

**IMPORTANT – THIS DOCUMENT IS OF CRITICAL IMPORTANCE
TO ALL PROFESSIONAL PHOTOGRAPHERS**

YOUR LIVELIHOOD IS AT STAKE!!

Immediate Action Required

**“COPYRIGHT COMMISSIONING RULE DISCUSSION PAPER
RELEASED BY GOVERNMENT”**

Think the above headline is a little dramatic – it isn't. We've been pushing for this for years! This may be our one and only chance for a long time to see the Commissioning Rule of the 1994 Copyright Act repealed.

The release of this discussion paper is almost purely a result of concerted efforts by *nzipp, AIPA and individual photographers to get this issue that affects our incomes addressed. Associate Minister of the Arts and Commerce Judith Tizard promised it at the Iris Awards Dinner last year and now it's our turn to act.

If you don't know what we're talking about here then you need to read the attached PDF file "Copyright – for Photographers" prepared by *NZIPP's intellectual property lawyers Clendon Feeny for a clear explanation of where things stand.

The Legislation up for discussion:

1994 Copyright Act

The general rule under copyright law is that the author is the first owner of copyright in a work but...

Section 21(3) provides that where a person commissions, and pays for, or agrees to pay for, the creation of a photograph, computer program, painting, drawing, diagram, map, chart, plan, engraving, model, sculpture, film or sound recording, the commissioner, not the creator, is the first owner of copyright in the work produced.

SUMMARY

The discussion document is rather lengthy so here is a summary of what it contains:

1. Photographers **DO NOT** own copyright on any commissioned work unless you specifically contract out of the Act. (Commission simply means to order or request)
2. The overall outcome of the discussion paper seeks to achieve “outcomes that are in the overall public interest”. Aspects of this include economic, legal, social and cultural objectives – some of which may conflict with each other. “A core objective of copyright protection is to advance the interests of the economy as a whole.”
3. **The primary principle of copyright law is that the person who creates a work enjoys a return on their investment by providing first ownership to him or her.**
4. The background and historical existence for the commissioning rule relates to protection of private individuals’ privacy where work was produced for domestic purposes to prevent unauthorised distribution/publication of that work.
5. However, Section 105 (1) of the 1994 Copyright Act protects individual privacy and rights:
 - a. “A person who, for private and domestic purposes, commissions the taking of a photograph or the making of a film has, where copyright exists in the resulting work but is owned by some other person the right –
 - i. Not to have copies of the work issued to the public; and
 - ii. Not to have the work exhibited or shown in public; and
 - iii. Not to have the work broadcast or included in a cable programme.”

Section 105 therefore implies that there is no need for public protection via the commissioning rule – they are already protected!

6. The UK, Australia, Ireland and Canada have all either amended or repealed their commissioning provisions or are in the process of doing so. The USA Copyright act provides that the author of a work will be the copyright owner, except where the work is “made for hire”.
7. The commissioning rule has been previously addressed:
 - a. In 1959 a report discussed and rejected a submission that would have limited commissioners’ ownership of copyright in photographs on the basis that:
 - i. “...a change in the law could cause serious inconvenience to commissioners. E.g. A commissioner who subsequently wished the commissioned photograph to be reproduced would be forced to go to the original photographer, who might refuse to permit any reproduction or it might prove difficult to trace the photographer. The Committee further argued that the agreed price for which professional photographers offer to do certain work is presumable calculated on the basis that they do not acquire copyright in the photograph.”
 - b. In 1994 the Commerce Select Committee considered the issue. It argued that:
 - i. “...granting ownership to the commissioner by default was necessary to protect the members of the public who commissioned works, such as family or wedding photographs. The committee considered that professional photographers would have sufficient knowledge of copyright and therefore more bargaining power, to negotiate with commissioners to have copyright in the commissioned works assigned to them.”

8. The paper notes the following key issues:
- a. Photographers often derive their income from taking photographs for commercial entities and the commissioning rule puts them in a weak position when negotiating. The commissioning rule therefore disadvantages commercial photographers.
 - b. The commissioner has unlimited rights to use of their work for subsequent purposes beyond what the image/s were initially commissioned without any consideration of the value of that subsequent use or the original price paid.
 - c. The rule undervalues the creative talents of photographers and treats photographers differently from other creators.
 - d. It can also be argued that assigning copyright to the commissioner reflects their investment and creative input into that work.
 - e. Change to the commissioning rule may incur high compliance costs for the commissioners and it may be difficult to locate a photographer for later usage.
 - f. Consumers commissioning work for private and domestic purposes have an expectation to be able to subsequently use the commissioned photograph and to be asked for permission when others, including the photographer, may wish to use the photograph. They may have insufficient knowledge to bargain with the photographer i.e. it puts them in a weak negotiating position. It is noted that many photographers use standard documentation (i.e. *nzipp Terms & Conditions) to contract out of this anyway.

The paper briefly discusses other work affected but notes that “[it] is not clear whether individuals or industries have substantial issues with the commissioning rule relating to those types of work”.

Four options are listed as outcomes:

1. No amendments to sections 21(3) and 105 (1) of the Act
2. Repeal section 21(3) of the Act. The Author of any commissioned work is the first owner of copyright. Section 105(1) of the Act continues to apply to photographs and films commissioned for private and domestic purposes, or be extended to certain other types of works (yet to be specified)
i.e. the photographer retains copyright but must ask permission from the commissioner to use the images.

The other two options are variations of # 2 with more limitations.

Part Three of the discussion paper looks in some detail at contracting out of the copyright act particularly in relationship to digital technology and software licensing.

This is of course what photographers must currently do to retain copyright and is what *NZIPP and AIPA have been advocating for many years in relation to our Standard Terms and Conditions and Licensing of images to clients.

A couple of relevant points noted are that:

- “Copyright owners can develop new business models in the digital environment which allow for more targeted or tailored use of materials.”
- New developments “provide benefits to consumers allowing them to chose and pay for only what the wish to use”.

WE NEED QUANTIFIABLE DATA NOW!

The discussion paper specifically lists a number of questions. To answer them **we will need your help.**

You may recall that three years ago our previous Commercial Director, Craig Robertson asked for specific details and figures of how the commissioning rule was affecting your business. He received three responses! That data was supposed to ensure that we had the ammunition to support anecdotal evidence for changing the commissioning rule – we don't have it.

Specific questions from the paper that we need information for are:

1. Are most commissioned photographs commissioned by commercial or private clients?
 - *i.e. we need to know from every photographer how many consumer oriented shoots and how many commercial shoots they undertake each year.*
2. To what extent and in what way is copyright ownership of the photographs subject to contractual agreements?
 - *i.e. how many photographers ARE actually using *nzipp/aipa Terms and Conditions (or their own) and Licensing their work.*
3. What is your view on, and experience of, subsequent use of commercially commissioned photographs?
 - *i.e. how many times do you see your work published for purposes other than those it was originally shot for eg brochure images used later on web.*
4. Does the amount of paid commission cover subsequent use of the commissioned photograph?
 - *i.e. if you shoot images for a magazine does what you charge them cover their later use in a book or if they are on sold via the publisher's photolibrary.*
5. In your view who has more creative input into the taking of a commissioned photograph – the commissioner or the photographer?
 - *i.e. are you hired for your creativity or purely as a shutter pressing technician.*
6. What is your view on and experience of subsequent use of privately commissioned photographs?
 - *what is the result of consumers being let loose with their scanners, photocopiers etc etc*

We need as many specific, and in dollar terms, examples of how this law has affected your business!

WHERE TO NOW?

*NZIPP action will be as follows:

- Document distributed to all members for reading prior to Easter
- Other key creative industry groups contacted for support e.g. Artist's Alliance, DINZ and NZIA.
- Sub-committee formed to prepare our submission
- Data collected to answer specific questions with quantifiable facts
- Publicity generated via appropriate industry media e.g. Photographer's Mail
- Guidelines/templates for submissions sent to members
- Final submission prepared in collaboration with AIPA and advice from Clendon Feeny.

Submissions close 31 May and with Easter and school holidays etc in that period time is short. We will provide you with Guidelines and/or a template for you to prepare an individual submission very shortly. It should be noted that this is only Step One in what could be a long process

BUT

THIS MAY BE OUR ONLY CHANCE – LET'S NOT BLOW IT – ACT NOW

Happy Easter Reading!