zealand website as well as a more detailed listing of the key aspects of each licence.
- 73 A key point to emphasise at the outset is that, in all cases, Crown copyright or other copyright in the subject material is preserved. The effect of the licences is to allow certain forms of copying, adaptation and distribution.

BY		Attribution
BY-NC		Attribution – Noncommercial
BY-NC-ND		Attribution – Noncommercial – No Derivatives
BY-NC-SA		Attribution – Noncommercial – Share Alike
BY-ND		Attribution – No Derivatives
BY-SA		Attribution – Share Alike

²⁷ http://www.creativecommons.org.nz/choose_and_apply_a_cc_licence

²⁸ The Digital Code can be found by following the process at: <http://creativecommons.org/license/?jurisdiction=nz>

Table: Summary of Creative Commons New Zealand Licences

Licence type	Summary of licence ²⁹	Key legal aspects of licence ³⁰
<p>Attribution 3.0 New Zealand (BY)</p> 	<p>This licence lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation. This is the most accommodating of the licences offered, in terms of what others can do with your works licensed under Attribution.</p>	<p>Key legal aspects:</p> <ul style="list-style-type: none"> • Worldwide, royalty-free, non-exclusive, Licence for use for duration of copyright in the Work • Licensee may copy Work, create Adaptations, incorporate Work into Collections, copy Adaptations or Work as incorporated in Collections, and publish, distribute, archive, perform or otherwise disseminate the Work, Adaptation or Work as incorporated in any Collection, to the public • Licensee must not impose either terms restricting scope of licence or digital rights management technology on the Work • Licensee must not sublicense the Work • Licensee must not subject Work to derogatory treatment as defined in Copyright Act (although Licensor waives its moral right to object to derogatory treatment to the extent necessary to enable licensee to reasonably exercise its right under the Licence to make Adaptations) • Licensee must reference Licence on all copies of the Work/Adaptations/Collections published, distributed, performed or otherwise disseminated to the public • Licensee must recognise Licensor's/Original Author's right of Attribution (right to be identified) • Licensee must not assert/imply sponsorship or endorsement by Original Author or Licensor without express prior written permission • Licensee must, to extent reasonably practicable, keep intact all notices that refer to the Licence • Licensor waives the right to collect royalties for any exercise by licensee of rights

²⁹ These summaries are taken from the Creative Commons Aotearoa New Zealand website, at:

http://www.creativecommons.org.nz/choose_and_apply_a_cc_licence

³⁰ Capitalised terms are defined within the licence.

Licence type	Summary of licence ²⁹	Key legal aspects of licence ³⁰
		<p>granted under the Licence</p> <ul style="list-style-type: none"> • Except as required by law or agreed in writing between parties, Work is licensed by Licensor on “as is” and “as available” basis without any warranty of any kind, express or implied • Except as not permitted by law, Licensor excludes all liability for loss or damage • Licence terminates automatically upon breach by licensee of terms of Licence
<p>Attribution-Noncommercial 3.0 New Zealand (BY-NC)</p> 	<p>This licence lets others remix, tweak, and build upon your work noncommercially and although their new works must also acknowledge you and be noncommercial, they do not have to license their derivative works on the same terms.</p>	<p>Same key legal aspects as Attribution 3.0 New Zealand (BY) licence (immediately above) except that:</p> <ul style="list-style-type: none"> • Licence limited to “Non-Commercial use”. “Non-Commercial” means “not primarily intended or directed towards commercial advantage or private monetary compensation” • Licence preserves right to collect royalties for any use of the Work which results in commercial advantage or private monetary compensation (but Licensor still waives right to collect royalties for any use of the Work which does not result in commercial advantage or private monetary compensation)
<p>Attribution-Noncommercial-No Derivative Works 3.0 New Zealand (BY-NC-ND)</p> 	<p>This licence is the most restrictive of the six main licences, allowing redistribution. This licence is often called the “free advertising” licence because it allows others to download your works and share them with others as long as they mention you and link back to you, but they cannot change them in any way or use them commercially.</p>	<p>Same key legal aspects as Attribution-Noncommercial 3.0 New Zealand (BY-NC) licence (immediately above) except that:</p> <ul style="list-style-type: none"> • The right to create Adaptations and all other rights in relation to Adaptations have been removed and there is an express prohibition on the making of any Adaptations • There are consequential amendments reflecting the reduced scope of the Licence

<p>Attribution-Noncommercial-Share Alike 3.0 New Zealand (BY-NC-SA)</p> 	<p>This licence lets others remix, tweak, and build upon your work noncommercially, as long as they credit you and license their new creations under the identical terms. Others can download and redistribute your work as they can with the BY-NC-ND licence, but they can also translate, make remixes, and produce new stories based on your work. All new work based on yours will carry the same licence; so any derivatives will also be noncommercial in nature.</p>	<p>Same key legal aspects as Attribution-Noncommercial 3.0 New Zealand (BY-NC) except that:</p> <ul style="list-style-type: none"> • There are new provisions (including a new definition of “Licence Elements”) requiring the licensee to make any Adaptation or Adaptation as incorporated in a Collection available to third party users on either the same terms and conditions of this Licence or a later version of it or any other Creative Commons licence (whether the Unported or a jurisdiction licence) with the same Licence Elements
<p>Attribution-No Derivative Works 3.0 New Zealand (BY-ND)</p> 	<p>This licence allows for redistribution, commercial and noncommercial use of your work, as long as it is passed along unchanged and whole, with credit to you.</p>	<p>Same key legal aspects as Attribution 3.0 New Zealand (BY) licence except that:</p> <ul style="list-style-type: none"> • The right to create Adaptations and all other rights in relation to Adaptations have been removed and there is an express prohibition on the making of any Adaptations • There are consequential amendments reflecting the reduced scope of the Licence
<p>Attribution-Share Alike 3.0 New Zealand (BY-SA)</p> 	<p>This licence lets others remix, tweak, and build upon your work even for commercial purposes, as long as they credit you and license their new creations under the identical terms. This licence is often compared to open source software licences. All new works based on yours will carry the same licence; so any derivatives will also allow commercial use.</p>	<p>Same key legal aspects as Attribution 3.0 New Zealand (BY) licence except that:</p> <ul style="list-style-type: none"> • There are additional provisions (including a new definition of “Licence Elements” (similar to that in the Attribution-Noncommercial-Share Alike 3.0 licence) and “Creative Commons Compatible Licence” (not found in any other New Zealand Creative Commons licence)) requiring the licensee to make any Adaptation or Adaptation as incorporated in a Collection available to third party users on either the same terms and conditions of this Licence or a later version of it or any other Creative Commons licence (whether the Unported or a jurisdiction licence) with the same Licence Elements or a Creative Commons Compatible Licence

Restrictive Licence template

- 74 *[As noted above, the restrictive licence template is a work-in-progress. It is not yet ready for release. It is expected to be recommended for use where the Creative Commons model is not appropriate but where more limited forms of release, whether with or without charging, are necessary or desirable.]*

Creative Commons Public Domain Certification tool

Interim solution

- 75 As noted at paragraph 61 above, at the time of writing Creative Commons' new public domain certification tool had not yet been released.

- 76 Pending its release and evaluation for inclusion in the NZGOAL, agencies releasing material which is not subject to copyright or other intellectual property rights are encouraged to add a statement at the point of release (and in the material itself if practicable) to this effect:

“To the best of [name of agency]’s knowledge, under New Zealand law:

- there is no copyright or other intellectual property rights in this [identify material in question]; and
- it may be copied and otherwise re-used without copyright-related restriction.

[While [name of agency] has sought to ensure there are no intellectual property rights in the material under New Zealand law that would prevent copying and other re-use, please note that the [identify material in question] is released on an as-is basis and with no representations or warranties of any kind, to the greatest extent permissible by law. Subject to any liability which may not be excluded or limited by law, [name of agency] shall not be liable on any legal basis (including without limitation negligence) and hereby expressly excludes all liability for loss or damage howsoever and whenever caused to you in connection with your use of the material.]”

- 77 The last paragraph in square brackets is optional. Its purpose is to protect the releasing agency from liability in the event that:

- (a) there are, in fact, intellectual property-related restrictions on copying or other re-use of the released material; or
- (b) someone relies on the released material in a way which subsequently causes harm (e.g., economic loss).

- 78 It is for the releasing agency to determine whether there is any risk warranting the inclusion of that paragraph.

Warning

- 79 Agencies should appreciate, however, that adding the statement in paragraph 76 above to released material in the absence of their having a high level of confidence in there being no copyright or other intellectual property rights in the material (or any components of it) may expose end users – the people of New Zealand and others – to legal risk in the form of third party complaint or action against them. In addition, the exclusion of liability (which is consistent with the Creative Commons licensing model) transfers legal risk to those end users. Should it transpire, for example, that the material:

- (a) constitutes a third party copyright work;

- (b) contains third party copyright components;
- (c) contains trademarks or other protected names, symbols or marks;
- (d) contains confidential or personal information or information which otherwise ought not to be disclosed such as Māori or other cultural traditional knowledge or culturally sensitive material; or
- (e) encourages action that would infringe a third party's patent,

then users of the material may be exposed to legal or other risk. Because agencies should not be exposing end users of such material to liability risks vis-à-vis true intellectual property right owners or other right holders, the material should not be publicly released on such terms if doing so would breach others' intellectual property or other rights.

80 Similarly, the above statement should not be used if the relevant material needs to be disclosed under the Official Information Act 1982 but the agency does not have the high level of confidence referred to above. Releasing such material following a request under the Official Information Act neither requires such a statement nor entitles others to reproduce the material in any way which would infringe a third party's intellectual property rights.

Creative Commons Plus (CC+) protocol

81 Where an agency wishes to licence material pursuant to a non-commercial variant of Creative Commons licence, and offer a separate fee-based arrangement for commercial use, it could utilise the Creative Commons Plus protocol (also referred to as CCPlus or CC+). As noted on the Creative Commons website:³¹

“CC+ is a protocol providing a simple way for users to get rights beyond the rights granted by a CC license. For example, a work's Creative Commons license might offer noncommercial rights. With CC+, the license can also provide a link by which a user might secure rights beyond noncommercial rights -- most obviously commercial rights, but also additional permissions or services such as warranty, permission to use without attribution, or even access to performance or physical media.

The CC+ architecture gives businesses a simple way to move between the sharing and commercial economies. CC+ provides a lightweight standard around these best practices and is available for implementation immediately.”

82 There are various ways in which CC+ can be implemented, the simplest being the presence of additional graphical or text-based links to the arrangements governing commercial use.³²



³¹ <http://wiki.creativecommons.org/CCPlus> See also “CC and CC+ Overview for the World Wide Web” (<http://wiki.creativecommons.org/images/c/cb/Ccplus-general.pdf>) and “CC+ Technical Implementation for the World Wide Web” (<http://wiki.creativecommons.org/images/0/06/Ccplus-technical.pdf>).

³² See http://wiki.creativecommons.org/CCPlus#What_is_a_simple_way_of_explaining_CC.2B.3F for further examples. Overseas, services are even beginning to crop up which mediate and facilitate the commercial selling side of the equation; see, for example, www.ozmo.com.

Or, for example:

```
My Book by Jon Phillips is licensed under a
```

```
<a rel="license" href="http://creativecommons.org/licenses/by-nc/3.0/">Creative Commons  
Attribution Non-Commercial 3.0 License</a>.
```

```
Permissions beyond the scope of this license may be available at
```

```
<a xmlns:cc="http://creativecommons.org/ns#" rel="cc:morePermissions"  
href="http://somecompany.com/revenue_sharing_agreement">somecompany.com</a>.
```

NZGOAL Review and Release Process

Introduction

- 83 It is recommended that State Services agencies follow the review and release process set out below before releasing information, data or copyright works for re-use, with assistance where required from their legal teams. The process consists of six main stages:
- (a) copyright-related rights evaluation;
 - (b) evaluation of restrictions;
 - (c) re-use rights selection;
 - (d) application of no-known-rights statement or licence;
 - (e) format selection; and
 - (f) release.
- 84 Each stage contains one or more issues that may need to be worked through. The stages and the issues within them reflect a mixture of the NZGOAL Policy Principles, legal requirements and practical considerations.
- 85 It can be important to work through these steps to ensure that the agency:
- (a) has all relevant rights in the information, data or copyright work that it proposes to release;
 - (b) uses “no known rights” statements when appropriate, Creative Commons licences when appropriate, a restrictive licence when appropriate, or does not release the information, data or work at all when one or more of the prohibitive restrictions apply; and
 - (c) does not expose either itself or those who may re-use the information, data or copyright work to liability or related risk.
- 86 A decision tree for the review and release process is set out at paragraph 135 below.

Stage 1: Copyright-related rights evaluation

- 87 The first stage involves:
- (a) clearly identifying the boundaries of the information, data or work that the agency proposes to release; and then
 - (b) determining:
 - (i) whether the information, data or work to be released constitutes a copyright work; and, if so
 - (ii) who owns that copyright, with a view to determining whether it can, in principle, be the subject of a copyright licence.
- 88 This can entail consideration of some or all of the issues set out below.

Qualifying original work

- 89 Does the information, data or work constitute a copyright work under the Copyright Act, i.e., is it an original:
- (a) literary, dramatic, musical, or artistic work;
 - (b) sound recording;
 - (c) film;
 - (d) communication work; or
 - (e) typographical arrangement of a published edition,
- whose period of copyright protection has not expired?
- 90 If the information, data or work does not constitute a copyright work, the copyright analysis ceases and the agency can skip to Stage 2.

Copyright ownership

- 91 If the information, data or work does constitute a copyright work, questions of copyright ownership need to be considered. Who owns the copyright in the work?

Singular works

- 92 In the context of NZGOAL and its focus on State Services agencies, this question is likely to entail consideration, in the first instance, of who created the work and in what circumstances:
- (a) **employees and contractors of the “Crown” (as defined; see paragraph 163 below):** where a work is made by a person employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a contract for services, the work qualifies for copyright and the Crown is the first owner of any copyright in the work, unless the parties to the contract agree otherwise;³³
 - (b) **employees of other State Services agencies (e.g., Crown entities):** where an employee makes, in the course of his or her employment, a literary, dramatic, musical, or artistic work, that person's employer is the first owner of any copyright in the work, unless the parties to the contract agree otherwise (which is rare);³⁴
 - (c) **contractors of other State Services agencies (e.g., Crown entities):** where a person commissions, and pays or agrees to pay for, the taking of a photograph or the making of a computer program, painting, drawing, diagram, map, chart, plan, engraving, model, sculpture, film, or sound recording, and the work is made in pursuance of that commission, that person is the first owner of any copyright in the work, unless the parties to the contract agree otherwise.³⁵

Note that there is a significant difference in who owns copyright in a *commissioned* literary work depending on whether the State Services agency is part of the “Crown” (Ministers, departments, Offices of Parliament) or not (e.g., Crown entities, Reserve Bank of New Zealand). In the case of Crown copyright, the default position is that copyright ownership of all types of literary works commissioned by the Crown vests in the Crown. By contrast, for other agencies, first ownership of a

³³ Section 26(1) and (6) of the Copyright Act 1994.

³⁴ Section 21(2) and (4) of the Copyright Act 1994.

³⁵ Section 21(3) and (4) of the Copyright Act 1994.

commissioned literary work (other than a computer program) vests in the author. (In both cases, the default position is subject to agreement to the contrary by the commissioner and the commissioned party.)

Composite works/compilations

- 93 Paragraph 92 above assumes that the copyright work in question is singular or indivisible, that is, it is not a compilation of distinct components, some of which are copyright and owned by the agency, with others having been sourced from third parties.
- 94 Copyright ownership questions can be more complex in the case of works such as compilations which contain discrete components sourced from third parties.³⁶ If an agency proposes to release and license such a composite work for re-use, before doing so it will need to consider, for each discrete third party component, whether the agency has sufficient rights to do so. An agency may have sufficient rights to do so if:
- (a) in the case of components which themselves are copyright works:
 - (i) the agency:
 - commissioned the component work from a third party and, under either the Copyright Act or an express contractual provision, was the owner of copyright in the work (as to which, see paragraphs 92(a) (relevant to the Crown) and 92(c) (relevant to other agencies) above); or
 - obtained a licence from the commissioned party allowing it to sub-license the copyright component as part of a wider work and in sufficiently broad terms;
 - and
 - (ii) there is otherwise no contractual restriction on licensing the work for re-use; or
 - (b) in the case of components which themselves are not copyright works, there is no contractual restriction on including the component within a wider work and licensing that wider work for re-use.

Position where agency did not at time of content creation own some or all of copyright or otherwise obtain licence allowing sub-licensing

- 95 In situations where the agency did not at the time of content creation own some or all of the requisite copyright in the work it proposes to release for re-use or otherwise have a licence allowing it to do so, it may nevertheless be able to licence the work for re-use if, before doing so, it can first, to the extent required:
- (a) obtain an assignment of copyright from the copyright owner;³⁷ or
 - (b) obtain from the relevant copyright owner(s) a right to sub-license the work, or relevant third party components, on the terms of the preferred Creative Commons or restrictive licence.
- 96 If this is not possible, the agency should not attempt to license the wider work for re-use.

³⁶ As noted in Appendix 2 below, the Copyright Act's definition of "literary work" includes a "table or compilation", and the definition of "compilation" includes "a compilation consisting wholly of works or parts of works, a compilation consisting partly of works or parts of works, and a compilation of data other than works or parts of works".

³⁷ An assignment of copyright is not effective unless it is in writing signed by or on behalf of the assignor: section 114 of the Copyright Act 1994.

No exclusive licensing

- 97 The final point to note under Stage 1 is that, if an agency owns copyright in a work it is proposing to release and license for re-use, but has already granted an exclusive licence to another party, then it will have prevented itself from licensing the work to others under a Creative Commons or restrictive licence. In such circumstances, to license the work on either Creative Commons or restrictive terms, the agency would need to either:
- (a) await expiry of the exclusive licence (assuming it is for a period shorter than the duration of the copyright in the work); or
 - (b) renegotiate the terms of the licence it has already granted to the exclusive licensee, with a view to removing the exclusivity and allowing the agency to license the work on the relevant Creative Commons or restrictive terms.

Stage 2: Evaluation of restrictions

- 98 If an agency has completed Stage 1 and concluded either that:
- (a) there are no copyright-related rights in the information, data or work that it proposes to release for re-use; or
 - (b) it does have the requisite copyright-related rights to release the copyright work for re-use (either in the form of owning all relevant copyright or, to the extent it does not, having one or more licences which allow sub-licensing on sufficiently broad terms),
- then the NZGOAL Policy Principles recommend, respectively, that:
- (c) the non-copyright information, data or work be released on open access terms; or
 - (d) the copyright work be released and licensed for re-use with the Creative Commons Attribution (BY) licence,
- unless a restriction set out in paragraph 37 applies.
- 99 For each proposed release, the restrictions need to be considered in the light of all the surrounding circumstances relevant to the specific information, data or work and its release.
- 100 In many instances, the exercise will be quick as none of the restrictions will apply. In that event, the agency can move to Stage 4 below. This is because the recommendation in paragraph 98(c) or 98(d) (as applicable) will not have been displaced.
- 101 If one or more of the restrictions applies, it may displace the recommendation in paragraph 98(c) or 98(d) (as applicable). Where that is the case, then:
- (a) in the case of non-copyright information or data or a non-copyright work, the relevant restriction(s) may:
 - (i) prevent any release of it at all, in which case the analysis stops at this point; or
 - (ii) be able to be accommodated through release of the information, data or work on restricted contractual terms to a restricted audience, in which case one can move to Stage 3 below;
 - (b) in the case of a copyright work, the relevant restriction(s) may:
 - (i) prevent any licensing of the work at all, in which case the analysis stops at this point; or

- (ii) be able to be accommodated through release and licensing with either another Creative Commons licence or, if that is not possible, the NZGOAL restrictive licence, in which case one can move to Stage 3 below.

102 In some cases, restrictions may apply only to discrete portions of non-copyright information, data or works or to copyright works that an agency proposes to release. In that event, the agency may wish to consider whether it could release an amended version of the information, data or work with those discrete portions removed. Whether an agency wishes to do so and whether it makes sense to do so is a matter entirely for the agency's discretion. It may be the case, for example, that removing the discrete portions would result in incomplete, misleading or comparatively useless information or data or an incomplete, misleading or comparatively useless work.

103 If an agency decides to produce an amended version, the agency can proceed to Stage 3 below.

Stage 3: Re-use rights selection

104 Stage 3 applies where one or more restrictions have been identified at Stage 2 but those restrictions are not such as to completely prevent release of the information, data or copyright work.

105 Where no restriction was identified at Stage 2 to displace the Open Access Principle or the Open Licensing Principle, as applicable, the agency should move to Stage 4.

Non-copyright information, data or works

106 Where, in the case of non-copyright information or data or a non-copyright work, the relevant restriction(s) can be accommodated through release of the information, data or work on restricted contractual terms to a restricted audience, it is up to the agency to decide whether to do so. There may, for example, be no immediate demand. If there is demand, it is for the agency to exercise its discretion as it sees fit. So far as NZGOAL is concerned, the analysis stops at this point, as the matter becomes one of restricted contractual provisioning.

Copyright works

107 Where, in the case of a copyright work, the restrictions can be accommodated through release and licensing with another Creative Commons licence, the agency should, before selecting the licence, take into account:

- (a) the nature of the relevant restriction(s); and
- (b) the Creativity, Authenticity and Non-Discrimination Principles set out in paragraphs 40-41 of the NZGOAL Policy Principles.

108 Having taken those matters into account, it is for the agency to determine which of the Creative Commons licences is most appropriate in all the circumstances. Having done so, the agency should proceed to Stage 4.

109 Where the restrictions can be accommodated only through use of the NZGOAL or other restrictive licence, it is up to the agency to decide whether to do so. There may, for example, be no immediate demand. If there is demand, it is for the agency to exercise its discretion as it sees fit. So far as NZGOAL is concerned, the analysis stops at this point, as the matters becomes one of restricted licensing, using NZGOAL's restricted licence as required.

Stage 4: Application of no-known-rights statement or Creative Commons licence

Introduction

- 110 This description of Stage 4 explains how agencies go about applying the NZGOAL licences and tools. In particular, it explains:
- (a) how to mark non-copyright information and data with an appropriate “no known rights” statement; and³⁸
 - (b) how to apply a Creative Commons licence to copyright works.
- 111 Restrictive licences are expected to be customised to the individual circumstances of any given release, in consultation with the agency’s legal team. For that reason, there is no separate treatment below of how to complete and mark the restrictive licence.

How to mark non-copyright information and data with an appropriate “no known rights” statement

- 112 As noted at paragraphs 76-78 above, pending release of Creative Commons’ new public domain certification tool and evaluation of it for inclusion in NZGOAL, agencies releasing material which is not subject to copyright or other intellectual property rights are encouraged to add a statement at the point of release (and in the material itself if practicable) to this effect:

“To the best of [name of agency]’s knowledge:

- there is no copyright or other intellectual property rights in this [identify material in question]; and
- it may be copied and otherwise re-used without copyright-related restriction.

[While [name of agency] has sought to ensure there are no intellectual property rights in the material that would prevent copying and other re-use, please note that the [identify material in question] is released on an as-is basis and with no representations or warranties of any kind, to the greatest extent permissible by law. Subject to any liability which may not be excluded or limited by law, [name of agency] shall not be liable on any legal basis (including without limitation negligence) and hereby expressly excludes all liability for loss or damage howsoever and whenever caused to you.]”

- 113 The last paragraph in square brackets is optional. Its purpose is to protect the releasing agency from liability in the event that:
- (a) there are, in fact, intellectual property-related restrictions on copying or other re-use of the released material; or
 - (b) someone relies on the released material in a way which subsequently causes harm (e.g., economic loss).
- 114 It is for the releasing agency to determine whether there is any risk warranting the inclusion of that paragraph.

³⁸ This part may be updated in the near future if Creative Commons’ new public domain assertion tool, once released, is considered appropriate for inclusion in NZGOAL.

Applying Creative Commons licences

- 115 Where an agency has determined that:
- (a) material it wishes to release on terms allowing re-use is a copyright work; and
 - (b) a Creative Commons licence is to be used to license that work,
- it needs to apply the appropriate Creative Commons licence markings before releasing the work.
- 116 The means by which a Creative Commons licence is applied depends on whether the relevant work is:
- (a) a document or other work that is not conveyed electronically or is conveyed electronically but can be consumed in an offline environment (e.g., a PDF document that can be printed); and/or
 - (b) a work that is released electronically, or consists of or is contained in, website pages.
- 117 As discussed in more detail below, it is strongly recommended that State Services agencies that apply Creative Commons licences to hard copy/non-electronic works also announce the availability of the work and the relevant Creative Commons licence terms electronically, whether:
- (a) on its own website (and preferably including the announcement as an item within the site's Atom or (if not available) RSS feed so that the item can be imported into one or more centralised online repositories); or
 - (b) on the [*to be determined*] website. [*As at the date of public release of the draft NZGOAL, details of such website were still being considered*]
- 118 Both of these alternatives are explained below.

Applying the licences to literary and other copyright works that can be consumed in an offline environment

- 119 Documents and other works that are not conveyed electronically or are conveyed electronically but can be consumed in an offline environment should contain:
- (a) the minimum markings set out in the table below for each Creative Commons licence; and
 - (b) any of the recommended markings set out in the table below which the agency wishes to add to the work.³⁹

³⁹ SSC acknowledges and thanks the Queensland Government for its documented approach to applying Creative Commons licences, on which the table above is based.

Table: Minimum and recommended markings

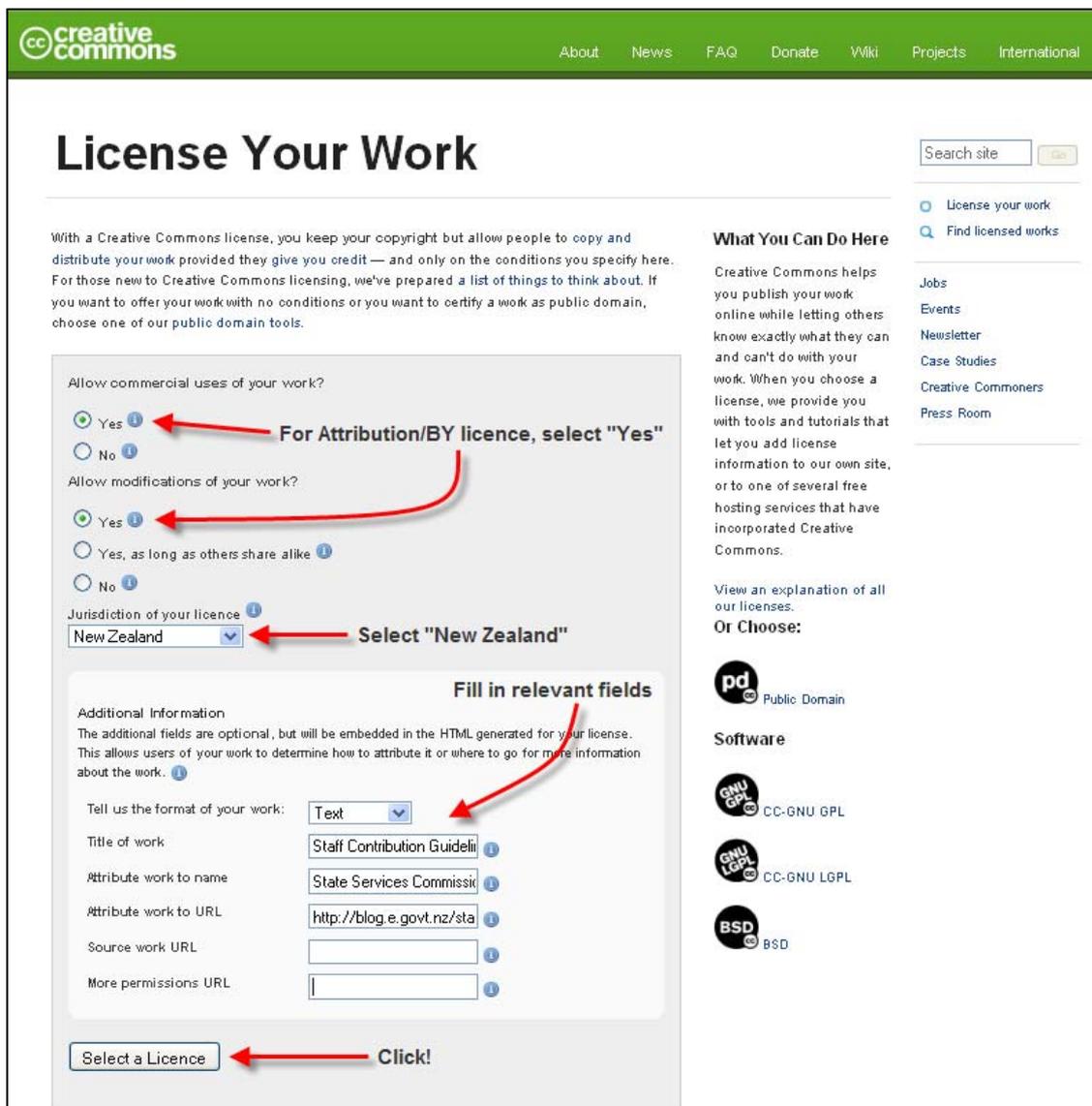
Minimum markings		Recommended markings
		(The portion in square brackets, “[In essence, ... other licence terms]” is optional but recommended. If included, remove the square brackets. Also be sure to replace “[name of agency/licensor]” as appropriate.)
<i>Licence name:</i>	Creative Commons Attribution (BY)	
<i>Licence image:</i>	 <p>(Linked to licence URL in electronic versions (e.g., PDF, Word, Excel, etc))</p>	<i>Copyright licensing statement:</i>
<i>Licence URL link:</i>	http://creativecommons.org/licenses/by/3.0/nz/	This work is licensed under the Creative Commons Attribution 3.0 New Zealand licence. [In essence, you are free to copy, distribute and adapt the work, as long as you attribute the work to [name of agency/licensor] and abide by the other licence terms.] To view a copy of this licence, visit http://creativecommons.org/licenses/by/3.0/nz/ .
<i>Licence name:</i>	Creative Commons Attribution-Noncommercial (BY-NC)	
<i>Licence image:</i>	 <p>(Linked to licence URL in electronic versions (e.g., PDF, Word, Excel, etc))</p> <p>For non-commercial licences, like BY-NC, agencies may also wish to consider using the CC+ tool to specify additional licensing or contacts for commercial use, as to which see paragraphs 81-82 above.</p>	<i>Copyright licensing statement:</i>
<i>Licence URL link:</i>	http://creativecommons.org/licenses/by-nc/3.0/nz/	This work is licensed under the Creative Commons Attribution-Noncommercial 3.0 New Zealand licence. [In essence, you are free to copy, distribute and adapt the work for non-commercial purposes, as long as you attribute the work to [name of agency/licensor] and abide by the other licence terms.]. To view a copy of this licence, visit http://creativecommons.org/licenses/by-nc/3.0/nz/ .
<i>Licence name:</i>	Creative Commons Attribution-No Derivative Works (BY-ND)	
<i>Licence image:</i>	 <p>(Linked to licence URL in electronic versions (e.g., PDF, Word, Excel, etc))</p>	<i>Copyright licensing statement:</i>
<i>URL link:</i>	http://creativecommons.org/licenses/by-nd/3.0/nz/	This work is licensed under the Creative Commons Attribution-No Derivative Works 3.0 New Zealand licence. [In essence, you are free to copy and distribute the work (including in other media and formats), as long as you attribute the work to [name of agency/licensor], do not adapt the work and abide by the other licence terms.] To view a copy of this licence, visit http://creativecommons.org/licenses/by-nd/3.0/nz/ .
<i>Licence name:</i>	Creative Commons Attribution-Noncommercial-No Derivative Works (BY-NC-ND)	
<i>Licence image:</i>	 <p>(Linked to licence URL in electronic versions (e.g., PDF, Word, Excel, etc))</p> <p>For non-commercial licences, like BY-NC-ND, agencies may also wish to consider using the CC+ tool to specify additional licensing or contacts for commercial use, as to which see paragraphs 81-82 above.</p>	<i>Copyright licensing statement:</i>
<i>Licence URL link:</i>	http://creativecommons.org/licenses/by-nc-nd/3.0/nz/	This work is licensed under the Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 New Zealand licence. [In essence, you are free to copy and distribute the work (including in other media and formats) for non-commercial purposes, as long as you attribute the work to [name of agency/licensor], do not adapt the work and abide by the other licence terms.] To view a copy of this licence, visit http://creativecommons.org/licenses/by-nc-nd/3.0/nz/ .

Licence name:	Creative Commons Attribution-Share Alike (BY-SA)	
Licence image:	 <p>(Linked to licence URL in electronic versions (e.g., PDF, Word, Excel, etc))</p>	<p><i>Copyright licensing statement:</i></p> <p>This work is licensed under the Creative Commons Attribution-Share Alike 3.0 New Zealand licence. [In essence, you are free to copy, distribute and adapt the work, as long as you attribute the work to [name of agency/licensor] and abide by the other licence terms. If you alter, transform, or build upon this work, you may distribute the resulting work only under the same, similar or a compatible licence.] To view a copy of this licence, visit http://creativecommons.org/licenses/by-sa/3.0/nz/.</p>
Licence URL link:	http://creativecommons.org/licenses/by-sa/3.0/nz/	
Licence name:	Creative Commons Attribution-Noncommercial-Share Alike (BY-NC-SA)	
Licence image:	 <p>(Linked to licence URL in electronic versions (e.g., PDF, Word, Excel, etc))</p>	<p><i>Copyright licensing statement:</i></p> <p>This work is licensed under the Creative Commons Attribution-Noncommercial-Share Alike 3.0 New Zealand licence. [In essence, you are free to copy, distribute and adapt the work for non-commercial purposes, as long as you attribute the work to [name of agency/licensor] and abide by the other licence terms. If you alter, transform, or build upon this work, you may distribute the resulting work only under the same, similar or a compatible licence.] To view a copy of this licence, visit http://creativecommons.org/licenses/by-nc-sa/3.0/nz/.</p>
Licence URL link:	http://creativecommons.org/licenses/by-nc-sa/3.0/nz/	

- 120 As noted above, it is strongly recommended that State Services agencies that apply Creative Commons licences to hard copy/non-electronic works *also* announce the availability of the work and the relevant Creative Commons licence terms electronically, whether:
- on its own website (and preferably including the announcement as an item within the site's Atom or (if not available) RSS feed so that the item can be imported into one or more centralised online repositories); and/or
 - on the [*to be determined*] website. [*As at the date of public release of the draft NZGOAL, details of such website were still being considered*].
- 121 The reason for this is to two-fold:
- to make State Services agencies' Creative Commons-licensed works more readily available to the public; and
 - to enable search engines and other tools to crawl and, where available, read the underlying metadata.
- 122 In the first instance, it is recommended that, to the extent practicable, agencies make an announcement on their own websites of copyright works which they are releasing under a Creative Commons licence. This can be done either on a page describing the work or its general surrounding subject matter or a discrete news item in a news area of the site (where available). The process is explained at paragraphs 124-128 below.
- 123 To the extent that it is not practicable for agencies to make an announcement on their own websites, they are strongly encouraged to make an announcement on the [*to be determined*] website. [*As at the date of public release of the draft NZGOAL, details of such website were still being considered*]

Applying the licences to copyright works constituted by, contained within or linked to from, website pages

- 124 Creative Commons licences are applied to copyright works which are constituted by website pages, contained within website pages or linked to from website pages, through the insertion of a snippet of HTML code in the relevant webpage(s).
- 125 The process of obtaining and applying the HTML code is straight-forward:
 - (a) visit the Creative Commons licensing page at <http://creativecommons.org/choose/>;
 - (b) select the appropriate licensing options (e.g., to select the Creative Commons Attribution licence, select “Yes” to the question “Allow commercial uses of your work?” and “Yes” to the question “Allow modifications of your work?”);
 - (c) select “New Zealand” in the drop-down menu under “Jurisdiction of your license”;
 - (d) fill out the additional fields in the “Additional Information” box, to the extent they are relevant (and otherwise leave blank);⁴⁰ and
 - (e) click on the “Select a Licence” button.



⁴⁰ Agencies are strongly encouraged to provide details for all relevant fields in the “Additional Information” box, including the “Title of work” which should match the work being licensed.

- 126 After following the steps above, you will see a screen with a box containing some HTML code. Copy that text into your computer's memory (PC: Ctrl-C) (Mac: Command-C).

The screenshot shows the Creative Commons website with the heading "Here is the licence you've chosen". It displays the Creative Commons Attribution 3.0 New Zealand Licence logo and provides instructions on how to use the license. A red arrow points to a text box containing HTML code for embedding the license on a website. The code is as follows:

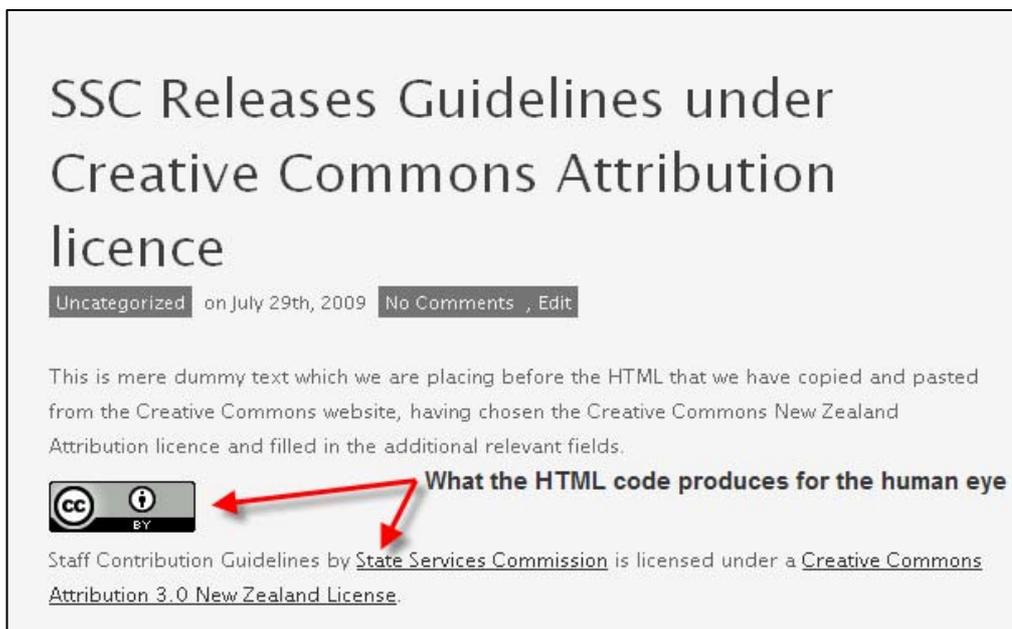
```
<a rel="license" href="http://creativecommons.org/licenses/by/3.0/nz/"></a><br /><span xmlns:dc="http://purl.org/dc/elements/1.1/" href="http://purl.org/dc/dcmitype/Text" property="dc:title" rel="dc:type">Staff Contribution Guidelines</span> by <a xmlns:cc="http://creativecommons.org/ns#" href="http://blog.e.govt.nz/staff" property="cc:attributionName" rel="cc:attributionURL">State Services Commission</a> is licensed under a <a rel="license"
```

- 127 Next, paste the code into the relevant page or post on your website. For example, if an agency were releasing a copyright work via a post on a WordPress powered website, it would add the HTML into the post content screen, as follows:

The screenshot shows the WordPress editor interface. The title of the post is "SSC Releases Guidelines under Creative Commons Attribution licence". The HTML code from the previous screenshot is pasted into the content area. A red arrow points to the code. The code is as follows:

```
<a rel="license" href="http://creativecommons.org/licenses/by/3.0/nz/"></a><br /><span xmlns:dc="http://purl.org/dc/elements/1.1/" href="http://purl.org/dc/dcmitype/Text" property="dc:title" rel="dc:type">Staff Contribution Guidelines</span> by <a xmlns:cc="http://creativecommons.org/ns#" href="http://blog.e.govt.nz/staff" property="cc:attributionName" rel="cc:attributionURL">State Services Commission</a> is licensed under a <a rel="license" href="http://creativecommons.org/licenses/by/3.0/nz/">Creative Commons Attribution 3.0 New Zealand License</a>.
```

128 The saved post, in this example, would look something like this when published:



129 Note that we “humans” only see what we need to see. The rest of the metadata is embedded in the webpage for search engines and similar tools.

Stage 5: Format selection

130 Before releasing the relevant information, data or copyright work, the agency should consider the formats in which it ought to be released.

Where agency knows users' format preferences

131 If the agency already knows the formats in which users of the information, data or work would like or are most likely to see it provided, the agency should – to the greatest extent practicable – prepare the material for release in those formats.

Where agency does not know users' format preferences

132 If the agency does not know the formats in which users of the information, data or work would like or are most likely to see it provided, it should either:

- (a) seek public feedback on the desired format(s) before release; or
- (b) prepare the material for release in one or more standards-compliant formats with a view to asking recipients, after release, whether they are satisfied with those format(s).

Proprietary and non-proprietary formats

133 To the extent that information, data or a copyright work is provided in a proprietary format (such as Microsoft Word), the agency should endeavour to provide it in one or more open, non-proprietary formats.

Stage 6: Release

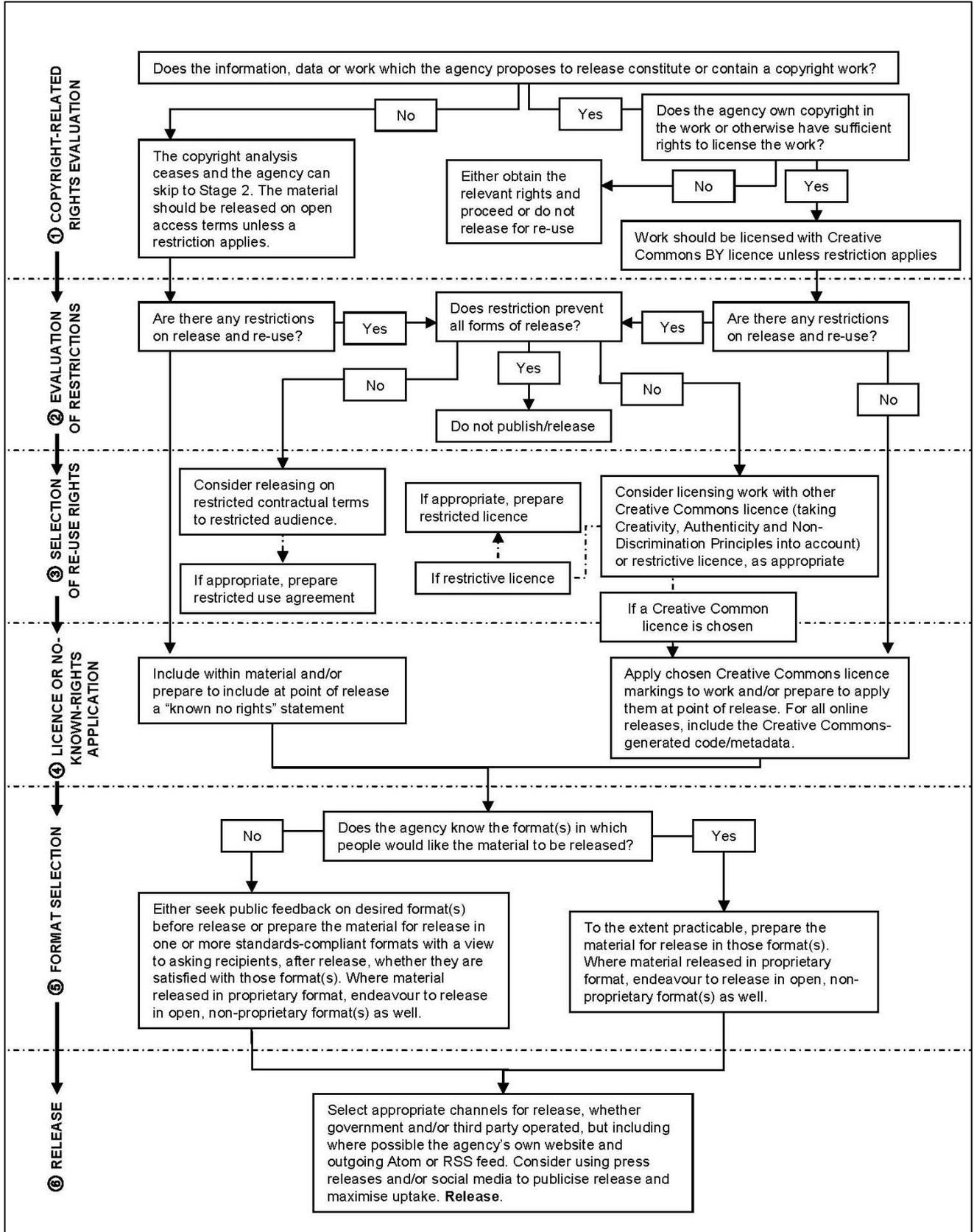
134 When the information, data or copyright work is ready for release, the agency should:

- (a) consider the various channels through which it could be released (whether governmental and/or third party operated), selecting those which are most appropriate in all the circumstances;
- (b) consider whether to use press releases and/or social media to publicise the release and maximise uptake; and
- (c) release!

NZGOAL Review and Release Process Decision Tree

135 The decision tree below explains in diagrammatic form the NZGOAL Review and Release Process explained above. It is intended to be read in conjunction with the explanations above of each of the six stages.

Diagram: NZGOAL Review and Release Process decision tree



Appendix 1 – Glossary of Terms

Atom feed	means a type of web feed and one which uses the Atom syndication format. Web feeds, in turn, allow desktop and web-based software applications to check for updated content. ⁴¹
BY	means the Creative Commons Attribution licence.
BY-NC	means the Creative Commons Attribution-Noncommercial licence.
BY-ND	means the Creative Commons Attribution-No Derivative Works licence.
BY-NC-ND	means the Creative Commons Attribution-Noncommercial-No Derivative Works licence.
BY-NC-SA	means the Creative Commons Attribution-Noncommercial licence-Share Alike licence.
BY-SA	means the Creative Commons Attribution-Share Alike licence.
CC+	means the Creative Commons Plus protocol which is a means by which licensors can provide links to rights or rights-related information beyond the rights granted by a given CC licence.
Crown copyright	means the species of copyright conferred on copyright works created by or for the “Crown” as defined in the Copyright Act.
DIA	means the Department of Internal Affairs;
HTML	means Hypertext Markup Language, the predominant markup language for web pages. ⁴²
licence	means, in a copyright context, permission to deal with a copyright work in one or more ways which, without such permission, would constitute an infringement of copyright.
metadata	means data about data and is used to facilitate the description, understanding, management and usage of data.
NZGOAL	means this New Zealand Government Open Access and Licensing framework.
RSS feed	means a type of web feed and one which uses one of a number of RSS (Really Simple Syndication or Rich Site Summary) formats. Web feeds, in turn, allow desktop and web-based software applications to check for updated content. ⁴³
SSC	means the State Services Commission.
URL	means uniform resource locator, often referred to in popular language as a web address. ⁴⁴

⁴¹ See further “Atom (standard)” at http://en.wikipedia.org/wiki/Atom_feed.

⁴² See further “HTML” at <http://en.wikipedia.org/wiki/Html>.

⁴³ See further “RSS” at http://en.wikipedia.org/wiki/RSS_feed.

⁴⁴ See further “Uniform Resource Locator” at <http://en.wikipedia.org/wiki/URL>.

Appendix 2 – Key Features of New Zealand Copyright Law

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Introduction⁴⁵

- 136 The law of copyright in New Zealand is contained in the Copyright Act 1994 and case law on the interpretation of its provisions. This Appendix provides a brief introduction to certain features of copyright law, namely:
- (a) the nature and exercise of copyright;
 - (b) ownership of copyright;
 - (c) duration of copyright;
 - (d) Crown copyright as a particular species of copyright;
 - (e) specific public sector works in which there is no copyright;
 - (f) infringement of copyright; and
 - (g) copyright and licensing.
- 137 These features are considered the most relevant to NZGOAL. Other features of copyright law, such as the range of statutorily permitted acts in relation to copyright works, internet service provider liability, remedies for infringement and performers' rights, are not addressed.

The nature and exercise of copyright

Copyright exists in qualifying original works

- 138 Copyright is a property right that exists in certain original works. To be protected, the original works must come within one or more of the following categories:⁴⁶
- (a) literary, dramatic, musical, or artistic works;
 - (b) sound recordings;
 - (c) films;
 - (d) communication works; or
 - (e) typographical arrangements of published editions.
- 139 Dealing briefly with each in turn:⁴⁷
- (a) “literary work” means any work, other than a dramatic or musical work, that is written, spoken, or sung, including a table or compilation and a computer program;
 - (b) “dramatic work” is defined non-exhaustively to include a work of dance or mime, and a scenario or script for a film;
 - (c) “musical work” is a work consisting of music, exclusive of any words intended to be sung or spoken with the music or any actions intended to be performed with the music;
 - (d) “artistic work” means a graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality; or a work of architecture, being a building or a

⁴⁵ What follows is necessarily a brief overview of only select aspects of a wide-ranging and sometimes complex area of law. See further S Frankel and G McLay *Intellectual Property in New Zealand* (LexisNexis Butterworths, Wellington, 2002) pp. 157-320; I Finch (Ed) *James & Wells Intellectual Property Law in New Zealand* (Thomson Brookers, Wellington, 2007) pp. 166-243; *The Laws of New Zealand, Intellectual Property: Copyright*, paras 1-7 (LexisNexis, online service); and the IPONZ website at <http://www.iponz.govt.nz/cms/copyright>.

⁴⁶ Section 14(1) of the Copyright Act 1994, as amended by the Copyright (New Technologies) Amendment Act 2008.

⁴⁷ The following definitions are found in section 2(1) of the Copyright Act 1994.

model for a building; or a work of artistic craftsmanship, not falling within the previous parts of this definition; the definition does not, however, include a layout design or an integrated circuit within the meaning of section 2 of the Layout Designs Act 1994);

- (e) “sound recording” means a recording of sounds, from which the sounds may be reproduced, or a recording of the whole or any part of a literary, dramatic, or musical work, from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced;
- (f) “film” means a recording on any medium from which a moving image may by any means be produced;
- (g) “communication work” means a transmission of sounds, visual images, or other information, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme; and
- (h) a “typographical arrangement of a published edition” refers to a typographical arrangement of a published edition of the whole or any part of one or more literary, dramatic, or musical works.⁴⁸

Low threshold for originality

140 As the Court of Appeal has stated, the “threshold test for originality is not high”, the determining factor being “whether sufficient time, skill, labour, or judgment has been expended in producing the work”.⁴⁹ The Court has also reiterated the axiom, or principle, that copyright is not concerned with the originality of ideas but with the form of their expression.

141 A work is not original, however, if:

- (a) it is, or to the extent that it is, a copy of another work; or
- (b) it infringes the copyright in, or to the extent that it infringes the copyright in, another work.⁵⁰

Copyright does not protect mere facts or information

142 It is important to note from the outset that copyright does not protect mere facts or information. It protects original works (which, as noted below, may include datasets or databases).

No registration

143 Registration of copyright is not required and no formal system for the registration of copyright exists in New Zealand.

Literary works, datasets and databases

144 While this NZGOAL does not address each category of qualifying work in any detail, it is important to comment on copyright in datasets and databases, as a good deal of the

⁴⁸ “Typographical arrangement” is not defined in the Act, whereas “published edition” is defined, to mean a published edition of the whole or any part of one or more literary, dramatic, or musical works.

⁴⁹ *University of Waikato v Benchmarking Services Ltd* (2004) 8 NZBLC 101,561 (CA), para 27, available online at <http://www.nzlii.org/nz/cases/NZCA/2004/90.txt>

⁵⁰ Section 14(2) of the Copyright Act 1994.

public sector information that people and companies are likely to want takes the form of datasets and databases.

145 The Copyright Act's definition of "literary work" includes a "table or compilation", and the definition of "compilation" includes "a compilation consisting wholly of works or parts of works, a compilation consisting partly of works or parts of works, and a compilation of data other than works or parts of works".⁵¹ It follows that certain datasets and databases can, in principle, qualify as literary works.⁵² By way of example:

- (a) it is "well established that copyright may subsist in publications such as dictionaries, directories, maps, or in the mere preparation of lists",⁵³
- (b) reports showing financial survey data, tabulated and converted into certain ratios for comparison, have been held to be protected by copyright.⁵⁴

146 At the same time, and as the Court of Appeal has observed:⁵⁵

"In such cases, there can be no claim to any right in the information contained in the compilation where the compiler of factual information is not the author or originator of the individual facts recorded in the compilation. ... The only claim can be to copyright in the compilation itself. It must be shown that a sufficient degree of labour, skill, and judgment is involved in preparing the compilation. That may arise, for example, through the manner in which the information is selected for inclusion in the publication, the format or presentation of the data or ... the selection and calculation of the relevant ratios, percentiles, averages, and other details."

147 One can go further and state that where individual facts or components in a dataset or database do not, of themselves, constitute original literary (or other qualifying) works (irrespective of their authors or originators), then there will be no copyright in those individual facts or components. It is only the compilation as a whole – the dataset or database – that qualifies as a copyright work.

Exercise of rights

148 Only the owner of the copyright in a work may do the following in New Zealand regarding that work:

- (a) copy it;
- (b) issue copies to the public whether by sale or otherwise;
- (c) perform, play or show it in public;
- (d) communicate the work to the public;
- (e) make an adaptation of it;
- (f) do any of the foregoing in relation to an adaptation; or

⁵¹ Section 2(1) of the Copyright Act 1994.

⁵² Detailed discussion of this important issue is beyond the scope of this paper. See, e.g., Frankel and McLay, above n 45, pp. 171-173 and 624-633; Finch, above n 45, pp. 186-188.

⁵³ *University of Waikato*, above n 49, para 35. See also *YPG IP Ltd and others v Yellow Book.com.au Pty Ltd* (2008) 8 NZBLC 102,063, para 38.

⁵⁴ *University of Waikato*, above n 49. See further the extensive discussion of English and Australian case law, and the distillation of principle, in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112, particularly the judgment of Lindgren J at para 160 and the judgment of Sackville J at para 409: The decision is available online at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2002/112.html?&nocontext=1>.

⁵⁵ *University of Waikato*, above n 49, para 36.

(g) authorise another person to do any of the foregoing acts.

149 These exclusive rights are subject to statutorily permitted acts and the doing of acts in accordance with copyright licences.

Ownership of copyright

150 The default position under the Copyright Act is that the person who is the author of a work is the first owner of any copyright in the work.⁵⁶

151 That default position is displaced in employment and commissioning contexts, as follows:

(a) where an employee makes, in the course of his or her employment, a literary, dramatic, musical, or artistic work, that person's employer is the first owner of any copyright in the work (which we can call the “employment rule”);⁵⁷ and

(b) where a person commissions, and pays or agrees to pay for, the taking of a photograph or the making of a computer program, painting, drawing, diagram, map, chart, plan, engraving, model, sculpture, film, or sound recording, and the work is made in pursuance of that commission, that person is the first owner of any copyright in the work (this is known as the “commissioning rule”).⁵⁸

152 Note, however, that:

(a) the commissioning rule does not apply to all literary works; and

(b) both the employment rule and the commissioning rule may be modified by contract (i.e., an employee or contractor might, by contract, be treated as the first owner of certain types of works otherwise falling within the employment and commissioning rules).

153 Note also that some distinct rules apply to Crown copyright works. Crown copyright is discussed separately below.

154 Copyright is assignable, i.e., it may be transferred to another. Such transfer may complete or partial, partial in the sense of being limited so as to apply:

(a) to one or more, but not all, of the things the copyright owner has the exclusive right to do; and/or

(b) to part, but not the whole, of the period for which the copyright is to exist.⁵⁹

Duration of copyright

155 For literary, dramatic, musical and artistic works:

(a) copyright expires at the end of the period of 50 years from the end of the calendar year in which the author dies;

(b) if the work is computer-generated, copyright expires at the end of the period of 50 years from the end of the calendar year in which the work is made; and

(c) if the work is of unknown authorship, copyright expires at the end of the period of 50 years from the end of the calendar year in which it is first made available to the public by an authorised act.⁶⁰

⁵⁶ Section 21(1) of the Copyright Act 1994.

⁵⁷ Section 21(2) of the Copyright Act 1994.

⁵⁸ Section 21(3) of the Copyright Act 1994.

⁵⁹ Section 113 of the Copyright Act 1994.

- 156 For sound recordings and films, copyright expires at the later of:
- (a) the end of the period of 50 years from the end of the calendar year in which the work is made; and
 - (b) if it is made available to the public by an authorised act before the end of that period, 50 years from the end of the calendar year in which it is so made available.⁶¹
- 157 For communication works, copyright expires at the end of the period of 50 years from the end of the calendar year in which the communication work is first communicated to the public.⁶²
- 158 For typographical arrangements of published editions, copyright expires at the end of the period of 25 years from the end of the calendar year in which the edition is first published.⁶³
- 159 Different duration rules apply to Crown copyright. They are discussed below.

Crown copyright as a species of copyright

Nature of Crown copyright

- 160 Crown copyright is a species of copyright regulated principally by section 26 of the Copyright Act.⁶⁴ That section states that:
- (a) where a work is made by a person employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a contract for services, the work qualifies for copyright and the Crown is the first owner of any copyright in the work, unless the parties to the contract agree otherwise;⁶⁵ and
 - (b) copyright in such a work is referred to as “Crown copyright”, even if such copyright is assigned to another person;⁶⁶

Duration of Crown copyright

- 161 Crown copyright expires:
- (a) in the case of a typographical arrangement of a published edition, at the end of the period of 25 years from the end of the calendar year in which the work is made; or
 - (b) in the case of any other work, at the end of the period of 100 years from the end of the calendar year in which the work is made.⁶⁷

Works of joint authorship

- 162 In the case of a work of joint authorship where one or more, but not all, of the authors are persons employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a contract for services, the section applies only in relation to those authors and the copyright existing by virtue of their contribution to the work.⁶⁸

⁶⁰ Section 22 of the Copyright Act 1994. Specific rules apply to rules of joint authorship (see subsection (6)). They are not discussed here.

⁶¹ Section 23 of the Copyright Act 1994.

⁶² Section 24 of the Copyright Act 1994.

⁶³ Section 25 of the Copyright Act 1994.

⁶⁴ <http://legislation.govt.nz/act/public/1994/0143/latest/DLM345937.html>

⁶⁵ Section 26(1) and (6).

⁶⁶ Section 26(2).

⁶⁷ Section 26(3).

⁶⁸ Section 26(4).

Definition of “Crown” does not include Crown entities and SOEs

163 “Crown” for these purposes is defined in section 2 of the Copyright Act to mean Her Majesty the Queen in right of New Zealand and includes a Minister of the Crown, a government department, and an Office of Parliament. It expressly does not include a Crown entity or a State enterprise named in Schedule 1 to the State-Owned Enterprises Act 1986. As such, while Crown entities and State owned enterprises do enjoy copyright in their original works, their copyright is not “Crown copyright”.

Specific public sector works in which there is no copyright

164 Section 27(1) of the Copyright Act contains a list of governmental and Parliamentary materials in which no copyright exists. In essence, no copyright exists in Bills, Acts, regulations, bylaws, NZ Parliamentary debates, select committee reports laid before the House, court and tribunal judgments, and reports of Royal commissions, commissions of inquiry, ministerial inquiries, or statutory inquiries.

165 Section 27(1A) goes on to state that no Crown copyright exists in any work, whenever that work was made:

- (a) in which the Crown copyright has not been assigned to another person; and
- (b) that is incorporated by reference in a work referred to in subsection (1) (that is, those works referred to in paragraph 164 above).

Section 27(1B) states that, except as specified in subsection (1A), nothing in subsection (1) affects copyright in any work that is incorporated by reference in a work referred to in subsection (1).

166 In substance, the effect of subsections (1A) and (1B) is two-fold.⁶⁹

- (a) to strip existing and non-assigned Crown copyright from any work that is incorporated by reference into one of the works referred to in subsection (1); and
- (b) to ensure that third party copyright in works that are incorporated by reference into any of the works referred to in paragraph 164 is not overridden by section 27(1).

Infringement of copyright

Primary infringement

167 The Copyright Act distinguishes between primary infringement and secondary infringement of copyright. Only primary infringement is addressed here.

168 A person infringes copyright in a work when he or she, other than pursuant to a copyright licence, does any of the following “restricted acts”, either in relation to the work as a whole or any “substantial part” of it:⁷⁰

- (a) copies it;
- (b) issues copies to the public whether by sale or otherwise;

⁶⁹ See further the Legislation (Incorporation by Reference) Bill (250-1) (30 March 2005) as reported by the Government Administration Committee, at http://www.parliament.nz/NR/rdonlyres/3DFA2143-5189-4C90-972C-0A5EA2CD6005/48100/DBSCH_SCR_3038_31391.pdf; the Hon Pete Hodgson’s comments during the second reading of the Bill, at http://www.hansard.parliament.govt.nz/hansard/Final/FINAL_2005_04_12.htm; and G McLay *Strategy and Intellectual Property – Scoping the Legal Issues* (NZ Digital Content Strategy Working Paper 2, April 2006) pp. 44-46, at <http://www.parliament.nz/NR/rdonlyres/E795AA07-4CB0-4A5B-806E-976A60A2E2D9/63800/StrategyandintellectualpropertyMcLay3.pdf>

⁷⁰ Section 29(1) and (2) of the Copyright Act 1994.

- (c) performs, plays or shows it in public;
- (d) communicates the work to the public;
- (e) makes an adaptation of it;
- (f) does any of the foregoing in relation to an adaptation; or
- (g) authorises another person to do any of the foregoing acts.

169 The Act states that:⁷¹

- (a) the copying of a work is a restricted act in relation to every description of copyright work;
- (b) the issue of copies of a work to the public is a restricted act in relation to every description of copyright work;
- (c) the performance of a work in public is a restricted act only in relation to a literary, dramatic, or musical work;
- (d) the playing or showing of a work in public is a restricted act only in relation to a sound recording, film, or communication work;
- (e) communicating a work to the public is a restricted act in relation to every description of copyright work; and
- (f) the making of an adaptation of a work is a restricted act only in relation to a literary, dramatic, or musical work.

170 So far as copying is concerned, it is worth noting that “copying” is defined broadly to mean, among other things, “in relation to any description of work, reproducing, recording, or storing the work in any material form (including any digital format), in any medium and by any means”.⁷²

Infringement in the case of datasets and databases

171 Given that the re-use of datasets and databases is highly relevant to NZGOAL, it may be useful to note the courts’ approach to what is required for infringement of copyright where a database or dataset consists of facts or information which, on their own, are not copyright works.

172 As with other types of copyright works, copyright in a database or dataset may be infringed by, among other things, copying either the entire database or dataset or a substantial part of it.⁷³ In the context of arrangements and compilations, the Supreme Court has endorsed the principle that “the greater the originality, the wider will be the scope of the protection which copyright affords *and vice versa*”.⁷⁴

⁷¹ See sections 30-34.

⁷² Section 2(1) of the Copyright Act 1994.

⁷³ Sections 29 and 30 of the Copyright Act 1994.

⁷⁴ *Henkel KgaA v Holdfast* [2006] NZSC 102; [2007] 1 NZLR 577, para 38. While *Henkel* was a “graphic work” rather than a literary work/compilation case, Tipping J relied for this statement of principle on *Land Transport Safety Authority of New Zealand v Glogau* [1999] 1 NZLR 261 (CA), which was a literary work case. A recent decision of the High Court of Australia addresses the issue of copying a “substantial part” of a compilation in detail: *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14.

173 The Court quoted and approved the following passages from an earlier High Court decision. While these passages were made in the context of a graphic work, the stated principles are considered to apply to “compilations” (a subset of literary works) as well:⁷⁵

“Where ... the plaintiff relies for its copyright on a collection of individual features, none of which on their own would attract copyright, this has ramifications when it comes to infringement. To infringe in such circumstances the defendant must have used the same or a substantially similar arrangement or collocation of the individual features. If the defendant has copied the individual features but has made its own arrangement of them, this will not represent an infringement. That is because the plaintiff has no monopoly in the individual features as such but only in their arrangement or collocation. Because the plaintiffs' copyright resides in the arrangement or collocation the defendant, to infringe, must have copied the arrangement or collocation or a substantial part thereof.”

174 The Court also said:⁷⁶

“As we observed earlier, it may be relevant for infringement purposes to determine how much skill and labour went into the making of the copyright work. This point can have particular relevance in arrangement cases. The skill and labour which has given rise to the arrangement is what gives the work its originality and if that skill and labour is not great, another arrangement of the same unoriginal underlying features may not have to depart greatly from the copyright arrangement in order to avoid infringement. If the level of originality in the copyright arrangement is low, the amount of originality required to qualify another arrangement of the same elements as original, is also likely to be low. Substantial reproduction of those aspects of the work in which the originality lies must be shown to establish infringement. This is consistent with the purpose of the law of copyright which is to recognise and protect the skill and labour of the author of the copyright work.”

Copyright and licensing

175 It is not uncommon for those not familiar with copyright law to confuse the distinction between Crown copyright (or regular copyright), on the one hand, and the licensing of material in which Crown or regular copyright exists, on the other. That is so irrespective of the form that the licensing takes, but has most recently been noticed in discussions around Creative Commons licensing of Crown copyright material.

176 The key point is that Crown or regular copyright in content and licenses to use such content are conceptually distinct things. In a licensing scenario, copyright ownership stays with the owner, but the licensee(s) are permitted to deal with the copyright work in accordance with the terms of the licence.

177 One way of conceptualising the distinction is to think of copyright as a bundle of rights, some of which can, at the election of the copyright owner, be shared with others by way of various licence arrangements, whether that be a one-off, bespoke license, or a uniform licence such as those offered by Creative Commons.

⁷⁵ Above n 74, para 40. A recent decision of the High Court of Australia addresses the issue of copying a “substantial part” of a compilation in detail: *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14.

⁷⁶ Above n 74, para 41. See also *YPG IP Ltd and others v Yellow Book.com.au Pty Ltd* (2008) 8 NZBLC 102,063, paras 56-59.