

# The Copyright Act 1994: Issues Paper

## Your name and organisation

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## Responses to Issues Paper questions

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What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?

### Benefits of Current Situation

The purpose of Crown Copyright in countries such as New Zealand whose copyright law derives from the UK Copyright Act 1911 has been to ensure that government's copyright works are seen as authoritative and made available in an accurate and reliable form. Agencies have "exercise[d] their exclusive rights to ensure that their copyright materials are made available for access and reuse, in accordance with any laws and policies relating to access to public sector materials".<sup>1</sup> Professor Anne Fitzgerald also says that "while copyright law vests copyright owners with extensive bundles of exclusive rights which can be exercised to prevent others making use of the copyright material, in the case of Crown copyright materials these rights should rarely be asserted by government to deviate from the general rule that Crown copyright materials will be available for "full and free reproduction" by the community at large". She concludes by saying that distributing publications in a reliable form is "inextricably linked with what would now be termed open content licensing practices- to permit full and free reproduction and widespread dissemination".

<sup>1</sup> Fitzgerald, Anne, Queensland University of Technology, School of Law.

[https://ses.library.usyd.edu.au/bitstream/2123/7326/1/FitzgeraldA\\_9781920899714\\_TEXT.pdf](https://ses.library.usyd.edu.au/bitstream/2123/7326/1/FitzgeraldA_9781920899714_TEXT.pdf): p1.

The 2010 New Zealand Government Open Access and Licensing Framework (NZGOAL), updated in 2014, extends that approach into the digital environment. It retains the benefits of Crown ownership and clarifies this by adding a simple parallel open licensing activity to make it very clear to the public that government wants this material re-used legally. While many agencies' website copyright statements already permitted use and re-use, a significant number were restrictive and required potential users to seek permission from the agency. Government agencies are now encouraged to display licences on analogue and online copyright works that allow the public to re-use them legally and to have website copyright statements that confirm that.<sup>2</sup> By adding this process, government is carrying out its legal responsibility as a copyright owner. This requires agencies such as crown entities and school boards of trustees to also clarify ownership of material that employees create in the course of their employment and enable or restrict the use of that material.

When releasing NZGOAL, the Minister of State Services noted that using open Creative Commons licenses saved taxpayer funds because government agencies no longer needed to spend money writing their own bespoke licences for copyright material and that the internationally recognised CC licenses used icons and tools that simplify matters for the general public.<sup>3</sup> It was a simple solution which essentially updated Crown copyright for the twenty-first century.

### **Problems of Current Situation**

This approach assumes that government wishes to use Crown copyright as a mechanism for published copyright works to be seen as authoritative, accurate and reliable. NZGOAL and its software extension, NZGOAL-SE are now widely used and praised in New Zealand, including by Internet New Zealand (INZ).<sup>4</sup> Government agencies routinely use Creative Commons (CC) and open source software licensing to allow the public to re-use government's copyright works legally.

However, there are issues.

- INZ notes implementation problems for agencies releasing big datasets (compilations of data which in New Zealand are generally copyright works. For example, there are licensing stacking issues when open licensing datasets have been combined from many sources;<sup>5</sup>
- Assigning CC licences to copyright works is not yet business as usual across some government agencies, meaning that not all are applying NZGOAL and there is some reluctance and risk aversion to provide the resource to do so;
- Given high staff turnover in agencies' publishing and marketing teams and inadequate senior management leadership, government has to fund regular staff training across agencies on updating copyright statements and adding CC icons to online and analogue materials;
- Agencies, such as CRIs, with multiple funding sources, are increasingly finding it difficult to or are reluctant to apply NZGOAL to their publicly-funded research outputs; or to retain Crown copyright ownership with some contractors or partners; and
- There is no clear ownership, leadership and oversight of cross government information and copyright policy.

The 100-year Crown copyright expiry date also makes access to and use of historic Crown copyright material difficult, particularly following extensive and ongoing machinery of government change over the last few decades. Agencies that have inherited Crown copyright works are

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<sup>2</sup> New Zealand Government Open Access and Licensing framework, revised 2014.

<https://www.data.govt.nz/manage-data/policies/nzgoal>

<sup>3</sup> Minister of State Services, <https://www.beehive.govt.nz/release/more-government-information-reuse>, August 2010.

<sup>4</sup> Internet New Zealand. Getting copyright right in the Internet age. 2016, p13. <https://internetnz.nz/getting-copyright-right-information-age>

<sup>5</sup> *ibid*

reluctant to allow use or re-use, when they are unfamiliar with the material. A recent example is the Ministry of Culture and Heritage's WW100 anniversary celebrations when important Crown copyrighted material (often orphan works) could not be included.<sup>6</sup>

### **Solution Discussion**

The principles that government's published works on and off-line are authoritative, accurate and reliable and that Crown copyright is permissive<sup>7</sup> must be asserted. A simple, practical and practicable solution with minimal exceptions is required. Options for achieving this canvassed, include:

1. Retaining and updating NZGOAL and well understood and applied open Creative Commons licensing and establishing a central government function for leading and driving delivery of this mechanism.
2. Removing Crown copyright entirely and placing government works in the public domain. The Options Paper could assess the United States Federal government model which, with some exceptions, places government works prepared by officers or employees in the public domain, without copyright protection. This would include assessing whether the USA's extensive exceptions covering contractors and some government publications would actually replace existing operational NZGOAL and open licensing issues with greater complexity.<sup>8</sup>
3. Extending the list of exclusions in Section 27 of the Copyright Act 1994. There appears to have been no risk that the public would not see this legal and parliamentary information as authoritative, reliable or accurate, given it is released by Parliament and the Parliamentary Counsel Office. Gilchrist assumes that access to this type of information is best encouraged by eliminating copyright protection over it, unlike in Australia.<sup>9</sup> Extending this list to cover all material that currently has Crown copyright protection needs consideration.
4. Reducing the 100-year expiry date for historic Crown copyright material which does not have an open licence. Opening up this material is a low risk for Government and essentially backdates the policy established by NZGOAL in 2010.
5. Establishing a cross-government role to address Crown Copyright matters.

Further specific recommendations are:

1. Adding secondary legislative instruments to the Section 27 list, once they are added to the NZ Legislation website, so that primary and secondary legislation have the same public domain status.<sup>10</sup>
2. Considering how best to address the application of copyright and open licensing or public domain to government's publicly-funded datasets and databases.<sup>11</sup>

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<sup>6</sup> <https://ww100.govt.nz/>

<sup>7</sup> See The Power of Information Taskforce report, 2009: Recommendation 12.

<https://webarchive.nationalarchives.gov.uk/20100407162259/http://poit.cabinetoffice.gov.uk/poit/>

<sup>8</sup> <https://www.usa.gov/government-works>; <https://cendi.gov/publications/04-8copyright.html#31>

<sup>9</sup> Gilchrist, John. The Government and copyright. Sydney University Press, 2015.

<sup>10</sup> <http://www.pco.govt.nz/access-project/>

<sup>11</sup> <https://www.data.govt.nz/manage-data/policies/nzgoal/guidance-note-4/>