

New Zealand Government Open Access and Licensing framework (NZGOAL)

Guidance Note 7: Obtaining licensing rights when creating databases that may be open-licensed

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Introduction and context

NZGOAL Guidance Notes

- 1 NZGOAL is the New Zealand Government Open Access and Licensing framework. NZGOAL Guidance Notes either explore issues raised in NZGOAL or address operational or technical issues that arise in practice. All references in this Guidance Note to NZGOAL are to version 2 of NZGOAL.

What this Guidance Note covers

- 2 This Guidance Note addresses a licensing issue that can arise when agencies are creating databases that may in the future be open-licensed for re-use in accordance with NZGOAL.

Importance of incoming licensing

- 3 The key point is that it may be important for an agency that is creating a database to obtain incoming licensing rights from content contributors to enable outgoing open licensing. If an agency doesn't get its licensing right, it could invest considerable time and money in creating a database only to find it cannot positively allow re-use of all its content in future.

Database content

- 4 Whether there is a need to obtain incoming licensing rights depends on the type of content in the database, as there are various means by which an agency may create a database. For example:
 - (a) an agency may create and compile all database content itself;
 - (b) an agency's database may contain content the agency has created as well as content that has been contributed by other agencies, organisations and/or individuals; or
 - (c) an agency's database may be purely crowd-sourced, in that all content is contributed by members of the public.
- 5 In each of these situations, the agency creating or maintaining the database may wish to license the database for re-use under, for example, a Creative Commons Attribution 4.0 International licence, so as to maximise the value of the database to New Zealanders. It is in the second and third situations that it may be important to ensure that the agency creating or maintaining the database obtains incoming licensing rights from content contributors to enable outgoing open licensing.

Practical implications

- 6 The practical implications for agencies creating databases that may be licensed for re-use are as follows:
 - (a) when creating a database, assess the different kinds of content that may be contributed to the database;
 - (b) if some of that content is sourced from third parties, ensure that incoming licensing rights are obtained to enable the agency to license all database content for re-use. This will often be achieved through including incoming licensing clauses in the

website or database's terms of use that contributors must accept before contributing content. Sample clauses are set out below.

- 7 Agencies are encouraged to consult their legal teams before finalising the terms of use that apply to a given website or database.
- 8 The remainder of this Guidance Note contains more detailed discussion of the issues and sets out the specimen clauses mentioned above.

Detailed discussion

Different kinds of database content

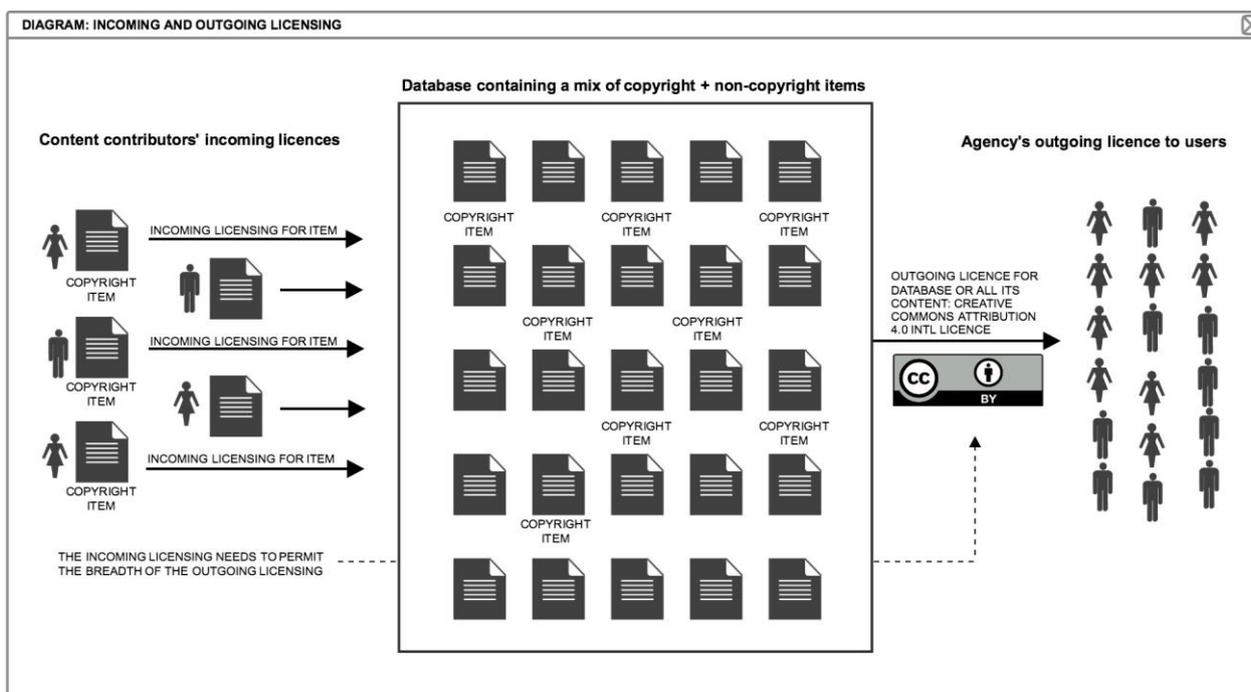
- 9 Databases can comprise:
 - (a) individual data items, none of which alone are protected by copyright, but the compilation of which can qualify as a copyright work (let's call this a **Type 1 Database**); or
 - (b) a mixture of individual non-copyright data items as well as copyright items (in this situation copyright may subsist in the overall compilation, in addition to the distinct copyright in the individual copyright items) (**Type 2 Database**); or
 - (c) a range of individual items each of which is protected by copyright in its own right (and again, there may be copyright in the overall compilation as well) (**Type 3 Database**).
- 10 Individual items in a database that may, themselves, be distinct copyright works could be in the nature of (for example):
 - (a) written reports or tracts of sufficiently original text that people provide to the agency, e.g., through a crowd-sourcing website;
 - (b) photos or other images that people provide to the agency; or
 - (c) sound or film clips that people provide to the agency.

Incoming and outgoing licensing rights

- 11 In the case of Type 2 and Type 3 Databases, it is important for the compiling agency to obtain incoming licensing rights for the individual copyright items contributed by others that are commensurate with the agency's intended use and open licensing of those items. This is important because if the incoming licensing rights are narrower than the agency's intended use and licensing, the agency may be infringing copyright when:
 - (a) putting the individual copyright items to certain uses; and
 - (b) purporting to license the overall database for re-use by others.

A mismatch between incoming licensing rights from contributors and the agency's open licensing of the database contents as a whole, i.e., its outgoing licensing, could also expose end users to allegations of copyright infringement.

- 12 The diagram on the next page illustrates the manner in which an agency may need incoming licensing rights from contributors in relation to their individual copyright items that are as broad as the outgoing licence the agency wishes to apply to the overall database or all its content:



Sample clauses

- 13 When an agency obtains contributions to a database from other organisations or members of the public, the agency may wish to consider including in its terms of use:
- a warranty (promise) that a user who uploads content has all relevant rights to do so (the **warranty clause**);
 - a right for the agency to sub-license user contributions under either a specified, or any, Creative Commons licence (the main purpose of this Guidance Note) (the **licensing clause**);
 - a clause prohibiting users from uploading material that is objectionable or invasive of third party rights (the **no objectionable content clause**); and
 - an indemnity under which each user agrees to compensate the agency for any loss it suffers as a result of breaching the licensing clause or the no objectionable content clause (the **indemnity clause**).¹
- 14 Sample clauses are set out below.²

1. Your contributions

You promise to us that you do and will have all required rights to upload your contributions to the site and that your licensing to us and our use of those contributions in accordance with these terms will not:

- infringe any person's intellectual property rights or

It's important that you only upload content that you're allowed to upload, that you respect other people's rights, that you comply with applicable laws and that we can remove material when we need to.

¹ It is suggested that agencies consider whether inclusion of such an indemnity is appropriate by reference to the likely audience of the website and the potentially adverse message it could send to users of Government services. This is a context-dependent question and it is for each agency to decide whether to include one.

² The boxed notes are aids to quick understanding. They can be reproduced in terms of use but do not need to be. If they are reproduced, it is advisable to state at the beginning of the terms that the boxed notes provide quick snapshots of clauses but are not part of the legal terms. Note also that the sample clauses are not intended to represent all the kinds of clauses an agency might need in the context of an interactive website. See further the discussion of drafting terms of use in the New Zealand Government Web Toolkit: <https://webtoolkit.govt.nz/guidance/legal-and-policy/terms-of-use/>

other legal rights or legally protected interests;

- (b) breach any laws or legally binding codes; or
- (c) give rise to any cause of action or legal right of complaint against us or you or any third party.

If you breach this promise, we may:

- (d) remove (either completely or from public access), suspend, amend or delete the relevant material; and/or
- (e) suspend your access to the site or ability to add material to the site while we investigate the matter.

2. Your licence to us

You or your licensors retain any copyright in contributions you post to the site or send us via email or other means. You grant us a non-exclusive, royalty-free, transferable and irrevocable licence to:

You retain ownership of your content but you permit us to use it and to allow others to re-use it under a Creative Commons licence.

- (a) store, copy, adapt, reformat and otherwise use your contributions and to publish them in any media and in any format, including on this website and any other website and in hard copy publications, email notifications and web feeds; and
- (b) sub-license such material for re-use by others pursuant to the terms of the [Creative Commons Attribution 4.0 International licence](#).

Or (alternative drafting)

- (b) sub-license such material for re-use by others pursuant to the terms of [any Creative Commons licence](#) under which we may choose to license material on this site.

3. No objectionable material

You promise:

- (a) not to upload or transmit to or from this site any material that is obscene, defamatory, threatening, invasive of privacy or that is otherwise, in our opinion, injurious or objectionable, including any worms or viruses or any code of a destructive nature; and
- (b) to comply with any usage or other guidelines we may post to the site from time to time.

You are not allowed to upload objectionable material to this site and you have to follow our usage or other guidelines.

4. Indemnity

Unless this clause is waived by us in writing, you agree you will indemnify us and keep us indemnified against all liabilities, damages, losses, costs and expenses (including legal expenses) suffered or incurred by us and arising as a result of any breach by you of clause 1 (Your and third party content) or 3 (No objectionable material). This clause does not apply to departments of the Crown or any of their staff.

If you upload content that you should not upload, you'll need to protect us from the consequences of your doing so.