

# Submission on review of the Copyright Act 1994: Issues Paper

## Your name and organisation

<b>Name</b>	Ollie Dale
<b>Organisation</b>	New Zealand Institute of Professional Photography

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## Responses to Issues Paper questions

### Objectives

1	Are the above objectives the right ones for New Zealand’s copyright regime? How well do you think the copyright system is achieving these objectives?  The NZIPP supports the proposed objectives and believes that the current legislation does not fulfil these proposed objectives. In particular the ability of New Zealand based creators/authors to retain and enforce their intellectual property rights is problematic and difficult compared to photographers working in other jurisdictions.
2	Are there other objectives that we should be aiming to achieve? For example, do you think adaptability or resilience to future technological change should be included as an objective and, if so, do you think that would be achievable without reducing certainty and clarity?

	Create a mechanism to allow for disputes over copyright to be quickly and efficiently resolved at minimal cost to the parties involved, similar to the Disputes Tribunal. Currently the cost of enforcement for copyright infringements means that many infringers know that enforcement is unlikely to be taken.
3	Should sub-objectives or different objectives for any parts of the Act be considered (eg for moral rights or performers' rights)? Please be specific in your answer.
	<i>[Insert response here]</i>
4	What weighting (if any) should be given to each objective?
	<p>When considering the proposed objectives, the NZIPP would weight/rank them in order of priority; 3, 1, 4, 5, 2;</p> <p>3. Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law</p> <p>1. Provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so</p> <p>4. Meet New Zealand's international obligations</p> <p>5. Ensure that the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi</p> <p>2. Permit reasonable access to works for use, adaptation and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand</p>

### **Rights: What does copyright protect and who gets the rights?**

5	What are the problems (or advantages) with the way the Copyright Act categorises works?
	<i>[Insert response here]</i>
6	Is it clear what 'skill, effort and judgement' means as a test as to whether a work is protected by copyright? Does this test make copyright protection apply too widely? If it does, what are the implications, and what changes should be considered?
	<i>[Insert response here]</i>
7	Are there any problems with (or benefits arising from) the treatment of data and compilations in the Copyright Act? What changes (if any) should be considered?
	<i>[Insert response here]</i>
8	What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?

The NZIPP believes that the Commissioning Rule in section 21(3) of the Copyright Act 1994 is the single most detrimental issue facing the professional photography industry in New Zealand. The existence of the commissioning rule serves to discourage creativity, one of the cornerstones on which the future success of the New Zealand economy rests. It creates an issue of unequal bargaining power and a divisive operating environment. The NZIPP believes that the first ownership of copyright is a basic right of any creator/author including professional photographers. While NZIPP encourages all photographers to contract out of the Act and retain copyright in their work, the realities of the engagement dynamics can make this a challenging and formidable task.

- Current NZ law on first ownership of copyright is out of step with the laws of our trading partners and international convention. Most other developed countries, including those in Europe, the UK, USA and Australia already afford the photographer the first right of copyright ownership.
- The current legislation is putting the New Zealand photography industry at risk. In addition to New Zealand photographers being vulnerable to exploitation by international clients, there is also the risk of losing leading photographers overseas contributing to the skill drain. NZIPP is aware of many examples of this occurring with New Zealanders moving overseas to work in countries that do not allow their work to be exploited as it can be in New Zealand.
- The commissioning rule applies to some artistic works, but not others. The rule therefore discriminates against the photographic industry and essentially enhances the rights of other professions not subject to the rule.
- The commissioning rule creates unequal bargaining power and gives the commissioner an immediate advantage when negotiating with photographers. A photographer must negotiate to retain ownership of something that they will be creating. If, as a result of a change in this rule, copyright is perceived as something a commissioner has to buy rather than automatically receive, it may assist in reducing the imbalance of negotiating power somewhat.
- Privacy is often mentioned as one justification for the commissioning rule in the case of photographers being engaged for private or domestic purposes. The NZIPP disagrees with this and believes that there are already adequate privacy protections in the Copyright Act 1994 and other relevant laws. section 105 of the Copyright Act 1994 provides protection for the clients privacy where copyright is owned by the photographer and section 107 provides for the waiver of these rights by the client.
- Typically a client when approaching a photographer to create images will make statements about the intended use. The photographer will establish a fee based on this information. The client may then use the images for other purposes outside of the original brief/agreed usage. These future uses may not be known or disclosed by the client, however under the commissioning rule, the photographer has no recourse to be financially compensated for any additional use. While it may be suggested that the fees charged by the photographer should reflect that this may occur when setting fees, the reality is that clients are generally unwilling to pay anymore than the fee for the initial disclosed uses and some clients will knowingly misrepresent the facts to gain an advantage in the negotiation.
- The commissioning rule can be confusing as many clients of photographers are in fact not commissioning the images they purchase at all. These clients however may (incorrectly) believe that they own the copyright. An example being event photographers who may cover everything from school class photos, graduation ceremonies, sports events or social photos where the images are often created and then offered for sale to the subjects. If the copyright ownership was that of the author by default it would remove this confusion.

9	What problems (or benefits) are there with the current rules related to computer-generated works, particularly in light of the development and application of new technologies like artificial intelligence to general works? What changes, if any, should be considered?
	<i>[Insert response here]</i>
10	What are the problems (or benefits) with the rights the Copyright Act gives visual artists (including painting, drawings, prints, sculptures etc)? What changes (if any) should be considered?
	<i>[Insert response here]</i>
11	What are the problems creators and authors, who have previously transferred their copyright in a work to another person, experience in seeking to have the copyright in that work reassigned back to them? What changes (if any) should be considered?
	<i>[Insert response here]</i>
12	What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?
	Many of the photographic engagements made for Crown entities are for purposes that would be also typical in commercial (non Crown) businesses. Why does the Crown require copyright in these circumstances? Commercial licensing arrangements as negotiated with private businesses could be just as effective in giving these entities the usage required while allowing the photographer to retain copyright.
13	Are there any problems (or benefits) in providing a copyright term for communication works that is longer than the minimum required by New Zealand's international obligations?
	<i>[Insert response here]</i>
14	Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?
	<i>[Insert response here]</i>

## Other comments

*[Insert response here]*

### Rights: What actions does copyright reserve for copyright owners?

15	Do you think there are any problems with (or benefits arising from) the exclusive rights or how they are expressed? What changes (if any) should be considered?
	<i>[Insert response here]</i>

16	Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?
	<i>[Insert response here]</i>
17	What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?
	<i>[Insert response here]</i>

## Other comments

*[Insert response here]*

### Rights: Specific issues with the current rights

18	What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?
	<i>[Insert response here]</i>
19	What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?
	<i>[Insert response here]</i>
20	What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?
	<i>[Insert response here]</i>
21	Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain.
	<i>[Insert response here]</i>
22	What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?
	<i>[Insert response here]</i>
23	What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?
	<i>[Insert response here]</i>

24	Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.
	<i>[Insert response here]</i>

## Other comments

*[Insert response here]*

### Rights: Moral rights, performers' rights and technological protection measures

25	What are the problems (or benefits) with the way the moral rights are formulated under the Copyright Act? What changes to the rights (if any) should be considered?
	<i>[Insert response here]</i>
26	What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?
	<i>[Insert response here]</i>
27	Will there be other problems (or benefits) with the performers' rights regime once the CPTPP changes come into effect? What changes to the performers' rights regime (if any) should be considered after those changes come into effect?
	<i>[Insert response here]</i>
28	What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?
	<i>[Insert response here]</i>
29	Is it clear what the TPMs regime allows and what it does not allow? Why/why not?
	<i>[Insert response here]</i>

## Other comments

*[Insert response here]*

### Exceptions and Limitations: Exceptions that facilitate particular desirable uses

30	Do you have examples of activities or uses that have been impeded by the current framing and interpretation of the exceptions for criticism, review, news reporting and research or study? Is it because of a lack of certainty? How do you assess any risk relating to the use? Have you ever been threatened with, or involved in, legal action? Are there any other barriers?
	<i>[Insert response here]</i>
31	What are the problems (or benefits) with how any of the criticism, review, news reporting and research or study exceptions operate in practice? Under what circumstances, if any, should someone be able to use these exceptions for a commercial outcome? What changes (if any) should be considered?
	<i>[Insert response here]</i>
32	What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?
	NZIPP believes that photographs should continue to be excluded from reporting current events. Many freelance photographers working in news and event photography do so as freelancers in a non-commissioned capacity, so called "on-spec" and rely on the sale of their images to run their businesses. If photographs were not excluded, news organisations could legally use photographs with no payment due, ending the ability of photographers to make a living. It would result in less coverage of news and events by photographers as the incentive to create the works (being paid) would no longer exist.
33	What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?
	<i>[Insert response here]</i>
34	What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?
	<i>[Insert response here]</i>
35	What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?
	<i>[Insert response here]</i>
36	What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?
	<i>[Insert response here]</i>
37	Are there any other current or emerging technological processes we should be considering for the purposes of the review?
	<i>[Insert response here]</i>
38	What problems (or benefits) are there with copying of works for non-expressive uses like data-mining. What changes, if any, should be considered?
	<i>[Insert response here]</i>
39	What do problems (or benefits) arising from the Copyright Act not having an express exception for parody and satire? What about the absence of an exception for caricature and pastiche?
	<i>[Insert response here]</i>

40	What problems (or benefit) are there with the use of quotations or extracts taken from copyright works? What changes, if any, should be considered?
	<i>[Insert response here]</i>

## Other comments

*[Insert response here]*

### Exceptions and Limitations: Exceptions for libraries and archives

41	Do you have any specific examples of where the uncertainty about the exceptions for libraries and archives has resulted in undesirable outcomes? Please be specific about the situation, why this caused a problem and who it caused a problem for.
	<i>[Insert response here]</i>
42	Does the Copyright Act provide enough flexibility for libraries and archives to copy, archive and make available to the public digital content published over the internet? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?
	<i>[Insert response here]</i>
43	Does the Copyright Act provide enough flexibility for libraries and archives to facilitate mass digitisation projects and make copies of physical works in digital format more widely available to the public? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?
	<i>[Insert response here]</i>
44	Does the Copyright Act provide enough flexibility for libraries and archives to make copies of copyright works within their collections for collection management and administration without the copyright holder's permission? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?
	<i>[Insert response here]</i>
45	What are the problems with (or benefits arising from) the flexibility given to libraries and archives to copy and make available content published online? What changes (if any) should be considered?
	<i>[Insert response here]</i>
46	What are the problems with (or benefits arising from) excluding museums and galleries from the libraries and archives exceptions? What changes (if any) should be considered?
	<i>[Insert response here]</i>

## Other comments



*[Insert response here]*

### **Exceptions and Limitations: Exceptions for education**

47	Does the Copyright Act provide enough flexibility to enable teachers, pupils and educational institutions to benefit from new technologies? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?
	<i>[Insert response here]</i>
48	Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	<i>[Insert response here]</i>
49	Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	<i>[Insert response here]</i>
50	Is copyright well understood in the education sector? What problems does this create (if any)?
	<i>[Insert response here]</i>

### **Other comments**

*[Insert response here]*

### **Exceptions and Limitations: Exceptions relating to the use of particular categories of works**

51	What are the problems (or advantages) with the free public playing exceptions in sections 81, 87 and 87 A of the Copyright Act? What changes (if any) should be considered?
	<i>[Insert response here]</i>
52	What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?
	<i>[Insert response here]</i>
53	What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?
	<i>[Insert response here]</i>

54	What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?
	<i>[Insert response here]</i>
55	What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?
	<i>[Insert response here]</i>
56	Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?
	<i>[Insert response here]</i>
57	Do you think that section 73 should be amended to make it clear that the exception applies to the works underlying the works specified in section 73(1)? And should the exception be limited to copies made for personal and private use, with copies made for commercial gain being excluded? Why?
	<i>[Insert response here]</i>

## Other comments

*[Insert response here]*

### Exceptions and Limitations: Contracting out of exceptions

58	What problems (or benefits) are there in allowing copyright owners to limit or modify a person's ability to use the existing exceptions through contract? What changes (if any) should be considered?
	<i>[Insert response here]</i>

### Exceptions and Limitations: Internet service provider liability

59	What are problems (or benefits) with the ISP definition? What changes, if any should be considered?
	<i>[Insert response here]</i>
60	Are there any problems (or benefit) with the absence of an explicit exception for linking to copyright material and not having a safe harbour for providers of search tools (eg search engines)? What changes (if any) should be considered?

	<i>[Insert response here]</i>
61	Do the safe harbour provisions in the Copyright Act affect the commercial relationship between online platforms and copyright owners? Please be specific about who is, and how they are, affected.
	<i>[Insert response here]</i>
62	What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?
	<i>[Insert response here]</i>

## Transactions

63	Is there a sufficient number and variety of CMOs in New Zealand? If not, which type copyright works do you think would benefit from the formation of CMOs in New Zealand?
	<i>[Insert response here]</i>
64	If you are a member of a CMO, have you experienced problems with the way they operate in New Zealand? Please give examples of any problems experienced.
	<i>[Insert response here]</i>
65	If you are a user of copyright works, have you experienced problems trying to obtain a licence from a CMO? Please give examples of any problems experienced.
	<i>[Insert response here]</i>
66	What are the problems (or advantages) with the way the Copyright Tribunal operates? Why do you think so few applications are being made to the Copyright Tribunal? What changes (if any) to the way the Copyright Tribunal regime should be considered?
	Create a mechanism to allow for disputes over copyright to be quickly and efficiently resolved at minimal cost to the parties involved, similar to the Disputes Tribunal. Currently the cost of enforcement for copyright infringements means that many infringers know that enforcement is unlikely to be taken.
67	Which CMOs offer an alternative dispute resolution service? How frequently are they used? What are the benefits (or disadvantages) with these services when compared to the Copyright Tribunal?
	<i>[Insert response here]</i>
68	Has a social media platform or other communication tool that you have used to upload, modify or create content undermined your ability to monetise that content? Please provide details.
	<i>[Insert response here]</i>

69	What are the advantages of social media platforms or other communication tools to disseminate and monetise their works? What are the disadvantages? What changes to the Copyright Act (if any) should be considered?
	<i>[Insert response here]</i>
70	Do the transactions provisions of the Copyright Act support the development of new technologies like blockchain technology and other technologies that could provide new ways to disseminate and monetise copyright works? If not, in what way do the provisions hinder the development and use of new technologies?
	<i>[Insert response here]</i>
71	Have you ever been impeded using, preserving or making available copies of old works because you could not identify or contact the copyright? Please provide as much detail as you can about what the problem was and its impact.
	<i>[Insert response here]</i>
72	How do you or your organisation deal with orphan works (general approaches, specific policies etc.)? And can you describe the time and resources you routinely spend on identifying and contacting the copyright owners of orphan works?
	<i>[Insert response here]</i>
73	Has a copyright owner of an orphan work ever come forward to claim copyright after it had been used without authorisation? If so, what was the outcome?
	<i>[Insert response here]</i>
74	What were the problems or benefits of the system of using an overseas regime for orphan works?
	<i>[Insert response here]</i>
75	What problems do you or your organisation face when using open data released under an attribution only Creative Commons Licences? What changes to the Copyright Act should be considered?
	<i>[Insert response here]</i>

## Other comments

*[Insert response here]*

## Enforcement of Copyright

76	How difficult is it for copyright owners to establish before the courts that copyright exists in a work and they are the copyright owners? What changes (if any) should be considered to help copyright owners take legal action to enforce their copyright?
	<i>[Insert response here]</i>
77	What are the problems (or advantages) with reserving legal action to copyright owners and their exclusive licensees? What changes (if any) should be considered?
	<i>[Insert response here]</i>
78	Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?
	<i>[Insert response here]</i>
79	Does the cost of enforcement have an impact on copyright owners' enforcement decisions? Please be specific about how decisions are affected and the impact of those decisions. What changes (if any) should be considered?
	Yes the cost of enforcement means that many infringements of photographic copyrights go unchallenged. The cost and effort required to pursue the infringer is outweighs the remedy/fees that may be gained. While individual occurrences may be of a relatively small value, collectively the impact of multiple infringements on a photographers business can be significant. As mentioned in the response to question 66, a mechanism to allow for disputes over copyright to be quickly and efficiently resolved at minimal cost to the parties involved, similar to the Disputes Tribunal would be very beneficial to copyright owners.
80	Are groundless threats of legal action for infringing copyright being made in New Zealand by copyright owners? If so, how wide spread do you think the practice is and what impact is the practice having on recipients of such threats?
	<i>[Insert response here]</i>
81	Is the requirement to pay the \$5,000 bond to Customs deterring right holders from using the border protection measures to prevent the importation of infringing works? Are there any issues with the border protection measures that should be addressed? Please describe these issues and their impact.
	<i>[Insert response here]</i>
82	Are peer-to-peer file sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?
	<i>[Insert response here]</i>
83	Why do you think the infringing file sharing regime is not being used to address copyright infringements that occur over peer-to-peer file sharing technologies?
	<i>[Insert response here]</i>
84	What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing file sharing regime (if any) should be considered?
	<i>[Insert response here]</i>

85	What are the problems (or advantages) with the existing measures copyright owners have to address online infringements? What changes (if any) should be considered?
	<i>[Insert response here]</i>
86	Should ISPs be required to assist copyright owners enforce their rights? Why / why not?
	<i>[Insert response here]</i>
87	Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?
	<i>[Insert response here]</i>
88	Are there any problems with the types of criminal offences or the size of the penalties under the Copyright Act? What changes (if any) should be considered?
	<i>[Insert response here]</i>

## Other comments

*[Insert response here]*

## Other issues: Relationship between copyright and registered design protection

89	Do you think there are any problems with (or benefits from) having an overlap between copyright and industrial design protection. What changes (if any) should be considered?
	<i>[Insert response here]</i>
90	Have you experienced any problems when seeking protection for an industrial design, especially overseas?
	<i>[Insert response here]</i>
91	We are interested in further information on the use of digital 3-D printer files to distribute industrial designs. For those that produce such files, how do you protect your designs? Have you faced any issues with the current provisions of the Copyright Act?
	<i>[Insert response here]</i>
92	Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?
	<i>[Insert response here]</i>

## Other comments

*[Insert response here]*

### Other issues: Copyright and the Wai 262 inquiry

93	Have we accurately characterised the Waitangi Tribunal’s analysis of the problems with the current protections provided for taonga works and mātauranga Māori? If not, please explain the inaccuracies.
	<i>[Insert response here]</i>
94	Do you agree with the Waitangi Tribunal’s use of the concepts ‘taonga works’ and ‘taonga-derived works’? If not, why not?
	<i>[Insert response here]</i>
95	The Waitangi Tribunal did not recommend any changes to the copyright regime, and instead recommended a new legal regime for taonga works and mātauranga Māori. Are there ways in which the copyright regime might conflict with any new protection of taonga works and mātauranga Māori?
	<i>[Insert response here]</i>
96	Do you agree with our proposed process to launch a new work stream on taonga works alongside the Copyright Act review? Are there any other Treaty of Waitangi considerations we should be aware of in the Copyright Act review?
	<i>[Insert response here]</i>
97	How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?
	<i>[Insert response here]</i>

## Other comments

### Background to the NZIPP

NZIPP was founded in 1938. The NZIPP is a not for profit Incorporated Society which serves to raise the standard and profile of Professional Photography and to represent the interests of professional photographers across New Zealand on relevant industry issues such as copyright, legal and business matters, and technical developments in a rapidly changing market. The NZIPP currently has over 340 members across New Zealand which include professional photographers, trade suppliers and students at affiliated tertiary institutions. NZIPP is funded by membership subscriptions and revenue raised from numerous regional meetings, events including the annual Exposure Pro conference, seminars and exhibitions nationwide each year.

The NZIPP strives to maintain and promote the highest professional standards in the industry through education, fellowship and support. Members must abide by a Code of Ethics. Members may be granted "NZIPP Accredited Professional Photographer" status through demonstrating a peer reviewed attainable, minimum standard of quality technically, creatively and business practices.

Each year the NZIPP runs a professional photography awards programme, the Iris Awards, which has been in existence for over 40 years. In addition to the opportunity to win major titles, including that of New Zealand Professional Photographer of the Year, the awards also enable members, through a merit point system, to achieve Associate, Master and Grand Master status of the NZIPP.

The NZIPP has established close links with the Advertising and Illustrative Photographers Association (AIPA) and the Australian Institute of Professional Photography (AIPP). The NZIPP is also a member of We Create.

The typical NZIPP member is a self-employed owner/operator with no full time employees and often works based from home with images created on location at clients premises/homes or public spaces. Surveys and anecdotal evidence over the years suggests that the typical member entered the industry to further their artistic desires and creativity, the business side often comes second and they typically make a modest income.

There has always been a significant requirement on capital to set up, maintain and operate a photography business. Since the millennium, the shift to digital photography has created an increasingly capital-intensive business environment. Where photographers once had equipment which would last for decades, they must now frequently re-equip with new digital camera and computer equipment to keep pace with rapid technological change as much of today's equipment has an inherently shorter lifecycle before obsolescence.

A photographers stock in trade is their creative skills. The ability to leverage the resulting intellectual property and copyrights to offset the high costs involved in running a successful professional photography business is paramount.

### **Background on the Types of Photographers:**

Photographers working in NZ generally fall into one of the following categories:

*Media* - Generally permanent employees of media organisations i.e. newspapers, and to a lesser extent magazines. The copyright in images created by employee media photographers is owned by their employer pursuant to section 21(2) of the Copyright Act 1994.

*Professional* - Generally self-employed owner/operators (i.e. in business as sole traders or limited liability companies) and often referred to as freelancers. Professional photographers perform a wide variety of work ranging from commercial assignments (e.g. advertising, corporate communications, and editorial) to private & domestic assignments (e.g. weddings, portraiture, and events such as graduations, teams and school balls). The majority work in response to a client brief and therefore are subject to section 21(3) of the Copyright Act 1994.



*Fine Art* - These photographers usually produce self-commissioned works and therefore own the copyright of the works produced as in section 21(1).

*Specialists* - Often involved in scientific areas such as medical photography and forensics, these are generally permanent employees of an organisation. The copyright in images created by these employees is owned by their employer pursuant to section 21(2) of the Copyright Act 1994.

This submission is made only in relation to professional photographers, who, as freelancers, lose operation of section 21(3) to those commissioning them (opportunity to contract out notwithstanding). The NZIPP accepts that although photographers working in the media or as specialists do not enjoy the benefit of copyright retention by default, they do however enjoy the security of permanent/regular work and income, and also have all equipment provided and risk of trade covered by their employers.

### **Background on Client Types:**

The clients of professional photographers generally fall into the following categories:

*Commercial* - Commercial photography is usually commissioned by advertising/design agencies or by businesses directly. The images created are typically for the advertising and promotion of goods and services, or for corporate communications such as annual reports, public relations etc. Many of these client types will commission photography regularly, while others may seldom do so.

Formulas used by professional photographers for pricing commercial assignments vary, but fees generally include the following:

- a) Photography/creative fee incorporating their base rate (based on covering overheads)
- b) Expenses + margin - for image capture & file processing, equipment, insurance, travel and other direct costs
- c) some photographers may include a separate license fee based on the intended usage of the images

*Editorial* - Editorial photography is usually commissioned by magazines, newspapers and book publishers. Editorial clients are often large multi-national organisations with multiple titles in their publication stable, for example:

- a) Bauer Media Group: titles include Food; Fashion Quarterly; Metro; Next; North & South; NZ Listener Woman's Day
- b) Stuff: titles include Dominion Post; NZ Home & Garden; Sunday Star–Times; The Press

Editorial clients regularly use professional photographers and typically impose standard form contracts which suit their business model. In terms of pricing, the fees for editorial work are generally dictated by the client and are based on an estimate of time for the job (e.g. quarter day, half day or full day). Editorial fees tend to be lower than those typically charged for commercial assignments. With the consolidation of the numerous current titles published into ownership by only a few dominant publishers, and the correspondingly significant bargaining strength of the few publishers in the market, there is little or no opportunity to negotiate reassignment of copyright or increased fees in return for giving away copyright.

Private & domestic - Private and domestic photography is generally that of wedding and portraiture. This type of client, will usually engage the services of a professional, on an infrequent basis, to obtain a higher level of skill and creativity than they could achieve themselves in the same scenario. Formulas for pricing this kind of work will usually be based on the initial photography shoot (i.e. on the wedding day or a portrait sitting) plus photo sales (e.g. prints of varying sizes, albums and framed wall prints or digital files).

Another type of private and domestic photography is where the professional photographer is engaged to photograph an event e.g. a graduation, sports team or school ball by the event organiser, where purchases are made by private individuals (e.g. a graduate or team member). Often do payment is made to the photographer to create the images and the photographer in this scenario will generally rely on the sale of prints or digital files to recover their costs of providing the coverage.

### Summary

Fundamental to the NZIPP submission is that copyright should be first and foremost about protection of creators rights. The creator should be the able to choose who gets to use their intellectual property. The basis of copyright is to encourage those who originate creative works to continue to do so by enabling them to earn a living.

The current Commissioning Rule in section 21(3) of the Copyright Act 1994 creates an imbalance of negotiating power that adversely affects New Zealand creators, by placing them in a considerably weaker position than those working in other jurisdictions and is diametrically opposed to that laws of our main trading partners. The Commissioning Rule in section 21(3) of the Copyright Act 1994 should be repealed.