

Appendix 3 – Key Features of New Zealand Copyright Law

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Introduction⁶³

170 The law of copyright in New Zealand is contained in the Copyright Act 1994 and case law on the interpretation of its provisions. This Appendix provides a brief introduction to certain features of copyright law, namely:

- (a) the nature and exercise of copyright;
- (b) ownership of copyright;
- (c) duration of copyright;
- (d) Crown copyright as a particular species of copyright;
- (e) specific public sector works in which there is no copyright;
- (f) infringement of copyright; and
- (g) copyright and licensing.

171 These features are considered the most relevant to NZGOAL. Other features of copyright law, such as the range of statutorily permitted acts in relation to copyright works, internet service provider liability, remedies for infringement and performers' rights, are not addressed.

The nature and exercise of copyright

Copyright exists in qualifying original works

172 Copyright is a property right that exists in certain original works. To be protected, the original works must come within one or more of the following categories:⁶⁴

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

173 Dealing briefly with each in turn.⁶⁵

- (a) "literary work" means any work, other than a dramatic or musical work, that is written, spoken, or sung, including a table or compilation and a computer program;
- (b) "dramatic work" is defined non-exhaustively to include a work of dance or mime, and a scenario or script for a film;
- (c) "musical work" is a work consisting of music, exclusive of any words intended to be sung or spoken with the music or any actions intended to be performed with the music;
- (d) "artistic work" means a graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality; or a work of architecture, being a building or a model for a building; or a work of artistic craftsmanship, not falling within the previous parts of this definition; the definition does not, however, include a layout design or

⁶³ What follows is necessarily a brief overview of only select aspects of a wide-ranging and sometimes complex area of law. See further S Frankel and G McLay *Intellectual Property in New Zealand* (LexisNexis Butterworths, Wellington, 2002) pp. 157-320; I Finch (Ed) *James & Wells Intellectual Property Law in New Zealand* (Thomson Brookers, Wellington, 2007) pp. 166-243; *The Laws of New Zealand*, Intellectual Property: Copyright, paras 1-7 (LexisNexis, online service); and the IPONZ website at <http://www.iponz.govt.nz/cms/copyright>.

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

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

an integrated circuit within the meaning of section 2 of the Layout Designs Act 1994);

- (e) “sound recording” means a recording of sounds, from which the sounds may be reproduced, or a recording of the whole or any part of a literary, dramatic, or musical work, from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced;
- (f) “film” means a recording on any medium from which a moving image may by any means be produced;
- (g) “communication work” means a transmission of sounds, visual images, or other information, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme; and
- (h) a “typographical arrangement of a published edition” refers to a typographical arrangement of a published edition of the whole or any part of one or more literary, dramatic, or musical works.⁶⁶

Low threshold for originality

174 As the Court of Appeal has stated, the “threshold test for originality is not high”, the determining factor being “whether sufficient time, skill, labour, or judgment has been expended in producing the work”.⁶⁷ The Court has also reiterated the axiom, or principle, that copyright is not concerned with the originality of ideas but with the form of their expression.

175 A work is not original, however, if:

- (a) it is, or to the extent that it is, a copy of another work; or
- (b) it infringes the copyright in, or to the extent that it infringes the copyright in, another work.⁶⁸

Copyright does not protect mere facts or information

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

No registration

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

Literary works, datasets and databases

178 While NZGOAL does not address each category of qualifying work in any detail, it is important to comment on copyright in datasets and databases, as a good deal of the public sector information that people and companies are likely to want takes the form of datasets and databases.

179 The Copyright Act’s definition of “literary work” includes a “table or compilation”, and the definition of “compilation” includes “a compilation consisting wholly of works or parts of works, a compilation consisting partly of works or parts of works, and a compilation of

⁶⁶ “Typographical arrangement” is not defined in the Act, whereas “published edition” is defined, to mean a published edition of the whole or any part of one or more literary, dramatic, or musical works.

⁶⁷ *University of Waikato v Benchmarking Services Ltd* (2004) 8 NZBLC 101,561 (CA), para 27, available online at <http://www.nzlii.org/nz/cases/NZCA/2004/90.txt>

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

data other than works or parts of works”.⁶⁹ It follows that certain datasets and databases can, in principle, qualify as literary works.⁷⁰ By way of example:

- (a) it is “well established that copyright may subsist in publications such as dictionaries, directories, maps, or in the mere preparation of lists”,⁷¹
- (b) reports showing financial survey data, tabulated and converted into certain ratios for comparison, have been held to be protected by copyright.⁷²

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

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

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

Exercise of rights

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

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

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

Ownership of copyright

184 The default position under the Copyright Act is that the person who is the author of a work is the first owner of any copyright in the work.⁷⁴

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

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

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

⁷² *University of Waikato*, above n 67. See further the extensive discussion of English and Australian case law, and the distillation of principle, in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112, particularly the judgment of Lindgren J at para 160 and the judgment of Sackville J at para 409: The decision is available online at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2002/112.html?&nocontext=1>. Cf *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 and *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* [2010] FCA 44, as well as the interlocutory decision in *YPG IP Limited v Yellowbook.com.au Pty Ltd* [2010] NZHC 943.

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

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

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

- (a) where an employee makes, in the course of his or her employment, a literary, dramatic, musical, or artistic work, that person's employer is the first owner of any copyright in the work (which we can call the "employment rule");⁷⁵ and
- (b) where a person commissions, and pays or agrees to pay for, the taking of a photograph or the making of a computer program, painting, drawing, diagram, map, chart, plan, engraving, model, sculpture, film, or sound recording, and the work is made in pursuance of that commission, that person is the first owner of any copyright in the work (this is known as the "commissioning rule").⁷⁶

186 Note, however, that:

- (a) the commissioning rule does not apply to all literary works; and
- (b) both the employment rule and the commissioning rule may be modified by contract (i.e., an employee or contractor might, by contract, be treated as the first owner of certain types of works otherwise falling within the employment and commissioning rules).

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

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

- (a) to one or more, but not all, of the things the copyright owner has the exclusive right to do; and/or
- (b) to part, but not the whole, of the period for which the copyright is to exist.⁷⁷

Duration of copyright

189 For literary, dramatic, musical and artistic works:

- (a) copyright expires at the end of the period of 50 years from the end of the calendar year in which the author dies;
- (b) if the work is computer-generated, copyright expires at the end of the period of 50 years from the end of the calendar year in which the work is made; and
- (c) if the work is of unknown authorship, copyright expires at the end of the period of 50 years from the end of the calendar year in which it is first made available to the public by an authorised act.⁷⁸

190 For sound recordings and films, copyright expires at the later of:

- (a) the end of the period of 50 years from the end of the calendar year in which the work is made; and
- (b) if it is made available to the public by an authorised act before the end of that period, 50 years from the end of the calendar year in which it is so made available.⁷⁹

191 For communication works, copyright expires at the end of the period of 50 years from the end of the calendar year in which the communication work is first communicated to the public.⁸⁰

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

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

⁷⁷ Section 113 of the Copyright Act 1994.

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

⁷⁹ Section 23 of the Copyright Act 1994.

192 For typographical arrangements of published editions, copyright expires at the end of the period of 25 years from the end of the calendar year in which the edition is first published.⁸¹

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

Crown copyright as a species of copyright

Nature of Crown copyright

194 Crown copyright is a species of copyright regulated principally by section 26 of the Copyright Act.⁸² That section states that:

- (a) where a work is made by a person employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a contract for services, the work qualifies for copyright and the Crown is the first owner of any copyright in the work, unless the parties to the contract agree otherwise;⁸³ and
- (b) copyright in such a work is referred to as “Crown copyright”, even if such copyright is assigned to another person.⁸⁴

Duration of Crown copyright

195 Crown copyright expires:

- (a) in the case of a typographical arrangement of a published edition, at the end of the period of 25 years from the end of the calendar year in which the work is made; or
- (b) in the case of any other work, at the end of the period of 100 years from the end of the calendar year in which the work is made.⁸⁵

Works of joint authorship

196 In the case of a work of joint authorship where one or more, but not all, of the authors are persons employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a contract for services, section 26 applies only in relation to those authors and the copyright existing by virtue of their contribution to the work.⁸⁶

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

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

Specific public sector works in which there is no copyright

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

⁸⁰ Section 24 of the Copyright Act 1994.

⁸¹ Section 25 of the Copyright Act 1994.

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

⁸³ Section 26(1) and (6).

⁸⁴ Section 26(2).

⁸⁵ Section 26(3).

⁸⁶ Section 26(4).

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

- (a) in which the Crown copyright has not been assigned to another person; and
- (b) that is incorporated by reference in a work referred to in subsection (1) (that is, those works referred to in paragraph 198 above).

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

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

- (a) to strip existing and non-assigned Crown copyright from any work that is incorporated by reference into one of the works referred to in subsection (1); and
- (b) to ensure that third party copyright in works that are incorporated by reference into any of the works referred to in paragraph 198 is not overridden by section 27(1).

Infringement of copyright

Primary infringement

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

202 A person infringes copyright in a work when he or she, other than pursuant to a copyright licence, does any of the following “restricted acts”, either in relation to the work as a whole or any “substantial part” of it:⁸⁸

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

203 The Act states that:⁸⁹

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

⁸⁷ See further the Legislation (Incorporation by Reference) Bill (250-1) (30 March 2005) as reported by the Government Administration Committee, at http://www.parliament.nz/NR/rdonlyres/3DFA2143-5189-4C90-972C-0A5EA2CD6005/48100/DBSCH_SCR_3038_31391.pdf; the Hon Pete Hodgson’s comments during the second reading of the Bill, at http://www.hansard.parliament.govt.nz/hansard/Final/FINAL_2005_04_12.htm; and G McLay *Strategy and Intellectual Property – Scoping the Legal Issues* (NZ Digital Content Strategy Working Paper 2, April 2006) pp. 44-46, at <http://www.parliament.nz/NR/rdonlyres/E795AA07-4CB0-4A5B-806E-976A60A2E2D9/63800/StrategyandintellectualpropertyMcLay3.pdf>

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

⁸⁹ See sections 30-34.

- (e) communicating a work to the public is a restricted act in relation to every description of copyright work; and
- (f) the making of an adaptation of a work is a restricted act only in relation to a literary, dramatic, or musical work.

204 So far as copying is concerned, it is worth noting that “copying” is defined broadly to mean, among other things, “in relation to any description of work, reproducing, recording, or storing the work in any material form (including any digital format), in any medium and by any means”.⁹⁰

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

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

Infringement in the case of datasets and databases

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

207 As with other types of copyright works, copyright in a database or dataset may be infringed by, among other things, copying either the entire database or dataset or a substantial part of it.⁹¹ In the context of arrangements and compilations, the Supreme Court has endorsed the principle that “the greater the originality, the wider will be the scope of the protection which copyright affords *and vice versa*”.⁹²

208 The Court quoted and approved the following passages from an earlier High Court decision. While these passages were made in the context of a graphic work, the stated principles are considered broadly to apply to “compilations” (a subset of literary works) as well.⁹³

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

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

⁹¹ Sections 29 and 30 of the Copyright Act 1994.

⁹² *Henkel KgaA v Holdfast* [2006] NZSC 102; [2007] 1 NZLR 577, para 38. While *Henkel* was a “graphic work” rather than a literary work/compilation case, Tipping J relied for this statement of principle on *Land Transport Safety Authority of New Zealand v Glogau* [1999] 1 NZLR 261 (CA), which was a literary work case.

⁹³ Above n 92, para 40. A recent decision of the High Court of Australia addresses the issue of copying a “substantial part” of a compilation in detail: *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14.

209 The Court also said:⁹⁴

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

Copyright and licensing

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

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

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

Moral rights

Introduction

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

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

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

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

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

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

Right to be identified as author

The right and its duration

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

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

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

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

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

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

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

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

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

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

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

Asserting the right

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

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

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

Who is bound by an assertion

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

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

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

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

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

⁹⁹ “Communication work” is defined as a transmission of sounds, visual images, or other information, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme (section 2(1)).

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

Application of the right to State Services agencies

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

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

226 In addition:

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

Practical implications for State Services agencies applying NZGOAL

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

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

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

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

¹⁰¹ See section 26 of the Copyright Act.

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

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

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

Right to object to derogatory treatment of a work

The right and its duration

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

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

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

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

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

Application of the right to State Services agencies

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

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

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

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

233 In addition:

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

Practical implications for State Services agencies applying NZGOAL

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

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

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