



## Photography Law in New Zealand – The Clendons Guide to NZ Law Relating to Photography

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## 1. What Is Unique About Photography At Law?

There are many unique aspects to photography at law.

Photographs can:

- Invade a person's privacy.
- Defame a person.
- Infringe on a trademark or registered design.
- Be found, in some jurisdictions, to be an actionable breach of character merchandising rights.
- Not be authorised because the release is not clear or is limited to a specific use.
- Result in awards of punitive damages if copyright is infringed and the infringement causes the owner of the copyright emotional distress.

As a photograph reproduces a visual art work (e.g. a painting or a drawing), if there is copyright in that work, the photograph can infringe the copyright in the original work.

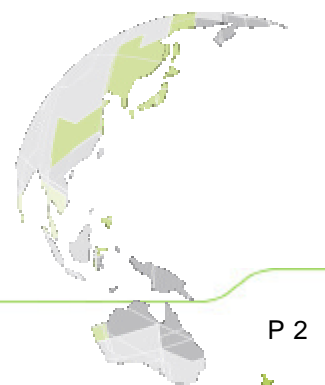
Some types of professional photography are supplied to consumers (e.g. portrait photography) meaning that the Consumer Guarantees Act 1993 applies. In that situation it is illegal for a photographer to try to contract out of the statutory warranties. In particular this involves dealing with the statutory warranty of fitness of the service to the consumer.

Photographers have, under statute, both legal and moral rights (right to attribution, right to object to derogatory treatment of works etc) and in some cases a client will also have statutory moral rights to insist upon privacy and non-publication of other images (irrespective of copyright ownership).

## 2. "Copyright" In A Photograph – What Is It?

Copyright is the right to copy.

That right exists in every photograph from when it is taken and lasts for 50 years from the end of the calendar year in which the photographer dies. (Section 22 (1) of the Copyright Act, 1994)



Someone, although not necessarily the photographer, owns copyright in every photograph.

That right gives the copyright owner the **exclusive** rights to:

- Make copies for themselves **and**;
- Control the copying of that photograph by others (by licensing) **and**;
- Issue copies to the public **and**;
- Show the work in public **and**;
- Broadcast the photograph (that is show it on TV or display it on computer terminals over computer networks like the Internet and similar broadcasts) **and**;
- Adapt or change the photograph **and**;
- Allow others to use your **copy rights**.

(see Section 16 (1) of the Copyright Act, 1994).

If the work is of a different type to a photograph, that is another type of artistic work or a literary work there are other rights that may be relevant.

Copyright is all about property rights. This right to copy can be sold or part of the rights licensed to others for them to exploit the photograph. Copyright itself can be jointly owned, in equal or unequal shares.

For example a photograph may be so good that a postcard manufacturer wants to use it. That photograph may also be intended for a book of photographs. In this case the copyright owner would usually license the two organisations that wanted to use the copyright, the book publisher for the use in the book and the postcard manufacturer on the postcards. The copyright owner might be paid a flat fee or royalties (or a combination) for each use.

### 3. Who Owns Copyright?

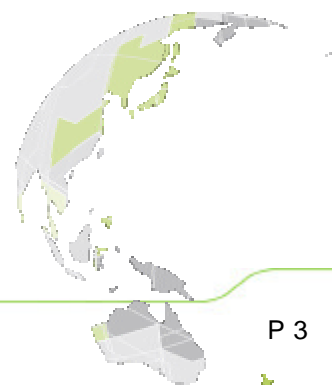
The owner of copyright in photograph is either:

- THE PHOTOGRAPHER – if the photographer is NOT commissioned or takes the photograph as an employee; OR.
- THE EMPLOYER – if the photograph is taken by an employee in the course of their employment, OR
- THE CUSTOMER – if the photographer accepts a commission to produce a photograph.

Commissioning a photographer occurs when a person commissions (engages) a photographer to take a photograph(s) and at the time of the commission agrees to pay or pays the photographer for that work.

If the photographer is not commissioned then the person that took the photograph owns the copyright.

- It does not matter who owns the film.



- It does not matter who owns the prints.
- It does not matter who owns the camera.

The only issue is who took the photograph and whether – at the time the image was taken- that photographer was commissioned. See paragraph 7.3 below for more discussion on the “commissioning rule”.

#### 4. What Are The Owners Rights In Prints?

The owner does have rights over prints or copies made of the film or transparencies. The owner's rights may vary but generally include:

- The right to prevent copies of the prints.
- The right to seek destruction of the prints if any print is being used for illegal copying.
- The right to seek orders from the Courts to force the illegal copier to pay damages for losses sustained by illegal copying.
- The right to lay a complaint with the Police and seek prosecution for those who copy as part of a business (Section 131 of the Copyright Act, 1994). The fines can be up to \$10,000 for each copy up to \$150,000 and up to five years imprisonment.

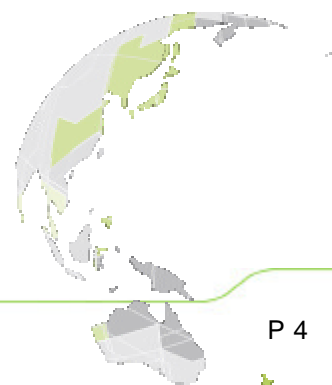
#### 5. Its Just A Photo!

Making copies of photograph when the person making the copy does not own the right to copy that photograph can expose that person to:

- Civil court proceedings; and
- If those copies are made for sale, criminal proceedings. Parliament in 1994 intended, by setting new high fines (up to \$ 150,000) and prison (up to five years) as a penalty, to clearly indicate that profiting by stealing work the work of others should be treated seriously by the Police and the Courts.

Apart from the penalties for stealing another person's work there are further reasons for not illegally copying photographs:

- By copying without permission the person copying may be breaching the rights of persons other than the photographer's rights. For example copying posters of famous people will be illegal copying of the photograph concerned and may also give rise to a claim from the person in the photograph who may have control over reproduction of their own image. These rights to control your own image are called character-merchandising rights.
- Copying a photographer's work takes away income from the owner. The owner may not be a helpless self-employed photographer, but instead may be a sizeable media or stock photography company. These owners have the resources to bring formal enforcement proceedings, and will do so when necessary.



## 6. Property Rights & the Copyright Act 1994

The Copyright Act 1994 aims to protect the rights of the creators of original expressions of ideas by giving the creator a property right in that original work.

This property right can be compared to the ownership of a vehicle.

The owner of a car may use the car as he or she pleases and may allow others to use or hire the car. The owner of a car also has the right to take action against anyone who steals the car or vandalises it. In a similar way the owner of copyright in a work decides who may copy, publish, sell, perform, play, show, broadcast that work and can protect the work from being used in a derogatory manner.

This property right can, in some cases, form a very valuable asset for the copyright owner. For example the value of the copyright in a novel by Stephen King or a song by the Beatles can be worth millions of dollars. The copyright in collections of works by local photographers such as Anne Geddes or Andris Apse will similarly be valuable. The photographer can transfer these valuable rights by will or by assignment to a trust.

### 6.1. Scope Of The Works Protected

The law of copyright in New Zealand is contained entirely within the Copyright Act, 1994, which became law on 1 January 1995. The change in the law was brought about by New Zealand's international trade commitments under the GATT agreement.

Original works are granted property rights and protected by the Act. Original works are divided into various descriptions in section 14. The description "artistic works" included photographs.

The definition of photograph under the Act is:

*"...a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced; but does not include a film or part of a film"*

The term 'film' in this context is referring to the recording of a 'moving image'. Films are protected separately in the Act.

#### 6.1.1. Authorship

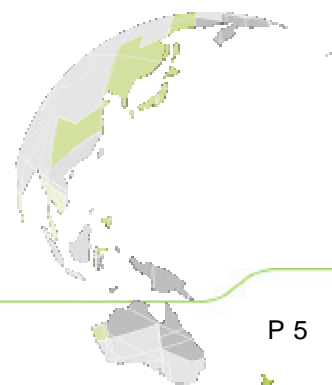
The author must be a citizen of, resident of or incorporated in New Zealand or a foreign country that is a party to a convention or other international agreement with New Zealand. Copyright of foreign owners will in other circumstances be acknowledged, although the protection for the foreign owner will only be as good as the foreign country offers New Zealanders.

### 6.2. Ownership

Under Section 21 of the Act the ownership of the copyright usually vests, upon creation of the work, in the author. However there are two situations where this is not the case:

1. Where certain copyright works are created by an employee in the course of his or her employment; or
2. Where certain copyright works are created pursuant to a commission.

Both of these cases include photographs and unless there is an agreement to the contrary, the ownership vests in the employer or commissioner.



A “commissioning” requires two elements:

- (i) The engagement/ retention/ briefing of the photographer by a client; and
- (ii) Payment, or an agreement to pay, for the photographic works.

Section 21(3)(b) then provides that, where a work is produced under such a commission, then copyright vests in the commissioning client.

Although not expressly stated, the language of section 21 strongly indicates that the commissioning arrangement (both (i) and (ii)) must exist before the image is created. Copyright will vest immediately upon creation, and in the absence of a pre-existing commissioning arrangement, copyright will only vest in the client if a formal assignment in writing is subsequently completed, which must be signed by the owner or their authorised representative (section 114).

### 6.3. Term Of Protection

The term of protection for photographs expires 50 years after the end of the calendar year in which the author dies.

## 7. Infringement Under The Copyright Act 1994

### 7.1. Infringement Of Copyright

Under Section 16 of the Act the owner of the work is granted the exclusive right to do certain acts with the copyright work in New Zealand. The restricted acts relevant to photographs are:

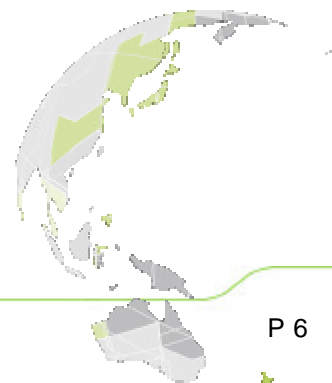
- To copy the work.
- To issue copies of the work to the public, whether by sale or otherwise.
- To show the work in public
- To broadcast the work or include the work in a cable programme service.
- To make an adaptation of the work.
- To authorise another person to do any of the above acts.

The restricted acts include situations where the copying is of any substantial part of the work as well as the whole work.

### 7.2 What is “Copying”?

The Copyright Act 1994 defines “copying” broadly, as including:

- Reproducing or recording work in any material form.
- The making of a copy in 3 dimensions of a two-dimensional work and the making of a copy in 2 dimensions of a three-dimensional work.



- The making of a photograph of the whole or any substantial part of any image forming part of the film, broadcast, or cable programme.

Furthermore, the Act provides guidelines as to what constitutes an infringement of copyright. Copyright in a work is infringed by a person who, other than pursuant to a copyright licence, does "any restricted act". A "restricted act" relates to either directly or indirectly to the copying of work, as a whole or any substantial part of it.

The basic elements constituting infringement of copyright, by copying works are:

1. A sufficient degree of objective similarity between the two works; and
2. Some causal connection between the work infringed and the infringer's work (so that one could say that the latter was derived -consciously or subconsciously- from the work of the original author).

These factors need to be considered in conjunction with the Copyright Act 1994 and fairly balanced, based on the need to protect the rights of the original artist against allowing creative development.

The extent of "copying" required to constitute infringement has been discussed in several leading Court decisions. The main established principle is that it is the *quality* of what is adopted from the original work, not the *quantity* that dictates whether work has been copied. This will be a question of fact and degree examined in each case. In theory, 8 bars from a song, or one page from a book, can constitute infringement if these form a "substantial" part of the work.

For a leading case concerning infringement of copyright in a photograph (which was reported by a painter), see *Bauman v Fussell* [1978] RPC.485

### 7.3 Owners Of Copying Devices & Infringement Of Copyright

Under Section 29 a person who does any restricted act other than pursuant to a copyright license infringes copyright.

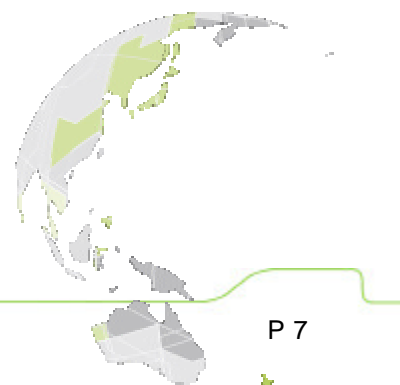
Section 37 says:

*"Copyright in a work is infringed by a person who, other than pursuant to a copyright license"*

- (a) *Makes; or*
- (b) *Imports into New Zealand; or*
- (c) *Possesses in the course of business; or*
- (d) *In the course of business or otherwise, sells or lets for hire; or*
- (e) *In the course of business, offers or exposes for sale or hire-an object specifically designed or adapted for making copies of that work, knowing or having reason to believe that the object is to be used to make such infringing copies.*

Where a reprographic retailer knows (or should have reason to believe) that the person obtaining the copy or copies is not the owner of the copyright in the work, then the retailer may also have committed an infringement of the copyright.

Due to the uncertain nature of the initial copyright ownership, not to mention the possible subsequent sale or assignment of those rights, it is very difficult for the



reprographic retailer to know who owns the copyright and who is therefore entitled to copy or authorise the copying of the photograph.

The key issue is whether, in the circumstances, the reprographic retailer is put on notice of a likely unlawful copying. The words of the Section 37 include "...having reason to believe..." that an unlawful copying is occurring. The reprographic retailer can therefore be expected to inquire as to the ownership of the copyright if they are put on notice that the copyright does not belong to their customer. Professional photographers should therefore put a copyright notice on their work so the reprographic retailer is put on notice. Appropriate metadata details should be attached to digital works, and other Digital Rights Management techniques can be adopted (discussed further below).

Other circumstances that should put the reprographic retailer on notice are:

- Reproductions of photographs of well known events/personalities/object that are unlikely to be have been photographed by an amateur.
- Copies of photographs that feature subjects that the reprographic retailer should know their customer is not likely to have created e.g. photographs of Princess Diana.
- Requests for volume prints from other than transparencies. The most common example here is studio work that would normally have been submitted by transparencies.

If the reprographic retailer is still in any doubt after those inquiries then the prudent retailer will ask for evidence, such as the contract of engagement or the deed of assignment. If the copyright is alleged to have been transferred, the retailer should ensure that the assignment is in writing and signed by the photographer, as this is what is required at law to effect a valid assignment. If the retailer does not get this information it should decline the work.

## 8. Moral Rights

The 1994 Act introduced a new set of rights, moral rights, which are additional to the copyright rights.

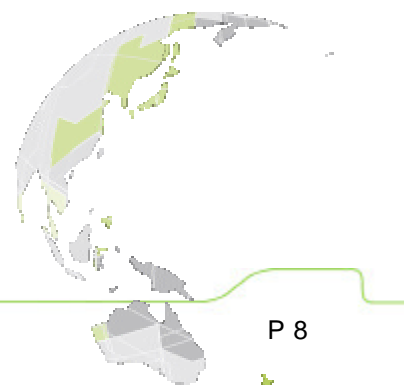
These rights are called moral rights and are divided into three areas which affect the copying of photographs:

- (1) The right to be identified as the author;
- (2) The right to object to derogatory treatment of the work; and
- (3) The right not to have work falsely attributed to them; and
- (4) The right to privacy of certain photographs.

The first two rights are designed to give some residual protection to the creators of works if they have sold (by assignment) the copyright in the work or never have had the copyright because they were commissioned so never had the copyright.

Moral rights on photographs, if a photographer asserts her/his rights under this section, ensure that the photographer is entitled to be named as the photographer.

To assert moral rights, a photographer must ensure that all people dealing with the image are put on notice that the moral rights are asserted. This can be done simply by the following statement:





“© (M) All copyright reserved and all moral rights asserted - <First name. <Last name> <month> <year>”

If copying includes a photo with a copyright/moral rights notice, apart from a release from the owner of the copyright to enable the copying to occur, the reprographic retailer or magazine publisher or poster maker is obliged to ensure that any reproduction attributes the photograph to the photographer.

## 9. Digital Rights

Digital photography has grown rapidly in recent years. The digital age enables swift global transmission of high-quality images, and also enables copyright piracy/breaches to occur efficiently. Although the same laws apply to digital works (compared with traditional film photography), specific laws are emerging in response to the increasing use - and misuse - of digital copyright works.

For example, Section 226 of the Copyright Act 1994 is directed at devices or means that circumvent technological protection measures. The section provides copyright owners and persons who issue electronic “copy-protected” works to the public with rights against those who make, sell, advertise or publish information concerning these circumvention devices or means.

Key issues concerning digital photographic works include:

1. Storage of the works and archive retrieval – does the photographer assume an obligation to maintain historical electronic files?
2. Reproduction – what is "permitted" and "infringing", compared to automatic backups and servers with mirrored hard drives for high speed disaster recovery?
3. "Delivery" – does the Electronic Transactions Act 2002 apply? Is there some other method for achieving electronic delivery?
4. With 'orphaned works' legislation proposed in the US and mooted elsewhere, what Metadata should accompany the image? And how should the image be 'tagged' with that data?
5. What licensing process should the photographer adopt, and how does this interrelate with the practical viewing, ordering and delivery process in place?
6. In addition to 4 and 5, what digital rights management systems should be adopted to protect the images supplied/made available? This can be particularly important if the photographer is giving the client the right to sub-license the image(s) in question.

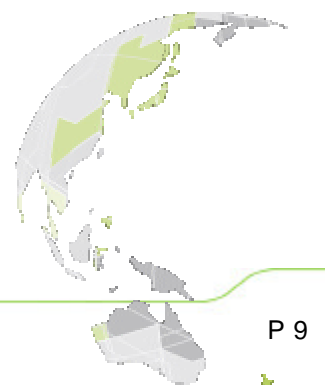
The AIPA Standard Photographic Terms v2006 (Clause 5) has specific provisions directed at these issues.

## 10. Rights of People (Models etc) in Photos

People featured in a photograph can also involve consideration of rights at law.

These can include:

- Privacy rights (under the Privacy Act and/or at law).
- Character merchandising rights; and/or
- The right to be represented in the photograph in a specific manner; and/or



- Rights arising from the conditions, and the circumstances, under which the photograph was taken.

### 10.1. Privacy Rights of People (models etc) In Photographs

Privacy rights under the Privacy Act can be a complex issue.

Photographs have been recognised as “personal information” under the Privacy Act (Case Note 60017 [2006] NZPrivCmr 1 (March 2006))

If the photograph is made by a collecting ‘agency’ (which is any party that collects personal information about a person), then a photograph made as part of that information collection process will be covered by the Privacy Act.

That means that the ‘information’ (the photograph) cannot be disclosed to anyone outside the collecting ‘agency’ or used for any other purpose than the purpose disclosed at the time of collection.

An example:

*Bill comes to a modelling agency to be considered as a model. Bill has his photograph taken by the agency for the agency to consider whether the agency will have him on their books. The agency then uses the photograph for other purposes. – say for instance that they sent it to a client as an example of an ugly male that could be used in a campaign that required ugly males.. Even though Bill wanted modelling work he was unhappy about the agency’s use of the photograph. Bill does not consider himself ugly. The modelling agency did not have Bill’s permission to use the photograph in that way and as a collecting ‘agency’ would have breached Bill’s rights under the Privacy Act. The modelling agency would probably also be found to have engaged in misleading or deceptive conduct under Section 9 of the Fair Trading Act 1986.*

It is the role of the Privacy Commissioner to receive written complaints from the public outlining potential breaches of privacy. The Privacy Act 1993 enables the Commissioner to either disregard or investigate the complaint and assess whether the grounds amount to a breach of privacy.

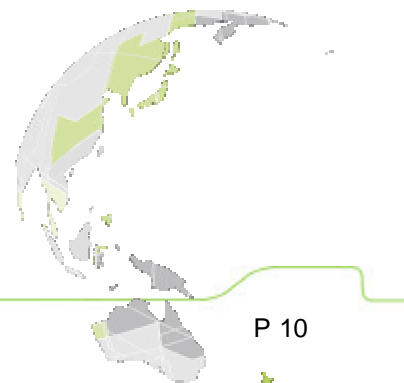
An action for breach of privacy may be brought by the Commissioner where a breach has occurred and that breach has caused;

- (a) Loss, detriment, damage or injury to the complainant; or
- (b) The rights, benefits, privileges, obligations of the complainant to be adversely affected, or may do so; or
- (c) Significant humiliation, loss of dignity or injury to the complainant’s feelings, or may do so.

An example,

*A complaint was made in March 2006 after a man was photographed, by a professional photographer, in a shopping mall and later saw two photographs of himself in a business directory, promoting the mall. The Privacy commissioner treated the photographs as personal information. However, the complainant fell short of proving a breach of privacy, as he was unable to show he had suffered any adverse effects as a result of the information being published.*

An alternate route to asserting privacy rights is bringing a claim in tort. In the 2004 case of *Hosking v Runting*, the New Zealand Court of Appeal confirmed the existence of the tort of breach of privacy. For a claim for interference with privacy to be successfully brought, it must be shown that:



- (i) In the particular circumstances, there is a reasonable expectation of privacy; and
- (ii) Those circumstances are publicised in a manner that would be considered highly offensive to an objectively reasonable person.

## 10.2. Merchandising Rights of People (Models etc) in Photographs

Character merchandising is not an area that is yet established at law in New Zealand.

If however, a dispute arises concerning the use of a model's image, the photographer needs the protection of a well-drafted model release.

The model's engagement will be covered by a contract, whether written or oral. Unless covered by a comprehensive written contract, the Courts (if necessary) will imply customary or usual terms into the modelling contract. As the limitation of a model's appearance in a campaign is general practice in the industry, professional photographers that do not use model releases are running the risk that restrictions and obligations might be imposed by Court into the modelling contract.

A Court, if the issue is raised properly, may for example find that the contract between the photographer and model includes implied terms such as strict limitations on use of the photograph. If this happens the photographer is at risk of being sued by both the model and the photographer's client if the client is not aware of the restriction and then cannot use the image.

It is therefore good practise to insist that:

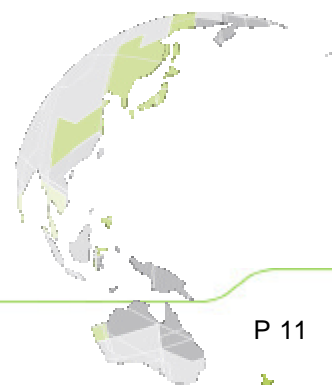
- (i) All models sign a model release; and
- (ii) The release be appropriately written in order to enable the current (and any foreseeable future) commercial exploitation of the image by the photographer.

The use of model releases is only the starting point. If the model or subject has a public persona the photographer will need to consider the possibility of character merchandising complications. Again a good general rule is to ensure that when dealing with a public persona the primary and any intended collateral uses of the image are very clearly defined in a contract.

A model release is required in any situation where a photographer intends to sell images for advertising or commercial exploitation. By obtaining a release a photographer is able to increase sales potential by securing rights to sell/ exploit the image at the outset.

The contents of a release may vary depending on the circumstances. However, a model release should contain the following:

- (i) The names of both contracting parties; and
- (ii) Details of the sitting (date, time, hours worked etc); and
- (iii) Total hours and total fee; and
- (iv) The photographers entitlement to commercial exploitation of the image (and any specific restrictions on the same); and
- (v) If the model is under the age of 18 years, parental consent is required; and



- (vi) The period of time the licence extends until; and
- (vii) The signatures of the parties, stating that they have read and understood the terms of the release and consent to the commercial exploitation of the image.

### 10.3. Contractual Rights of People (Models etc) in Photographs

Among most common problems faced by professional photographers are problems arising from cropping of images, and from representation made to subjects.

**Cropping** instructions often are forgotten or become detached from transparencies. Damages for failure to ensure that cropping occurs can be very large due the emotional distress on the subject if for example the crop was designed to prevent identification of the subject when photographed in the nude. The failure to crop will give rise to rights of action in contract against the photographer by the subject and possibly the modelling agency in contract and tort. The subject may also have rights against the other parties in the chain, the advertising agency, its client, publisher and others such as billboard companies.

**Representation** problems arise if the photographer or others in the chain have made representations to the subjects that are then not observed. Typical representations that give rise to problems are representations that the subject will have the right to reject images that do meet her/his approval.

Model releases and agreements and good paperwork on transmission of the transparencies up the chain are the best form of defence and should be adopted as best practice.

### 10.4. Legitimate Public Concern

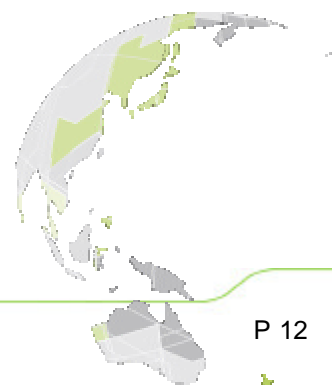
The Courts have recognised a possible defence for breach of privacy (both statute and tort based). If publication is justified by a legitimate public concern for the information, the photographer will be justified in releasing the images to the public. However, the court clearly distinguishes between “interest or curiosity to the public” and information or images of “legitimate public concern”.

## 11. Rights In Objects Or Trademarks In Photographs

The law on the rights relating to reproduction of images of other artistic works or trademarks in a photograph is complex and not settled in New Zealand.

General principles are:

- Photographs of other artistic works (e.g. paintings, other photographs, drawings etc) will usually be an infringement of the original copyright. Some copyright owners (e.g. the Audubon Society, modern art galleries) employ watcher services and special reproduction techniques to protect their works. If in doubt as to use photographers should seek permission from the copyright owner to reproduce even part of such a work.
- Most countries extend special legal protection to national symbols (e.g. in New Zealand in the Flags, Emblems, And Names Protection Act 1981) and increasingly for indigenous peoples in their sacred symbols. In New Zealand we have claims for protection of Maori symbols before the Waitangi Tribunal and there has been considerable concern expressed over use of symbols such as the koru. The only advice that can be given is thinking about what is being photographed. If a national symbol or indigenous peoples sacred symbol is being used it is best to check to see whether the image can be included in the photograph without



breaching some law before making what may turn out to be an expensive mistake.

- A question that often comes up is whether a building or object in a public place or that can be seen from a public place is able to be photographed without a release from the owner or creator of the work (architect or sculptor etc). The answer here is 'yes'. In the case of buildings there is a specific exemption for photographing buildings in the Copyright Act.
- Finally photographs of registered trademarks (even if on a building) will almost certainly create problems if the image is being used for brand surfing. It may be, however, that the existence of a third-party trademark in a photographic image does not breach the rights of the third party, depending on:
  - (i) Whether the trademark was an integral part of the photograph, or was merely peripheral
  - (ii) The relative (qualitative) prominence of the mark in the photograph.
  - (iii) The use of the photograph.
  - (iv) Site access rights.
  - (v) The particular characteristics of the photograph.

## 12. Liability For Infringement

### 12.1. Civil Remedies

The most likely cause of action to be brought under the Act is a civil claim by the copyright owner for damages resulting from the infringement.

The remedies available from the court are the same as for any other property right and include:

- Damages including an accounting of lost profits;
- Exemplary (sometimes called punitive) damages for flagrant breaches – these are not linked to any economic loss but will be awarded for emotional distress or as penalty in the form of a fine;
- Injunctions; and
- Orders to deliver up infringing copies or objects specifically used to make copies.

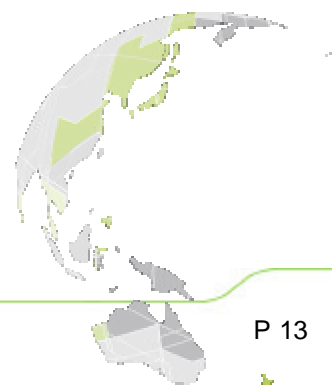
### 12.2. Criminal Remedies

As stated above it is a criminal offence to knowingly commit an infringement of copyright in the course of business or otherwise than for a domestic purpose.

The potential liability under the Act for a fine of up to \$10,000 per infringing copy up to a maximum of \$150,000 or a term of imprisonment for a term of up to 5 years.

If the offender has profited or gained from the infringement then the Court can order that reparations be paid to the victim.

## 13. Avoiding Liability For Copyright Infringement



### 13.1. Only the Owner Of Copyright Work May Make Copies

The simplest situation is where the person or company wishing to make the copy is the owner of the copyright work. In this situation no infringement occurs. However reprographic retailers, magazine publishers etc should still be aware of the possible breach of the Copyright Act 1994 if they know or have reason to believe that the person or company obtaining copies is not the owner.

As noted above then the reprographic retailer magazine publishers etc could be liable as well as the copyist.

### 13.2. Obtaining Authority To Make Copies Of A Copyright Work

The owner may expressly or impliedly permit another person to commit an infringing act.

This is known as a copyright licence. The terms of the licence depend on each particular circumstance. The licence may be limited (e.g. As to time (duration), territory, categories of use, number of reproductions, medium/ mode of reproductions) and may impose specific conditions on use or other legal/ moral rights.

Unlike assignment of copyright, a licence does not need to be in writing to be effective. An unwritten licence is, of course, a recipe for dispute.

There are circumstances where a licence must be in writing and signed by the copyright owner. For example, if the licensee wishes to be the “exclusive licensee” of a copyright work in New Zealand (Sections 123, 124), which enables the licensee to enforce key copyright rights as if they were the owner, then the licence needs to be documented and signed.

## 14. Defences

The Act does allow certain exceptions to the copyright protection.

These exceptions fall into several categories, which are generally justified as desirable reductions of the monopoly rights of the copyright owner because of the public good that they create.

### 14.1. Fair Dealing

The term “fair dealing” is used in several of these exceptions.

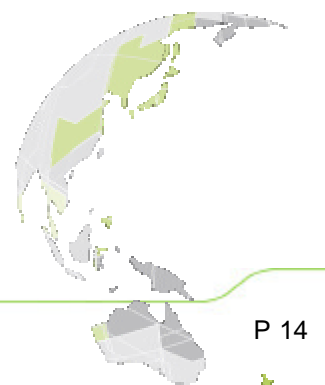
Although it is not possible to precisely define what constitutes fair dealing we can say that it is a matter of degree taking into account the extent and use of the original work. This makes sense when applied to a literary work to the extent that extracts may be used.

The application to photographs is usually less certain because of the completeness of the photograph.

The following is a more detailed discussion of this topic.

### 14.2. Criticism, Review and News Reporting

This is an exception that allows fair dealing with copyright works for the purpose of criticism or review of that particular work or another work (i.e. used for comparison purposes). However the fair dealing must be accompanied by sufficient acknowledgement. The same is true for fair dealing with a work for the purpose of reporting current events HOWEVER this exception **does not** include photographs.



### 14.3. Research or Private Study

The fair dealing with a work for the purpose of research or private study will not infringe copyright.

The Act gives the following guidelines as to what should be considered when assessing what constitutes fair dealing:

- Purpose of copying.
- Nature of work copied.
- Reasonableness of obtaining at ordinary commercial price.
- Effect copying will have on the works marketable value.
- Amount of the work copied.

The copying of photographs without cropping will usually mean that it is the whole work that is copied therefore the person claiming this defence will usually have to rely on the other factors. This defence relates specifically to the individual who is conducting the research or private study therefore the Copyright Act says that only one copy can be made. This is not to be confused with the education exceptions discussed below.

### 14.4. Education Exceptions

If copying is done in preparation for or for use in the course of instruction there are again special exceptions.

In this area there are sufficient complications and grey areas that anyone planning to copy for educational purposes should not rely on their own judgement but rely on an indemnity from the school or other educational institution involved.

This can be done by an official order from the school or other educational institution that specifically acknowledges that the copying is done on its instruction relying on the educational exceptions under the Copyright Act 1994.

## 15. Contracting

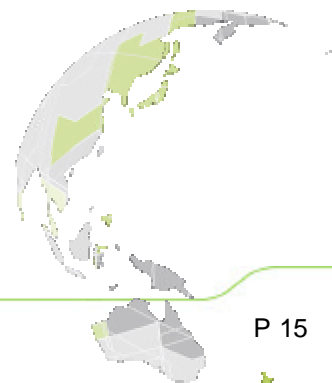
The professional photographer needs to understand that contracting practise with consumers and commercial customers has to be different. One size does NOT fit all. This is because of the provisions of the Consumer Guarantees Act, 1993 and the Privacy Act 1993.

### 15.1. Commercial

The most recently updated forms (including NZIPP Standard Terms and Booking/ Ordering forms 2004; and AIPA Standard Photographic Terms and Conditions, and Licence and Order Confirmation Form, 2006) are available from the NZIPP and AIPA web sites at:

- <http://www.aipa.org.nz/>
- <http://www.nzipp.org.nz/>

Model release and property release forms are also available.



## 15.2. A final word on Forms and Standard Terms

You should check from time to time to see whether changes have been made to any of the forms. Changes will be made to reflect photographer's experiences and ensure that legislative updates and new strategies by publishers etc are covered in the wording.



## 16. Disclaimer

This Background Paper by its nature cannot be comprehensive and cannot be relied on by clients as advice.

This Background Paper is provided to assist clients to identify legal issues on which they should seek legal advice.

Please consult the professional staff of Clendons for advice specific to your situation.

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