



New Zealand Government Open Access and Licensing framework (NZGOAL)

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Introduction

Purpose

- 1 State Services agencies hold and own vast quantities of:
 - (a) copyright works, including geospatial datasets, commissioned research reports, scientific datasets, collections of official statistics, datasets on government performance (financial and otherwise), photographic images, educational resources and archive film; and
 - (b) non-copyright material, such as out-of-copyright images and material in which, by law, there is no copyright.
- 2 It is widely recognised, in New Zealand and abroad, that significant creative and economic potential may lie dormant in such copyright and non-copyright material when locked up in agencies and not released on terms allowing re-use by others. That potential is two-fold:
 - (a) potential for individuals, non-profit and commercial organisations to leverage this material for creative, cultural and economic growth, improved environmental sustainability, greater productivity, and the wider public benefit; and
 - (b) potential for experts and others to contribute to improved policy development and more efficient financial performance by government through being able to access, manipulate and provide feedback on such material.
- 3 The Government wants to encourage the realisation of this potential. It wants individuals and organisations to be able to leverage State Services agencies' data stores for their own, agencies' and others' benefit. With a view to enabling such realisation through the release of State Services agencies' material for re-use, the State Services Commission (**SSC**), in collaboration with the Department of Internal Affairs (**DIA**), has prepared this New Zealand Government Open Access and Licensing framework (**NZGOAL**).
- 4 In essence, NZGOAL:
 - (a) sets out a series of open licensing and open access principles, for copyright works and non-copyright material respectively;
 - (b) advocates the use of:
 - (i) Creative Commons licences for those State Services agencies' copyright works which are appropriate for release and re-use; and
 - (ii) clear "no known rights" statements for non-copyright material released for re-use; and
 - (c) sets out a review and release process to guide agencies through the review of works and other material they consider ought to be released for re-use.
- 5 The release of this finalised version 1 of NZGOAL follows:
 - (a) investigation and consideration during 2008-2010 of issues relating to the re-use of State Services agencies' copyright works and non-copyright material, including consideration of:
 - (i) the policy context of both the Policy Framework for Government-Held Information (1997)¹ and the New Zealand Government Web Standards,²

¹ <http://www.e.govt.nz/policy/information-and-data/policy-framework-for-government-held-information>

² <http://www.webstandards.govt.nz/>

- (ii) the legal context of copyright (Crown copyright and otherwise) in qualifying works under the Copyright Act 1994, the Official Information Act 1982, the Public Records Act 2005 and the Privacy Act 1993; and
 - (iii) the prior factual context of various and inconsistent licensing practices across the State Services;
- (b) consultation in 2009 with departments and other organisations on the NZGOAL initiative, its drivers and a proposed licensing model;³ and
 - (c) release in August 2009 of a draft of NZGOAL for road-testing and further feedback, from both the public and agencies, and consideration of that feedback.
- 6 NZGOAL is now operative and is likely to be updated from time to time in the light of further practical experience across the State Services.

Scope

- 7 NZGOAL applies to State Services agencies. “State Services” is the term for a broad range of organisations that serve as instruments of the Crown in respect of the Government of New Zealand. It consists of:
- (a) all Public Service departments;
 - (b) other departments that are not part of the Public Service;
 - (c) all Crown entities (except tertiary education institutions);
 - (d) a variety of organisations included in the Government's annual financial statements by virtue of being listed in the Fourth Schedule to the Public Finance Act 1989; and
 - (e) the Reserve Bank of New Zealand.
- 8 NZGOAL covers both:
- (a) copyright works; and
 - (b) non-copyright material,
- that are produced by or for 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 copyright works, license (or sub-license) for re-use; and
 - (d) in the case of non-copyright material, release for re-use.
- 9 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. Except for its guidance on anonymisation of datasets and other material which, once stripped of personal information, might be licensed or released, NZGOAL does not apply to personal information.
- 10 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 should be used.

³ See “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>. For SSC's collation of and feedback on the responses received, see “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”, also available at <http://e.govt.nz/policy/information-data/nzgoalframework.html>.

Status

- 11 Cabinet has endorsed NZGOAL as guidance for State Services agencies to take into account when releasing their copyright works and non-copyright material publicly for re-use. In particular, Cabinet has:
- (a) **directed** all Public Service departments, the New Zealand Police, the New Zealand Defence Force, the Parliamentary Counsel Office, and the New Zealand Security Intelligence Service;
 - (b) strongly **encouraged** other State Services agencies (other than school boards of trustees; and
 - (c) **invited** school boards of trustees,
to:
 - (d) familiarise themselves with NZGOAL, in its current form and as may be updated from time to time; and
 - (e) take NZGOAL into account when releasing copyright material and non-copyright material to the public for re-use.⁴
- 12 It is hoped that agencies will:
- (a) embrace NZGOAL;
 - (b) license more of their copyright works on open terms; and
 - (c) open up access to more of their non-copyright material that may be of interest to the public,
- bearing in mind the potential benefits of doing so for both the public and agencies alike.

Audiences

- 13 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;
 - (ii) developers of web and other applications; and
 - (iii) researchers who may draw on large numbers of datasets; and
 - (c) State Services agencies.

Additional guidance notes

- 14 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 copyright works and non-copyright material released in accordance with NZGOAL.
- 15 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

⁴ CAB Min (10) 24/5A.

SSC nor DIA will be providing legal advice to members of the public in response to such recommendations.

Copyright and other legal context

Copyright law basics

- 16 As noted above, NZGOAL covers both copyright works and non-copyright material. Given that copyright law is fundamental to the need for and operation of NZGOAL, it is appropriate to set out certain key aspects of copyright law at the outset, before launching into the NZGOAL Policy Principles.
- 17 Key aspects of copyright law relevant to NZGOAL can be summarised as follows:
 - (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 the licensing of works in which copyright exists, as they are conceptually distinct; when, for example, a department licences a copyright work that the department owns, the department retains its copyright ownership but grants permissions to do things with the work (such as copy it) which would otherwise be prohibited;
 - (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; and
 - (i) in certain specific circumstances, those who deal in or publish copyright works need to respect authors’ so-called “moral rights” which, as explained in more detail in paragraphs 51-53 and Appendix 3 below, are a set of statutory rights in the Copyright Act that are personal to the authors or other creators of original works.
- 18 It is important to emphasise at the outset that not all government held or created material qualifies for copyright protection. An informational or other product, work or dataset only qualifies if, first, it falls within one of the categories mentioned in paragraph 17(b) above, and second, the period of copyright protection that applies to it has not expired. To assume that all information and data held by State Services agencies is protected by copyright can lead to error. 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”.

- 19 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 State Services agencies' copyright works and non-copyright material. Further detail on some of the more fundamental features of New Zealand copyright law are set out in Appendix 3.

Information laws

- 20 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.
- 21 At the same time, there are two ways in which NZGOAL can be seen to intersect with such laws that are worth noting.
- 22 First, 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 the Act.⁵
- 23 Second, NZGOAL does not extend to personal information. It is for this reason that no issues arise under the Privacy Act. Agencies should, nevertheless, be mindful of the potential for seemingly anonymised datasets, when combined, to reveal personal information, an issue which is addressed within the NZGOAL Policy Principles at paragraph 34 below.

⁵ Where appropriate, agencies may even wish to start applying NZGOAL when releasing copyright works and non-copyright material in response to requests under the Act. That is an administrative decision for agencies.

NZGOAL Policy Principles

Introduction

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

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

- 26 Unless a restriction in paragraph 29 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 open of licensing terms available within NZGOAL (the **Open Licensing Principle**).⁶ To the greatest extent practicable, such works should be made available online. The most open of licensing terms available within NZGOAL is the Creative Commons Attribution (BY) licence.

Ensuring copyright ownership or right to sub-license

- 27 Agencies should only license 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-license the work (or relevant elements of the work)⁷ on the terms of their preferred licence (such as a Creative Commons licence) from the relevant copyright owner(s).

Open access to non-copyright material

- 28 Unless a restriction in paragraph 29 applies, State Services agencies should:
- (a) provide online public access to non-copyright material that is or may be of interest or use to people;
 - (b) allow them to copy and re-use such material without restriction; and
 - (c) include, at the point of release (and in the released material itself if practicable), the “no known rights” statement set out at paragraph 86 below or a statement in broadly equivalent terms
- (the **Open Access Principle**).

⁶ The Creative Commons Attribution (BY) licence is recommended as the default licence so as to promote the greatest re-use of State Services agencies' copyright works and interoperability between the different licence types.

⁷ The reference here to obtaining a right to sub-license 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

- 29 Neither the Open Licensing Principle nor the Open Access Principle applies where licensing a copyright work with the Creative Commons Attribution (BY) licence (in the case of copyright works) or providing open access to and allowing re-use of other material (in the case of non-copyright material) would:
- (a) be contrary to legislation, court order or specific government policy;
 - (b) constitute a breach of contract, breach of confidence, breach of privacy, disclosure of a trade secret or other actionable wrong;
 - (c) be contrary to an agency's own legitimate commercial interests or business model (such as Standards New Zealand's charging for standards);⁸
 - (d) result in the publication of a patentable invention for which the agency proposes or may wish to apply for a patent;⁹
 - (e) be contrary to the public interest, where it exists, in having a single, authoritative and non-adapted version of a specific data source;
 - (f) result in the release of an incomplete work or incomplete material where the agency considers, acting reasonably, that:
 - (i) such release would be:¹⁰
 - materially misleading; or
 - likely to cause or contribute to material error on the part of recipients or licensees; and
 - (ii) such risks could not be adequately mitigated by the use of disclaimers or other statements at the point of release and/or within the work or material regarding the incompleteness of the work or material;
 - (g) threaten the control over and/or integrity of Māori or other traditional knowledge or other culturally sensitive material;
 - (h) jeopardise the economic or other potential to Māori or other indigenous groups of Māori or other traditional knowledge or other culturally sensitive material;¹¹ or
 - (i) otherwise conflict with the existence of a good reason under sections 6, 7 or 9 of the Official Information Act for withholding release of the work or material if the work or material were requested under that Act.

Other Creative Commons licensing or restrictive licensing

- 30 Where, in the case of a copyright work, one of the above restrictions applies but an agency may still be able to license the copyright work on Creative Commons terms (the restrictions in paragraphs 29(c) and 29(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 32-33 below:

⁸ It is acknowledged that open access and licensing may, to varying extents, be inconsistent with the business models of certain Crown entities. However, it does not follow that they ought therefore to be beyond the scope of NZGOAL. There may well be instances where it is not contrary to a Crown entity's business model to release copyright works on, for example, Creative Commons Attribution (BY) terms or where wider social good questions properly inform decisions on release. There may also be instances where a restriction does apply but that restriction does not preclude release on terms that allow all but commercial uses.

⁹ 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>

¹⁰ 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.

¹¹ 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.

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

31 Where no other Creative Commons licence can be applied, the agency may wish to consider making the work available pursuant to a more restrictive licence. This is expected to be the exception rather than the norm. Agencies that do have a genuine need to use a more restrictive licence may wish to take into account the drafting issues set out in paragraph 85 below.

Share-alike and no derivative works restrictions

32 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

33 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**).

Anonymisation

34 Particular care needs to be taken when an agency is considering the release of a dataset which once contained personal information but which the agency believes it has successfully anonymised, leading it to conclude that there would be no release of personal information. Before releasing apparently anonymised datasets, agencies should give serious consideration to:

- (a) whether its anonymisation processes are sufficiently robust to protect individuals' privacy, from the perspectives of both:
 - (i) interrogation of the particular dataset in question; and
 - (ii) interrogation of that dataset in conjunction with other datasets which are either currently publicly available or which might become publicly available in the future;
- (b) the legal position that:
 - (i) "personal information" is defined in the Privacy Act 1993 to mean "information about an *identifiable* individual"; and
 - (ii) that definition "only requires that the information be about an identifiable individual not that the individual be identified in the information", such that information may be "personal information" where its combination with

some extrinsic link, knowledge or circumstances – including combinations with other datasets – enables one or more persons to be identifiable.¹²

- 35 Agencies requiring assistance with the anonymisation of datasets that contain personal information may wish to:
- (a) consult international literature on the subject;¹³ and/or
 - (b) contact the Office of the Privacy Commissioner or Statistics New Zealand.¹⁴
- 36 Agencies should also bear in mind, when considering issues of anonymisation, that photographic and some satellite and geospatial images may contain personal information. Agencies may need to take care when releasing such images to ensure there is no unauthorised release or use of personal information.

Attribution requirements for datasets

- 37 All Creative Commons New Zealand law copyright licences contain attribution requirements, requiring licensees (i.e., users) to:
- (a) make reference to the licence on all copies of the work, adaptations of the work and collections containing the work that they (the licensees/users) publish, distribute, perform or otherwise disseminate or make available to the public;
 - (b) recognise the licensor's / original author's right of attribution (right to be identified) in the work, any adaptation of the work or any collection containing the work *that they publish, distribute, perform or otherwise disseminate to the public* and give credit to the licensor / original author as appropriate to the media used (unless the licensor / original author asks for such credit to be removed); and
 - (c) to the extent reasonably practicable, keep intact all notices that refer to the licence, in particular the URI, if any, that the licensor specifies to be associated with the work, unless such URI does not refer to the copyright notice or licensing information for the work.
- 38 At the same time, any or all of these attribution requirements can be waived by the licensor (i.e., licensing agency).
- 39 Copyright datasets released on terms allowing re-use are more likely than other copyright works to be combined or mashed-up with other datasets, either wholly or partially. In some instances data from multiple datasets, potentially large numbers of datasets, may feed into an end application. This may be particularly so in applications of a scientific, technological or geographic nature. In such situations compliance with multiple attribution requirements, one to each source, may be burdensome for researchers or the developers of such applications, at least where the attribution requirements are more than minimal and non-standardised. This has been referred to in the literature as the problem of "attribution stacking".
- 40 For these reasons, State Services agencies releasing copyright datasets under Creative Commons licences should:
- (a) consider whether there is any prospect that those datasets or portions of them will be combined with one or more other datasets or portions of other datasets; and

¹² See *Privacy Law and Practice* (LexisNexis, loose-leaf service, Service 55) at p. 152,403 and *Sievwrights v Apostolakis* CIV-2005-485-000527, Ronald Young J, Dr A Trlin and G Kerr.

¹³ See, for example, the United Nations Economic Commission for Europe Conference of European Statisticians' *Managing Statistical Confidentiality and Microdata Access: Principles and Guidelines of Good Practice* (2007), available online at: http://www.unece.org/stats/publications/Managing_statistical_confidentiality_and_microdata_access.pdf; and ESSNet's *Handbook on Statistical Disclosure Control* (January 2010, version 1.2), available online at http://neon.vb.cbs.nl/casc/.%5CSDC_Handbook.pdf; see also the "Anonymization" section of the International Household Survey Network (IHSN) website at: <http://www.ihsn.org/home/index.php?q=tools/anonymization>

¹⁴ Statistics New Zealand has produced a 'Confidentiality standard for microdata access', a 'Confidentialised unit record file (CURF) production guide' and a 'Confidentiality best practices manual' which, while not published, are available to agencies on request.

- (b) if there is any such prospect, keep attribution requirements (if any) to a minimum, requiring at most a statement that:
- (i) identifies the agency as a data source; and
 - (ii) contains the agency's URI that contains licensing information for the data but only if it is reasonably practicable for the end user to refer to the URI in its application, tool, system, programme, research or other use.
- 41 A statement of the kind referred to in paragraph 40(b), which also accommodates wholesale copying of the dataset without combination with other datasets (which would not give rise to attribution stacking problems), could be along the following lines:
- If you publish, distribute or otherwise disseminate this work to the public without adapting it, the following attribution to *[name of agency]* should be used:
- ‘Source: *[name of agency]* and licensed by *[name of agency]* for re-use under the *[name of and link to applicable Creative Commons licence]*.’
- If you adapt this work in any way or include it in a collection, and publish, distribute or otherwise disseminate that adaptation or collection to the public, the following attribution to *[name of agency]* should be used:
- ‘This *[work/product/application/etc]* uses data sourced from *[name of agency]*.’
- 42 An end user who, for example, develops a web application that combines that dataset with other data sources would then be able to include a brief statement somewhere on its website (e.g., in its footer) such as this (the agency names are fictitious):
- “This application uses data sourced from Geo Agency, Met Agency, CRI Agency.”
- In this example, the names of the agencies could be deep-linked back to the relevant pages on each agency's or other website on which the original data sources can be found.
- 43 Alternatively, the end user may wish to include an even briefer statement somewhere on its website such as this:
- “This application uses data from various sources.”
- The words “various sources” could then be linked to a web page that lists all the sources in full, with links to the locations of the original data sources.
- 44 Nothing in paragraph 40:
- (a) limits an agency's right to waive *all* attribution requirements that would otherwise apply under a selected Creative Commons licence;
 - (b) limits an agency's right to positively request that there be no attribution; or
 - (c) affects the legal proposition that where a user copies less than a “substantial part” of a copyright dataset, a licence for such use is not required as such copying, without a licence, would not constitute an infringement of copyright.

Protected names, emblems and trade marks

- 45 State Services agencies that are licensing their copyright works for re-use or enabling public access to and re-use of their non-copyright material, should take care to ensure that the relevant works or material and their licensing or release statements:

- (a) 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;¹⁵ and
 - (b) do not contain any third party trade marks where the reproduction of such trade marks would infringe the trade mark owner's intellectual property rights or any contractual restriction on reproduction (for example, a trade mark may be a copyright artistic work, reproduction of which without permission would constitute copyright infringement).
- 46 To the extent that protected names or emblems are included within copyright works or non-copyright material made available for re-use, State Services agencies should:
- (a) in the case of copyright works, either:
 - (i) include a statement (within the copyright and licensing statement) 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; or
 - (ii) exclude them from the scope of the licence granted; or
 - (b) in the case of non-copyright material, either:
 - (i) include a statement (in the "no known rights" statement) 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; or
 - (ii) exclude them from the scope of the no known rights statement.
- 47 When deciding which approach to take in the case of copyright works, agencies should consider the practical implications of the alternatives. Where it is likely that users of a licensed copyright work will wish to copy it completely (e.g., by photocopying it or reproducing it in its entirety on a website), excluding emblems and logos from the scope of the licence may be impractical or unduly burdensome for users because, strictly speaking, users may need to white out the emblems and logos before reproducing the work. In such circumstances, it may be preferable only to make the statement referred to in paragraph 46(a)(i).
- 48 To the extent that trade marks of a kind referred to in paragraph 45(b) are included within copyright works or non-copyright material made available for re-use, State Services agencies should expressly exclude them from the scope of any:
- (a) licence allowing re-use, in the case of copyright works; and
 - (b) "no known rights" statement, in the case of non-copyright material.

Formats

- 49 When licensing copyright works and releasing non-copyright material for re-use, agencies should:
- (a) consider the formats in which they ought to be released, taking into account, where relevant, the wishes of those who will or are likely to re-use the works or material;
 - (b) release them in the formats they know or believe are best suited for interoperability and re-use and are searchable and indexable by search engines; and
 - (c) in the case of datasets, add their details into data.govt.nz.

¹⁵ Among other things, this Act prohibits certain unauthorised uses of Royal and vice-regal emblems, State emblems, words suggesting Royal or government patronage, and advertising claim government patronage. See, in particular, sections 12-15 of the Act at <http://www.legislation.govt.nz/act/public/1981/0047/latest/whole.html#DLM52214>

- 50 When releasing works or material in proprietary formats, agencies should also release the works or material in open, non-proprietary formats (the **Open Format Principle**).

Respect moral rights

- 51 Moral rights are a set of statutory rights in the Copyright Act that are personal to the authors or other creators of original works. They are distinct from the exclusive and economic property rights conferred on the owners of copyright works. In the New Zealand State Services context, where the vast majority of candidate copyright works will be literary works (whether in the nature of narrative or informational products such as reports and research or data products such as geospatial datasets), the most potentially relevant moral rights in the Copyright Act will be:¹⁶
- (a) the right to be identified as author (section 94); and
 - (b) the right to object to derogatory treatment of a work (section 98).
- 52 More often than not, however, these rights will not exist in the context of copyright works that State Services agencies own and license to others for re-use, the reasons for which are set out in Appendix 3. To the extent that they do exist (and there are circumstances where they will exist), they should be respected. In essence, this means that:
- (a) where an author has the right to be identified as author *and* asserts that right, an agency releasing the work online for re-use should identify the author; and
 - (b) where an author has the right not to have his or her work subjected to a derogatory treatment, agencies should take care to ensure that they do not subject the work to such treatment.
- 53 Detail on the application of these two rights within the context of NZGOAL can be found in Appendix 3.

Digital rights management

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

Charging

- 55 Charging by State Services agencies for people's use and re-use of copyright works and non-copyright material 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);¹⁸

¹⁶ Other moral rights may be relevant in a minority of circumstances but are not considered here. Those moral rights are the right not to have a literary, dramatic, musical, or artistic work or a film falsely attributed to a person as author or director (section 102), the right not to have a literary, dramatic, or musical work falsely represented as being an adaptation of a work of which the person is the author (section 103), certain rights against false representations as to artistic works (section 104) and certain privacy rights in respect of photographs and films commissioned for private and domestic purposes (section 105).

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/trust-and-security/trusted-computing-digital-rights-management>, and "Trusted Computing and Digital Rights Management Standards and Guidelines" (July 2007), available at <http://www.e.govt.nz/standards/trusted-computing-digital-rights-management>.

¹⁸ Available here: <http://www.treasury.govt.nz/publications/guidance/planning/charges>

- (b) the Auditor-General’s “Charging Fees for Public Sector Goods and Services” (June 2008);¹⁹
 - (c) 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
 - (d) 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.
- 56 To the extent that State Services agencies do propose to impose a charge for copyright works, 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+) protocol²⁰ 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
 - (d) to seek legal advice on the most appropriate choice of NZGOAL licence, whether Creative Commons or restricted.
- 57 Paragraphs 55-56 are subject to any statutory, policy or commercial imperatives to the contrary.

Updating released copyright works and non-copyright material

- 58 Where State Services agencies have released copyright works or non-copyright material on terms allowing re-use, and the released copyright works or material 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 copyright works and non-copyright material

- 59 When procuring, preparing or commissioning copyright works and non-copyright material, State Services agencies are encouraged to consider whether such works and material should, in accordance with these Policy Principles, be released to the public for re-use.
- 60 Where such works and material 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 the agency 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;

¹⁹ Available here: <http://oag.govt.nz/2008/charging-fees/docs/charging-fees.pdf>

²⁰ The Creative Commons Plus (CC+) protocol is discussed at paragraphs 92-93 below.

- (b) ensuring, where practicable and relevant, that non-copyright material is not subject to either confidentiality obligations owed to third parties²¹ or other contractual restrictions; and
 - (c) ensuring that procured or commissioned copyright works or non-copyright material are not encumbered by externally-imposed digital restrictions, by specifying this as a requirement in procurement documentation (if any) and drafting contractual provisions accordingly.²²
- 61 Agencies are also advised to be cautious of provisions which consultants or researchers may endeavour to include in agreements that would require agencies to co-brand reports, research papers or other outputs. The existence of co-branding can raise downstream licensing complexities which it may be preferable to avoid through not accepting such provisions in the first place.
- 62 Paragraphs 59-61 are subject to any statutory, policy or commercial imperatives to the contrary.

Review and Release Process

- 63 State Services agencies should ensure that the NZGOAL Review and Release Process has been followed prior to:
- (a) the release for re-use of what they believe to be copyright works on the terms of either a Creative Commons licence or a more restrictive licence; or
 - (b) the release for re-use of material in which they believe there is no copyright or other intellectual property rights related restrictions.
- 64 Agencies may need to consult their legal teams when undertaking the NZGOAL Review and Release Process.
- 65 Before licensing a copyright work on Creative Commons terms, State Services agencies should also take into account:
- (a) the fact that the licences are stated to be for the duration of copyright in the work; and
 - (b) the likelihood that, for all practical intents and purposes, they are irrevocable.²³
- 66 At the same time, it may also be noted that if a licensee breaches the terms of the applicable Creative Commons licence, the licence to that person terminates automatically.

²¹ 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.

²² 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/standards/trusted-computing-digital-rights-management>

²³ The licences are likely to be irrevocable either because they are contractual as opposed to bare licences (an issue which, in this specific context, has not been determined by the courts) or pursuant to the doctrine of estoppel. To avoid doubt, ordinarily the likely 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

- 67 NZGOAL consists of:
- (a) the six Creative Commons New Zealand law licences; and
 - (b) a template “no known rights” statement for non-copyright material.
- 68 It also provides guidance on certain issues that agencies may wish to take into account when they have a genuine need for a copyright licence that is more restrictive than the Creative Commons licences.
- 69 The Creative Commons licences are expected to cover the clear majority of State Services agencies’ copyright licensing requirements and, over time, to result in considerably greater consistency in licensing approaches across the State Services.
- 70 The no known rights statement enables agencies to specify that material has no copyright or other intellectual property rights and may be re-used without restriction. It can be used for works and material which:
- (a) are not copyright works because they are not qualifying works under the Copyright Act, such as 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; or
 - (b) are no longer copyright works in the sense that the relevant term of copyright protection has expired.
- 71 To avoid doubt, the no known rights statement is not intended to be used for copyright datasets and databases.
- 72 (Creative Commons is working on a new public domain assertion tool which is expected to be preferable to the current no known rights statement as it will be consistent with the Creative Commons format and contain search engine friendly metadata. Its appropriateness for New Zealand’s legal environment and incorporation into NZGOAL will be assessed as soon as possible upon its release.)²⁴
- 73 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.
- 74 The remainder of this section explains:
- (a) the Creative Commons licences;
 - (b) issues that agencies may wish to take into account when they have a genuine need for a copyright licence that is more restrictive than the Creative Commons licences;
 - (c) the no known rights statement; and
 - (d) the Creative Commons Plus (CC+) protocol.

²⁴ 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

- 75 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.
- 76 As noted on the Creative Commons Aotearoa New Zealand website,²⁵ Creative Commons aims to establish a middle way between full copyright control and the uncontrolled uses of intellectual property.²⁶ It provides a range of copyright licences, freely available to the public, which allow those creating intellectual property – including authors, artists, educators and scientists (as well as government agencies) – to mark their work with the freedoms they want it to carry.
- 77 The role of Creative Commons licences in the copyright-to-public-domain continuum is usefully summarised on the Creative Commons (international) website as follows:²⁷
- “Creative Commons defines the spectrum of possibilities between full copyright and the public domain. From *all rights reserved* to *no rights reserved*. Our licenses help you keep your copyright while allowing certain uses of your work — a ‘some rights reserved’ copyright.”

International standardisation

- 78 The original set of Creative Commons licences have been “ported” to the laws of multiple jurisdictions.²⁸ 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

- 79 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 led the development of Creative Commons in New Zealand with generous pro-bono legal support principally from private sector and academic lawyers. SSC acknowledges and thanks both the Council for the Humanities and those supporting it for the important work they have done in this area. From 9 February 2010, the Council for the Humanities has become a part of the Royal Society of New Zealand. As such, the Royal Society is now the home for Creative Commons in New Zealand.
- 80 There are six Creative Commons New Zealand law licences:
- (a) Attribution 3.0 New Zealand (BY);
 - (b) Attribution-Noncommercial 3.0 New Zealand (BY-NC);
 - (c) Attribution-Noncommercial-No Derivative Works 3.0 New Zealand (BY-NC-ND);

²⁵ <http://www.creativecommons.org.nz/>

²⁶ 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 NZGOAL should be construed as questioning current New Zealand copyright law.

²⁷ <http://creativecommons.org/about/what-is-cc>

²⁸ The reference here to “porting” means ensuring the licences are compatible with a jurisdiction’s domestic law and making them subject to that law.

- (d) Attribution-Noncommercial-Share Alike 3.0 New Zealand (BY-NC-SA);
 - (e) Attribution-No Derivative Works 3.0 New Zealand (BY-ND); and
 - (f) Attribution-Share Alike 3.0 New Zealand (BY-SA).
- 81 As noted on the Creative Commons Aotearoa New Zealand website,²⁹ the licences share a set of baseline rights, with each licence choice being expressed in three ways:
- (a) **Commons Deed:** A plain-language summary of the licence, with relevant icons.
 - (b) **Legal Code:** The full legal terms.
 - (c) **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.
- 82 The existence of these three forms of expression is significant:
- (a) the Commons Deed form makes the licences readily comprehensible for the public;
 - (b) the Legal Code is required to ensure the licences are legally sound; and
 - (c) the Digital Code³⁰ 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.
- 83 The tables that follow summarise the terms of each licence. 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.
- 84 A key point to emphasise at the outset is that, in all cases, Crown copyright or other copyright in the subject material is preserved. There is no waiving or abandonment of copyright. The effect of the licences is to allow certain forms of copying, adaptation and distribution.

Table 1: Summary of licence icons and descriptions

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

²⁹ http://www.creativecommons.org.nz/choose_and_apply_a_cc_licence

³⁰ The Digital Code can be found by following the process at: <http://creativecommons.org/license/?jurisdiction=nz>

Table 2: Summary of Creative Commons New Zealand Licences

Licence type	Summary of licence ³¹	Key legal aspects of licence ³²
<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 granted under the Licence • 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

³¹ These summaries are taken from the Creative Commons Aotearoa New Zealand website, at: http://www.creativecommons.org.nz/choose_and_apply_a_cc_licence

³² Capitalised terms are defined within the licence.

Licence type	Summary of licence ³¹	Key legal aspects of licence ³²
Attribution-Noncommercial 3.0 New Zealand (BY-NC) 	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.	Same key legal aspects as Attribution 3.0 New Zealand (BY) licence (immediately above) except that: <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)
Attribution-Noncommercial-No Derivative Works 3.0 New Zealand (BY-NC-ND) 	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.	Same key legal aspects as Attribution-Noncommercial 3.0 New Zealand (BY-NC) licence (immediately above) except that: <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

Licence type	Summary of licence ³³	Key legal aspects of licence ³⁴
Attribution-Noncommercial-Share Alike 3.0 New Zealand (BY-NC-SA) 	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.	Same key legal aspects as Attribution-Noncommercial 3.0 New Zealand (BY-NC) except that: <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
Attribution-No Derivative Works 3.0 New Zealand (BY-ND) 	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.	Same key legal aspects as Attribution 3.0 New Zealand (BY) licence except that: <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

³³ These summaries are taken from the Creative Commons Aotearoa New Zealand website, at: http://www.creativecommons.org.nz/choose_and_apply_a_cc_licence

³⁴ Capitalised terms are defined within 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
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Restrictive licensing drafting issues

- 85 In the minority of cases where an agency needs to use a licence that is more restrictive than the Creative Commons licences (which in all likelihood will take the form of a licence agreement), it may wish to consider, in consultation with its legal team, inclusion of terms dealing with some or all of the following matters or issues:³⁵
- (a) clear identification of the parties with their full legal names and addresses or registered offices;
 - (b) clear identification of the copyright material that is being licensed;
 - (c) a statement or acknowledgement as to who owns the copyright material;
 - (d) whether there is any need for a warranty as to ownership of the copyright material being licensed;
 - (e) the scope and duration of the acts permitted by the licence, potentially with restrictions as to:
 - (i) the making of adaptations;
 - (ii) certain or all types of commercial exploitation;
 - (iii) the territory or territories in which the acts are permitted;
 - (iv) offline versus online activity;
 - (v) permitted technical activities (e.g., generic copying versus, for example, caching, hosting, streaming, zipping, downloading and the like);
 - (vi) for digital media, permitted delivery and storage media and/or device limitations;
 - (f) for digital media, whether there is a need for future-proofing provisions, either in the sense of positively allowing exploitation through technologies not in existence at the time of the licence grant or in the sense of limiting permitted acts to technologies in existence at the time of the licence grant (e.g., by a provision stating that technology not invented at the time of the grant is not covered by the licence);
 - (g) whether, if adaptations are permissible, there is any desire to obtain a licence back in relation to those adaptations;
 - (h) if the licensed copyright material includes personal information that the licensing agency is, under the Privacy Act 1993 or otherwise, permitted to share:
 - (i) provisions regulating licensees' treatment of that personal information to ensure the scope of the permission is not exceeded; and/or
 - (ii) notification obligations in the event of privacy breaches to enable compliance with the Privacy Commissioner's Privacy Breach Guidelines;³⁶
 - (i) whether there is any need for provisions requiring compliance with specific legislation;
 - (j) whether there is any need for a provision by which the licensee agrees to respect and not infringe any moral rights (if any) in the licensed copyright material;
 - (k) the term (duration) of the licence and whether, during the term, there needs to be any timing restrictions;
 - (l) whether the licence is exclusive or non-exclusive, whether wholly or in part;

³⁵ See further, e.g., R Boothroyd "Licensing digital content: opportunities and risks" (2007) (November) Practical Law for Companies 49, available online at <http://ipandit.practicallaw.com/9-378-7587>.

³⁶ The Privacy Breach Guidelines are available online at <http://www.privacy.org.nz/privacy-breach-guidelines-2/>

- (m) whether any right to sub-licensing is required by the licensee;
- (n) whether or the extent to which to prohibit assignment of the licensed rights and/or sub-licensing of those rights;
- (o) whether there is a need for confidentiality provisions;
- (p) whether it is desirable to include any indemnity provisions;
- (q) where relevant, payment terms (e.g., a single lump sum payment, periodic payments or royalty payments);
- (r) whether there should be any attribution requirements and, if so, in what circumstances;
- (s) whether it is necessary or desirable to include exclusions of implied warranties and/or exclusions of liability;
- (t) dispute resolution provisions;
- (u) termination provisions;
- (v) post-termination obligations, such as returning, destroying or removing stored licensed materials;
- (w) governing law and jurisdiction provisions; and
- (x) miscellaneous provisions dealing with the likes of waiver, variation, notices and severability.

No known rights statement

86 State Services 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] in New Zealand; and
- it may be copied and otherwise re-used in New Zealand without copyright or other intellectual property right related restriction.

[[Name of agency] will not be liable to you, on any legal basis (including negligence), for any loss or damage you suffer through your use of this material, except in those cases where the law does not allow us to exclude or limit our liability to you.]”

87 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).

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

89 Agencies are reminded to consider the “Protected names, emblems and trade marks” Policy Principle at paragraphs 45-48 above when drafting a no known rights statement for any given release.

Warning regarding liability exclusions and official information disclosures

90 The square bracketed statement in paragraph 86 above is materially similar to the exclusion of liability in the Creative Commons licences. In neither case, however, should agencies look at the existence of such a disclaimer as a reason for not conducting appropriate due diligence before releasing a copyright work or non-copyright material for re-use. To the contrary, agencies should not release either works or material for re-use unless they have a high level of confidence that there is no copyright or other intellectual property rights restrictions in the material (or any components of it) and no contractual or other restriction that would prevent release and/or re-use. This is important to avoid exposing end users – the people of New Zealand and others – to legal risk in the form of third party complaint or action against them. Bear in mind, in this context, that 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 trade marks or other protected names, symbols or marks that are not dealt with appropriately;
- (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 rights holders, works and other material should not be publicly released for re-use if doing so would breach others' intellectual property or other rights.

91 Similarly, the above no known rights 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

92 Where an agency wishes to license 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:³⁷

“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.

³⁷ <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>).

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.”

- 93 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.³⁸



Or, for example:

```
My Book by Jon Phillips is licensed under a
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```
<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>.
```

³⁸ See [http://wiki.creativecommons.org/CCPlus#What is a simple way of explaining CC.2B.3F](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.

NZGOAL Review and Release Process

Introduction

- 94 It is recommended that State Services agencies follow the review and release process set out below before releasing copyright works or non-copyright material for re-use, with assistance where required from their legal teams. The process consists of seven main stages:
- (a) copyright-related rights evaluation;
 - (b) evaluation of restrictions;
 - (c) re-use rights selection;
 - (d) application of licence or no known rights statement;
 - (e) moral rights check;
 - (f) format selection; and
 - (g) release.
- 95 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.
- 96 It can be important to work through these steps to ensure that the agency:
- (a) has all relevant rights in the copyright work or non-copyright material that it proposes to release;
 - (b) uses Creative Commons licences when appropriate, a more restrictive licence when appropriate, “no known rights” statements when appropriate, or does not release the work or material 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 copyright work or non-copyright material to liability or related risk.
- 97 A decision tree for the review and release process is set out at paragraph 165 below.
- 98 The suggested review and release process set out below is not intended to be rigidly prescriptive. In some cases, for example, an agency may be able to determine immediately that a work is subject to a restriction of a nature that prevents any form of release. In that event, undertaking a prior copyright-related rights evaluation may not be particularly helpful.

Stage 1: Copyright-related rights evaluation

- 99 The first stage involves:
- (a) clearly identifying the boundaries of the work or material that the agency proposes to release; and then
 - (b) determining:
 - (i) whether the work or material 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.
- 100 This can entail consideration of some or all of the issues set out below.

Qualifying original work

- 101 Does the work or material 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?
- 102 If the work or material does not constitute a copyright work, the copyright analysis ceases and the agency can skip to Stage 2.

Copyright ownership

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

Singular works

- 104 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 197 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;³⁹
- (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);⁴⁰
- (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.⁴¹

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 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.)

³⁹ Section 26(1) and (6) of the Copyright Act 1994.

⁴⁰ Section 21(2) and (4) of the Copyright Act 1994.

⁴¹ Section 21(3) and (4) of the Copyright Act 1994.

Composite works/compilations

- 105 Paragraph 104 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.
- 106 Copyright ownership and re-use questions can be more complex in the case of works such as compilations which contain discrete components sourced from third parties.⁴² 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 104(a) (relevant to the Crown) and 104(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 (such as a confidentiality obligation) on including the component within a wider work and licensing that wider work for re-use.

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

- 107 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 license 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;⁴³ 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 licence or, where necessary, a more restrictive licence.
- 108 If this is not possible, the agency should not attempt to license the (wider) work for re-use.

No exclusive licensing

- 109 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

⁴² As noted in Appendix 3 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".

⁴³ 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.

license the work further 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

110 If an agency has completed Stage 1 and concluded either that:

- (a) 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); or
- (b) there are no copyright-related rights in the work or material that it proposes to release for re-use,

then the NZGOAL Policy Principles recommend, respectively, that:

- (c) the copyright work be released and licensed for re-use with the Creative Commons Attribution (BY) licence; or
- (d) the non-copyright material or work be released on open access terms, unless a restriction set out in paragraph 29 applies.

111 For each proposed release, the restrictions need to be considered in the light of all the surrounding circumstances relevant to the specific work or material and its release.

112 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 110(c) or 110(d) (as applicable) will not have been displaced.

113 If one or more of the restrictions applies, it may displace the recommendation in paragraph 110(c) or 110(d) (as applicable). Where that is the case, then:

- (a) 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, a more restrictive licence, in which case one can move to Stage 3 below;
- (b) in the case of non-copyright material, 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 material or work on restricted contractual terms to a restricted audience, in which case one can move to Stage 3 below.

114 In some cases, restrictions may apply only to discrete portions of copyright works or non-copyright material that an agency proposes to release. In that event, the agency may wish to consider whether it could release an amended version of the work or material with those discrete portions removed. For example, a dataset containing personal information may be able to be safely anonymised. 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 an incomplete, misleading or comparatively useless work or incomplete, misleading or comparatively useless material.

- 115 If an agency produces an amended version that is capable of addressing any restriction(s) (i.e., the restriction(s) fall away), the agency can proceed to Stage 3 below.
- 116 Agencies are reminded that, should they be in any doubt as to whether a restriction in paragraph 29(g) or 29(h) applies (regarding the protection of Māori or other traditional knowledge or other culturally sensitive material), they are advised to consult Te Puni Kokiri before release.

Stage 3: Re-use rights selection

- 117 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 copyright work or non-copyright material.
- 118 Where:
- (a) no restriction was identified at Stage 2 to displace the Open Licensing Principle or the Open Access Principle, as applicable; or
 - (b) any restrictions can and will be addressed (i.e., removed) by providing an amended version of the work or material,
- the agency should move to Stage 4.

Copyright works

- 119 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 32-33 of the NZGOAL Policy Principles.
- 120 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.
- 121 Where the restrictions can be accommodated only through use of a more 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 matter becomes one of restricted licensing.

Non-copyright material

- 122 Where, in the case of non-copyright material, the relevant restriction(s) can be accommodated through release of the material 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.

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

Introduction

- 123 This description of Stage 4 explains how agencies go about applying the NZGOAL licences and tools. In particular, it explains:
- (a) how to apply a Creative Commons licence to copyright works; and
 - (b) how to mark non-copyright material with an appropriate “no known rights” statement.⁴⁴
- 124 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 in NZGOAL of how to draft a restrictive licence beyond the drafting issues set out at paragraph 85 above.

Applying Creative Commons licences

- 125 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.
- 126 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.

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

- 127 A document or other work that is not conveyed electronically or is conveyed electronically but can be consumed in an offline environment:
- (a) must contain the minimum markings set out in the table in Appendix 2 for the relevant Creative Commons licence;
 - (b) may, in addition, contain any of the recommended copyright and licensing statements for that licence set out in that table in Appendix 2 which the agency wishes to add to the work; and
 - (c) may also contain any of the specimen attribution statements for that licence set out in the table in Appendix 2 which the agency may wish to require of licensees when those licensees publish, distribute, perform or otherwise disseminate to the public either the licensed copyright work, any adaptation of the work or any collection containing the work.
- 128 The table in Appendix 2 includes specimen attribution statements because agencies may wish to provide such statements to licensees rather than leaving it to them to devise an attribution statement and comply with other licence obligations such as

⁴⁴ 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.

referring to the licence's URL and, where relevant, indicating that an adaptation of the original is in fact an adaptation. It is likely that an agency's decision in this regard will depend on the type of licensed work, the manner of its release, its likely uses and, in some instances, design considerations.

- 129 It is strongly recommended that State Services agencies that apply Creative Commons licences to a hard copy/non-electronic work *also* announce the availability of the work and the relevant Creative Commons licence terms electronically:
- (a) on its own website in accordance with the instructions below (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 directories); and
 - (b) if the work is a dataset, on data.govt.nz.
- 130 The reason for this is two-fold:
- (a) to make State Services agencies' Creative Commons-licensed works more readily available to the public; and
 - (b) to enable search engines and other tools to crawl and, where available, read the underlying metadata.
- 131 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 133-139 below.
- 132 The process for adding an announcement of a dataset release to data.govt.nz is explained at paragraph 148 below.

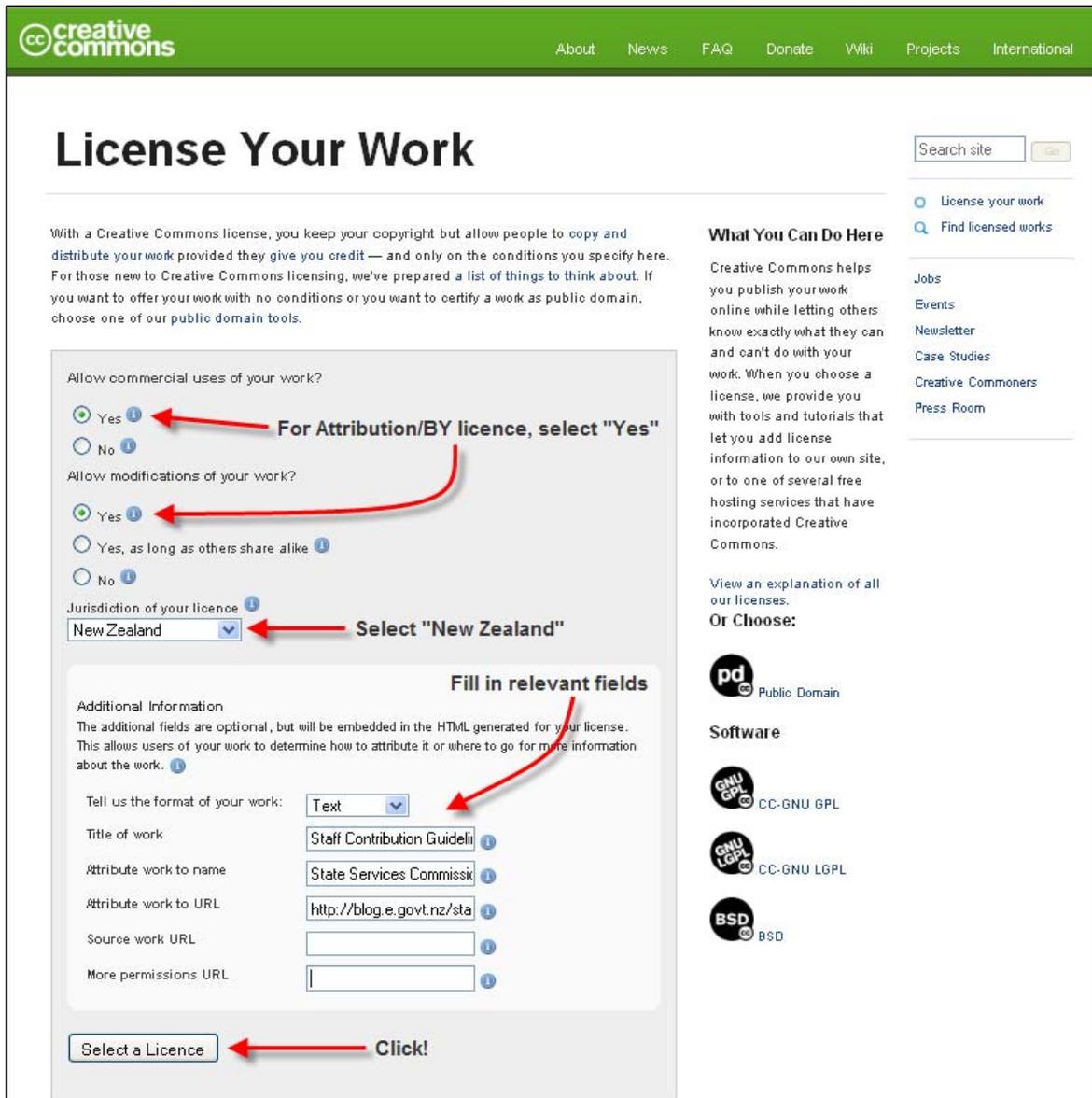
Applying the licences to copyright works constituted by, contained within or linked to from, website pages

- 133 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).
- 134 The process of obtaining 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 licence";
 - (d) fill out the additional fields in the "Additional Information" box, to the extent they are relevant (and otherwise leave blank);⁴⁵ and
 - (e) click on the "Select a Licence" button.

⁴⁵ 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.

135 The image below illustrates what you will see when visiting the Creative Commons licensing page.

Image: The Creative Commons licensing page



- 136 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).

Image: HTML produced by the Creative Commons licensing tool

The screenshot shows the Creative Commons website interface. At the top, there is a green navigation bar with the Creative Commons logo and links for About, News, FAQ, Donate, Wiki, Projects, and International. The main heading reads "Here is the licence you've chosen". Below this, a box displays the selected license: "You have selected the Creative Commons Attribution 3.0 New Zealand Licence. See how the licence will look to your site's visitors." This box contains three license icons: the CC logo, the BY logo, and a combined CC BY icon. To the right of the license selection, there are several links and sections: "Learn about other places you can host your licenced files...", "Publish your licenced music or video to the Internet Archive", "Post your licenced images at Flickr", "Add a Creative Commons licence to your blog", "Offline Work?", and "Optional next steps" which includes "Register your work with the CC Network" and "Track use of your work with FairShare". On the far right, there is a search bar and a list of site features like "License your work", "Find licenced works", "Jobs", "Events", "Newsletter", "Case Studies", "Creative Commonsers", and "Press Room".

Below the license selection box, the text "Have your own website?" is followed by "Select and copy this text" and "Copy the text below to your Web site to let your visitors know what licence applies to your works." A red arrow points from this text to a text area containing the following HTML code:

```
<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>
```

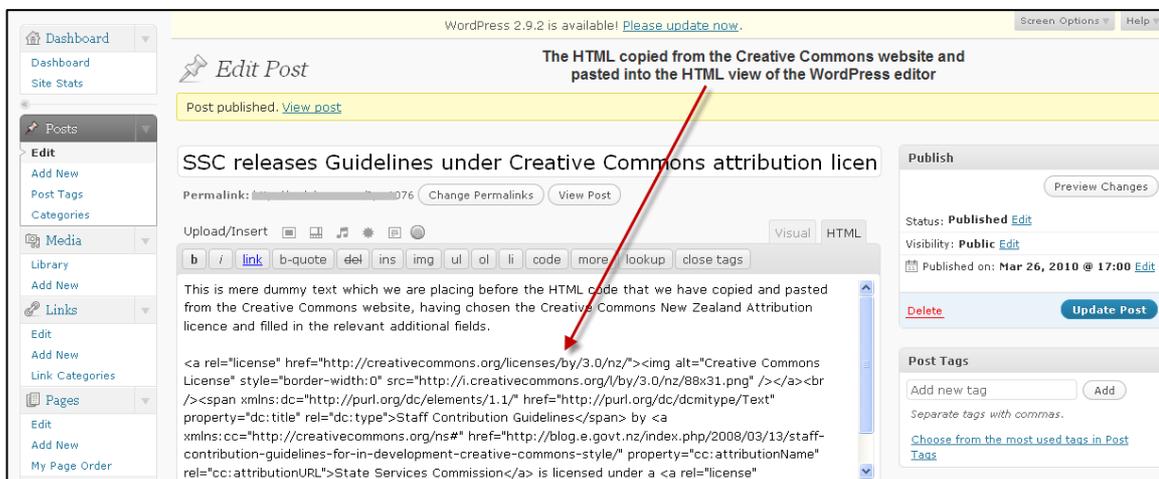
Below the code, it says "Select the contents of the box above and copy it. Or, have it emailed to yourself." and "Need more help? Read our tutorial." At the bottom, it says "After publishing your license, please consider supporting Creative Commons."

- 137 In the above example (where a Creative Commons Attribution (BY) licence has been selected for the State Services Commission's "Staff Contribution Guidelines"), the full HTML code produced by the Creative Commons licensing tool 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/index.php/2008/03/13/staff-contribution-guidelines-for-in-development-creative-commons-style/" 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>
```

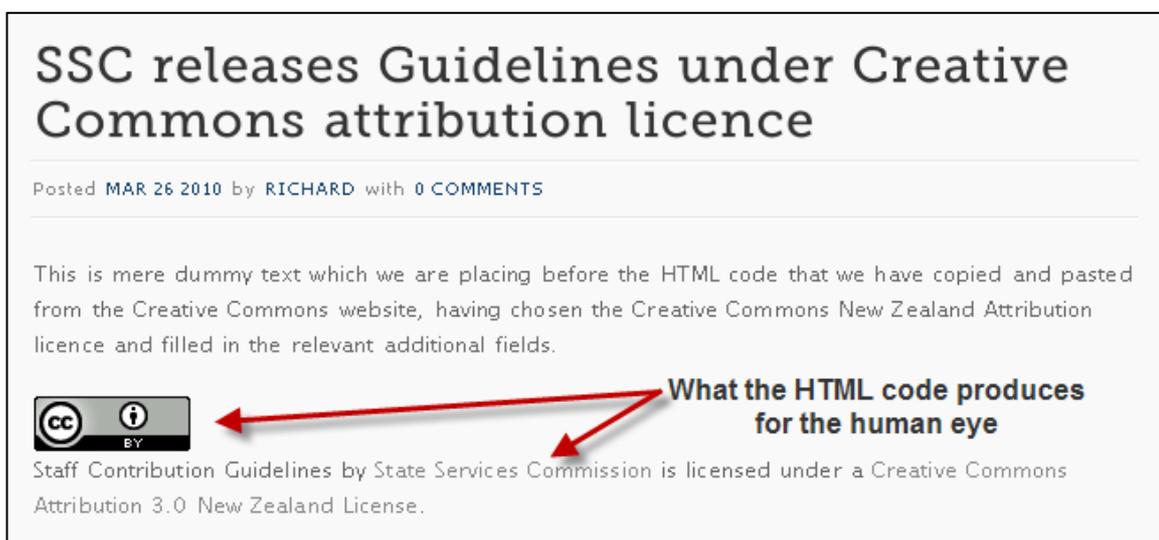
- 138 If one were to proceed to use this code above, the next step would be to paste the code into the relevant page or post on your website. For example, if an agency were releasing a copyright work via a post on a WordPress powered website, it would add the HTML into the post content screen, as follows:

Image: Pasting HTML code into relevant page or post on website



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

Image: Example of page or post containing the Creative Commons-produced HTML



- 140 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.
- 141 If one compares this licensing information with the licensing information recommended for hard copy releases set out in the table in Appendix 2, one will see that the online statement is less encompassing. For example, it does not:
- contain the recommended reference to Crown copyright (“Crown” copyright here because SSC is part of the Crown);
 - contain any carve-outs for the likes of logos and emblems; or

- (c) prescribe specific attribution statements for situations where licensees (i.e., users) publish, distribute or otherwise disseminate to the public either the work itself or any adaptation of the work or any collection containing the work (leaving the formulation of such statements to the licensee/user).

142 These matters can, however, be added easily to the HTML code obtained from the Creative Commons licensing tool, to the extent that an agency wishes to do so. Dealing with each of the three matters listed in the preceding paragraph:

- (a) in this particular example, “Crown copyright” should be added (i.e., “Crown copyright” rather than “Copyright”, given that we’re dealing here with a work produced by a government department);
- (b) because the work bears the State Services Commission’s emblem, one might also wish to add a statement that *either* excludes the emblem from the scope of the licence *or* notifies people that the emblem may not be used in any way which infringes any provision of the Flags, Emblems, and Names Protection Act 1981 or would infringe such provision if the relevant use occurred within New Zealand; for the purposes of this example, we’ll do the latter; and
- (c) one may wish to prescribe a specific form of attribution; in this case, assume a decision has been made to require the following attribution statements:

If you publish, distribute or otherwise disseminate this work to the public without adapting it, the following attribution to SSC should be used:

“Source: State Services Commission (SSC) and licensed by SSC for re-use under the [Creative Commons Attribution 3.0 New Zealand licence](#).”

If you adapt this work in any way or include it in a collection, and publish, distribute or otherwise disseminate that adaptation or collection to the public, the following attribution to SSC should be used:

“This work is [based on/includes] the State Services Commission’s ‘Staff Contribution Guidelines’ which are licensed by SSC for re-use under the [Creative Commons Attribution 3.0 New Zealand licence](#).”

143 These three matters, and any other wording an agency may wish to add to improve the grammatical flow of the licensing statement, can be added to the HTML code as follows (the insertions are highlighted to explain where they should go):

```
<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">Crown copyright @. These Staff Contribution Guidelines</span> by <a xmlns:cc="http://creativecommons.org/ns#" href="http://blog.e.govt.nz/index.php/2008/03/13/staff-contribution-guidelines-for-in-development-creative-commons-style/" property="cc:attributionName" rel="cc:attributionURL">the State Services Commission (SSC)</a> are licensed under a <a rel="license" href="http://creativecommons.org/licenses/by/3.0/nz/">Creative Commons Attribution 3.0 New Zealand License</a>. Please note that the SSC emblem may not be used in any way which infringes any provision of the Flags, Emblems, and Names Protection Act 1981 or would infringe such provision if the relevant use occurred within New Zealand. Attribution to SSC should be in written form and not by reproduction of this emblem. If you publish, distribute or otherwise disseminate this work to the public without adapting it, the following attribution to SSC should be used: "Source: State Services Commission (SSC) and licensed by SSC for re-use under the Creative Commons Attribution 3.0 New Zealand licence." If you adapt this work in any way or include it in a collection, and publish, distribute or otherwise disseminate that adaptation or collection to the public, the following attribution to SSC should be used: "This work is [based on/includes] the State Services Commission’s ‘Staff Contribution Guidelines’ which are licensed by SSC for re-use under the Creative Commons Attribution 3.0 New Zealand licence."
```

144 When this code is inserted into the relevant page, the result is as follows:⁴⁶

Image: Example of page or post containing supplementary content in HTML

SSC releases Guidelines under Creative Commons attribution licence

Posted MAR 26 2010 by RICHARD with 0 COMMENTS

This is mere dummy text which we are placing before the HTML code that we have copied and pasted from the Creative Commons website, having chosen the Creative Commons New Zealand Attribution licence and filled in the relevant additional fields.



Crown copyright ©. These Staff Contribution Guidelines by the State Services Commission (SSC) are licensed under a Creative Commons Attribution 3.0 New Zealand License. Please note that the SSC emblem may not be used in any way which infringes any provision of the Flags, Emblems, and Names Protection Act 1981 or would infringe such provision if the relevant use occurred within New Zealand. Attribution to SSC should be in written form and not by reproduction of this emblem. If you publish, distribute or otherwise disseminate this work to the public without adapting it, the following attribution to SSC should be used:

“Source: State Services Commission (SSC) and licensed by SSC for re-use under the Creative Commons Attribution 3.0 New Zealand licence.”

If you adapt this work in any way or include it in a collection, and publish, distribute or otherwise disseminate that adaptation or collection to the public, the following attribution to SSC should be used:

“This work is [based on/includes] the State Services Commission’s ‘Staff Contribution Guidelines’ which are licensed by SSC for re-use under the Creative Commons Attribution 3.0 New Zealand licence.”

145 Note that there are alternative means of providing such licensing and attribution information on a webpage/website. In particular, some agencies may not wish to have these attribution requirements appearing on each webpage that contains a licensed copyright work in this manner, preferring instead a generic treatment within the website’s general copyright statement or attribution policy within the site’s “About this site” section. The means for achieving this is set out in the table in Appendix 2. Where this approach is taken, the HTML code to be pasted into the specific webpage containing the specific licensed copyright work could be simplified 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">Crown copyright ©. These Staff Contribution Guidelines</span> by <a xmlns:cc="http://creativecommons.org/ns#" href="http://blog.e.govt.nz/index.php/2008/03/13/staff-contribution-guidelines-for-in-development-creative-commons-style/" property="cc:attributionName" rel="cc:attributionURL">the State Services Commission (SSC)</a> are licensed under
```

⁴⁶ Please note that, to produce the indentation for the prescribed attribution statements in this snapshot, some HTML paragraph tags and padding were added to the HTML code above. That additional code has not been added in the code extract because it not necessary for the example. An agency’s web team will easily be able to add whatever HTML or CSS is required to produce such formatting effects.

a `Creative Commons Attribution 3.0 New Zealand License`. Please note that the SSC emblem may not be used in any way which infringes any provision of the Flags, Emblems, and Names Protection Act 1981 or would infringe such provision if the relevant use occurred within New Zealand. Attribution to SSC should be in written form and not by reproduction of this emblem. **Specific attribution requirements are set out in this website's general copyright statement.**

146 When this code is inserted into the relevant webpage, the result is as follows:

Image: Example of page or post linking to generic copyright statement



147 The website's general copyright statement would then contain the applicable attribution requirements, following the approach set out in the table in Appendix 2 where desired.

Announcing a new dataset release on data.govt.nz

148 If the relevant work is a dataset, the releasing agency should also announce the release on data.govt.nz. If the agency is not already providing DIA with an Atom feed of such releases (if it is, an announcement on data.govt.nz will be automatic), it should:

- (a) go to the data.govt.nz website;
- (b) click on the "Add Dataset" tab; and then
- (c) follow the instructions on the page that appears.

149 The image on the next page illustrates what you will see when clicking the "Add Dataset" tab on the data.govt.nz website.

Image: "Add Dataset" tab on the data.govt.nz website

[Skip to content]

data.govt.nz
Kāwanatanga o Aotearoa
New Zealand Government

Data
Search New Zealand Government data

SEARCH >>

Home **Browse** **Add Dataset** **Discussion** **Contact Us** BETA

Add dataset

We welcome your assistance in shaping data.govt.nz. You can suggest a dataset already published by government agencies in a re-usable machine-readable format to be added to the list. If you're a government agency with one or more datasets that can be listed on data.govt.nz, please complete and submit the form below for each dataset.

If you're someone else who is aware of an available public sector dataset that should be listed on data.govt.nz, please complete and submit the form below to the extent you are able. Please note that whether any given dataset is appropriate for release is a matter for the agency holding it. Suggestions will be checked for validity before being published.

Please note

Datasets containing **unpublished personal, or otherwise sensitive**, information will not be listed on data.govt.nz. We don't include records of data available only in **PDF format**.

Dataset title *

Link to dataset *

Description

Keywords

Comma separated e.g. *Statistics, Legal, Geo, Crime, Health, School etc.*

Available Formats *

- CSV
- Spreadsheet
- KML
- XML-ATOM-RSS
- Other

Re-use rights *

i Please select the re-use rights that already apply to this dataset. Note that your selection should describe an existing licence or other re-use rights position. This is because re-use rights are evaluated and determined by the source agency and applied at the point of release. Your use of this form does not apply a licence to the actual dataset. It merely lists the existing licence or other re-use rights.

- Creative Commons Attribution 3.0 New Zealand licence
- Creative Commons Attribution-Noncommercial 3.0 New Zealand licence
- Creative Commons Attribution-No Derivative Works 3.0 New Zealand licence
- Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 New Zealand licence
- Creative Commons Attribution-Share Alike 3.0 New Zealand licence
- Creative Commons Attribution-Noncommercial-Share Alike 3.0 New Zealand licence
- Other licensing (check with source agency)
- Copyright and either not yet licensed for re-use or application of generic website licensing statement to dataset unclear (check with source agency)
- No known New Zealand copyright-related restrictions on re-use

i For information on applying Creative Commons licences to public sector copyright works (including datasets), see the State Services Commission's New Zealand Government Open Access and Licensing framework (NZGOAL).

i For more general information on Creative Commons in New Zealand, see the Creative Commons Aotearoa New Zealand website.

Date of submission

Responsible agency *

Your email address *

How to mark non-copyright material with an appropriate “no known rights” statement

150 As noted at paragraphs 86-88 above, 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] in New Zealand; and
- it may be copied and otherwise re-used in New Zealand without copyright or other intellectual property right related restriction.

[[Name of agency] will not be liable to you, on any legal basis (including negligence), for any loss or damage you suffer through your use of this material, except in those cases where the law does not allow us to exclude or limit our liability to you.]”

151 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).

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

153 If the released non-copyright material is some form of dataset, then its release should also be notified on data.govt.nz in accordance with the instructions at paragraph 148 above.

Stage 5: Moral rights check

154 Stage 5 applies only to copyright works being released to the public for re-use. It does not apply to non-copyright material being released to the public for re-use. Agencies releasing non-copyright material for re-use should proceed to Stage 6.

155 This discussion of Stage 5 only asks moral rights-related questions in respect of literary works with a singular focus on the “right to be identified as author”.⁴⁷ Consistent with the approach taken in the discussion of moral rights in Appendix 3, NZGOAL’s discussion of moral rights is limited to literary works because the vast majority of works falling within the scope of NZGOAL are likely to be literary works.⁴⁸ While some agencies may deal with other kinds of copyright works, such as dramatic, musical and/or artistic works, they are likely to be in a small statistical minority and so are not addressed here. Agencies dealing in such works are encouraged to consult Part 4 of the Copyright Act directly in consultation with their legal teams.

156 The following paragraphs set out considerations for organs of the Crown as an indivisible legal entity (e.g., departments), on the one hand, and for wider State Services agencies (e.g., Crown entities), on the other. The reason for this is that there are some moral-rights related provisions in the Copyright Act that apply uniquely to the Crown, but not to wider State Services agencies.

⁴⁷ For the purposes of the present discussion, it is assumed that, even if an author’s right to object to derogatory treatment of a work does arise, the releasing agency will not be subjecting the author’s work to a derogatory treatment.

⁴⁸ Additional considerations apply to literary works consisting of words intended to be sung or spoken with music. Those additional considerations are not addressed here.

The Crown (e.g., departments, but *not* Crown entities)

- 157 If the agency releasing a copyright work for re-use is part of the Crown (e.g., a department, but *not* a Crown entity) and the work is a literary work which is subject to Crown copyright, then:⁴⁹
- (a) if the work is a computer program or computer-generated work, the right to be identified as author does not arise and the agency can proceed to Stage 6;
 - (b) if the author has not previously been identified as the author in or on published copies of the work, the right to be identified as author does not arise and the agency can proceed to Stage 6;
 - (c) if the author has previously been identified as the author in or on published copies of the work but has either consented to non-application of, or waived, the right to be identified as author (e.g., in the author's employment agreement with the Crown), then the right to be identified as author does not apply and the agency can proceed to Stage 6;
 - (d) even if the right does arise – because the author *has* previously been identified as the author in or on published copies of the work – if the author has not *asserted* the right to be identified as author, then the agency is under no identification obligation and can proceed to Stage 6;
 - (e) if the right does arise – because the author *has* previously been identified as the author in or on published copies of the work – and if the author *has* asserted the right to be identified as author, then the releasing agency must identify the author (as per paragraphs 223-224 below) whenever the agency publishes the work or an adaptation of it commercially, performs it in public or communicates it to the public.
- 158 If the agency releasing a copyright work for re-use is part of the Crown and the work is a literary work which is subject to regular (i.e., not Crown) copyright,⁵⁰ then if the author has asserted the right to be identified as author and the agency is aware of that assertion, the agency must identify the author (as per paragraphs 223-224 below) whenever the agency publishes the work or an adaptation of it commercially, performs it in public or communicates it to the public.

Other State Services agencies (e.g., Crown entities)

- 159 If the State Services agency releasing a copyright work for re-use is not part of the Crown as defined in the Copyright Act (as to which see paragraph 197 below), then:
- (a) if the work is a computer program or computer-generated work, the right to be identified as author does not arise and the agency can proceed to Stage 6;
 - (b) if the work was authored by an agency employee and if, when the agency publishes the work or an adaptation of it commercially, performs it in public or communicates it to the public, either the author cannot readily be identified or it is impracticable to identify co-creators' contributions and the authors have not previously been identified in or on published copies of the work, the right to be identified as author will not apply and the agency can proceed to Stage 6;
 - (c) if these circumstances do not apply and the employee author can be identified, but the author has either consented to non-application of, or waived, the right to be identified as author (e.g., in the author's employment agreement with the agency),

⁴⁹ This discussion of Stage 5 only asks moral rights-related questions in respect of literary works. Consistent with the approach taken in the discussion of moral rights in Appendix 3, NZGOAL's discussion of moral rights is limited to literary works because the vast majority of works falling within the scope of NZGOAL are likely to be literary works.

⁵⁰ This would be the case where the Crown was not the first owner of the copyright but subsequently became the copyright owner through an assignment (i.e., transfer) of the copyright to the Crown.

then the right to be identified as author does not apply and the agency can proceed to Stage 6;

- (d) if the circumstances in subparagraph (b) do not apply and the employee author can be identified, and if the author has asserted the right to be identified as author, then the agency must identify the author (as per paragraphs 223-224 below) whenever the agency publishes the work or an adaptation of it commercially, performs it in public or communicates it to the public;
- (e) similarly, if the agency's work was authored by an independent contractor, that independent contractor has not waived the right to be identified as author (e.g., in its consultancy contract with the agency) and he or she asserts the right to be identified as author, then the agency must identify the author (as per paragraphs 223-224 below) whenever the agency publishes the work or an adaptation of it commercially, performs it in public or communicates it to the public.

Stage 6: Format selection

160 Before releasing the relevant copyright work or non-copyright material, the agency should consider the formats in which it ought to be released.

Where agency knows users' format preferences

161 If the agency already knows the formats in which users of the work or material would or would probably like to see it provided, the agency should – to the greatest extent practicable – prepare the work or material for release in those formats.

Where agency does not know users' format preferences

162 If the agency does not know the formats in which users of the work or material would or would probably like 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

163 To the extent that a copyright work or non-copyright material is provided in a proprietary format, the agency should endeavour to provide it in one or more open, non-proprietary formats.

Stage 7: Release

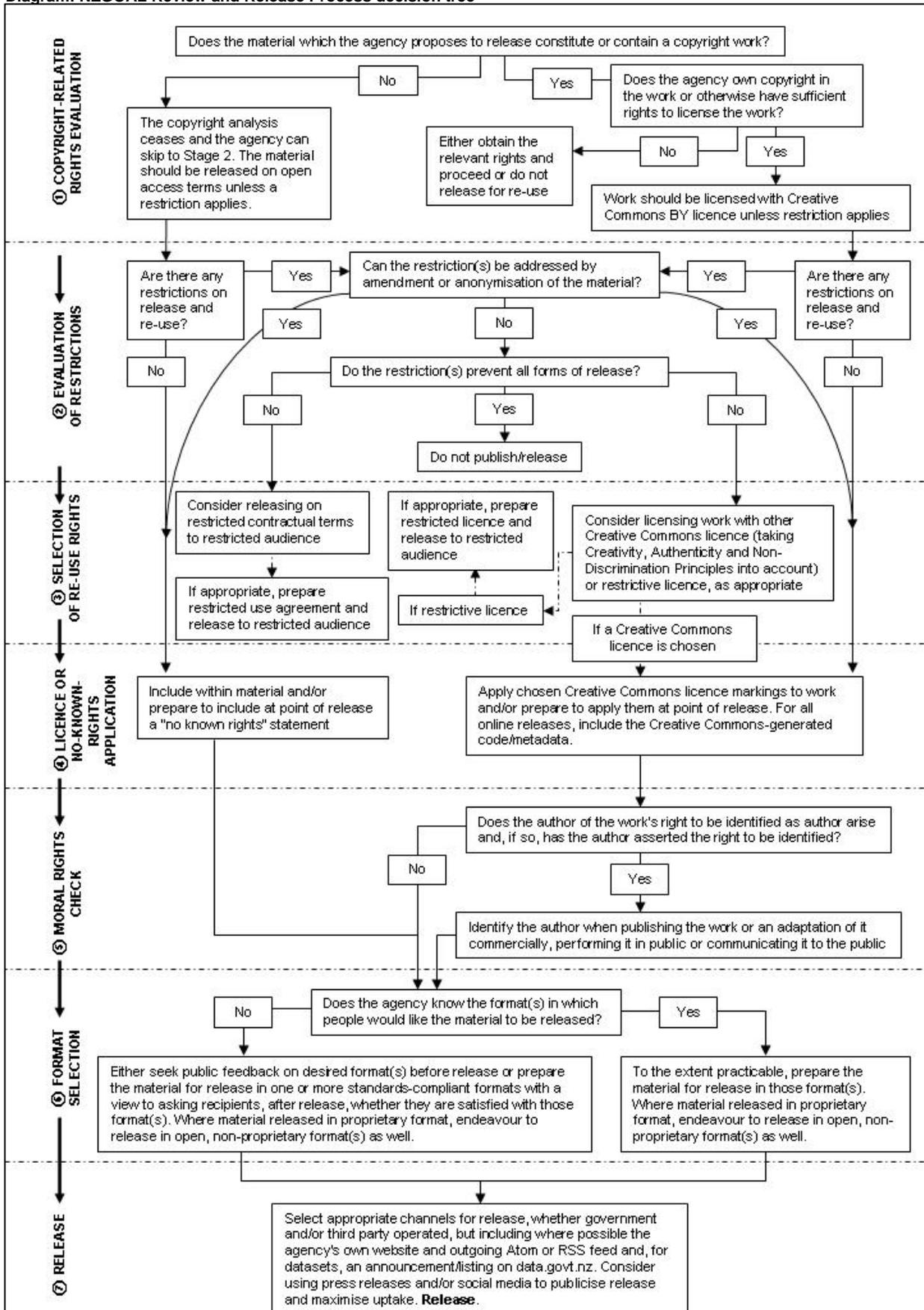
164 When the copyright work or non-copyright material is ready for release, the agency should:

- (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 (with announcements on its own website and, for datasets, on data.govt.nz, as a minimum);
- (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

165 The decision tree below illustrates the Review and Release Process explained above. It is intended to be read in conjunction with the explanations above for each stage.

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. ⁵¹
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-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. ⁵²
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.
RSS feed	means a type of web feed and one which uses one of a number of RSS formats. Web feeds, in turn, allow desktop and web-based software applications to check for updated content. ⁵³
SSC	means the State Services Commission.
URI	means Uniform Resource Identifier, a string of characters used to identify a name or a resource on the Internet. ⁵⁴
URL	means Uniform Resource Locator, often referred to in popular language as a web address. As explained on Wikipedia, a “URL is a URI that, in addition to identifying a network-homed resource, specifies the means of acting upon or obtaining the representation: either through description of the primary access mechanism, or through network ‘location’. For example, the URL http://www.wikipedia.org/ identifies a resource (Wikipedia’s home page) and implies that a representation of that resource (such as the home page’s current HTML code, as encoded characters) is obtainable via HTTP from a network host named www.wikipedia.org .” ⁵⁵

⁵¹ See further “Atom (standard)” at http://en.wikipedia.org/wiki/Atom_feed.

⁵² See further “HTML” at <http://en.wikipedia.org/wiki/Html>.

⁵³ See further “RSS” at http://en.wikipedia.org/wiki/RSS_feed.

⁵⁴ See further “Uniform Resource Identifier” at <http://en.wikipedia.org/wiki/URI>.

⁵⁵ See further “Uniform Resource Locator” at <http://en.wikipedia.org/wiki/URL> and above n. 54.

Appendix 2 – Minimum Markings, Recommended Copyright and Licensing Statements, and Attribution Statements

- 166 Table 3 commencing on the next page sets out the minimum markings, recommended copyright and licensing statements, and attribution statements for individual copyright works, referred to at paragraphs 127-128 and 141 above.⁵⁶
- 167 When working through the table, agencies should bear the following in mind:
- (a) each recommended copyright and licensing statement begins with the words “[Crown copyright / Copyright]”. Ministers, departments and offices of Parliament should select “Crown copyright”; all other agencies should select “Copyright” as they do not have “Crown” copyright in their original copyright works;
 - (b) each recommended copyright and licensing statement contains, in square brackets, a summary of what the licence permits (in the sentence commencing “In essence...”); while that summary is suggested to give licensees a quick snapshot of the key licence terms, it is optional and may be removed (the square brackets should be removed in any event);
 - (c) the copyright and licensing statement options headed “Statement with logo/trade mark carve out” and “Statement with no carve out but warning re Flags, Emblems, and Names Protection Act” reflect the “Protected names, emblems and trade marks” Policy Principle at paragraphs 45-48 above;
 - (d) agencies are not obliged to require attribution statements from licensees and may, if they wish, expressly waive them;⁵⁷
 - (e) an agency may request an attribution statement (i.e., to be used when licensees publish, distribute, perform or otherwise disseminate to the public either the licensed copyright work, any adaptation of the work or any collection containing the work) but later request its removal should it not wish to be attributed in a given context (as the licence terms require licensees to “remove such a credit if requested by the Licensor/Original Author”); and
 - (f) agencies licensing datasets which may be mashed up with other datasets and give rise to attribution stacking problems (as discussed at paragraph 39 above) should consider opting for the most minimal of attribution requirements (if any); the most minimal requirement is the third option set out in the relevant “Attribution statements” column of the table for each licence that permits derivative works/adaptations (i.e., “This [work/product/application/etc] uses data sourced from [name of agency]”).
- 168 As noted at paragraph 145 above, some agencies may prefer a generic treatment of attribution requirements, within a website’s general copyright statement or attribution policy, that applies to all Creative Commons licensed works on a website, rather than including attribution information for each discrete copyright work. Suggested wording for this kind of generic treatment is set out after table 3.

⁵⁶ SSC acknowledges and thanks the Queensland Government for its documented approach to applying Creative Commons licences, on which the table below is partly based.

⁵⁷ Should an agency wish to expressly waive any attribution requirements, it could do so by adding a statement such as the following at the end of the copyright and licensing statement it selects from the table below: “[name of agency] does not require any attribution when someone publishes, distributes, performs or otherwise disseminates this work to the public and hereby waives its right of attribution.”

Table 3: Minimum markings, recommended copyright and licensing statements, and attribution statements for individual copyright works

Minimum markings	Recommended copyright and licensing statements	Attribution statements (highlighted text is intended for use on websites, as appropriate, rather than in hard copy releases)
Licence name:	Creative Commons Attribution (BY)	
Licence image:	 <p>(Linked to licence URL in electronic versions (e.g., PDF, Word, Excel, etc))</p>	<p>Basic statement</p> <p>[Crown copyright / Copyright] ©. This copyright 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/.</p>
Licence URL link:	<p>http://creativecommons.org/licenses/by/3.0/nz/</p>	<p>Statement with logo/trade mark carve out</p> <p>[Crown copyright / Copyright] ©. Except for [name relevant logos, emblems and/or trade marks], this copyright 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/.</p> <p>Statement with no carve out but warning re Flags, Emblems, and Names Protection Act</p> <p>[Crown copyright / Copyright] ©. This copyright 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/. Please note that no [departmental or governmental emblem, logo or Coat of Arms] may be used in any way which infringes any provision of the Flags, Emblems, and Names Protection Act 1981 or would infringe such provision if the relevant use occurred within New Zealand. Attribution to [name of agency] should be in written form and not by reproduction of any such [emblem, logo or Coat of Arms].</p>
		<p>If you publish, distribute or otherwise disseminate this work to the public without adapting it, the following attribution to [name of agency] should be used:</p> <p>“Source: [name of agency] and licensed by [name of agency] for re-use under the [name of and link to or URL for applicable Creative Commons licence]”</p> <p>If you adapt this work in any way or include it in a collection, and publish, distribute or otherwise disseminate that adaptation or collection to the public, the following attribution to [name of agency] should be used.⁵⁸</p> <p><i>Either:</i></p> <p>This work is [based on/includes] [name of agency]’s [insert name of work or data] which [is/are] licensed by [name of agency] for re-use under the [name of and link to or URL for applicable Creative Commons licence]</p> <p><i>Or:</i></p> <p>This [work/product/application/etc] uses data sourced from [name of agency] which are licensed by [name of agency] for re-use under the [name of and link to or URL for applicable Creative Commons licence]</p> <p><i>Or:</i></p> <p>This [work/product/application/etc] uses data sourced from [name of agency].</p> <p>Where practicable, please hyperlink the name of the agency to the agency’s web page that contains or links to the source data.</p>

⁵⁸ The agency should choose which one of these statements is appropriate by reference to the work in question. It should not include all three.

Minimum markings	Recommended copyright and licensing statements	Attribution statements (highlighted text is intended for use on websites, as appropriate, rather than in hard copy releases)
Licence name:	Creative Commons Attribution-Noncommercial (BY-NC)	
Licence image:	 <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 points of contact for commercial use, as to which see paragraphs 92-93 above.</p>	<p>If you publish, distribute or otherwise disseminate this work to the public without adapting it, the following attribution to [name of agency] should be used:</p> <p>“Source: [name of agency] and licensed by [name of agency] for re-use under the [name of and link to or URL for applicable Creative Commons licence]”</p> <p>If you adapt this work in any way or include it in a wider collection, and publish, distribute or otherwise disseminate that adaptation or collection to the public, the following attribution to [name of agency] should be used.⁵⁹</p> <p><i>Either:</i></p> <p>This work is [based on/includes] [name of agency]’s [insert name of work or data] which [is/are] licensed by [name of agency] for re-use under the [name of and link to or URL for applicable Creative Commons licence]</p> <p><i>Or:</i></p> <p>This [work/product/application/etc] uses data sourced from [name of agency] which are licensed by [name of agency] for re-use under the [name of and link to or URL for applicable Creative Commons licence]</p> <p><i>Or:</i></p> <p>This [work/product/application/etc] uses data sourced from [name of agency].</p> <p>Where practicable, please hyperlink the name of the agency to the agency’s web page that contains or links to the source data.</p>
Licence URL link:	<p>http://creativecommons.org/licenses/by-nc/3.0/nz/</p> <p>Basic statement</p> <p>[Crown copyright / Copyright] ©. This copyright 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/.</p> <p>Statement with logo/trade mark carve out</p> <p>[Crown copyright / Copyright] ©. Except for [name relevant logos, emblems and/or trade marks], this copyright 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/.</p> <p>Statement with no carve out but warning re Flags, Emblems, and Names Protection Act</p> <p>[Crown copyright / Copyright] ©. This copyright 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/. Please note that no [departmental or governmental emblem, logo or Coat of Arms] may be used in any way which infringes any provision of the Flags, Emblems, and Names Protection Act 1981 or would infringe such provision if the relevant use occurred within New Zealand. Attribution to [name of agency] should be in written form and not by reproduction of any such [emblem, logo or Coat of Arms].</p>	

⁵⁹ The agency should choose which one of these statements is appropriate by reference to the work in question. It should not include all three.

Minimum markings	Recommended copyright and licensing statements	Attribution statements (highlighted text is intended for use on websites, as appropriate, rather than in hard copy releases)
Licence name:	Creative Commons Attribution-No Derivative Works (BY-ND)	
Licence image:	 <p>(Linked to licence URL in electronic versions (e.g., PDF, Word, Excel, etc))</p>	<p>If you publish, distribute or otherwise disseminate this work to the public, the following attribution to [name of agency] should be used:</p> <p>“Source: [name of agency] and licensed by [name of agency] for re-use under the [name of and link to applicable Creative Commons licence]”</p> <p>If you include this work in a collection, and publish, distribute or otherwise disseminate that collection to the public, the following attribution to [name of agency] should be used:</p> <p>“This work includes [name of agency]’s [insert name of work or data] which [is/are] licensed by [name of agency] for re-use under the [name of and link to or URL for applicable Creative Commons licence]</p> <p>Where practicable, please hyperlink the name of the agency to the agency’s web page that contains or links to the source data.</p>
URL link:	<p>http://creativecommons.org/licenses/by-nd/3.0/nz/</p> <p>Basic statement</p> <p>[Crown copyright / Copyright] ©. This copyright 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/.</p> <p>Statement with logo/trade mark carve out</p> <p>[Crown copyright / Copyright] ©. Except for [name relevant logos, emblems and/or trade marks], this copyright 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/.</p> <p>Statement with no carve out but warning re Flags, Emblems, and Names Protection Act</p> <p>[Crown copyright / Copyright] ©. This copyright 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/. Please note that no [departmental or governmental emblem, logo or Coat of Arms] may be used in any way which infringes any provision of the Flags, Emblems, and Names Protection Act 1981 or would infringe such provision if the relevant use occurred within New Zealand. Attribution to [name of agency] should be in written form and not by reproduction of any such [emblem, logo or Coat of Arms].</p>	

Minimum markings	Recommended copyright and licensing statements	Attribution statements (highlighted text is intended for use on websites, as appropriate, rather than in hard copy releases)
Licence name:	Creative Commons Attribution-Noncommercial-No Derivative Works (BY-NC-ND)	
Licence image:	 <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 points of contact for commercial use, as to which see paragraphs 92-93 above.</p>	<p>If you publish, distribute or otherwise disseminate this work to the public, the following attribution to [name of agency] should be used:</p> <p>“Source: [name of agency] and licensed by [name of agency] for re-use under the [name of and link to or URL for applicable Creative Commons licence]”</p> <p>If you include this work in a collection, and publish, distribute or otherwise disseminate that collection to the public, the following attribution to [name of agency] should be used:</p> <p>“This work includes [name of agency]’s [insert name of work or data] which [is/are] licensed by [name of agency] for re-use under the [name of and link to or URL for applicable Creative Commons licence]</p> <p>Where practicable, please hyperlink the name of the agency to the agency’s web page that contains or links to the source data.</p>
Licence URL link:	<p>http://creativecommons.org/licenses/by-nc-nd/3.0/nz/</p> <p>Basic statement</p> <p>[Crown copyright / Copyright] ©. This copyright 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/.</p> <p>Statement with logo/trade mark carve out</p> <p>[Crown copyright / Copyright] ©. Except for [name relevant logos, emblems and/or trade marks], this copyright 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/.</p> <p>Statement with no carve out but warning re Flags, Emblems, and Names Protection Act</p> <p>[Crown copyright / Copyright] ©. This copyright 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/. Please note that no [departmental or governmental emblem, logo or Coat of Arms] may be used in any way which infringes any provision of the Flags, Emblems, and Names Protection Act 1981 or would infringe such provision if the relevant use occurred within New Zealand. Attribution to [name of agency] should be in written form and not by reproduction of any such [emblem, logo or Coat of Arms].</p>	

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⁶⁰ The agency should choose which one of these statements is appropriate by reference to the work in question. It should not include all three.

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⁶¹ The agency should choose which one of these statements is appropriate by reference to the work in question. It should not include all three.

Generic treatment within websites of attribution requirements of licensees

169 Set out below is suggested wording for a generic treatment of attribution requirements of licensees, to apply to all Creative Commons licensed works on a website. It is intended for inclusion by the licensing agency within a website's general copyright statement or attribution policy, and may need to be tailored to meet an agency's specific circumstances and requirements. As noted above, including such attribution requirements is optional.

If you wish to use a copyright work contained on this website that is licensed for re-use under a Creative Commons licence, the terms of that licence require you to attribute the work in the manner specified by [name of agency] (but not in any way that suggests that [name of agency] endorses you or your use of the work) when you publish, distribute or otherwise disseminate to the public, either:

- the work itself; or
- where the applicable licence allows you to make an adaptation / derivative work, any adaptation of the work; or
- any collection containing the work.

In these circumstances, you are required to attribute licensed copyright works to [name of agency] in the manner set out below, unless [name of agency] has expressly waived the attribution requirement for a given work.

If you publish, distribute or otherwise disseminate a licensed work to the public without adapting it, the following style of attribution to [name of agency] should be used:

"Source: [name of agency] and licensed by [name of agency] for re-use under the [name of and link to or URL for applicable Creative Commons licence]"

If the applicable licence for a work allows you to make an adaptation / derivative work and you adapt the work in any way, or if you include the work in a collection, and publish, distribute or otherwise disseminate the adaptation or collection to the public, the following style of attribution to [name of agency] should be used, tailored as appropriate.⁶²

Either:

This work is [based on/includes] [name of agency]'s [insert name of work or data] which [is/are] licensed by [name of agency] for re-use under the [name of and link to or URL for applicable Creative Commons licence]

Or:

This [work/product/application/etc] uses data sourced from [name of agency] which are licensed by [name of agency] for re-use under the [name of and link to or URL for applicable Creative Commons licence]

Or:

This [work/product/application/etc] uses data sourced from [name of agency].

Where practicable, please hyperlink the name of the agency to the agency's web page that contains or links to the source data.

⁶² Depending on the variety of copyright works on its website, an agency may wish to select one of these kinds of statements or it may wish to include two or three of them and allow licensees to choose which one to use.

Appendix 3 – Key Features of New Zealand Copyright Law

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Introduction⁶³

170 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.

171 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

172 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:⁶⁴

- (a) literary, dramatic, musical, or artistic works;
- (b) sound recordings;
- (c) films;
- (d) communication works; or
- (e) typographical arrangements of published editions.

173 Dealing briefly with each in turn.⁶⁵

- (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 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

⁶³ 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>.

⁶⁴ Section 14(1) of the Copyright Act 1994, as amended by the Copyright (New Technologies) Amendment Act 2008.

⁶⁵ The following definitions are found in section 2(1) of the Copyright Act 1994.

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.⁶⁶

Low threshold for originality

174 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”.⁶⁷ 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.

175 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.⁶⁸

Copyright does not protect mere facts or information

176 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

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

Literary works, datasets and databases

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

179 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

⁶⁶ “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.

⁶⁷ *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>

⁶⁸ Section 14(2) of the Copyright Act 1994.

data other than works or parts of works”.⁶⁹ It follows that certain datasets and databases can, in principle, qualify as literary works.⁷⁰ 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”,⁷¹
- (b) reports showing financial survey data, tabulated and converted into certain ratios for comparison, have been held to be protected by copyright.⁷²

180 At the same time, and as the Court of Appeal has observed:⁷³

“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.”

181 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

182 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
- (g) authorise another person to do any of the foregoing acts.

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

Ownership of copyright

184 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.⁷⁴

⁶⁹ Section 2(1) of the Copyright Act 1994.

⁷⁰ Detailed discussion of this important issue is beyond the scope of this paper. See, e.g., Frankel and McLay, above n 63, pp. 171-173 and 624-633; Finch, above n 63, pp. 186-188.

⁷¹ *University of Waikato*, above n 67, para 35. See also *YPG IP Ltd and others v Yellow Book.com.au Pty Ltd* (2008) 8 NZBLC 102,063, para 38.

⁷² *University of Waikato*, above n 67. 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>. Cf *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 and *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* [2010] FCA 44, as well as the interlocutory decision in *YPG IP Limited v Yellowbook.com.au Pty Ltd* [2010] NZHC 943.

⁷³ *University of Waikato*, above n 67, para 36.

⁷⁴ Section 21(1) of the Copyright Act 1994.

185 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");⁷⁵ 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").⁷⁶

186 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).

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

188 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.⁷⁷

Duration of copyright

189 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.⁷⁸

190 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.⁷⁹

191 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.⁸⁰

⁷⁵ Section 21(2) of the Copyright Act 1994.

⁷⁶ Section 21(3) of the Copyright Act 1994.

⁷⁷ Section 113 of the Copyright Act 1994.

⁷⁸ Section 22 of the Copyright Act 1994. Specific rules apply to rules of joint authorship (see subsection (6)). They are not discussed here.

⁷⁹ Section 23 of the Copyright Act 1994.

192 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.⁸¹

193 Different duration rules apply to Crown copyright. They are discussed below.

Crown copyright as a species of copyright

Nature of Crown copyright

194 Crown copyright is a species of copyright regulated principally by section 26 of the Copyright Act.⁸² 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;⁸³ and
- (b) copyright in such a work is referred to as “Crown copyright”, even if such copyright is assigned to another person.⁸⁴

Duration of Crown copyright

195 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.⁸⁵

Works of joint authorship

196 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, section 26 applies only in relation to those authors and the copyright existing by virtue of their contribution to the work.⁸⁶

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

197 “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

198 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.

⁸⁰ Section 24 of the Copyright Act 1994.

⁸¹ Section 25 of the Copyright Act 1994.

⁸² <http://legislation.govt.nz/act/public/1994/0143/latest/DLM345937.html>

⁸³ Section 26(1) and (6).

⁸⁴ Section 26(2).

⁸⁵ Section 26(3).

⁸⁶ Section 26(4).

199 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 198 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).

200 In substance, the effect of subsections (1A) and (1B) is two-fold:⁸⁷

- (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 198 is not overridden by section 27(1).

Infringement of copyright

Primary infringement

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

202 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:⁸⁸

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

203 The Act states that:⁸⁹

- (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;

⁸⁷ 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>

⁸⁸ Section 29(1) and (2) of the Copyright Act 1994.

⁸⁹ See sections 30-34.

- (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.

204 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”.⁹⁰

205 It may also be noted that section 131 of the Copyright Act creates criminal liability for certain kinds of:

- (a) commercial dealings in infringing copies of copyright works;
- (b) production or possession for commercial purposes of objects specifically designed or adapted to make copies of particular copyright works; and
- (c) performances of copyright works.

Infringement in the case of datasets and databases

206 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.

207 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.⁹¹ 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*”.⁹²

208 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 broadly to apply to “compilations” (a subset of literary works) as well.⁹³

“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.”

⁹⁰ Section 2(1) of the Copyright Act 1994.

⁹¹ Sections 29 and 30 of the Copyright Act 1994.

⁹² *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.

⁹³ Above n 92, 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.

209 The Court also said:⁹⁴

“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

210 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.

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

212 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 licence, or a uniform licence such as those offered by Creative Commons.

Moral rights

Introduction

213 The “human-readable summary” for each of the Creative Commons New Zealand law licences states that in no way does the licence affect the author’s moral rights or rights that other persons may have either in the work itself or in how the work is used, such as publicity or privacy rights.

214 In the New Zealand State Services context, where the vast majority of candidate copyright works will be literary works (whether in the nature of narrative or informational products such as reports and research or data products such as geospatial datasets), the most relevant moral rights in the Copyright Act will be:⁹⁵

- (a) the right to be identified as author (section 94); and
- (b) the right to object to derogatory treatment of a work (section 98).

⁹⁴ Above n 92, para 41. See also *YPG IP Ltd and others v Yellow Book.com.au Pty Ltd* (2008) 8 NZBLC 102,063, paras 56-59.

⁹⁵ Other moral rights may be relevant in a minority of circumstances but are not considered here. Those moral rights are the right not to have a literary, dramatic, musical, or artistic work or a film falsely attributed to a person as author or director (section 102), the right not to have a literary, dramatic, or musical work falsely represented as being an adaptation of a work of which the person is the author (section 103), certain rights against false representations as to artistic works (section 104) and certain privacy rights in respect of photographs and films commissioned for private and domestic purposes (section 105).

215 The following paragraphs consider the potential relevance of these rights in the context of State Services agencies' literary works (which, as noted at paragraphs 178-181 above, can include datasets and databases), for the reason that the vast majority of works falling within the scope of NZGOAL are likely to be literary works.⁹⁶ While some agencies may deal with other kinds of copyright works, such as dramatic, musical and/or artistic works, they are likely to be in a small statistical minority and so are not addressed here. Agencies dealing in such works are encouraged to consult Part 4 of the Copyright Act in consultation with their legal teams.

Right to be identified as author

The right and its duration

216 Unless a statutory exception or qualification applies, authors of literary works have the right to be identified as author, in the circumstances set out in section 94, if they have "asserted" that right (section 94(1)).

217 The circumstances set out in section 94 are as follows:

- (a) an author of a literary work (other than words intended to be sung or spoken with music) has the right to be identified as author whenever the work is published commercially, performed in public or communicated to the public or when copies of a film or sound recording including the work are issued to the public (section 94(2)),⁹⁷
- (b) similarly, an author of a literary work from which an adaptation is made has the right to be identified as author of the work from which the adaptation is made whenever the adaptation is published commercially, performed in public or communicated to the public or when copies of a film or sound recording including the work are issued to the public (section 94(3)).

218 It is important to appreciate that the notions of issuing copies of works to the public, publication, communication and commercial publication are defined in the Copyright Act:

- (a) references to the "issue of copies of a work to the public":
 - (i) mean the act of putting into circulation copies not previously put into circulation;
 - (ii) but do not include (among other things) the acts of subsequent distribution or sale of those copies (section 9(1));
- (b) the term "publication", in relation to a work:
 - (i) means the issue of copies of the work to the public and includes, in the case of a literary, dramatic, musical, or artistic work, making it available to the public by means of an electronic retrieval system (section 10(1));⁹⁸ "publish" has a corresponding meaning (section 10(1));
 - (ii) but does not include (among other things):
 - publication that is not intended to satisfy the reasonable requirements of the public; or
 - for literary works (and some other types of works) the communication of the work to the public (otherwise than for the purposes of an electronic retrieval system) (section 10(3) and (4)(b));

⁹⁶ Additional considerations apply to literary works consisting of words intended to be sung or spoken with music. Those additional considerations are not addressed here.

⁹⁷ Section 2(1) of the Copyright Act defines "communicate" to mean "to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system".

⁹⁸ "Electronic retrieval system" is not defined in the Act but clearly includes websites.

- (c) the term “communicate” means to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system; “communication” has a corresponding meaning (section 2(1));
- (d) the term “commercial publication”, in relation to a literary, dramatic, musical, or artistic work, means the publication of the work consisting of:
 - (i) issuing copies of the work to the public at a time when copies made in advance of the receipt of orders are generally available to the public; or
 - (ii) making the work available to the public by means of an electronic retrieval system;

and related expressions are to be construed accordingly (section 11).

219 The right expires when copyright in the work that is the subject of the right expires (section 106(1)(a)).

Asserting the right

220 An author may assert the right to be identified as author either generally or in relation to specified circumstances, and may do so:

- (a) upon assignment of copyright in the work, by including in the assignment a statement that the author asserts in relation to that work his or her right to be identified as the author; or
- (b) at any time in written form signed by the author (section 96(2)).

221 If the author does not assert the right, then persons do not infringe the right by failing to identify the author as the author of the work (section 96(1)).

Who is bound by an assertion

222 The following persons are bound by an author’s assertion of the right to be identified as author:

- (a) where the right to be identified as author is asserted upon assignment, the assignee and anyone claiming through the assignee (section 96(4)(a)); and
- (b) where the right is otherwise asserted at any time by instrument in writing, anyone to whose notice the assertion is brought (section 96(4)(b)).

What they must do when the right is asserted / Mode of identification

223 What a person bound by an author’s assertion of the right to be identified as author must do to identify the author depends on the nature of the publication or communication to the public of the work:

- (a) in cases of commercial publication or issue to the public of copies of a film or sound recording, the author’s right is to be identified clearly and reasonably prominently in or on each copy published commercially or issued, or if identification in or on each copy is not appropriate, in some other manner likely to bring his or her identity to the attention of acquirers (section 95(1)(a));
- (b) in other cases, the author’s right is to be identified clearly and reasonably prominently in a manner likely to bring his or her identity to the attention of a person seeing or hearing the performance, exhibition, showing, or communication work (section 95(1)(b)).⁹⁹

⁹⁹ “Communication work” is defined as 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 (section 2(1)).

224 If the author, in asserting his or her right to be identified, specifies a pseudonym, initials, or some other particular form of identification, then that form must be used. In any other case, any reasonable form of identification may be used (section 95(2)).

Application of the right to State Services agencies

225 Section 97 of the Copyright Act contains a list of exceptions to the right to be identified as author. While most of these are of general application, one relates specifically to the Crown and another has a bearing on State Services agencies as employers. Of all the listed exceptions, the following are the most likely to be of relevance to departments or other State Services agencies:

- (a) the right does not apply to computer programs or computer-generated works (section 97(2));¹⁰⁰
- (b) the right does not apply to works in which Crown copyright exists unless the author has previously been identified as such in or on published copies of the work (section 97(7)(a));
- (c) the right does not apply to any act done by or with the licence of the copyright owner in relation to a work in which copyright first vested in the author's employer under section 21(2) of the Act if:
 - (i) the author cannot readily be identified at the time of the act; or
 - (ii) the work was co-created and it is impracticable at the time of the act to identify the contributors' respective contributions and the authors have not previously been identified in or on published copies of the work (section 97(6)).

226 In addition:

- (a) it is not an infringement of the right to do any act to which the author has consented (section 107(1)); and
- (b) the author may waive the right by instrument in writing; a waiver:
 - (i) may relate to a specific work, or to works of a specified description that are in existence, in progress, or about to be commenced; and
 - (ii) must state the rights to which the waiver relates; and
 - (iii) may be expressed to be subject to revocation; and
 - (iv) if made in favour of the owner or prospective owner of the copyright in the work or works to which the waiver relates, shall be presumed to extend to his or her licensees and successors in title unless a contrary intention is expressed (section 107(2) and (3)).

Practical implications for State Services agencies applying NZGOAL

227 Taking all these provisions together, and bearing in mind common approaches to creating documents across government:

- (a) **in the case of departments:**
 - (i) it is likely that the right to be identified as author will seldom exist in the context of Crown copyright works because it is unusual for the names of departmental staff and other authors to be added to published departmental works; if their names are not added, the right does not arise;

¹⁰⁰ "Computer-generated", in relation to a work, means that the work is generated by a computer in circumstances where there is no human author of the work (section 2(1)).

- (ii) this applies to works created by departmental employees, as well as to consultants and contractors, unless the department agrees with an employee, consultant or contractor that he, she or it, rather than the Crown, will be the first owner of copyright in original works created by that employee, consultant or contractor (a situation which is likely to be rare);¹⁰¹
 - (iii) in those rare cases where an author's name has been added to a published departmental work or where the Crown is not the first owner of copyright in a work but is subsequently assigned the copyright or obtains a right to sub-license the work:
 - the right to be identified as author of the work or author of a work from which an adaptation is made will exist, respectively, whenever the work or an adaptation of it is published commercially, performed in public or communicated to the public; such that
 - when the right is asserted, any assignee, person claiming through an assignee, or any other person to whose notice the assertion is brought, must identify the author (as per paragraphs 223-224 above) whenever any such person publishes the work or an adaptation of it commercially, performs it in public or communicates it to the public;
 - (iv) so far as a department's online release and Creative Commons licensing to the public of a copyright work is concerned:
 - it is most likely that this requirement will only be relevant where an author's name has already been added to a published version of the work, and not in the other identified rare case where the Crown is not the first owner of copyright;¹⁰²
 - only then – if the author has asserted the right in writing – will the department be obliged to identify the author;
 - where that has occurred, downstream Creative Commons licensees of the work will only be obliged to identify the author when:
 - they are aware of the author's assertion; and
 - they are either publishing the work or an adaptation of it commercially, performing it in public or communicating it to the public;
- (b) **in the case of other (non-departmental) State Services agencies:**
- (i) the right will not apply to works authored by an agency's employees in relation to acts done at a time when:
 - the author cannot readily be identified; or
 - it is impracticable to identify co-creators' contributions and the authors have not previously been identified in or on published copies of the work;
 - (ii) however, the right will exist and an employee author *can* therefore assert the right where those circumstances do not exist, unless there is a waiver

¹⁰¹ See section 26 of the Copyright Act.

¹⁰² It is unlikely to be relevant where the Crown is not the first owner of copyright in a work because, unless the Crown has obtained a broad right to sub-license the work or has obtained an assignment of copyright in the work, it will not be licensing the work to others on Creative Commons terms.

of either all moral rights or this particular right in the employee's contract of employment or subsequently;

- (iii) the right will also exist for independent contractor authors of works who, therefore, can likewise assert the right, unless there is a waiver of either all moral rights or this particular right in the contractor's contract for services with the agency or subsequently;
- (iv) accordingly, when the right is asserted in these situations (and assuming no prior waiver of the right), any assignee, person claiming through an assignee, or any other person to whose notice the assertion is brought, must identify the author (as per paragraphs 223-224 above) whenever any such person publishes the work or an adaptation of it commercially, performs it in public or communicates it to the public;
- (v) such persons may include agencies releasing works on Creative Commons terms as well as the licensees of those works where those agencies or licensees publish the work or an adaptation of it commercially, perform it in public or communicate it to the public.

Right to object to derogatory treatment of a work

The right and its duration

228 Unless a statutory exception or qualification applies, authors of literary works have the right not to have their works subjected to a "derogatory treatment" (section 98(2)).

229 "Treatment" means any addition to, deletion from, alteration to, or adaptation of the work, other than a translation (section 98(1)(a)(i)), and a treatment of a work is derogatory "if, whether by distortion or mutilation of the work or otherwise, the treatment is prejudicial to the honour or reputation of the author" (section 98(1)(b)).

230 In the case of literary works, the right is infringed by a person who:

- (a) publishes commercially, performs in public or communicates to the public a derogatory treatment of such a work; or
- (b) issues to the public copies of a film or sound recording of, or a film or sound recording that includes, a derogatory treatment of the work (section 99(1)).

231 The right expires when copyright in the work that is the subject of the right expires (section 106(1)(b)).

Application of the right to State Services agencies

232 Section 100 of the Copyright Act contains a list of exceptions to the right not to have one's work subjected to a derogatory treatment. While most of these are of general application, one relates specifically to the Crown and another has a bearing on State Services agencies as employers. Of all the listed exceptions, the following are the most likely to be of relevance to departments or other State Services agencies:

- (a) the right does not apply to computer programs or computer-generated works (section 100(2)),¹⁰³
- (b) the right does not apply to any act done, by or with the licence of the copyright owner, in relation to a work in which Crown copyright exists, unless the author is identified at the time of the act or has previously been identified in or on published copies of the work (section 100(8)(b), (d) and (e));

¹⁰³ "Computer-generated", in relation to a work, means that the work is generated by a computer in circumstances where there is no human author of the work (section 2(1)).

- (c) similarly, the right does not apply to any act done, by or with the licence of the copyright owner, in relation to a work in which copyright first vested in the author's employer, unless the author is identified at the time of the act or has previously been identified in or on published copies of the work (section 100(8)(a), (d) and (e));
- (d) in both classes of cases referred to in subparagraphs (b) and (c) where the right does apply (i.e., because the author is identified at the time of the act or has previously been identified in or on published copies of the work), the right is not infringed if:
 - (i) where the author is identified at the time of the act, there is a clear and reasonably prominent indication, given at the time of the act and appearing with the identification, that the work has been subjected to treatment to which the author has not consented; or
 - (ii) where the author has previously been identified in or on published copies of the work, there is a clear and reasonably prominent indication, given at the time of the act, that the work has been subjected to treatment to which the author has not consented (section 100(9)).

233 In addition:

- (a) it is not an infringement of the right to do any act to which the author has consented (section 107(1)); and
- (b) the author may waive the right by instrument in writing; a waiver:
 - (i) may relate to a specific work, or to works of a specified description that are in existence, in progress, or about to be commenced; and
 - (ii) must state the rights to which the waiver relates; and
 - (iii) may be expressed to be subject to revocation; and
 - (iv) if made in favour of the owner or prospective owner of the copyright in the work or works to which the waiver relates, shall be presumed to extend to his or her licensees and successors in title unless a contrary intention is expressed (section 107(2) and (3)).

Practical implications for State Services agencies applying NZGOAL

234 It is most unlikely that State Services agencies applying NZGOAL and licensing copyright works online for re-use will infringe an author's right not to have his or her work subjected to a derogatory treatment, because:

- (a) in the case of Crown copyright works:
 - (i) departmental staff and other authors are seldom identified as authors; and
 - (ii) even if they are, the likelihood of a department both identifying an author *and* subjecting that author's work to a derogatory treatment is low;
- (b) in the case of copyright works of other (i.e., non-departmental) State Services agencies:
 - (i) again, in many if not most instances, an agency's staff and other authors will not be identified as such; and
 - (ii) even if they are, the likelihood of an agency both identifying an author *and* subjecting that author's work to a derogatory treatment is low;
- (c) to the extent that an agency licenses on Creative Commons (or other) terms a work that identifies an author, it is conceivable that downstream licensees could

infringe the right if those licensees publish a derogatory treatment of the work commercially, perform such a treatment in public or communicate such a treatment to the public; that, however, is an issue for those licensees and not something for which the licensing State Services agency would be responsible.