



Open Government Information and Data Re-use Project

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

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Executive Summary

Background to departmental consultation

- 1 As part of the Open Government Information and Data Re-use Project, on 25 March 2009 SSC provided 36 departments with a discussion paper entitled “Suggested All-of-government Approach to Licensing of Public Sector Copyright Works: Discussion Paper for Public Service and Non-Public Service Departments” (the “Discussion Paper”). The Discussion Paper was also provided to the Human Rights Commission, the Office of the Privacy Commissioner, the Council for the Humanities Te Whaingā Aronui and certain colleagues in Australia involved with Queensland’s Government Information Licensing Framework and Creative Commons Australia.
- 2 The Discussion Paper contained 18 questions for interested departments to answer. It also encouraged any general comments any department wished to make. Departments were given until 24 April 2009 to respond.

Responses received

- 3 SSC received responses from 19 departments, namely:
 - (a) Land Information New Zealand (“LINZ”);
 - (b) Ministry for Culture and Heritage (“MCH”);
 - (c) Ministry for the Environment (“MFE”);
 - (d) Ministry of Education (“MOE”);
 - (e) Ministry of Research, Science and Technology (“MORST”);
 - (f) New Zealand Customs Service (“NZCC”);
 - (g) Statistics New Zealand (“SNZ”);
 - (h) New Zealand Police (“NYP”);
 - (i) Department of Prime Minister and Cabinet (“DPMC”);
 - (j) Ministry of Defence (“MOD”);
 - (k) Ministry of Transport (“MOT”);
 - (l) Ministry of Women’s Affairs (“MWA”);
 - (m) Human Rights Commission (“HRC”);
 - (n) Crown Law Office (“CLO”);
 - (o) Archives New Zealand (“Archives”);
 - (p) Department of Internal Affairs (“DIA”);
 - (q) the National Library (“NatLib”);
 - (r) the New Zealand Food Safety Authority (“NZFSA”); and
 - (s) Te Puni Kōkiri (“TPK”).
- 4 Of these 19 departments, 10 departments provided substantive and sometimes substantial feedback, while 4 gave some general feedback without addressing the 18 questions and 5 had no comments to make.
- 5 SSC also received responses from the Education Sector ICT Management Committee (“ESICTMC”) and the Council for the Humanities (“CFH”).

Overall summary

6 While the following paragraphs attempt to summarise the departmental and other feedback received, both the depth and thoughtfulness of the responses and the detail of SSC's replies to those responses can only be fully absorbed through reading the entirety of this paper.

Support for recommendatory NZGILF and NZGILF Toolkit with Creative Commons and more restrictive licences

7 Overall, the feedback revealed strong support for all-of-government adoption of Creative Commons licences in conjunction with one or more restrictive licences, such adoption to be in the form of an NZGILF and NZGILF Toolkit that would be recommendatory in nature and encompass the State Services. In particular:

- (a) 10 of the 11 departments that responded to question 7¹ agreed or generally agreed with SSC's preliminary assessment that the Creative Commons New Zealand law licences are the most obvious candidate for all-of-government adoption; and
- (b) all of the 10 departments that responded to question 14² appear to have agreed that an NZGILF should be recommendatory and "definitely not", as one department put it, mandatory.

8 Of the 10 departments that answered question 3,³ 6 were aware of interest that had been shown in the use of open access licences. Five of these referred to Creative Commons licences.

9 Of the 10 departments that responded to question 12,⁴ 8 either:

- (a) had no concern that information and data released under a Creative Commons licence is made available to the world at large; or
- (b) supported world-wide availability but subject to identification of situations where more limited licensing may be appropriate.

10 In response to question 10,⁵ 7 departments identified various circumstances in which they would or might require additional and more restrictive licences, i.e., licences that are more restrictive than the Creative Commons licences. The main identified circumstances concerned:

- (a) the need for adherence to the Privacy Act 1993 and, where applicable, the Domestic Violence Act 1995;
- (b) commercial sensitivity;
- (c) the desirability of permitting re-use for a fixed period of time;

¹ Question 7 was: "Does your agency agree with the Commission's preliminary assessment that the Creative Commons New Zealand law licences are the most obvious candidate for all-of-government adoption? If not, why not?"

² Question 14 was: "Do you agree with the proposed nature and scope of the NZGILF and NZGILF Toolkit, i.e., that they be recommendatory in nature and encompass the State Services?"

³ Question 3 was: "Have members of your agency shown any interest in Creative Commons or other forms of open access licences? If so, please explain the nature of that interest and the form of licences in question and, if such licences are already in use in your agency, please provide details."

⁴ Question 12 was: "Is it a matter of concern to your agency that information and data made available under a Creative Commons licence is made available to the world at large, as opposed only to those in or from New Zealand (bearing in mind that New Zealanders benefit from the information and data from other countries made available under Creative Commons or similar open access licences)? If so, what alternative approach would you suggest?"

⁵ Question 10 was: "Does your agency have a need for one or more restrictive licences, e.g., for commercially or otherwise sensitive copyright material? If so, please explain, to the extent appropriate, the type of restrictive licence(s) your agency requires."

- (d) needs to identify licensees and enforce licence terms against them where required; and
- (e) Maori traditional and historical knowledge (this subject is addressed separately below).

Indigenous licence(s)

- 11 Some departments, particularly TPK, provided helpful comments on the importance of the retention of control, usually by Maori, over the release of Maori traditional knowledge and other culturally sensitive material. The comments on this issue suggest a tangible need for an indigenous form of licence that caters for more restricted release than is possible under any of the Creative Commons licences.
- 12 As noted below, further analysis is required as to whether the needs of Maori and other indigenous groups could be met with a modular form of restrictive licence agreement which applies to other forms of sensitive or confidential material, various provisions of which could be “turned on or off” depending on the subject-matter, or whether a discrete licence or other form of agreement focusing solely on the needs and interests of Maori and other indigenous groups is preferable. It may well be, for example, that such an agreement needs to contemplate not only licensing of copyright works but, more likely in many contexts, restricted access to and use of private and confidential material, irrespective of whether there is copyright in it.

Identified candidates for Creative Commons licensing

- 13 The 10 departments that responded to question 15⁶ indicated that they would consider applying Creative Commons licences to the following categories of material:
 - (a) “most types of LINZ information (topographic, hydrographic, geodetic, place names)”;
 - (b) databases (including spreadsheets and spatial data layers);
 - (c) maps and images;
 - (d) reports, publications and evaluative data;
 - (e) presentations;
 - (f) audio and video recordings;
 - (g) online discussion groups;
 - (h) website materials and possibly intranet materials;
 - (i) customs public documents;
 - (j) published official statistics;
 - (k) certain educational resources;
 - (l) possibly, certain National Film Unit archive film; and
 - (m) contracts (consultancy contracts and funding agreements).

⁶ Question 15 was: “If the Creative Commons licences were recommended for all-of-government adoption, to which categories or types of information would your agency consider applying them?”

Policy Framework for Government-Held Information and Web Standard 16.5

- 14 Eight of the 10 departments that answered question 4 agreed with the views in the Discussion Paper that the current Policy Framework for Government-Held Information and what was Web Standard 16.5 are no longer adequate to deal with copyright licensing issues that arise in the digital age.⁷ At the same time, some departments noted that some of the principles in the Policy Framework remain valid and should be included in policy principles to be developed for an NZGILF, the examples given being the information availability and copyright principles.
- 15 SSC was also informed that the needs of contributors, particularly Maori contributors, should be recognised in any such policy framework “given the status that is applied to information sets, both formally and informally”. TPK gave the examples of restricted material, sacred material and sensitive material, adding that “[s]ome materials held in public collections are by their nature extremely sensitive”. SSC officials have considered this issue at some length, as set out in the body of this paper, and agree that the needs of contributors should be expressly recognised. This appears to be particularly important for traditional knowledge and other culturally sensitive material because copyright law, by itself, does not appear to provide sufficient protection for such knowledge and material. Of fundamental importance is the question of control over the release of such knowledge and material. To the extent that it is not already widely publicly available, there appears to be a strong case for agencies treating it as private and confidential, with any release being restrictive and subject to the informed consent of relevant iwi and other groups. SSC envisages the inclusion of draft principles to this effect in an NZGILF.

Common themes on which guidance would be useful

- 16 Analysis of the feedback reveals a number of themes which were common with either issues identified in the Discussion Paper or the responses of other departments. They are issues on which, to varying degrees, an NZGILF and NZGILF Toolkit could provide guidance, namely:
- (a) uncertainties or limited understanding, on the part of both members of the public and some (presumably front-line) departmental staff, around:
 - (i) core copyright and licensing concepts; and
 - (ii) the fact that release of copyright material under the Official Information Act does not carry with it a licence to re-use that material;
 - (b) constraints on departments being able to share commissioned works due to restrictions in their commissioning contracts;
 - (c) isolated instances of copyright licensing agencies insisting on charging educational institutions for photocopying departmental material, without the relevant department’s consent to the imposition of charges;
 - (d) difficulties, experienced by a minority of departments, when seeking permission to re-use material apparently owned by other agencies, arising from:
 - (i) insufficient information within those agencies as to who owns the copyright in the relevant works (assuming they are qualifying original works);

⁷ Question 4 was: “Does your agency agree with the views in this Discussion Paper that the current Policy Framework on Government-Held Information and Web Standard 16.5 are no longer adequate to deal with copyright licensing issues that arise in the digital age?”

- (ii) insufficient contact details within those agencies for the third party copyright owners;
- (iii) re-use agreements being limited in scope to, for example, specific websites or publications;
- (iv) inconsistencies in charging practices where copyright material is made available for re-use; and/or
- (v) fears on the part of the source agency that release to and wide dissemination by the requesting department might result in unanticipated or commercial re-use.

17 There were also a number of themes relating to the need for departments to retain flexibility in the management of their copyright works and their negotiations with contract providers, further supporting both the proposed recommendatory and not binding nature of an NZGILF and NZGILF Toolkit and the inclusion of a more restricted form of licence.

Creative Commons, open source software licences and digital technologies

18 Although there was insufficient support, in response to question 17,⁸ for separate guidance on the making available of agency-owned software on open source terms, interesting questions were raised regarding:

- (a) copyright in metadata;
- (b) copyright and licensing of user-generated content, particularly on social media sites and in the form of site users tagging website content and providing more substantive commentary or input;
- (c) the (potential) inappropriateness of Creative Commons licences for the likes of metadata, software and website code;
- (d) the need, in this context, to address the General Public Licence and other open licences “from the view of data and its associated code and technical documentation”, this being “particularly important if the public sector is serious about making open datasets available for re-use through semantic web machine-readable technologies”; and
- (e) the impact that digital rights management may have on copyright and licensing.

19 SSC officials consider that guidance on such issues in an NZGILF would be helpful.

Creative Commons Zero and Public Domain Certification

20 One department and ESICTMC suggested that the use of Creative Commons CC0, the “no rights reserved” option, and public domain dedication and certification need to be investigated.

21 CC0 (or CC Zero as it is read) is a means by which creators and owners of copyright-protected works can waive copyright interests in their works and thereby place them as completely as possible in the public domain, enabling others to freely build upon,

⁸ Question 17 was: “The proposed NZGILF and NZGILF Toolkit are unlikely to extend to software, as it is generally recognised that Creative Commons licences are not appropriate for software which is to be made available on open source terms. To what extent does your agency require separate guidance on the making available of software it owns on open source terms (bearing in mind that the *Guidance on the Treatment of Intellectual Property Rights in ICT Contracts* expressly contemplates retention of ownership in software where the relevant agency may wish to make that software available for re-use on open source terms)?”

enhance and re-use the works for any purposes without restriction under copyright.⁹ (CC0 is discussed further at paragraphs 72-73 below.)

- 22 The reference to public dedication and certification is to Creative Commons' Public Domain Dedication and Certification instrument ("PDDC"). This instrument, which existed before CC0, "was intended to serve two purposes – to allow copyright holders to 'dedicate' a work to the public domain, and to allow people to 'certify' a work as being in the public domain".¹⁰ Potential drawbacks of PDDC in the New Zealand context are as follows:
- (a) Creative Commons has found "that having a single tool performing both of these functions can be confusing";
 - (b) "PDDC is based on U.S. law, and the enforceability of its dedication function outside of the U.S. is not certain";¹¹
 - (c) to the extent that one wishes to dedicate works to the public domain, Creative Commons recommends the use of CC0 "because of its universality and because it is a more robust and complete legal tool".¹²
- 23 SSC officials consider that:
- (a) there is merit in further consultation on the potential inclusion of the CC0 instrument in an NZGILF. They propose to include this subject in any public consultation that may occur in relation to an NZGILF; and
 - (b) further thought needs to be given as to how agencies might perform a "public domain certification" function in respect of information and data in which there is no copyright and to which they give public access for re-use; officials see merit in agencies having the ability to certify such information and data as being in the public domain so as to clarify for users its non-copyright/public domain status but do not consider the PDDC instrument to be the appropriate means of doing so given that it is governed by US law.

Implementation issues

- 24 Eight of the 10 departments that responded to question 16¹³ identified the need or desirability for various kinds of implementation assistance or information. Among other things, they concerned:
- (a) the potential for an advisory service from SSC;
 - (b) clear guidance on pricing, charging and other economic issues that arise in the context of greater dissemination and re-use of public sector information;
 - (c) the need for greater awareness of Creative Commons licensing;
 - (d) the need to emphasise caution around ensuring the correct level of Creative Commons licensing is entered into, given that the licences are irrevocable;

⁹ See <http://creativecommons.org/about/cc0>

¹⁰ See <http://wiki.creativecommons.org/CC0>

¹¹ Above n 10.

¹² Above n 10.

¹³ Question 16 was: "If the Commission were to advocate all-of-government adoption of the Creative Commons licences, in conjunction with one or more additional licences addressing specific needs, are there any implementation issues you would like to raise that are not anticipated in this Discussion Paper to fall within the expected scope of the NZGILF and NZGILF Toolkit? Would your agency need any additional support?"

- (e) the need to analyse whether an agency owns all relevant copyright in given material that may be licensed for re-use so as to ensure the agency can lawfully do so and, where it does not, to ensure that third party rights are protected;
- (f) advice on the kinds of procurement practices that would secure the rights to share copyright works;
- (g) guidance on how to treat data and information currently bound by existing licenses;
- (h) guidance on the circumstances in which commercialising Crown IP is more appropriate than public release;
- (i) examples of situations where the release of public data has delivered greater benefits than commercialisation;
- (j) the potential need for different guidance resources for different target audiences;
- (k) the desirability of implementation assistance given the potential resources and costs that implementation might entail; and
- (l) the need for guidance to include clear statements regarding the position and treatment of Maori traditional knowledge.

The importance of principles

- 25 One department stressed the importance of overarching principles, stating (among other things) that it “seems ... that the first question to be addressed is what information government wants to make accessible”, that “it seems premature to look at licensing mechanisms before some principles are developed” and that its “first question is whether licensing is the issue”, observing “that at least some of the drivers behind this work could be addressed by updating the existing web standard”. In the context of noting economic factors that are likely to be at play, it also expressed the view that “it has been government policy that costs are recovered where there is private or commercial benefit”.
- 26 To some extent these comments are consistent with SSC’s recognition in the Discussion Paper of the importance of policy principles (see, e.g., paragraphs 89(h) and 192(e)). However:
- (a) One may debate whether it is premature to look at licensing mechanisms before such principles are fully developed. We suggest that Government is already guided by the spirit of the Official Information Act (which we recognise deals with access and not licensing), the policy principles in the Policy Framework for Government-Held Information and the Web Standards, as well as the specific drivers summarised at paragraph 42 of the Discussion Paper. We see the work of the Open Government Information and Data Re-use Project as arising naturally from those existing foundations and drivers.
 - (b) Officials do not consider that the Web Standards, by themselves, are a sufficient answer to some of the drivers behind this work, as there is only so much that they can say and their coverage is limited to material on websites. The issues raised by departments in response to the Discussion Paper, including on the re-use of website material, indicate that much deeper and wider guidance is required.
 - (c) SSC officials are not sure that, in general, it has been government policy that costs are recovered where there is private or commercial benefit from the use of copyright works. So far as website copyright statements are concerned, for example, one often sees a distinction between private and commercial use, the former often being allowed, the latter sometimes not. In addition, the Policy

Framework for Government-held Information states that “[f]ree dissemination of information is appropriate where there is a clear public policy purpose and recovery of costs is not feasible or cost effective” and that “[p]ricing to recover the cost of dissemination is appropriate if it is both feasible and cost effective *or the information has been produced for a commercial purpose of sale at a profit*”. In other words, the Policy Framework contemplates that recovery of dissemination costs may be appropriate in the context of commercial benefit but is silent on private benefit. Further, in some instances, cost recovery practices may well focus on the recovery of distribution costs generally, and not by reference to whether the distribution results in private or commercial benefit. To the extent that charging may have operated by reference to whether the distribution results in private or commercial benefit, we consider it is an issue worthy of critical examination.

- 27 Ultimately, SSC agrees that the inclusion of overarching principles within an NZGILF is highly desirable.
- 28 SSC proposes to develop policy principles for inclusion in the material on which public consultation will be sought. Such policy principles might take the general form set out below. (These are indicative only and not in any way predetermined. The phrase “*useful copyright works*” means copyright works which others may be able to use or re-use for creative, social, cultural, economic or other constructive purposes):
- (a) **Copyright ownership** Agencies should only licence works for re-use by others where they own all relevant copyright-related rights in the relevant works or, to the extent they do not, can obtain an assignment of copyright or have or can obtain an appropriately broad right to sub-license those works (or relevant elements of them) from the relevant copyright owner(s).
 - (b) **Liberal licensing terms for useful copyright works** Unless an agency is willing to waive its rights or an exception applies, agencies should make their useful copyright works available for re-use on the most liberal of licensing terms available within the New Zealand Government Information Licensing Framework (“NZGILF”) so as to facilitate re-use of such works and interoperability between the different licence types. The most liberal of licensing terms available within the NZGILF is the Creative Commons Attribution (BY) licence.
 - (c) **Waiver** Where an agency is willing to waive its rights in a copyright work of which it is the exclusive owner, having considered all the implications of doing so, it should do so by using the Creative Commons 0/CC0 instrument.
 - (d) **Exceptions** The liberal licensing terms principle does not apply where licensing a copyright work on such terms:
 - (i) would or might be contrary to legislation (e.g., the Privacy Act, Tax Administration Act or any other legislation) or court order;
 - (ii) would or might constitute a breach of contract, breach of confidence, disclosure of a trade secret or other actionable wrong;
 - (iii) would be contrary to an agency’s own commercial or other interests (bearing in mind, however, that, with certain exceptions, it is generally not the business of government to commercialise its copyright works);
 - (iv) would or might threaten the control over and/or integrity of Maori or other traditional knowledge or other culturally sensitive material;

- (v) would or might jeopardise the economic potential to Maori or other indigenous groups of Maori or other traditional knowledge or other culturally sensitive material; or
 - (vi) would otherwise conflict with the existence of a good reason under sections 6 or 9 of the Official Information Act for withholding release of the work if the work were requested under that Act.
- (e) **Other Creative Commons licensing** Where one of the above exceptions applies or appears to apply but an agency may still be able to licence the relevant copyright work (the exceptions in paragraph 28(d)(iii) being the most likely candidate), the agency should consider adopting one of the following licences for the work, taking into account the principles in paragraphs 28(f) and(g) below:
- (i) Creative Commons Attribution-Share Alike (BY-SA);
 - (ii) Creative Commons Attribution-No Derivative Works (BY-ND);
 - (iii) Creative Commons Attribution-Noncommercial (BY-NC);
 - (iv) Creative Commons Attribution-Noncommercial-No Derivative Works (BY-NC-ND);
 - (v) Creative Commons Attribution-Noncommercial-Share Alike (BY-NC-SA) licence.
- (f) **Share-Alike and No Derivative Works Restrictions** 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, agencies should take the following principles into account:
- (i) both the obligation to share-alike and the prohibition on the making of adaptations (derivative works) may have the adverse effect of stifling creativity and/or economic exploitation by licensees; and
 - (ii) the prohibition on the making of adaptations (derivative works) 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.
- (g) **Non-discrimination** Except where necessary to protect their own commercial or other interests, agencies should not discriminate, when selecting an NZGILF licence, between individual, not-for-profit and commercial uses of the relevant copyright works.
- (h) **Non-copyright information and data** Where potentially useful information or data does not constitute or contain a copyright work (or once did but the copyright has expired) and none of the exceptions in paragraph 28(d) applies to its release, the agency that holds that information or data should consider making it publicly available for re-use with a clear statement that the information or data is not subject to copyright.
- (i) **Formats** When licensing public sector copyright works and releasing non-copyright public sector information and data for re-use, agencies should:
- (i) consider the formats in which they ought to be released, taking into account, where relevant and to the extent practicable, the wishes of those who will or are likely to re-use the works, information or data; and

- (ii) to the extent practicable, release them in the formats they know or believe are best suited for interoperability and re-use.
- (j) **Charging** There is a rebuttable presumption against charging licensees for the use and re-use of public sector copyright works and non-copyright public sector information and data. Where the costs of dissemination are low or it is economically inefficient to put in place and administer a charging structure, licensees should not be charged. Where that is not the case, before imposing any charge, agencies should:
- (i) take into account The Treasury’s “Guidelines for Setting Charges in the Public Sector” (December 2002);
 - (ii) consider whether the creativity and/or national public benefit arising from licensing the work without charge could be significantly prejudiced by the imposition of a charge;
 - (iii) to the extent that they still propose to impose a charge:
 - limit charges to what is reasonably necessary to meet the costs of distribution; and
 - to the extent practicable, use technology to reduce such costs.

Agencies that do impose charges should review whether there is any ongoing need for the imposition of a charge once the bulk of the distribution costs have been met (assuming there are not significant ongoing distribution costs).

Next steps

- 29 In the light of changes to the structure of SSC and the transfer of Government Technology Services to DIA, SSC is currently considering how the Open Government Information and Data Re-use Project might be progressed, including questions around its future governance.
- 30 At this point, officials are proceeding on the basis that a modified version of the Discussion Paper will be prepared and, once approved at the relevant levels, released for public consultation.

Discussion Questions and Answers

Question 1: Has your agency either itself experienced copyright licensing difficulties or received comments or criticisms from the public regarding the licensing of copyright materials? If so, please describe these.

Feedback

- 31 Of the 10 departments who provided substantial feedback, 4 had not experienced any difficulties or received such comments or criticisms. Of the remaining 6 departments:
- (a) one receives 1-2 privacy-related complaints per month regarding its release of certain land-related information (notwithstanding that the information released is part of a public record);
 - (b) another receives regular requests for permission to use images or materials on its websites, even where the department clearly identifies ownership and conditions of re-use on its websites; some of the requests that that department receives assume either that the department owns all material on its websites or that the department can secure permission for re-use from third parties; the department has also observed instances of persons who re-use content from the department's websites inaccurately identifying and attributing the copyright holder or providing no attribution at all;
 - (c) one department noted that it had been constrained in reproducing a spatial data layer for a map, which it commissioned for a particular use, in another publication, given restrictions in the original commissioning contract; that department also observed that criticism of government licensing and Official Information Act ("OIA") responses is appearing in the "NZ Official Information Blog";¹⁴
 - (d) another department noted that, while it does not receive complaints from the public, since SSC's promulgation of the "Guidelines on the Treatment of Intellectual Property Rights in ICT Contracts", it has experienced pressure from certain contractors to grant copyright ownership to them; the ESICTMC made similar comments, adding that "this may not be in the best interests of the Crown";
 - (e) another department noted that a copyright licensing organisation insists on charging educational institutions to photocopy that department's material, something that department has challenged but, it seems, without success; and
 - (f) another department noted, among other things, that difficulty can arise where it is not clear whether material is Crown copyright or not; it said this may relate to derivative works such as metadata, which may combine factual descriptions or standard schema keywords with the department's own descriptive information, noting that while facts are not protected by copyright, a number of the descriptions require judgement and editing by staff or are received from third parties that provide the original material.
- 32 While TPK was one of the departments that had not experienced copyright licensing difficulties or received comments or criticisms from the public regarding the licensing of copyright materials, it noted that "issues do arise in the context of its funding agreements where the outputs involve the use of traditional Maori knowledge – for e.g., historical records, whakapapa database", adding that its "approach to such situations is to ensure

¹⁴ <http://officialinfo.wordpress.com/>

that ownership of any traditional Maori knowledge remains with the respective iwi/hapu/whanau”.

Commentary

- 33 **Confusion around re-use** As regards confusion around whether a department can permit someone to re-use third party copyright content on that department’s website, one might argue that such confusion ought not to arise given the requirements of the “Copyright of third parties” web standard,¹⁵ which states that the “agency’s website must ... contain a statement (e.g., in its copyright statement) that permission to utilise such material cannot be given by the agency”. However, in practice, evidently confusion may still arise, most likely due either to members of the public not reading a website’s copyright statement and/or terms of use or to their needing to contact the department to ascertain the identity of the real copyright owner.
- 34 The former cause could be addressed, to some extent, by providing guidance on this specific issue in an NZGILF or NZGILF Toolkit. The latter cause is difficult to address in the absence of a department identifying the copyright owner for every third-party-sourced input or content item. That is really a matter for the individual department rather than the NZGILF or NZGILF Toolkit.
- 35 **Constraints in use of commissioned works** In all likelihood, no department can expect to be able to negotiate Crown ownership of copyright in every commissioned work nor is that necessarily economically or otherwise desirable. The NZGILF may encourage up-front analysis of copyright ownership and licensing issues at the time of procurement and/or contract negotiation, but cannot and will not mandate Crown ownership in all cases and will respect the fact that different departments have different needs and drivers on such issues.
- 36 [redacted]
- 37 **ICT Contract Guidelines** As regards one department’s observation that, since SSC’s promulgation of the “Guidelines on the Treatment of Intellectual Property Rights in ICT Contracts”, it has experienced pressure from certain contractors to grant copyright ownership to them, we note that:
- (a) the focus in those Guidelines is on ownership of newly developed intellectual property in the context of ICT contracts; and
 - (b) vendor/supplier ownership is strongly encouraged; but
 - (c) the Guidelines do not apply to content that could be covered by the Policy Framework for Government-held Information; and
 - (d) in any event, departmental/agency ownership is expressly contemplated as appropriate in circumstances where the department/agency may wish to make the intellectual property available to all under open source licensing terms.
- 38 **Copyright licensing organisation charging without consent** As regards the reference to a copyright licensing organisation insisting on charging educational institutions to photocopy that department’s material without, it seems, that department’s consent, we note that such practices may be illegal. We suggest that guidance in the NZGILF and NZGILF Toolkit addresses this issue, for the benefit of both agencies and copyright licensing organisations alike.

¹⁵ <http://webstandards.govt.nz/copyright-of-third-parties/>

- 39 **Copyright in metadata:** The issue of copyright in metadata is an interesting one that may require further consideration in the wider context of the Open Government Information and Data Re-use Project. At this point, it suffices to say that there is unlikely to be a homogenous answer as to whether copyright exists in metadata, given the various forms it can take. In some cases, there may be sufficient originality to warrant its classification as an original literary work. In other cases, one might be dealing with a compilation of data which may be classified as an original literary work.¹⁶ In other cases, one might be dealing with a small amount of metadata in which it may be difficult to say there is any originality whatsoever.
- 40 **Traditional Maori knowledge** We comment on issues around traditional Maori knowledge at paragraphs 63-67, 90-93 and 107-112 below.

Question 2: Has your agency experienced any difficulty as regards the re-use of material held by other State Services agencies, whether on their websites or otherwise? If so, please describe such difficulty.

Feedback

- 41 Of the 10 departments who provided substantial feedback, 7 had experienced no such difficulties.
- 42 One department noted recurring difficulties it encounters when seeking permission, from other agencies, to re-use material apparently owned by those agencies. The difficulties fall into five discrete categories:
- (a) in some instances the material may be owned by third parties for whom contact information is scarce or out-of-date;
 - (b) in other instances it may be unclear whether the agency or another party owns copyright in the material;
 - (c) agency staff understanding of or interest in copyright issues may be low;
 - (d) agreements around re-use are often limited in scope (e.g., to a specific website or publication), such that if the agency requesting permission wishes to use the material on a different website or in a different publication, it must seek a separate agreement, resulting in duplicated staff time and cost;
 - (e) there can be inconsistencies across agencies as to whether charges are levied for re-use and, if so, the charges that are applied.
- 43 This department noted:
- “An all-of-government approach to licensing public sector copyright works could offer possible efficiencies for content sharing between State Service agencies if material available for re-use was clearly identified.”
- 44 Another department that provided certain data to local and regional authorities which it had sourced from another department’s database, encountered reluctance from that other

¹⁶ For recent commentary on this and related issues in the Australian context, see the Australian Copyright Council’s Information Sheet “Databases, compilations, tables & forms” (May 2009), available online at: http://www.google.co.nz/url?sa=U&start=4&q=http://www.copyright.org.au/pdf/acc/infosheets_pdf/G066.pdf&ei=VEwGSt7BJHstgOSweDyAQ&sig2=w3Jlvs91MKnybucpUpUTBw&usq=AFOjCNFIONfp_g12zUtmbelKV0LbN6HLeQ See also “Guide to Open Data Licensing” on The Open Knowledge Foundation Wiki, at <http://wiki.okfn.org/OpenDataLicensing>; AND E Gadd et al “RoMEO Studies 5: IPR issues facing OAI Data and Service Providers” <http://www.lboro.ac.uk/departments/ls/disresearch/romeo/Romeo%20Studies%205.pdf>.

department around wide distribution of its data for fear it might fall into the hands of commercial providers who could then market their services to particular suppliers.

45 The other department had a number of comments relating to difficulty in obtaining permission to re-use material from other agencies:

- (a) where it wants to re-use material for purposes such as online discovery, it is required to seek permission from the relevant agencies; while noting that such permission is generally not difficult to obtain, it notes that, where departments are no longer in existence, Archives New Zealand holds the rights to these documents and a licence must be sought on each occasion a user of the department's services wishes to use such material, which – the department says – adds to the complexity of the process;
- (b) there is a wider issue concerning the difficulty as to who can approve use of orphan copyrighted material if the creator no longer exists;
- (c) of greater concern in the growing public heritage sector is Crown copyright material from before 1944; almost without exception, the department said, that material is no longer in copyright, but due to the Crown ownership issues (often driven by competing demands of copyright law versus contractual terms of use and cost), this content remains 'locked' or subject to overreaching licence conditions (e.g. by preventing private companies or non-profits from undertaking digitisation activities that are common in other countries). Any discussion of Crown copyright licensing needs to address the handling of 100+ years of government held information that is no longer under copyright for which there may be great public interest; and
- (d) many members of the public are not aware that Parliamentary material and legislation is not subject to copyright, as there is no certification scheme to make this apparent.

46 ESICTMC noted that:

- (a) depending on the terms under which material is collected by an agency, that agency may find it difficult to make the material available to another agency, particularly where the original terms have not included permission for further re-use of that material;
- (b) there can be difficulty with orphaned works, that is, where the original copyright owner is no longer known or contactable; and
- (c) with some agencies there can be licensing issues with material that was once under Crown copyright but where this has now lapsed so that it is now out of copyright and therefore not licensable.

Commentary

- 47 While an NZGILF and NZGILF Toolkit cannot be expected to cure existing uncertainties around copyright ownership and owners' contact details, they could usefully provide guidance on:
- (a) key copyright and licensing concepts to assist agency staff who receive requests for permission to re-use their copyright works;
 - (b) the processes that agencies could employ to document both copyright ownership and licensing arrangements on sufficiently broad terms (including by affixation of Creative Commons licensing symbols and (where relevant) metadata to their works);
 - (c) factors that agencies may wish to take into account when negotiating content contribution contracts and (where relevant and permissible) subsequent licence arrangements with other agencies; and
 - (d) factors relevant to decisions on whether charges might be levied when allowing re-use of copyright material.
- 48 SSC agrees with the suggestion that any discussion of Crown copyright licensing needs to address the handling of original works which were once subject to copyright but whose copyright has now expired. It also proposes to consider whether to include guidance on the treatment of orphaned works.

Question 3: Have members of your agency shown any interest in Creative Commons or other forms of open access licences? If so, please explain the nature of that interest and the form of licences in question and, if such licences are already in use in your agency, please provide details.

Feedback

- 49 Of the 10 departments who provided substantial feedback, 6 were aware of interest that had been shown in the use of open access licences. Five of these referred to Creative Commons licences.
- 50 Noteworthy feedback included the following:
- (a) one department referred to increased interest, particularly in Australia, of using Creative Commons licences in connection with the use of geospatial information;
 - (b) another department noted its regularly demonstrated willingness to share the publicly-funded material it creates, its interest in Creative Commons licences (and the Creative Commons Plus combination referred to at paragraphs 131-132 of the Discussion Paper), and that it welcomes SSC's initiatives in this area;
 - (c) one department had obtained a licence over a significant amount of satellite imagery for use by all government agencies, noting that it would be interested in an open content licence that could apply solely to government agencies "which would retain the integrity of our original licence";
 - (d) parts of another department have been "very keen to use the [Creative Commons] licences" but to date had been advised not to use them until SSC has completed its work; this department added that it would also want to consider how the use of Creative Commons licences would fit within its own IP policy;

- (e) that same department noted that it already licences many copyright materials on a similar basis to Creative Commons licences, referring by way of example to the following website licensing statement:
- “You may utilise any of the material on this website that is copyright to the [Ministry] free of charge and without the permission of the Ministry provided that:
- you are using the material for non-commercial purposes;
 - the material is not altered; and
 - the source and copyright owner of the material is acknowledged”
- (f) another department referred to its Australian counterparts using Creative Commons licences for their publications, adding that as we “move towards electronic publications as the sole format, it is more important to ensure that the public and researchers know that they can download our publications legally”; and
- (g) one department noted that some online resources for DigitalNZ are currently licensed under Creative Commons licences; at the same time, this department noted that, in its experience, “Creative Commons is not sufficiently flexible to cover some aspects of data, including metadata, software and website code, and technical documentation”, adding that data “such as metadata, to the extent that it is copyrighted, may be best suited to GPL rather than Creative Commons as a number of the Creative Commons licences are incompatible with GPL and other open licences that application developers may require us to have in order to incorporate the open data we supply”.

51 ESICTMC noted that:

- (a) MOE has financially supported the establishment and initial operation of Creative Commons Aotearoa New Zealand and released some information resources under Creative Commons licences (e.g., ‘Case Studies - Creative Commons and attitudes to content sharing’, released under a Creative Commons BY-NC-SA licence);
- (b) MOE is considering the use of Creative Commons for open education resources; and
- (c) the New Zealand Teachers’ Council is in the process of refreshing its website and is considering using Creative Commons for some of its research materials.

52 While TPK had not considered Creative Commons or other open access licences, it noted, among other things, that:

- (a) in the context of its contracting, “the starting position is that [TPK] owns copyright in any deliverables and any new intellectual property created under the contracts”;
- (b) senior management have discretion to grant licences where appropriate; and
- (c) where “traditional Maori knowledge is involved, [TPK’s] approach is to ensure that Maori ownership of such knowledge is retained.

Commentary

53 **Interest noted** SSC notes and welcomes the degree of interest shown in open access licences, and Creative Commons licences in particular, including potential use of the Creative Commons Plus combination referred to at paragraphs 131-132 of the Discussion Paper.

- 54 **Open access licence for government agencies** One department's stated interest in an open content licence that could apply solely to government agencies, so as to retain the integrity of an original licence to that department from a third party content provider, is not considered to fall within the range of likely licences in an NZGILF. The reason for this is that the interest appears to relate to the terms of a specific sub-licence where the department is not the copyright owner of the relevant material. While an NZGILF and NZGILF Toolkit may provide guidance on the logically prior question of the scope of the licence from the third party content provider, it is unlikely to deal with the specific terms of sub-licences. Such sub-licences will often need to be bespoke, unless the third party content provider allows the receiving department to sub-license on open access terms.
- 55 **Awaiting SSC guidance** One department's reference to advising parts of its organisation not to use Creative Commons licences until SSC has completed its work highlights the importance, in officials' view, of SSC progressing its analysis and consultation phases as efficiently as possible.
- 56 **Similar licensing practice to Creative Commons** The same department's reference to its already licensing many copyright materials on a similar basis to Creative Commons licensing (referring by way of example to the website licensing statement set out in paragraph 50(e) above) is understandable but we note that the exemplar licensing statement is broadly equivalent to the most restrictive form of Creative Commons licences. It is not at all clear that that restrictive form of licence, which prohibits commercial use and the making of adaptations, is appropriate in all or even the majority of cases. This form of licence would not, for example, allow the use of Crown copyright material for positive, value-adding commercial enterprise (which usually will not be done by government) nor (probably) would it allow the use of Crown copyright databases in mash-ups. One of the advantages of the suite of Creative Commons licences is that it would give departments clear choice on issues of, among other things, the permissibility of commercial use and the making of adaptations.
- 57 **Creative Commons versus other open access licences** SSC recognises that Creative Commons licences are unlikely to be appropriate for software and website code, and drew attention to that in its discussion questions. It requires further information on the problems that might arise in the context of using Creative Commons licensing for metadata and is likely to seek public feedback on that issue.

Question 4: Does your agency agree with the views in this Discussion Paper that the current Policy Framework on Government-Held Information and Web Standard 16.5 are no longer adequate to deal with copyright licensing issues that arise in the digital age?

Feedback

- 58 Of the 10 departments who provided substantial feedback, 8 agreed with these views (as did ESICTMC), one had no comment and TPK raised an issue regarding the needs of contributors.
- 59 Of the 8 that did agree:
- (a) one noted that some of the principles in the Policy Framework on Government-Held Information are still valid and should be included in any policy principles developed for NZGILF, the examples given being the information availability and copyright principles; as to the latter, the department noted that it "seems to stand within the digital age but the mechanism for delivery needs updating and that's what the common system will do (all of the common licences credit back to source)";

- (b) another noted that the “proposed framework and toolkit will ensure a clear, consistent and user-friendly approach towards permitted re-use of Crown copyright protected material”; and
 - (c) another still observed that “the principles are sound, but the document needs updating to reflect changes in information technology”.
- 60 TPK noted that the “needs of contributors also need consideration given the status that is applied to information sets, both formally and informally”. It gave the examples of restricted material, sacred material and sensitive material, adding that “[s]ome materials held in public collections are by their nature extremely sensitive”.

Commentary

- 61 **Degree of agreement** SSC notes the large degree of agreement that the current Policy Framework on Government-Held Information and the now-outdated Web Standard 16.5 are no longer adequate to deal with copyright licensing issues that arise in the digital age.
- 62 **Continuing validity** At the same time, it agrees that certain principles in the Policy Framework remain valid and ought to be considered for incorporation into an NZGILF.
- 63 **Needs of contributors** SSC is grateful for TPK’s observations regarding the needs of contributors. Officials’ preliminary views on these observations, in the context of the Open Government Information and Data Re-use Project, are as follows:
- (a) in the context of government-held works which contain traditional Maori knowledge, sacred material and/or sensitive material, protection of contributors’ needs is likely to transcend questions of whether or not given material is an original work qualifying for copyright and, if so, whether – given the material’s age – copyright in the material has expired or may soon expire;
 - (b) the reason for this is that, while copyright law can protect Maori interests in such material by limiting the copying and other re-use of that material (to the extent that the material is or contains a copyright work), it provides incomplete protection in the sense that, once the material is publicly accessible, the essence of the relevant interests may have been damaged, irrespective of whether that material can or cannot be used/re-used by others (and noting that copyright protects the form of expression, not the underlying ideas);
 - (c) for this reason, it appears that certain works in the hands of government agencies which contain traditional Maori knowledge, sacred material and/or sensitive material ought to be treated – to the extent that they are not already widely publicly available – as private and confidential;
 - (d) depending on the nature of the material and to whom or what it relates, the laws of privacy (both statutory and tortious) and/or confidentiality¹⁷ may apply to restrict public release;
 - (e) to the extent that those people or groups from whom the privacy or confidentiality interests stem consent to release, that release can then be controlled contractually:
 - (i) in some cases that contractual control may take the form of contracts/licences between an agency and specific end-users, the scope of permissible re-use being predicated on the scope of the informed consent

¹⁷ It is conceivable that traditional Maori knowledge, sacred material and/or sensitive material might be confidential for reasons of privacy and cultural sensitivity and/or, in some instances, because they constitute or contain trade secrets.

given by those people or groups from whom the privacy or confidentiality interests stem;

- (ii) in other cases, e.g., where a government agency is the custodian of original works in which it does not own the copyright which still endures, the scope of permissible re-use could flow from a licence from the copyright owners, which may or may not entail a limited right to sub-licence the works to others;
- (f) the end result is that Maori interests in traditional Maori knowledge, sacred material and/or sensitive material in the hands of government agencies may be protected:
- (i) legally, in one or both of two ways:
 - the laws of copyright, to the extent they apply; and/or
 - the laws of privacy and confidentiality, to the extent they apply;and/or
 - (ii) in any event, by the exercise of careful judgement by agencies given the cultural and economic significance to Maori of traditional Maori knowledge, sacred material and/or sensitive material,

with limited release of any such material being the subject of contractual provisions protecting the material against public release and dissemination in accordance with the wishes of the copyright owners and/or those from whom privacy and/or confidentiality interests stem.¹⁸

- 64 So far as the Policy Framework for Government-held Information is concerned, whether in its current form or to the extent that aspects of it might be incorporated into an NZGILF, there appears to be a need for more specific recognition of the needs and interests of contributors, particularly the needs of Maori and other indigenous contributors. While the current Framework does refer to “reasons preclud[ing] ... availability as specified in legislation”, to the notion of information stewardship and to the Privacy Act, it does not contain any express recognition of the needs and interests of Maori and other indigenous contributors. Development of a new principle prescribing the taking into account of the needs and interests of Maori and other indigenous contributors, where relevant, appears desirable.¹⁹ While in some contexts it may be a subset of a more general principle to the effect that Creative Commons licences ought not to be used for any copyright works containing personal, private or confidential information, it appears desirable to be express about the nature and relevance of the needs and interests of Maori and other indigenous contributors.
- 65 The issue of using restricted as opposed to Creative Commons licences for traditional Maori knowledge, sacred material and/or sensitive material is addressed at paragraphs 90-93 and 107-112 below.

¹⁸ Officials note that these views appear to be generally consistent with those set out in “Te Mana Taumaruru Mātauranga – Intellectual Property Guide for Māori Organisations and Communities” (July 2007), available on the MED website at http://www.med.govt.nz/templates/MultipageDocumentTOC_28180.aspx.

¹⁹ While the phrase “taking into account” has been used in this paragraph, in some instances the taking into account of such needs and interests may result in a legally required decision to the effect that the relevant needs or interests simply preclude public release (e.g., because of the privacy or confidentiality interests involved); in others, an agency may have a discretion but one which ought to take into account such needs or interests in the administrative law sense.

- 66 For completeness, SSC notes that it is aware:
- (a) that a decision is awaited in Waitangi Tribunal Claim WAI 262;
 - (b) of the substantial body of materials available on the Ministry of Economic Development’s website,²⁰ including, in particular, “Te Mana Taumaruru Mātauranga – Intellectual Property Guide for Māori Organisations and Communities” (July 2007);²¹ and
 - (c) that the Ministry of Economic Development is currently consulting on a document entitled “Have Your Say: World Intellectual Property Organisation – Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (also known as Traditional Cultural Expressions)” (May/June 2009).²²
- 67 SSC is also mindful that its discussion in paragraphs 63-64 above deals with only a small subset of the legal and policy issues that arise in the context of the interaction of traditional knowledge and other culturally sensitive material with intellectual property regimes. In particular, SSC notes that it is only dealing with issues around the release by government agencies of material constituting or containing such knowledge or material. It is not dealing with broader issues regarding New Zealand’s intellectual property regimes and Article 2 of the Treaty of Waitangi, on which it defers to the other departments which are leading the work in those areas.

Question 5: Is your agency aware of any international developments or research (e.g., on economic modelling), not addressed in this paper, which would usefully inform the Commission’s consideration of open government information and data re-use issues? If so, please provide details

Feedback

- 68 Two departments were aware of such international developments or research, referring SSC to the following:
- (a) a paper by ACIL Tasman entitled “The Value of Spatial Information: the impact of modern spatial information technologies on the Australian economy” (March 2008);²³
 - (b) the Australian Government’s “Review of the National Innovation System”,²⁴ which recommends that “Australian governments should adopt international standards of open publishing as far as possible” and that “[m]aterial released for public information by Australian governments should be released under a [C]reative [C]ommons licence” (recommendation 7.8 in the report of the Review entitled “Venturous Australia - building strength in innovation, and associated materials” (August 2008)); and
 - (c) occasional reports on the subject on the website of the OAK Law Project.²⁵

²⁰ At http://www.med.govt.nz/templates/ContentTopicSummary_1937.aspx
²¹ http://www.med.govt.nz/templates/MultipageDocumentTOC_28180.aspx
²² Available at <http://www.med.govt.nz/upload/68112/have-your-say.pdf>
²³ http://www.crcsi.com.au/uploads/publications/PUBLICATION_323.pdf
²⁴ <http://www.innovation.gov.au/innovationreview/Pages/home.aspx>
²⁵ <http://www.oaklaw.qut.edu.au>

- 69 One department and ESICTMC both took the opportunity to raise additional licensing issues which, they said, ought to be considered, as follows:
- (a) the “paper needs to address [the General Public Licence (“GPL”)] and other open licences, not from the view of software, but from the view of data and its associated code and technical documentation”; this, it was said, “will be particularly important if the public sector is serious about making open datasets available for re-use through semantic web machine-readable technologies”, adding that, “[f]rom the point of view of usefulness, open digital information will be increasingly inseparable from the open technology systems that deliver it in the semantic web era”;
 - (b) to what extent does “public domain” material exist and how does this concept apply in New Zealand;
 - (c) the use of Creative Commons CC0, the “no rights reserved” option, and public domain dedication and certification need to be investigated; and
 - (d) “we are interested in how approaches to Digital Rights Management [(“DRM”)] may impact or be impacted by the proposed copyright and licensing approach”.

Commentary

- 70 **References** SSC notes the references provided and thanks the departments in question for providing them.
- 71 **GPL, public domain and DRM** SSC will consider the extent to which these issues should be addressed in the context of an NZGILF and/or NZGILF Toolkit. At this point, SSC officials’ preliminary views are that:
- (a) there is merit in discussing the differences between Creative Commons licences and the GPL and the circumstances in which Creative Commons licences are unlikely to be appropriate;
 - (b) in the copyright context, the concept of works falling into the “public domain” is generally understood to refer to works in which copyright expires, upon which those works fall into the public domain “and (in the absence of any other intellectual property rights attaching to the work – such as patent or registered design rights) can be used freely by the public”²⁶ (assuming they are accessible);
 - (c) DRM is unlikely to have much impact on the Open Government Information and Data Re-use Project, bearing in mind the general reluctance of government to accept DRM-protected works or to apply DRM to its own works; at the same time, it may be useful to cross-refer to the expectations set out in SSC’s “Trusted Computing and Digital Rights Management Principles & Policies” (September 2006) and “Trusted Computing and Digital Rights Management Standards and Guidelines” (July 2007).²⁷
- 72 **Creative Commons 0/CC0 and public domain dedication and certification** SSC officials consider that there is merit in further consideration of the “Creative Commons CC0” instrument (which was referred to in footnote 71 at page 32 of the Discussion Paper but not discussed in any detail) and public domain dedication and certification. At this point, we note the following:

²⁶ I Finch (Ed) *James & Wells Intellectual Property Law in New Zealand* (Thomson Brookers, Wellington, 2007) p. 198.
²⁷ Both are available at <http://www.e.govt.nz/policy/tc-and-drm>

- (a) CC0 (or CC Zero as it is read) is a means by which creators and owners of copyright-protected works can waive copyright interests in their works and thereby place them as completely as possible in the public domain, enabling others to freely build upon, enhance and re-use the works for any purposes without restriction under copyright.²⁸
- (b) As explained on the international Creative Commons website:
- “Dedicating works to the public domain is difficult if not impossible for those wanting to contribute their works for public use before applicable copyright term expires. Few if any jurisdictions have a process for doing so easily. Laws vary from jurisdiction to jurisdiction as to what rights are automatically granted and how and when they expire or may be voluntarily relinquished. More challenging yet, many legal systems effectively prohibit any attempt by copyright owners to surrender rights automatically conferred by law, particularly moral rights, even when the author wishing to do so is well informed and resolute about contributing a work to the public domain.”
- (c) Creative Commons’ solution is the CC0 instrument. Creative Commons states that CC0 helps solve the above problem by giving creators a way to waive all their copyright and related rights in their works to the fullest extent allowed by law.
- (d) CC0 is not an instrument used to mark works that are already in the public domain (due, for example, to such works being readily accessible after expiry of any copyright to which they were once entitled).
- (e) CC0 is said to be a universal instrument that is not ported to any particular legal jurisdiction. In other words, it is not expressly subject to any particular jurisdiction’s governing law. “[W]hile this means that CC0 may not be completely effective at relinquishing all copyright interests in every jurisdiction, [Creative Commons believes] it provides the best and most complete alternative for contributing a work to the public domain given the many complex and diverse copyright systems around the world.”
- (f) The “human-readable” summary of CC0 states:
- “The person who associated a work with this document has dedicated this work to the Commons by waiving all of his or her rights to the work under copyright law and all related or neighboring legal rights he or she had in the work, to the extent allowable by law.”
- (g) The CC0 “legal code” both reflects this summary (in more technical terms) and contains a fall-back position. That fall-back position is that if and to the extent that the waiver of rights is not legally effective, the person who is endeavouring to attach CC0 to his, her or its work provides a licence which grants the public an unconditional, irrevocable, non-exclusive, royalty-free licence to use the work for any purpose.
- (h) The reference to public dedication and certification is to Creative Commons’ Public Domain Dedication and Certification instrument (“PDDC”). This instrument, which existed before CC0, “was intended to serve two purposes – to allow copyright holders to ‘dedicate’ a work to the public domain, and to allow

²⁸ See <http://creativecommons.org/about/cc0>

people to ‘certify’ a work as being in the public domain”.²⁹ Potential drawbacks of PDDC in the New Zealand context are as follows:

- (i) Creative Commons has found “that having a single tool performing both of these functions can be confusing”;
- (ii) “PDDC is based on U.S. law, and the enforceability of its dedication function outside of the U.S. is not certain”,³⁰ and
- (iii) to the extent that one wishes to dedicate works to the public domain, Creative Commons recommends the use of CC0 “because of its universality and because it is a more robust and complete legal tool”.³¹

73 SSC officials consider that:

- (a) there is merit in further consultation on the potential inclusion of the CC0 instrument in an NZGILF. They propose to include this subject in any public consultation that may occur in relation to an NZGILF; and
- (b) further thought needs to be given as to how agencies might perform a “public domain certification” function in respect of information and data in which there is no copyright and to which they give public access for re-use; officials see merit in agencies having the ability to certify such information and data as being in the public domain so as to clarify for users its non-copyright/public domain status but do not consider the PDDC instrument to be the appropriate means of doing so given that it is governed by US law.

Question 6: Does your agency currently have any copyright licensing arrangements in place which do not fall within one or more of the three broad categories of licensing arrangements referred to at paragraph 40 of this Discussion Paper? If so, into which additional category or categories would they fall?

Feedback

74 Paragraph 40 of the Discussion Paper referred to anecdotal evidence suggesting that there are at least three broad categories of copyright licensing arrangements in place across government:

- (a) one-off, bespoke licence agreements relating to specific arrangements in respect of specific content;
- (b) bespoke licence agreements relating to specific arrangements in respect of specific content but made available to more than one licensee; and
- (c) open-ended licence arrangements pursuant to which specified copyright material may be used by anyone, usually subject to certain simple conditions.

75 While not intended to do so, this question usefully elicited answers from two different perspectives, namely:

- (a) the licensing arrangements in place on the part of departments which license their own copyright material for re-use by others (which is what the question was driving at); and
- (b) the licensing arrangements in place where departments are the licensees of copyright material owned by third party content providers.

²⁹ See <http://wiki.creativecommons.org/CC0>

³⁰ Above n 10.

³¹ Above n 10.

- 76 As to the former, in substance, no department appears to have identified any additional category of licensing arrangement they use in practice. One department noted that the large range of purpose-built licences it has in place range from detailed to commercial-style licences to a one-line email granting permission to quote from a publication. In substance, however, all these purpose-built licences would appear to fall within the first or second category of bespoke licences referred to above.
- 77 At the same time, both this department and another department drew SSC's attention to the fact that they have many content items, whether on websites, or being publications or other informational products, which either include or consist of third party copyright material. These content items often have different licensing arrangements in place with different conditions regarding the extent of permissible re-use. One of the departments noted that, while it commonly owns copyright in commissioned works, it needs to retain the ability to negotiate individually-tailored licences and other arrangements for ownership of copyright.
- 78 One of the departments added that, on some occasions, it may apply charges for the re-use of its material, particularly where the re-use is for a commercial purpose or (we infer from the comments made) if there were significant costs of distribution in making the material available. The department noted that "[l]icensing arrangements, additional to Creative Commons licensing, require flexibility to accommodate the above circumstances".

Commentary

- 79 **No homogenous position on copyright ownership and licensing** The comments in paragraph 77 above say two principal things to SSC officials, namely:
- (a) that departmental ownership of copyright in copyright works cannot always be assumed and, in some instances, may not be appropriate or desirable; and
 - (b) as such, open access licensing of apparently departmental works may not always be possible (or desirable).
- 80 **What NZGILF will not do** SSC agrees with these points as well with the points in paragraph 78 above. To avoid doubt, SSC has no current intention of issuing guidelines that would:
- (a) prevent a department from contracting out of the default position in section 26 of the Copyright Act that copyright in a commissioned literary work vests in the Crown; or
 - (b) require a department to affix any particular form of licence to all of its literary (or other) works; or
 - (c) prevent a department from charging for the re-use of Crown copyright material in appropriate circumstances.
- 81 Given the myriad of literary (and other) works that many departments will hold and the large diversity in contracting relationships that many will have, any regime with such prohibitions and requirements would be too rigid and, in all likelihood, commercially unrealistic.
- 82 **Clarity and up-front consideration of copyright and licensing issues** At the same time, the above discussion does emphasise the importance of departments being clear on whether they own copyright in, or otherwise have sufficient licensing rights in, copyright works that they may wish to make available for re-use by way of an open access licence.

- 83 In addition, SSC notes that guidance in an NZGILF or NZGILF Toolkit may recommend that departments take a methodical approach when considering questions of ownership in commissioned literary works, by reference to the potential interests of both the author of the work and members of the public who may wish to re-use the work. In some instances, the application of such an approach might suggest that the department consider whether to allow copyright in the original work to vest in the author (which in the case of departments would require contractual departure from the default position in the Copyright Act) but to seek to obtain an appropriately broad licence from the author, potentially with the right to sub-license the work in accordance with the terms of a given Creative Commons or other open access licence. In other instances, the application of such an approach may suggest that the department should own the copyright, with the needs of the author being met by either a specific licence back to the author or the application of an open access licence from which the author could benefit to the same extent as anyone else.
- 84 The important point here is that such an approach may prompt consideration of potential downstream re-use of a work going beyond the immediate needs of the commissioning department. Such consideration may, in turn, prompt the making of decisions at the time of contracting that better serve the wider public interest. It may also suggest that early thinking is required when commissioning works through open or closed tender processes. The flexibility in contracting that departments currently have would be augmented by a wider, and recommendatory, frame of reference, one which may need to kick in at the procurement phase.

Question 7: Does your agency agree with the Commission’s preliminary assessment that the Creative Commons New Zealand law licences are the most obvious candidate for all-of-government adoption? If not, why not?

Feedback

- 85 Eleven departments responded to this question. Of those 11, 10 agreed or generally agreed with SSC’s preliminary assessment. Three of those 10 noted, respectively, that:
- (a) New Zealand would be following the trends of other nations who have adopted similar licences;
 - (b) the approach would help standardise re-use permission and language across the State Services, and “may also significantly increase the availability of publicly-funded State Service material, should agencies be encouraged to automatically default to using Creative Commons licensing where appropriate”;
 - (c) they provide a useful framework and should, given the ability to choose from a set of standardised licences, assist both agencies and the public (whilst adding that Creative Commons licences should not be seen as the only licences available).
- 86 TPK, one of the 10 departments referred to above, agreed that Creative Commons licences “are appropriate in most cases (i.e., where Crown copyright exists)”, but added that “where the information held by a government department constitutes Maori traditional knowledge then Creative Commons framework will not be applicable because the Crown does not have copyright over such information”. TPK added that “[o]wnership of traditional Maori knowledge is and must remain with the respective iwi/hapu/whanau” and that “[c]onsultation with Maori must be undertaken before any decisions are made that impact on the ownership, use and management of traditional Maori knowledge”.

87 The eleventh department observed that it “already licences much of its information via a very similar licence and the adoption of Creative Commons licences would add nothing to this”. This department expressed the view that, while consistency across the government sector is useful, “we consider it less important than flexibility” (a point which was also made by ESICTMC). The department that made these remarks is the same department whose example website copyright statement is reproduced at paragraph 50(e) above.

Commentary

88 **High degree of agreement** SSC notes and welcomes the high degree of agreement with its preliminary assessment that the Creative Commons New Zealand law licences are the most obvious candidate for all-of-government adoption.

89 **Creative Commons licences would add to existing practices** The observation recorded at paragraph 86 above has been addressed at paragraph 56 above.

90 **Maori traditional knowledge** SSC officials are not in a position to comment on whether, in fact, the Crown has copyright in *any* original works that embody Maori traditional knowledge. Bearing in mind that copyright “protect[s] the expression of some forms of mātauranga Māori and traditional knowledge (but not the underlying ideas, content or style), when it is recorded in fixed form”, it is conceivable that the Crown could own copyright in some such works. At the same time, and as the Ministry of Economic Development has noted, “copyright protection is likely to be relevant to ‘contemporary’-based expressions of traditional culture only”.³² Even if the Crown does hold copyright in any such works, Creative Commons licences are most unlikely to be appropriate for them.

91 The potential difficulties with conceptualising this matter in terms of ‘ownership of traditional knowledge’ appear to be two-fold:

- (a) to the extent that such knowledge is embodied in a copyright work, while the work itself may be protected, the underlying ideas it represents may well not be; and
- (b) again to the extent that such knowledge is embodied in a copyright work, the work itself falls into the public domain once the period of protection expires.

92 This may mean that *control* of the traditional knowledge becomes of paramount importance. As the Ministry of Economic Development has noted:³³

“The trade-off for gaining a monopoly right over the IP is that it does enter the public domain once the term of protection expires. The only way to prevent information entering the public domain is to keep it secret through the use of trade secrets, by not telling anyone, or in the case of documented knowledge, restricting access to those you know are not going to disclose the information.

These methods are usually reinforced through contract law – by having people sign a contract to keep the information confidential.”

93 In SSC officials’ view, it is the paramount importance to be given to the control of traditional knowledge that leads one inexorably to the conclusion that, without the fully informed consent of all relevant iwi/hapu/whanau, open access licences for government

³² Te Mana Taumaruru Mātauranga – Intellectual Property Guide for Māori Organisations and Communities (July 2007) p. 7, available at http://www.med.govt.nz/templates/MultipageDocumentTOC___28180.aspx.

³³ Above n 32, p. 49.

owned copyright works containing such knowledge would be inappropriate. See further paragraphs 63-67 above.

Question 8: Is there any aspect of the Creative Commons model that raises concerns for your agency, whether legally, commercially, culturally, socially, economically or administratively?

Feedback

94 Four of the 10 departments that answered this question had no concerns. Of the remaining 6 departments:

- (a) one noted that, in some instances (i.e., for particular data types), privacy considerations need to be taken into account;
- (b) one stated that its preliminary view that it may be relatively straightforward to apply appropriate Creative Commons licensing to its Crown copyright protected material but noted that it would not have the resources to re-negotiate contracts and retrospectively apply Creative Commons licensing to material owned by other parties such as contractors or contributors;
- (c) the same department noted that websites would continue to include various copyright statements with variable re-use permissions, irrespective of the Creative Commons model, given that:
 - (i) multiple parties can create various components of available material and may have economic and moral rights to benefit from their creations; and
 - (ii) some material may be sourced from institutional or private collections with differing copyright protection arrangements;

this department noted that “[t]hese realities may impact adversely on the uptake, understanding and benefits of Creative Commons licensing and may lead to usability issues around implementation”;

- (d) the third department:
 - (i) stated that the “model does not seem as useful for more ‘creative’ copyright materials or ‘tools’ as for information”;
 - (ii) reiterated a point it had made earlier that it “considers that free sharing is not always desirable”;
 - (iii) noted that it also noted that it “produces Maori language materials under various contracts and the authors of these works would wish to retain tighter control over their distribution than is foreseen in the CC licences”; and
 - (iv) noted that it “would need to ensure that the needs of our contractors, including the ability to run a profitable business in some cases, is not prejudiced”;
- (e) the fourth department expressed the following concerns:
 - (i) as noted in the Discussion Paper, Creative Commons can create complexities in regard to derivative works, “particularly where there are commercial restrictions or adaptations”; “[w]e have found it not entirely clear as to what constitutes ‘commercial use’ e.g. is an iPhone application that a private developer sells, which uses our API to draw in data,

commercial use of the data?” “If we instead [sell] the application to recover development costs, is it then commercial use?”

- (ii) the “paper makes no reference to rights other than copyright”; the department “holds material that is out of copyright, but subject to other restrictions imposed by donors”; “[a]nother example is bequests, where copyright does not always belong [us]”; licensing “does not address the issue of making such material available for re-use”;
- (iii) what is the link to the Official Information Act? If information is made available under the Act, copyright is not affected. If information is made available pro-actively in advance of OIA requests, does that imply that it would be licensed under Creative Commons?
- (f) the fifth department said considered that the potential legal issues had been sufficiently addressed in the Discussion Paper but noted that “implementation of the scheme in terms of resources and costs is a concern for [us]”, noting that it has an extensive website of material for industry and consumers comprising over 7000 web pages, and stating that it envisaged “that it would take time and resources to implement the model and to continue using it”;
- (g) in addition to its comments on question 9 below, TPK observed, among other things, that “the status accorded by the Crown to knowledge can vary depending on either the way in which information has been gathered, and/or, the purpose for which information has been gathered”. TPK note that this “is especially the case with historical records that the Crown has purchased or generated in the past and affects the integrity and accuracy of this knowledge”, adding that “Maori are well aware of this issue and also attribute status to such information based on the way information is gathered, as well as on the purpose for which information was gathered.”

95 ESICTMC had a number of comments, in addition to those identified above:

- (a) in general, published agency reports, guidelines and/or regulations need to be read in context and it is important that they are not altered or adapted in any form as they may form the basis for compliance, or other, reviews;
- (b) for re-users to make informed and reasonable re-use of data (in datasets/databases that are available for re-use), there will need to be careful descriptions to avoid uninformed misinterpretation;
- (c) agencies have noted their concern regarding the ability to track who is utilising their material, to ensure that the material is meeting relevant needs and that it is not being misused;
- (d) there is some concern regarding the applicability and enforcement of NZ Creative Commons licences in overseas jurisdictions;
- (e) licensors may not be aware of the downstream impact of their licensing decisions (e.g., Otago Polytechnic licenses its courseware on a CC-BY (least restrictive) basis which then restricts the material it can incorporate within its courseware (as all other CC licenses are more restrictive). The Toolkit should include examples to make these sorts of implications clearer to licensors; and
- (f) Creative Commons licences may not be sufficiently flexible to cover derivative works such as catalogues, descriptive metadata, XML topic maps, etc.

Commentary

- 96 **Privacy** SSC agrees that privacy interests should always be taken into account when an agency is considering sharing or licensing copyright works containing personal information to ensure, among other things, compliance with the Privacy Act. Creative Commons licences are unlikely to be appropriate for the licensing of copyright works containing personal information. A more restrictive licence might be required and, even then, an agency would need to consider whether the proposed restricted form of licensing is consistent with the Privacy Act.
- 97 **Renegotiation of existing licences** SSC understands this concern. While agencies might be encouraged by members of the public to renegotiate contracts to allow wider downstream licensing of copyright material, there will be no expectation in an NZGILF that agencies undertake such renegotiation. That would be a matter for each agency's discretion and for many would, we expect, not be feasible.
- 98 **Continuing inconsistency** It is correct to point out that adoption of Creative Commons licences will not provide a universal panacea to the often complex issues that can arise involving copyright and licensing of varied content and inputs on government websites. At the same time, it is reasonable to expect that the adoption of a common set of licences, such as Creative Commons licences, will – over time – reduce the complexity that currently exists as regards the varying licences currently employed by agencies in respect of their own copyright works. Such adoption can also be expected to provide greater clarity as to what is and is not permitted in respect of any given licensed copyright work. SSC recognises that further changes to the Copyright standard in the Web Standards might be required. Guidance to the current Copyright standard contemplates that.
- 99 **Use of Creative Commons licences for creative works and tools** SSC takes the view that Creative Commons licences can, depending on the nature of the works and tools in question, be very well suited to the licensing of creative works and tools, assuming that they constitute or contain copyright works. Creative Commons licensing can be used for, among other things, literary works, musical works, artistic works, sound recordings and films.
- 100 **Free sharing is not always desirable** SSC notes and agrees with this point. As noted above, there is no homogenous solution that will be appropriate in all instances.
- 101 **Complexities in relation to derivative works and commercial use** SSC recognises that there can be difficulties of application in relation to derivative works and, in particular, what constitutes “commercial use”. SSC accepts that guidance on these issues would be useful. Irrespective of what such guidance might contain, SSC notes that there are at least four potential solutions if these matters concern a given agency in any particular context:
- (a) use the most permissive form of Creative Commons licence (the BY licence, which requires attribution but does not prohibit commercial use or the making of adaptations);
 - (b) use a more restrictive form of Creative Commons licence (e.g., one which prohibits commercial use and the making of adaptations) but on a “Creative Commons Plus” basis, such that the agency's approach to and licensing regarding, e.g., commercial use, can be discovered quickly and efficiently;
 - (c) opt for a restrictive, non-Creative Commons licence; or
 - (d) do not licence the given work(s) at all.

- 102 As noted above, however, SSC accepts that guidance on these issues would be useful and will endeavour to include it in an NZGILF or NZGILF Toolkit.
- 103 **Rights other than copyright** SSC accepts that, in some instances, there may be contractual or other restrictions on the use of works, regardless of whether they are still subject to copyright. This kind of situation is relevant to – and informs – the questions an agency must ask itself before seeking to license a given work or, where copyright has expired, release it into the public domain (e.g., by posting images to Flickr).
- 104 **Proactive OIA release** In SSC’s view, the mere proactive release of a copyright work in advance of a request under the Act would not imply that it would be licensed under a Creative Commons licence. Copyright works are routinely released by agencies for the purpose of informing and being transparent with the public. Without more, such release would not imply a freedom to publish, copy and/or re-mix such works without the copyright holder’s consent.
- 105 **7000 web pages** SSC empathises with the prospect of considering which pages of, or which content within, a 7000 page website ought to be Creative Commons licensed. Ultimately, however, it would be for the agency in question to decide how much of its online material it wished to license on Creative Commons terms. It might wish to do so for all copyright content on the website unless otherwise specified, or it could start small, by affixing Creative Commons licence-type logos and metadata to specific web pages or content.
- 106 **Adaptation, careful descriptions, tracking of users, enforcement, downstream impact, flexibility** SSC replies to each of ESICTMC’s comments, summarised in paragraph 95 above, as follows:
- (a) if it is important to an agency that a work released for public consumption and re-use should not be adapted, the agency could select either:
 - (i) the Creative Commons Attribution-No Derivative Works licence (BY-ND); or
 - (ii) the Creative Commons Attribution-Noncommercial-No Derivative Works licence (BY-NC-ND);
 - (b) SSC agrees there is a need for guidance on the different licence types, to guard against potential misinterpretation;
 - (c) if an agency has a genuine need to track all licensees, it may need to consider whether the Creative Commons model is appropriate and, if not, consider using a more restrictive licence; while it would be fairly simple to make supply to primary recipients subject to a prior authentication/identification process, supply from those primary recipients to secondary recipients may be more difficult to control (bearing in mind that a primary recipient would be entitled to copy the work for secondary recipients);
 - (d) the enforceability overseas of Creative Commons New Zealand law licences is discussed at paragraph 157 below;
 - (e) SSC agrees that licensors should be made aware of the potential downstream impacts of their licensing decisions; it is not clear, however, that Otago Polytechnic’s preference for the CC-BY licence for its courseware necessarily restricts the material it can incorporate into its courseware; while SSC understands the concern that incorporation of material under more restrictive Creative Commons (or other) licences would prevent the Polytechnic from releasing *all* its

courseware under a CC-BY licence, that kind of situation is manageable; in this particular example, the Polytechnic could state something along the lines of: “all material in this courseware is licensed on CC-BY terms unless otherwise indicated”; the Polytechnic could then clearly state, for certain courseware inputs, the licensing terms (if any) for those specific inputs; and

- (f) SSC appreciates that Creative Commons licences are not a homogenous solution for all kinds of copyright works (see, for example, paragraphs 39 and 79 above).

107 **Knowledge status** SSC understands TPK’s observations as to how the status accorded to knowledge can vary depending on the way in which it has been gathered and/or the purpose for which it has been gathered. For the reasons discussed at paragraphs 63-67 and 90-93 above, the issues inherent in that topic transcend those arising under copyright law and suggest that, irrespective of the copyright and licensing analysis, open access to traditional knowledge and culturally sensitive material could be harmful to the cultural and economic interests of Maori. As such, even where the Crown does own copyright works containing such knowledge or material, open access is most likely to be inappropriate. Restricted and tightly controlled disclosure, if any, is likely to be the preferred course.

Question 9: Is there a need for one or more additional licences addressing specifically the needs and interests of indigenous populations? If so, what are those needs and interests and how does your agency perceive them being accommodated in standard licensing terms?

Feedback

108 Six of the 10 departments that answered this question either saw no need for such additional licences or had no comment. One of those 6 added that “the answer to this question will depend on the report and recommendations from the Waitangi Tribunal on the WAI262 claim (the flora, fauna and cultural intellectual property claim)”.

109 As regards the other 4 departments:

- (a) one stated it “would be interested in seeing further discussion on how indigenous/cultural needs and interests can be addressed”, adding that, “to some extent, they may be accommodated within standard licensing arrangements”;³⁴ at the same time, it noted that there “may be other situations that are more difficult to accommodate within standard licensing arrangements, particularly where copyright may not be perceived to be held by any one person or by joint authors but by a community as a whole (traditional or collective ownership)”;³⁵
- (b) another department stated that an “indigenous licence would be useful, but the Ministry would probably continue to negotiate individual licences in preference”;
- (c) another department queried whether this issue may “be more of a task for the intellectual property people at MED”; it added that “SSC may want to look at the new Creative Commons approach to ‘CC0’ and ‘Public Domain’, which use a legal waiver and a certification respectively”, adding that “this approach might be more applicable for indigenous recognition given all the Creative Commons licences rely explicitly on provisions of the Copyright Act” and that “[c]ultural heritage

³⁴ The department stated: “For example, one of the Ministry’s websites contains photographs of marae but these can only be used on this website, and not for other Ministry purposes or websites. This is similar to permissions for re-use that the Ministry has with other non-indigenous contributors or contractors.”

³⁵ The department added: “Any rights associated with that copyright may also be perceived as lasting for longer than the legal duration. These situations require flexibility, rather than a standard range of conditions of re-use.”

institutions are making use of Terms of Use contractual agreements to address culturally sensitive material and taonga, which might be an appropriate approach for government agencies holding such material”; and

(d) TPK stated:

“[T]here is a need for additional licences specifically addressing the needs of indigenous populations. It is our view that the interests of Maori and other indigenous groups and other groups (with extremely private, sensitive or ritualistic non indigenous knowledge that is currently within the crown system) must be recognised and be given the ability to exercise a veto or form of agreement whereby certain types of information can be taken out of the system so it is not made common.

Information on pre-existing indigenous license arrangements in South Africa highlight the following functions relevant to Public Sector works:

- protecting the indigenous population against the misappropriation of indigenous traditional knowledge by others; and
- preserving and protecting indigenous traditional knowledge and works already in existence while promoting the generation of new knowledge and works.

In our view Iwi are the best source of knowledge on the appropriate types of works such a license would apply to, what sort of conditions would be placed on access, use, attribution, etc. However, we support the two functions above as critical elements of any indigenous licensing framework. We believe the indigenous license could be extremely helpful in assisting agencies to deal with the issue of collecting and storing culturally sensitive information/works going forward.

We also envision an arrangement where the indigenous license is available to Maori should they require it for the transaction that is taking place, rather than one that is applied in an across-the-board approach. For example, an Iwi may wish for a work based on their traditions being used by a third party to be for non-commercial purposes only, but have the option to use that same work for commercial purposes themselves if they choose.”

110 ESICTMC considered that:

- (a) there is a need for one or more additional licences addressing specifically the needs and interests of indigenous populations, particularly Māori; it noted that Māori (and other indigenous peoples) require restrictions on access to and/or use of some aspects of their traditional knowledge to members of their whānau, hapū, iwi, businesses or other rōpū and felt that these requirements need to be explored further; and
- (b) agencies would also appreciate more guidance in this area.

Commentary

111 There appears to be a tangible need for an indigenous form of licence that caters for more restricted release than is possible under any of the Creative Commons licences. SSC proposes to explore this further, both with TPK and as part of the public consultation process. It is also aware of a Crown entity that appears to have significant practical experience with such issues.

- 112 Further analysis is required as to whether the needs of Maori and other indigenous groups could be met with a modular form of restrictive licence agreement which applies to other forms of sensitive or confidential material, various provisions of which could be “turned on or off” depending on the subject-matter, or whether a discrete licence or other form of agreement focusing solely on the needs and interests of Maori and other indigenous groups is preferable. It may well be, for example, that such an agreement needs to contemplate not only licensing of copyright works but, more likely in many contexts, restricted access to and use of confidential material, irrespective of whether there is copyright in it.

Question 10: Does your agency have a need for one or more restrictive licences, e.g., for commercially or otherwise sensitive copyright material? If so, please explain, to the extent appropriate, the type of restrictive licence(s) your agency requires. If there is any commercial or other sensitivity around your response that needs to be kept confidential, please make a remark to that effect.

Feedback

- 113 Three of the 10 departments that answered this question did not have a need for one or more restrictive licences. One of those departments observed, correctly in our view, that it “comes down to how the framework will work in practice”. It stated that if the licences are recommendatory, and the agency makes the decision as to when/at what point/which Crown copyright information is licensed (bearing in mind the open access and data reuse policy), then presumably the agency could decide at the time:
- (a) whether it was appropriate to give access to and/or licence for reuse any sensitive copyright material in question at all; and, if so
 - (b) whether a Creative Commons licence or some other tailor-made form of licence was appropriate.
- 114 Some of the other 7 departments identified the following circumstances in which they would or might require more restrictive licences:
- (a) for the release of data containing property ownership information in relation to which the licence needs to require adherence by licensees to the Privacy Act 1993 and, when applicable, the Domestic Violence Act 1995;
 - (b) for the release of data that is commercially sensitive;
 - (c) for permitted re-use for a fixed period of time, after which the licence terminates or expires;
 - (d) where identification of particular licensees, the authority of those agreeing to the licence terms to do so on behalf of their organisations, and the ability to enforce licence terms against them assume high importance;³⁶
 - (e) where there is a need to prevent misuse;
 - (f) where a department’s ability to allow re-use is constrained by the terms of a licence to the department from the copyright owner (i.e., where the department is a licensee rather than the copyright owner); and

³⁶ As regards the first two of these concerns, the department gave a useful example of how an online registration process prior to data release could go some way to meeting those concerns, stating: “The operation of the Western Australian SLIP (Shared Land Information Platform) may be useful in this context. Anyone can query SLIP information online but only registered users can actually download data. The registration process would provide an opportunity to collect identification and contact details.”

(g) for Maori traditional and historical knowledge.

115 ESICTMC agreed that there is a need for one or more restrictive licences, noting that “agencies feel the need to be able to tailor licences to individual circumstances and/or to protect against misuse of certain information”.

Commentary

116 **Need for restrictive licence** All the circumstances set out in paragraph 114(a)-114(d) above suggest there is a need for a more restrictive licence template. Such licence would be akin to a bespoke licence. It would in all likelihood not be a substitute for all other restrictive licences that are either in use today or might be used in future. However, it might assist agencies who do not have a bespoke restrictive licence template yet who need one in specific circumstances. It would need to be tailored to an individual agency’s requirements.

117 **Role for igovt** As regards the circumstances identified in paragraph 114(d), SSC notes that there is a foreseeable role here for igovt, in particular, the igovt logon service and the igovt identity verification service once that service is rolled out. If an agency had concerns about questions of eligibility and authority, it could require logon access as a prerequisite to being able to download, for example, certain datasets. Identity verification might take place within the particular agency concerned or, once the igovt identity verification service is rolled out, online via that service.

118 **Sub-licensing** The position referred to in paragraph 114(f), of a department’s ability to allow re-use being constrained by the terms of a licence to the department from the copyright owner, is in substance addressed at paragraph 54 above. That kind of situation is not considered to fall within the range of likely licences in an NZGILF, because the agency would be a licensee interested in sub-licensing a third party copyright owner’s work(s). As noted in paragraph 54, while an NZGILF and NZGILF Toolkit may provide guidance on the logically prior question of the scope of the licence from the third party content provider, it is unlikely to deal with the specific terms of sub-licences. Such sub-licences will often need to be bespoke, unless the third party content provider allows the receiving department to on-licence on open access terms.

119 **Maori traditional knowledge** The need for an indigenous form of licence (or other agreement) is discussed at paragraphs 111-112 above.

Question 11: If additional licences were required (e.g., restrictive licences or licences addressing specific interests of indigenous populations), does your agency consider it appropriate for the government to advocate both Creative Commons licences as well as additional licences?

Feedback

120 Eight departments and ESICTMC considered this appropriate and 2 departments had no comment. Of the 8 departments that did consider this appropriate:

- (a) one remarked that “there seems widespread agreement that [Creative Commons licences] can cover most but not all types of public sector information”; and
- (b) another observed that “if the government is going to set up a framework then that framework should be expected to work for (say) 95% of cases”, adding that there “will always be a need for one-off licence arrangements but that should be the exception rather than the norm” and noting that “[a]dditional licences’ (any that

this survey etc. identifies as being required) could be defined and added to the ‘toolkit’ of licences available”.

Commentary

121 While SSC cannot be sure of the 95% figure referred to above, it otherwise agrees with these comments.

Question 12: Is it a matter of concern to your agency that information and data made available under a Creative Commons licence is made available to the world at large, as opposed only to those in or from New Zealand (bearing in mind that New Zealanders benefit from the information and data from other countries made available under Creative Commons or similar open access licences)? If so, what alternative approach would you suggest?

Feedback

122 Of the 10 departments that responded to this question, 8 either had no concern or supported world-wide availability but subject to identification of situations where more limited licensing may be appropriate.

123 Among those 8 departments:

(a) one noted that:

(i) New Zealand companies work relatively seamlessly in Australia and vice versa now, that both New Zealand and Australian governments are working together on the concept of a Single Economic Market (SEM) and that the sharing of information across borders fits within that framework; and

(ii) access to physical geospatial information in particular from different countries is needed to address global issues such as climate change;

(b) another said it was “more concerned to ensure appropriate permission, attribution and re-use of material, and less concerned with the location (or even the platform) of that re-use”;

(c) two departments said, in slightly different ways, that “data and information released under a Creative Commons, or open content, licence should be considered as being fit for world-wide distribution” and, if not, “then an alternative licence [would] be needed to limit distribution to a geographic region”; and

(d) one observed that if “the government is going to create a licence to commercialise Crown IP in a creative commons arrangement the government may wish to favour Australian and New Zealand business”.

124 Two departments and ESICTMC did have concerns about world-wide availability, noting that:

(a) they had or were aware of experiences where overseas interests had exploited materials for commercial purposes in a way (through modifications) which the relevant agencies believed to be inappropriate and resulting in potential reputational risk to those agencies;

(b) Maori may have particular concerns about use of traditional knowledge outside New Zealand; and

- (c) Maori traditional and historical knowledge and other categories identified by TPK should be afforded more protection than other categories.

Commentary

- 125 SSC agrees with or notes (as applicable) the comments in paragraph 123(a)-123(d). SSC also notes that where an agency wished to commercialise Crown copyright work(s), one option might be to licence the work(s) under a Creative Commons BY-NC (Attribution-Noncommercial) licence, and put alternative commercial arrangements in place for any party that wished to commercialise the work(s). This could be achieved with the Creative Commons Plus combination referred to at paragraphs 131-132 of the Discussion Paper.
- 126 SSC understands that Maori may have particular concerns about use of traditional knowledge outside New Zealand and, for reasons discussed above, agrees that Maori traditional knowledge and culturally sensitive material are not appropriate targets for either open access licensing (in the case of copyright works) or open release (in the case of material in which there is no copyright or in which copyright has expired).

Question 13: Does your agency have any agreements or arrangements in place with copyright licensing schemes such as Copyright Licensing Limited or Print Media Copyright Agency pursuant to which any such scheme is authorised to act as your agency’s agent or otherwise represent your agency in the licensing of Crown or other government copyright material?

Feedback

- 127 Seven of the 10 departments that responded do not currently have any such arrangement, one had no comment, one does have an arrangement with Print Media Copyright Agency via a shared services agreement it has with MAF, and the other noted that it has an arrangement with Learning Media to process licensing requests for existing departmental publications. The latter department also noted that Copyright Licensing Limited “currently offer licences for the use of copyright by all state schools through a scheme administered by the NZ School Trustees Association. Schools are funded for copyright licensing via their operational funding”.

Commentary

- 128 These comments are noted.

Question 14: Do you agree with the proposed nature and scope of the NZGILF and NZGILF Toolkit, i.e., that they be recommendatory in nature and encompass the State Services?

Feedback

- 129 All of the 10 departments that responded to this question appear to have agreed that an NZGILF should be recommendatory and “definitely not”, as one department put it, mandatory, with:
- (a) one department noting that a mandatory approach would not be able to address specific needs, including those of indigenous peoples and third party contributors;
 - (b) another department expressing “some concerns about the suitability of the scheme for schools”; and
 - (c) TPK noting that its affirmative response was subject to its comments on Maori traditional and historical knowledge and indigenous licences.

- 130 ESICTMC agreed that an NZGILF should be recommendatory.
- 131 As regards the proposed scope of an NZGILF (i.e., encompassing the State Services), two departments made specific comment:
- (a) one noted that “the term ‘all-of-government’ in terms of the NZ Geospatial Strategy also includes local government where a significant amount of very useful geospatial data is collected”. That department observed that a “licensing framework which encompasses local government information would result in a more integrated approach with wider benefits;” and
 - (b) “a cautious and recommendatory approach may be particularly pertinent for some State Service agencies, particularly Crown entities and State Owned Enterprises which are subject to “regular” copyright rather than Crown copyright under the Copyright Act 1994”. This department observed that a recommended (or aspirational) approach would reflect the commercial environment in which various entities or affiliated parties operate. Giving the example of television programming, it noted that there can be a considerable range of contractual arrangements, as copyright ownership is considered to be a valuable commercial right. The department observed that “these arrangements may involve multiple parties, and securing permission for re-use can be complex and time-consuming, even to the extent that it may prove impossible. A mandatory approach encompassing the State Services, therefore, would not be appropriate.”

Commentary

- 132 **Recommendatory not binding** The high degree of agreement with SSC’s proposal that an NZGILF and NZGILF Toolkit be recommendatory, not mandatory, is noted.
- 133 **Inclusion of local government** While there is nothing to prevent local government from operating in accordance with the guidance in an NZGILF, SSC considers it appropriate for its guidance to apply to State Services agencies but not local government.
- 134 **Crown entities and SOEs** SSC appreciates that some agencies will have different commercial drivers and ways of operating. That is one of the reasons why the guidance will be recommendatory and why there can be no homogenous approach to licensing of public sector copyright works that is applicable in all situations.

Question 15: If the Creative Commons licences were recommended for all-of-government adoption, to which categories or types of information would your agency consider applying them?

Feedback

- 135 The 9 departments that responded to this question indicated that they would consider applying Creative Commons licences to the following categories of material:
- (a) “most types of LINZ information (topographic, hydrographic, geodetic, place names)”, adding that “cadastral information is likely to require a restrictive licence because of sensitive privacy issues”;
 - (b) databases (including spreadsheets and spatial data layers);
 - (c) maps and images;
 - (d) reports, publications and evaluative data;
 - (e) presentations;

- (f) audio and video recordings;
- (g) online discussion groups;
- (h) website materials and possibly intranet materials;
- (i) customs public documents;
- (j) published official statistics;
- (k) certain educational resources;
- (l) possibly, certain National Film Unit archive film; and
- (m) contracts (consultancy contracts and funding agreements).

136 One department raised implementation and enforcement issues regarding:

- (a) how Creative Commons licences would “work where hardcopy is distributed, e.g., bulk topographic data distribution by DVD”; if such distribution – currently managed by a simple end user agreement being signed by both parties – were to be replaced with an online sign up process, then that online process would need to be able to record identifying details of the licensees; in the event of a breach of even simple terms and conditions, the licensor needs to be able to take the appropriate action; and
- (b) the remedies available under the Creative Commons Attribution 3.0 New Zealand (BY) Licence if the licensee does not recognise the licensor’s right of attribution.

137 Another department expressed its “preliminary view ... that ‘BY-NC-ND Attribution - Noncommercial - No Derivatives’ may generally be the most appropriate applicable level”, noting that that licence “appears to align to the level of accessibility currently applied to most of the Ministry’s Crown copyright protected material”. The department added, among other things, that this level “enables the Ministry to seek redress or correction in relation to infringements or inappropriate use” and that “‘BY-NC-ND’ also requires that the Ministry (or another copyright holder, if appropriate) be contacted and permission sought to create remixes and derivative works or for re-use for commercial purposes.” At the same time, the department said it “is possible that another level, such as ‘BY-NC-SA Attribution – Noncommercial – Share Alike’, could be applied to some material on the Ministry’s websites”, noting that one of its sites “currently enables events text to be used without further permission provided it is used for events guides, listings and calendars, is reproduced accurately and is not used in a misleading context”.

138 Yet another department considered that Creative Commons licences “would be useful for factual information but not so useful for more ‘creative’ works or tools”.

Commentary

139 **Preliminary list** The preliminary list of materials referred to in paragraph 135, to which departments have indicated they would consider applying Creative Commons licences, is a welcomed and promising start. (There will always be a question as to whether candidate material is an original work to which copyright attaches; an NZGILF can be expected to provide guidance on that issue.) As regards the potential inclusion of contracts, obviously care would need to be taken not to disclose any confidential or commercially sensitive information.

140 **Hard copy distribution** As regards the issue of hard copy distribution of copyright material via DVD, there is not any specific reason as to why a paper-based process cannot be used as opposed to an online mechanism. However, in some cases Creative

Commons licences may not be appropriate given the range of licence rights they confer upon anyone receiving the material.

- 141 **Remedies** As regards the question on the remedies available under the Creative Commons Attribution 3.0 New Zealand (BY) Licence if the licensee does not recognise the licensor's right of attribution, there are in principle at least two remedies. The first is automatic, in that breach of a Creative Commons licence by the licensee has the effect of terminating the licence [need to double check this point]. In addition, the licensing agency may have a cause of action for breach of contract.
- 142 **Appropriate form of Creative Commons licence** SSC understands one department's "preliminary view ... that 'BY-NC-ND Attribution - Noncommercial - No Derivatives' may generally be the most appropriate applicable level". However, it considers that it would be premature to come any firm conclusion in this regard. While the BY-NC-ND form of Creative Commons licence may be appropriate in some situations, in others a BY (Attribution) licence may be the best candidate. In SSC's view, having a default position that a restrictive form of Creative Commons licence (such as the BY-NC-ND form) ought to be applied, may be counter-productive and invite criticism from the public.
- 143 **Factual information** Another department's opinion that Creative Commons licences "would be useful for factual information but not so useful for more 'creative' works or tools" has been addressed, to some extent, at paragraph 99 above. SSC notes further that there are likely to be circumstances where mere factual information is not subject to copyright at all.³⁷

Question 16: If the Commission were to advocate all-of-government adoption of the Creative Commons licences, in conjunction with one or more additional licences addressing specific needs, are there any implementation issues you would like to raise that are not anticipated in this Discussion Paper to fall within the expected scope of the NZGILF and NZGILF Toolkit? Would your agency need any additional support?

Feedback

- 144 Two of the 10 departments that responded to this question did not see the need for any additional support. The remaining departments identified the need or desirability for various kinds of assistance or information, or made various comments, as follows:
- (a) an "advisory service from SSC would be most useful when issues arise which need person to person discussion to resolve";
 - (b) clear guidance on "pricing, charging and other economic issues that arise in the context of greater dissemination and re-use of public sector information... would be welcome for consistent implementation across government";
 - (c) "greater awareness of Creative Commons licensing is necessary among State Service and other agencies, other holders of copyright material and among the general public";

³⁷ The legal position is expressed succinctly in S Frankel and G McLay *Intellectual Property in New Zealand* (LexisNexis, Wellington, 2002) pp. 625-625, as follows: "It is a truism that copyright does not protect facts or information. Indeed, it is often observed that copyright is an inappropriate mechanism for protecting information or the fruits of often laborious research. ... Like most truisms, this one tells only half the story. While copyright law does not protect facts or information, it does protect compilations of facts, the way in which particular facts are organised, the expression of reports of facts, and sometimes even the typographical arrangement of facts or the stories that contain them."

- (d) the “toolkit and any associated training or presentations should emphasise caution around ensuring the correct level of Creative Commons licensing is entered into, given that the licence is irrevocable”; and in “instances where State Service websites or publications might consider applying a general Crown Copyright / Creative Commons statement or approach, caution is required to break material down into appropriate components to ensure attribution and protection for third parties whose contribution is not subject to Crown Copyright”;
- (e) “advice on the kinds of procurement practi[c]es that would secure the rights to share data and information”;
- (f) guidance “on how to treat data and information currently bound by existing licenses”;
- (g) guidance “on the circumstances where commercialising Crown IP is more appropriate than public release”;
- (h) examples, “whether real or hypothetical, of situations where the release of public data has delivered greater benefits than commercialisation” so as to enable departments to “demonstrate to CRIs and other commercial organisations that releasing data can benefit them, particularly when revenue is possible from value-added services arising from the release of data”;
- (i) the “NZGILF should target specific roles such as CIOs, departmental lawyers, data and technology managers”; “[d]ifferent resources may be needed for each”;
- (j) “extension of the scheme to schools needs further thought”;
- (k) “additional support to implement the adoption of such licences”;
- (l) “making information available under Creative Commons licences is one thing, but there may well be costs in making information usefully available for re-use”; adoption “needs to be tied clearly to purpose e.g. to increase access, or to increase re-use. It is dubious as to whether a Creative Commons licence on a Statement of Intent would increase either, given they are generally permanently available on the web or on request. In order not to mess with e.g. financial and output accountability, they would be presumably restricted in most cases to ‘no derivatives’ limiting re-use to simply making copies, which is of no benefit if they can already be linked to. The outcome here is not the same as it might be for open data sets – one is about open accountability, the other about leveraging off public investment”; “[p]erhaps there is merit in advocating instead for any government information that can be made available without restriction. For example, advocating the BY, BY SA licences and the PD certification, which are the most open and most compatible with other licensing regimes such as GPL. This would send a very clear message to agencies and the public about what to expect to be made available and why, while reducing transaction costs of assessing and preparing information for re-use”;
- (m) “[w]e do have concerns in regards to implementation, namely the resources and costs involved ... [and] would be grateful for any assistance/support in implementing them”; and
- (n) “[c]onsultation with Maori must be undertaken before any decisions are made that impact on the ownership, use and management of traditional Maori knowledge”; “[w]e would expect any guidelines and toolkits to have clear statements regarding the position and treatment of Maori traditional knowledge; “[w]e would also expect

to be included in any discussion regarding the appropriateness of the six Creative Commons licenses and their application to Maori and the development of any indigenous licences.”

145 ESICTMC made a number of points:

- (a) “we feel that the Toolkit should include examples of how a particular licensing decision may have downstream impacts to make these sorts of implications clearer to licensors”;
- (b) “[d]ifferent types of information may require different approaches, e.g.:
 - regulations, guidelines and certain reports require more careful conditions on reuse and non-adapt[at]ion than those of a more generally informative nature;
 - tools for use by third-parties (e.g. schools and tertiary education institutions) may also require more restrictive licensing;
 - derivative works such as catalogues, descriptive metadata, XML topic maps, etc;
 - ‘creative’ materials commissioned by agencies for use by third-parties (e.g. schools and tertiary education institutions) may need to consider the commercial impacts of allowing more open reuse of these resources; and
 - data collected to meet reporting and/or compliance requirements”;
- (c) “[a]gencies have noted concerns regarding the costs associated with implementing such a copyright and licensing approach, particularly if this requires modification to the way in which they currently curate their information and data”.

Commentary

146 SSC:

- (a) agrees that some form of advisory service would be useful but needs to consider the resourcing implications and potential alternatives; it may, for example, be possible to deal with the majority of questions that are likely to arise by creating a set of Frequently Asked Questions (“FAQs”) for placement on an NZGILF website; those FAQs could then be updated from time to time as and when new issues arise;
- (b) agrees that guidance on pricing and charging is desirable;
- (c) agrees that greater awareness of the Creative Commons licences is desirable; if SSC does advocate all-of-government adoption of Creative Commons licences, it would like to work together with the Council for the Humanities with a view to increasing the level of awareness on the part of both agencies and the public; SSC expects that an NZGILF website would be one avenue of promoting awareness and can see the potential for synergies with the Creative Commons Aotearoa New Zealand website;
- (d) agrees that agencies will need to consider carefully:
 - (i) the type of licence that is most appropriate for given copyright works; and
 - (ii) whether they are the copyright owners for all relevant components of such works or otherwise have or can acquire a right to sub-licence third party copyright components on appropriately broad terms;

SSC expects that an NZGILF would include guidance on such issues;

- (e) agrees, as noted above, that questions of copyright and licensing may need to be considered at the procurement stage; SSC expects that an NZGILF would include guidance on that issue;
- (f) agrees that some guidance on the treatment of third party copyright works currently bound by existing licences may be helpful, with a view to explaining:
 - (i) that there is no expectation that agencies will seek to renegotiate such licences with a view to either having copyright assigned to them or obtaining a broader licence allowing sub-licensing on Creative Commons terms; and
 - (ii) how an agency, as a licensee, may be able to sub-licence on Creative Commons terms if the licence to the agency allows such sub-licensing;
- (g) doubts that it will be able to provide specific guidance (as opposed to general comments) on the circumstances in which commercialisation of Crown copyright works is more appropriate than public release, for the reason that – at least for departments and many Crown entities – commercialisation of copyright works is not part of their core business;
- (h) agrees that it would be helpful to include examples of situations where the release of public data has delivered greater benefits than an agency’s own commercialisation; SSC will endeavour to include such examples;
- (i) recognises that it may be desirable to produce different guidance material for different target audiences;
- (j) understands that application of an NZGILF to schools may need further thought and considers that the Ministry of Education is best placed to do that; and
- (k) agrees with the need for guidance on the appropriateness, or otherwise, of open access licensing of, or open release of, Maori traditional knowledge and other culturally sensitive material.

Question 17: The proposed NZGILF and NZGILF Toolkit are unlikely to extend to software, as it is generally recognised that Creative Commons licences are not appropriate for software which is to be made available on open source terms. To what extent does your agency require separate guidance on the making available of software it owns on open source terms (bearing in mind that the *Guidance on the Treatment of Intellectual Property Rights in ICT Contracts* expressly contemplates retention of ownership in software where the relevant agency may wish to make that software available for re-use on open source terms)?

Feedback

- 147 Only 1 of the 10 departments that responded to this question saw a need for separate guidance on making Crown-owned software available on open source terms, while another noted that “software is likely to be an issue for [us]”.
- 148 ESICTMC felt “that the area of source code needs to be further investigated as there are significant opportunities around opening up government source code for reuse (as well as significant challenges). Further guidance would be useful in this area.”

Commentary

- 149 As this point, and without wishing to ignore the needs of a minority of departments, there does not appear to be sufficient interest in such separate guidance to warrant its

preparation by SSC. However, a FAQs section on an NZGILF website could usefully direct those interested in such issues to:

- (a) the main forms of open source software licences;
- (b) third party commentary on them; and
- (c) SSC's *Guide to Legal Issues in Using Open Source Software v2* (May 2006).³⁸

Question 18: Does your agency have any other comments, not falling within the questions above, arising from this Discussion Paper?

Feedback

150 A number of departments provided additional comment, including the following:

- (a) “[w]ork will begin soon on a project from the NZ Geospatial Strategy work programme – a report estimating the value of Spatial Information to the NZ economy. Part of the report will estimate the gains available from removing barriers to spatial information making a greater contribution to productivity. Some barriers are likely to relate to licensing and so the report may be relevant to ... SSC’s work on licensing in particular and on data re-use in general”;
- (b) the “machine code expression of a licence is likely to be very useful in the publishing of information regarding data created by LINZ and the publishing and distribution of the data itself, if implemented in a manner that allows searching and other applications to detect, interpret and report on it;
- (c) the Ministry “supports the Commission’s initiatives in this area and looks forward to further information on an all-of-government information licensing framework and toolkit. It would welcome the Commission making a presentation to Ministry staff on these initiatives and, if appropriate, to representatives of the other statutory bodies and agencies”;
- (d) the “emphasis is on public access to information. A lot of copyright materials produced by or on behalf of the Ministry are not informative in nature, but are either tools (eg assessment tools for schools) or more “creative” (such as Māori medium readers/CDs of waiata). Further, the Ministry makes considerable use of contracts which produce copyright either incidentally or as a primary output of the contract. While the default provision is that the Ministry owns copyright, we need to retain the ability to negotiate individually-tailored licences and other arrangements for ownership of copyright. We do not consider that free licensing is always the best option for the public good in the wider sense”;
- (e) it “will be interesting to see how the proposed NZGILF and Creative Commons licences work in practice. Presumably agencies will be encouraged to first identify items of potentially useful Crown copyright, secondly make these known (e.g. on the internet) and thirdly facilitate access to these by ‘attaching’ a Creative Commons licence? If that is the case I believe it could work well”;
- (f) the “NZGILF toolkit could cover advice to agencies on their contracting procedures at the point Crown copyright is developed. Practically it is not clear how much of an issue this could be but, for instance, items of Crown copyright

³⁸ Available online at <http://www.e.govt.nz/policy/open-source/open-source-legal2/>. While the focus of this Guide is on assisting New Zealand government agencies assess and mitigate some of the legal risks of *using* open source software, it contains useful discussion of both various types of open source licence and certain concepts that arise in the context of open source software licensing, such as open source licence propagation.

may contain pre-existing supplier copyright that does not vest in or is not assigned to the Crown. Ordinarily [we] would take an irrevocable licence of such copyright, to ensure the Crown copyright can be sensibly used and enjoyed. Pre-existing and new copyright may not be identified as the licence enables [us] to use the copyright for all the purposes [our department] needs. However, [we] would also commonly obtain a warranty (backed by an indemnity) from the supplier that the use of any pre-existing copyright in accordance with the licence terms will not breach any 3rd party's rights”;

- (g) “if standardised licensing is implemented across government and an opportunity exists for a whole of government enforcement/compliance approach to reduce the cost of this for small agencies and improve compliance costs”.

151 Two departments raised further questions for consideration, namely:

- (a) is “it intended that an agency would choose just one licence from the toolkit to apply to all Crown copyright that agency makes available for re-use? It would be more appropriate to be flexible – so an agency chooses one as its general or default licence, e.g. for material on its website, with anything covered by a different access or reuse licence clearly expressed as being so”; and
- (b) are NZ Creative Commons licences enforceable overseas and if so, how?

152 The National Library provided comprehensive comments to this question. Some were specific to issues around its catalogues, while others were wider-ranging with potential implications for wider government. The latter category of comments are summarised below:³⁹

- (a) **General comment:** the National Library is very supportive of the Creative Commons concept but “we believe the question of licensing is more complex than the SSC’s analysis to date”; “[t]he analysis is good as far as it goes, but there are many areas where Crown copyright is not straightforward”; “[w]e are aware that this paper sits in the context of the wider programme of work around information and data re-use. That appears to have a limited focus on re-use of information on websites, in mash-ups, and other technology-related uses. The National Library’s purpose is to make information available for re-use in a much wider sense – researchers re-use and re-purpose information for new thought and argument”;
- (b) **Principles:** “It is important that this work is guided by some overarching principles. It seems to the National Library that the first question to be addressed is what information government wants to make accessible. The background paper on ‘Promoting Government Information and Data Re-use’ does not address this question, and it seems premature to look at licensing mechanisms before some principles are developed”; “[o]ur first question is whether licensing is the issue. It seems to us that at least some of the drivers behind this work could be addressed by updating the existing web standard. We assume part of the drive for data re-use is based on economic factors, ie making information available for re-use leverages off the investment already made. However, is there an expectation that re-use of data will have commercial benefits for those who re-use the data on websites, etc? If this is the case, does this raise user-pays issues? In general, it has been government policy that costs are recovered where there is private or commercial benefit”;

³⁹ SSC does not overlook the importance of specific copyright and licensing issues that arise in connection with the National Library’s catalogues, many of which appear to arise from the fact that the National Library does not own copyright in many of its works. For the purposes of this document, however, it considers it appropriate to focus on issues of wider application.

- (c) **Coverage:** “[w]e appreciate that this work is focused on government-owned information at this stage. However, we assume the intention is that coverage would become broader over time and include other material held by government. Creative Commons licensing might not offer the same advantages for this material”;
- (d) **Metadata:** we have “made use of APIs to make material available, for example through DigitalNZ. However, this does not mean that the National Library owns the copyright to the material, some is copyrighted, some not. The National Library believes the metadata could made available for re-use, but not the copyright material”;
- (e) **Social media:** “The National Library would like to be able to offer opportunities for users to tag items, or provide other information, and is probably not alone in seeing opportunities for this. There [are] a number of issues at stake here – where copyright will lie, and will the National Library be able to licence information contributed by users of our collections access sites, through mechanisms such as tagging, commencing or metadata correction?”

153 TPK made a number of additional comments. The essence of those comments and SSC’s response to them have already been set out in the body of this paper.

154 ESICTMC made a number of comments. While many of them have already been addressed above and are not reproduced here, ESICTMC made the following additional comments:

- (a) “[w]e feel that there is a higher order question that needs to be addressed in terms of what types of information government wishes to make more available and accessible (and why) before the question of what mechanism(s) to enable this can be considered appropriately”; and
- (b) “[w]e are interested in how the matrix of other legislation ‘protecting’ information may impact on this proposal”.

Commentary

155 SSC notes these comments. Most of them have been addressed in replies to the answers to previous questions.

156 **Choice of licences** As regards the question as to whether it is intended that an agency would choose just one licence from the toolkit to apply to all Crown copyright material that the agency makes available for re-use, the answer is no. Such an approach would be artificial, inflexible and, in some instances, commercially unrealistic. While agencies can be expected to give due thought to the desirability of licensing its copyright works and to consider guiding principles as to the choice of appropriate licence, they would continue to have the discretion as to:

- (a) whether to licence copyright works for re-use at all; and, if so
- (b) selection of the appropriate form of Creative Commons licence or, where necessary, a more restrictive licence.

157 **Enforcement** As regards the question as to whether New Zealand Creative Commons licences are enforceable overseas, the answer is yes, in principle, they are. At the same time, enforcing any breach of licence or breach of contract claim overseas can be more difficult than enforcing such breaches within New Zealand, depending on factors such as whether the breaching licensee can be identified, the jurisdiction in which the breaching

licensee resides, and the conflict of laws rules in the jurisdiction. At the same time, the appropriate response to a given breach of licence is a matter to be considered by reference to all the surrounding circumstances. In some circumstances, non-litigious remedies may be available. For example, in the case of online infringement, one avenue may be requesting intervention on the part of the relevant internet service provider.

- 158 **Licensing not straight-forward and scope of work:** SSC recognises that questions of licensing are not always straight-forward. The Discussion Paper was not intended to focus only on “re-use of information on websites, in mash-ups, and other technology-related uses”, although we do suspect there is potentially much low-hanging fruit in these areas. We also agree with the National Library’s statement of purpose, i.e., “to make information available for re-use in a much wider sense”, whilst noting the distinction between making non-copyright material more *accessible* for re-use, on the one hand, and *licensing* copyright works for re-use (which implies accessibility as a necessary but not sufficient condition), on the other.
- 159 **Principles:** We agree with the National Library that it is important that this work be guided by some overarching principles. We had endeavoured to capture the importance of this at paragraph 192(e) of the Discussion Paper. At the same time, we do not agree that it is premature to look at licensing mechanisms before such principles are fully developed. We are already guided by the spirit of the Official Information Act (which we recognise deals with access and not licensing), the policy principles in the Policy Framework on Government-Held Information and the Web Standards, as well as the specific drivers summarised at paragraph 42 of the Discussion Paper. We see this work as arising naturally from those existing foundations and drivers. We do not consider that the Web Standards, by themselves, are a sufficient answer to some of the drivers behind this work, as there is only so much that they can say. The issues raised by departments in response to the Discussion Paper indicate that much deeper and wider guidance is required. And we are not sure that, in general, it has been government policy that costs are recovered where there is private or commercial benefit. To the extent that that may informally have been the case, we consider it is an issue worthy of critical examination. Why, for example, should there be any general rule that individuals and organisations not be permitted to benefit from tax-payer funded investment in copyright works unless they pay for the privilege?
- 160 **Coverage:** So far as governmental adoption of open access licences is concerned, SSC prefers to think of it in terms of the licensing by government (broadly construed) of Crown or other copyright works owned by the Crown or other governmental agencies. We say that because whether any item of “information” or any informational product is an appropriate subject for licensing will depend, in the first instance, on whether it is a copyright work in the first place. If not, then the fundamental question is one of access, not licensing.
- 161 **Metadata:** We agree that open access licensing of copyright material not owned by the relevant department or agency is unlikely to be possible (in the absence of a broad right to sub-license). We also agree that metadata produced by the National Library or any other department or agency could be made available for re-use. To the extent that there is copyright in the metadata, it could be licensed for re-use (or the relevant department or agency could, if it wished, waive all rights in it (to the extent legally possible) pursuant to the Creative Commons Zero/CC0 mechanism). As noted at paragraph 57 above, SSC requires further information on the problems that might arise in the context of using Creative Commons licensing for metadata and is likely to seek public feedback on that

issue. To the extent that there is no copyright in the relevant metadata, the question is principally one of access.

162 **Social media:** Interesting questions arise when considering user-generated tagging and categorisation of material and the submission of more substantive user-generated content. We do not pretend to have all the answers on such issues. Our preliminary thoughts are these:

- (a) mere tagging of department/agency-owned content by website users – whether pursuant to the department/agency’s own taxonomy or users’ own ‘folksonomic’ preference – may not confer any copyright-related rights on those users, for the reason that they are unlikely to be creating any original literary (or other) work;
- (b) whether a department/agency’s overall database or set of resulting metadata is subject to copyright is another question;
- (c) where website users submit more substantive comment or other material, they may well own copyright in that material unless the terms of use to which such users agree (in advance) have the effect of assigning copyright to the website-owning department or agency;
- (d) where there is no such assignment, the department/agency may wish or need to obtain a licence from such users (again, under the website’s terms of use, agreed to in advance);
- (e) such licence could be expressed in a sufficiently broad way to allow the department or agency to sub-licence such contributions on Creative Commons terms; and
- (f) obtaining such a licence may be more appropriate than the department or agency trying to obtain an assignment of copyright; consistent with what we perceive to be a general trend internationally in social media sites, wherever feasible, individual citizens should be able to retain any copyright in their own individual contributions. We consider it appropriate to consider governmental enjoyment of the wisdom of the crowds as a privilege made possible by new technologies, and one that ought not to be taken for granted.

163 **Kinds of information to be made available:** SSC officials understand the comment that government first needs to address the types of information it wishes to make more available and accessible (and why) before the question of what mechanism(s) to enable this can be considered appropriately. Ultimately, however, this is unlikely to be a question that any one department can answer, or should try to answer, in isolation. SSC needs input from both other departments and other agencies as well, importantly, from the wider public. We consider it important that whatever guidance SSC produces be justifiable not only by reference to policy principles but also by reference to agency and public need. It is an iterative process. Departments and other agencies will have their own views on what may appropriately be released and licensed for re-use and that, in turn, will inform the question of whether government adoption of Creative Commons licences is appropriate. Members of the public will have their own views on what should be released. Some of them can also be expected to have views on the terms on which copyright material should be released for re-use.

164 So far as departments are concerned, these considerations are one of the reasons why SSC asked question 15 in its Discussion Paper, namely, “if the Creative Commons licences were recommended for all-of-government adoption, to which categories or types of information would your agency consider applying them?” Our preliminary view before release of the Discussion Paper was that the Creative Commons licences are an

appropriate mechanism through which agencies could licence many of the kinds of work identified in paragraph 135 above. Departments' responses reinforce that view. At the same time, such licences may not cover all circumstances in which copyright material may be released for re-use. We recognise that one or more restrictive licences may be helpful.

- 165 **Matrix of other legislation:** At this point SSC officials have not endeavoured to review all pieces of other legislation that may impact on the proposal that government adopts the suite of Creative Commons licences. We have, however, focussed on the most likely candidates, namely, the Official Information Act 1982 and the Public Records Act 2005, as addressed in the Discussion Paper. There will, of course, be circumstances in which various types of information cannot be released or only on a limited basis, and irrespective of whether that "information" constitutes a copyright work. An NZGILF and NZGILF Toolkit would not advocate the open access release and licensing of any information or data in respect of which there are statutory or other restraints. Obvious examples are personal information to which the Privacy Act 1993 applies, and tax-related information to which the Tax Administration Act 1994 applies. The same would apply to security sensitive or commercially sensitive information. As a general guide to materials that may not be appropriate for release and open access licensing, one might refer to sections 6 and 9 of the Official Information Act. If good reason were to exist for withholding material under those sections upon receipt of an OIA request, then that material is most unlikely to be the appropriate subject of open access release and licensing.

General Comment

Feedback

- 166 All consulted departments were also asked to provide any general comments they wished to make. Departments' general comments included the following:
- (a) there are two reasons for the Crown to be concerned about copyright, i.e., the prospect of commercial gain and misuse of Crown copyright material, whether inappropriate or misleading;
 - (b) the "important principle that underpins the Crown's approach to copyright is that the Crown should not unnecessarily constrain the use of what it produces (using tax-payer funding), particularly when the business of most Departments is to improve the flow of information to citizens";
 - (c) as regards the Discussion Paper itself, "[w]e think that a more succinct version would be useful for the purposes of wider consultation. ... We think much of the overseas stuff could be cut out (or put in an appendix). We would like to see some more practical examples, and we also think some terms need to be defined or explained – for example, *datasets*. Having said that, we found the paper interesting, timely and stimulating and have greatly appreciated the opportunity to comment";
 - (d) "[w]e consider [the] Paper is most helpful with its analysis of the current situation around copyright and the appropriateness of the Creative Commons concept and suite of licences";
 - (e) "[w]e note at para 198(a) that [Archives New Zealand] is identified as having an 'overlapping' interest in the development [and] promulgation of the NZGILF and Toolkit. We would prefer to characterise [Archives New Zealand's] interest as that of a stakeholder in view of our holdings of historic Crown copyright material".

- 167 Another department took the opportunity to note various circumstances in which copyright or other IP-related issues have arisen, as follows:
- (a) an attempted use of a Civil Defence emblem;
 - (b) a very similar operation to the department’s “Language Line” popping up and using similar colours etc (although, the department noted, this was possibly more trademark related);
 - (c) people attempting to register company names including the word “Scout” prohibited by legislation (the Scout Association of New Zealand Amendment Act 1967, section 5) “so probably outside the scope of this project but worth mentioning”;
 - (d) use of the word “Royal” (among other words) prohibited by the Flag, Emblems and Names Protection Act 1981; “[a]gain protected by legislation so probably outside of the scope of this project but worth mentioning”.

Commentary

- 168 **Commercial gain** SSC perceives a potential default position on the part of some agencies that allowing re-use of Crown or other public sector copyright works for commercial gain is inherently wrong or unsatisfactory. This may be an area in which a change of mindset is required. While there may be understandable instances where commercial gain is undesirable, in SSC’s view there should not be any presumption in this regard. Companies, for example, are taxpayers just as individual income earners are. A presumption against allowing re-use of copyright works for commercial purposes may be unhelpful.
- 169 **Amendments to Discussion Paper** SSC is grateful for the constructive comments around the length of the Discussion Paper and its reference to Archives New Zealand. It will take those comments on board when producing a revised version for public consultation.
- 170 **Examples of copyright or trademark issues:** SSC officials note the circumstances referred to in paragraph 167. While not directly relevant to licensing of public sector copyright works, it does appear to officials that brief guidance might be given in the NZGILF on circumstances in which members of the public ought not to reproduce certain agency names and emblems.

Position of the Council for the Humanities

- 171 As noted in paragraph 110 of the Discussion Paper, Te Whāinga Aronui/the Council for the Humanities is leading the development of Creative Commons in New Zealand with, to date, generous pro-bono legal support principally from private sector and academic lawyers.
- 172 The Council for the Humanities provided SSC with a detailed letter in response to the Discussion Paper. Among other things, the Council:
- (a) was highly supportive of the project;
 - (b) noted that:

“Now more than ever is there a very present need to bring information the Government holds on behalf of its people into the public domain so that it may be used in ways that stimulate innovation, generate cultural creativity, social interaction and dialogue, while also kick starting economic growth.”

- (c) commented on funding options to enable the Council to deliver timely advice, education, collaboration and administrative support;
- (d) re-stated its commitment to working with Government through the current process;
- (e) noted that it had already had preliminary discussions with the Maori Language Commission and a Victoria University law professor about the creation of an indigenous licence;
- (f) commented on the need to be aware of the historical and cultural issues surrounding indigenous knowledge and expressed the desire to work with government and others in championing culturally appropriate progress in this area;
- (g) acknowledged issues around the wording of some of the Creative Commons Aotearoa New Zealand licences and its willingness to consider a review of the licences where possible;
- (h) provided examples of the ways in which it could assist in the development of an NZGILF and NZGILF Toolkit and practical feedback on their implementation;
- (i) expressed interest in exploring how digital Creative Commons licences may be incorporated into search engine technology;
- (j) observed that a clearer statement from SSC on where it stands on the commercialisation of public sector information is needed; on this important issue, and having noted the competing arguments, the Council said it “agree[s] with the position taken by the National Library and the findings of the Digital Content Strategy, p. 30: ‘both commercial and non-commercial users should be able to benefit from vital data that can lead to a public good outcome for government’”; and
- (k) noted that it is looking forward to helping shape the suggestion of bringing together, in a summit, all stakeholders (both public and private sectors) interested in the creation, conservation, collaboration/re-use and transmission of knowledge to benefit Aotearoa New Zealand and its people.

173 The spirit of the Council’s letter is perhaps best captured in its closing paragraphs:

“Finally, it seems that your Discussion Paper, and the subsequent points we have raised are all about increasing demand for, supply and support of Public Sector Information so that it may be usefully translated into knowledge that benefits us all. Culture is a society’s reservoir of collective knowledge. It is enriched by its citizens’ open access to as many datasets as possible. Information is then able to be re-mixed in ways that are as yet inconceivable to its producers or gateholders. Governments must trust in this democratic process to build innovation and creativity. It is this kind of trust that the State Services Commission’s own mission and development goals hope to achieve for Government and all New Zealanders. It seems that we are all working towards a ‘networked, accessible and trusted’ government for, with and by the people.

We look forward to working with you and towards this democratic ideal.”

174 SSC welcomes this feedback and looks forward to working with the Council in future if feedback from the public is similarly supportive of the adoption of Creative Commons licences as that expressed by departments.