

HEAD-SWAPPED PHOTOGRAPHS & COPYRIGHT: A NEW ZEALAND PERSPECTIVE

S. CHE EKARATNE*

ABSTRACT

With increasing advances in photo-manipulation technology, the digital alteration of personal photographs is becoming more frequent. One type of altered photograph is the “head-swapped photograph” featuring one person’s head and a different person’s body as a result of combining portions of two photos. This article examines to what extent New Zealand copyright law can protect against the unauthorised creation and dissemination of head-swapped photographs. While New Zealand copyright law provides many advantages in this regard, it also presents some challenges. The article identifies and evaluates some of these challenges, using an example scenario of a real-life head-swapping incident in New Zealand. The article goes on to posit a suggested approach specifically applicable to the infringement analysis of a head-swapped photograph and applies this approach to several scenarios. While this suggested approach is with reference to New Zealand law, it may also be helpful in other jurisdictions with similar copyright regimes.

I. INTRODUCTION

In the past, options for changing or manipulating a person’s photograph were usually limited to physical alterations, such as drawing a moustache on the photographed face or gluing on a photo of a different person’s head. With emerging technological developments, however, the potential for photo-manipulation is now both more sophisticated (in terms of the degree of alteration possible) and more simple (in terms of the ease of photo-manipulation software).¹ Furthermore, the distribution of altered images can now be faster and broader due to the internet and social media.

* Lecturer, School of Law, University of Canterbury. The author thanks Professors Ursula Cheer, Stephen Todd and the anonymous reviewers for their helpful comments. The author also thanks Wendy Smith for her kind assistance with newspaper sources.

1 For a summary of technological photo-alteration processes, see Raphael Winick “Intellectual Property, Defamation and the Digital Alteration of Visual Images” (1997) 21 Colum-VLA JL & Arts 143 at 150-152.

One type of photo-manipulation involves substituting a photographed individual's head with a different individual's head, or substituting a photographed individual's body with a different body. This type of altered photograph thus features one person's head and a different person's body as a result of combining portions of two photos. Such photographs are referred to in this article as "head-swapped photographs". With modern photo-manipulation technology, such a head-swapped photograph may not be immediately obvious: some viewers may believe it to be an unaltered photo of a single individual. This is especially likely because, unless an alteration is visually obvious, we usually assume that a photograph depicts reality.² Altered photographs can therefore "present different legal and artistic issues than any previously known method of creative expression".³

The creation and distribution of head-swapped photos without consent may result in emotional, reputational, or financial harm to the individual/s in question.⁴ Such unauthorised alteration often occurs in relation to people who are in the public eye, such as entertainers and politicians. For instance, a 1971 magazine published a photograph featuring the actor Cary Grant's head superimposed on the body of a different man.⁵ Similarly, in 2006, a New Zealand newspaper published a photo composed of film director Lee Tamahori's head and a Wellington performer's body.⁶ A more recent head-swap, from 2016, involved the actress Meghan Markle after she was romantically linked to Prince Harry. Photographs of her head were "superimposed on to the body of a porn star [and] were published on an X-rated site".⁷ With respect to such well-known individuals, "the use of digital technology gives ... the ability to create images of celebrities that are far more damaging than any actual photograph".⁸

This kind of unauthorised photo-manipulation is not, however, limited to 'celebrity' individuals: it could happen to anyone. For example, an employee distributed to co-workers photocopied images featuring his supervisor's head-photo superimposed on sexually-explicit female bodies.⁹ Such unconsented alteration is only likely to become more frequent with the increasing ease of image-manipulation through technological advances.

2 See Winick, above n 1, at 148.

3 At 148.

4 See Carissa Byrne Hessick "The Right of Publicity in Digitally Produced Images: How the First Amendment is Being Used to Pick Celebrities' Pockets" (2002) 10 UCLA Ent LR 1 at 4-6; Peter Jones "Manipulating the Law Against Misleading Imagery: Photo-Montage and Appropriation of Well-Known Personality" (1999) 21(1) EIPR 28 at 28.

5 *Grant v Esquire, Inc* 367 F Supp 876 (SDNY 1973).

6 Kristian South "Tamahori Shock New Sex Claims" *Sunday News* (5 February 2006) at 1-3. The head-swap was identified in Liz Smith "That's my dress, Lee" *The Wellingtonian* (16 February 2006) at 3.

7 Felicity Cross "Meghan Markle 'TOPLESS' pics shock - internet wags superimpose her head on porn stars body" (Daily Star, 6 November 2016) <www.dailystar.co.uk>.

8 Hessick, above n 4, at 4.

9 *Bowman v Heller* 420 Mass 517 (1995).

In New Zealand, those who are displeased about dissemination of head-swapped photos may have several legal options, depending on the circumstances. Potentially-applicable legal areas include copyright, defamation, moral rights, passing off, and laws specific to digital harms. From among these legal areas, this article focuses on copyright: specifically, to what extent New Zealand copyright law can protect against the unauthorised creation and dissemination of head-swapped photographs.

This article begins by delineating the scope of photographs that it discusses. It then describes advantages of copyright law for New Zealand plaintiffs attempting to counter head-swapped photos. Next, the article explains how photographs may be classified for purposes of New Zealand copyright protection. The article goes on to explain how copyright in a photograph could be infringed by head-swapping and subsequent dissemination of the head-swapped photo. To this end, a real-life head-swapping incident in New Zealand will be used as an example scenario. This is the head-swap involving Lee Tamahori's head and a Wellington performer's body mentioned above.¹⁰ By means of this discussion, the article identifies and evaluates potential challenges in attempting to address head-swapping by means of a copyright infringement action. Finally, the article suggests an approach specifically applicable to the infringement analysis of a head-swapped photograph, and applies this approach to several scenarios.

II. SCOPE OF PHOTOGRAPHS DISCUSSED

The focus of this article is the unconsented creation and dissemination of head-swapped photographs of identifiable human beings.

In this context, "identifiable" refers to the subject being identifiable in the original, unaltered photo. A "subject" of a photograph is an individual who is visible in the photograph. The subject may not be identifiable in the original photo due to being incidentally shown (such as in a crowd scene) or otherwise unrecognisable (such as due to lack of camera focus when the photo is taken). Such photographs with non-identifiable subjects fall outside the scope of this article.

The article limits its discussion to head-swapped photographs. As explained in the Introduction, a head-swapped photograph is one that features one person's head and a different person's body as a result of combining portions of two different photographs. This article does not address head-swapped photographs that have undergone further photo-manipulation, such as colour changes or additions of photo-objects to the individuals' bodies.¹¹

10 See above n 6. As of March 2017, no reported New Zealand cases were found involving copyright infringement relating to head-swapped photos.

11 For examples of other forms of photo-manipulation, see Molly Torsen Stech "Detangling Copyright, Transformation and Ideas (in Photographs)" (2016) 11 JIPLP 339 at 343.

The assumption, therefore, is that the head and body portions have not been further modified when creating the head-swapped photo. This limited scope is useful to highlight the main challenges of copyright law in the head-swapping context within the length of this article.

This article's focus is the creation and dissemination of head-swapped photographs without the photograph subject's consent. 'Creation' here refers to the head-swapping, that is, the combining of head and body portions to create the final head-swapped version. A subject may have consented to the taking and/or dissemination of the original (unaltered) photo, but may not desire that photo to be disseminated in an altered or digitally-manipulated form. In many instances, "alteration of a photograph ... may be in excess of a license to use the photograph as originally taken".¹² For example, an American author allows her website photo to be downloaded and reposted, but only under a Creative Commons licence that does not permit distribution of modified versions.¹³ Another type of unauthorised dissemination is when the subject has consented to some form of dissemination of the altered photo, but the altered photo has been distributed beyond the scope of that consent. An example would be a head-swapped photo circulated as a joke among a small group of friends. The subject may be happy with this but not with anything beyond this small-group circulation.

The assumption of this article is that any appropriate legal protections would ideally be applicable to a broad group of people and contexts—to both celebrities and non-celebrities, and to both online and offline uses. While there may not be universal agreement that this is the scope of what should be protected, such a broadly-defined scope accounts for the diversity of persons who face these situations in real life. In this article, the term 'celebrities' denotes individuals generally identifiable due to their presence in the media or online. The term 'non-celebrities' refers to all other individuals, with an understanding that sometimes celebrity/non-celebrity status may not always be clear-cut. As discussed in the next section, one benefit of copyright law for New Zealand plaintiffs is that it is applicable to such a broad range of contexts.

III. COPYRIGHT'S ADVANTAGES IN THE HEAD-SWAPPING CONTEXT

In the head-swapping context, copyright law can be a useful legal tool for several reasons. First, unlike some other jurisdictions, New Zealand does not recognise a specific cause of action for the unauthorised use of an individual's image—either as a privacy tort or as a separate legal action. The New Zealand Court of Appeal "do[es] not consider there is a cause of action in our law directed to unauthorized representation of one's image".¹⁴ The same approach

12 J Thomas McCarthy *The Rights of Publicity and Privacy* (Thomson Reuters, 2016) at § 10:37.

13 See NK Jemison "About" (2017) <<http://nkjemisin.com>>. Copyright in this photo is owned by the photograph subject. See McCarthy, above n 12.

14 *Hosking v Runting* [2005] 1 NZLR 1 (CA) [171].

is found in English law.¹⁵ By contrast, the laws of most American states recognise publicity rights, including image rights, in some form.¹⁶ Therefore, while plaintiffs in some other jurisdictions have used “image rights” as a basis for legal action against head-swapping,¹⁷ New Zealand plaintiffs do not have this option.

Second, compared to many other legal areas, copyright law can be an advantageous tool for a head-swapping plaintiff. Copyright has been described as “the most effective [legal] tool against the unauthorized alteration of motion pictures, videotaped images and photographs”.¹⁸ Even outside the context of photo-manipulation, it has been recognised that many “[o]ther legal actions [besides copyright] ... are limited in scope and rarely applicable to prevent the unauthorised distribution of an individual’s photograph”.¹⁹ For instance, defamation seems at first glance to be a useful cause of action in a head-swapping context. However, with respect to the New Zealand head-swap mentioned in the Introduction,²⁰ a media law commentator pointed out that the potential success of a defamation lawsuit was not clear-cut.²¹ This is exemplified by head-swapping cases in other jurisdictions where defamation claims failed.²² Similarly, privacy law may not be applicable in many head-swapping circumstances.²³

Another legal option is contract law: that is, contracting that a photograph would not be altered. This option was also mentioned by the aforementioned media law commentator regarding the New Zealand Lee Tamahori head-swap.²⁴ Yet people often do not contractually specify future uses of their photos, either due to legal ignorance or due to a lack of bargaining power.

15 See *Fenty v Arcadia Group Brands Ltd* [2015] EWCA Civ 3 (22 January 2015) [29] (“There is in English law no ‘image right’ or ‘character right’ which allows a celebrity to control the use of his or her name or image.”).

16 See McCarthy, above n 12, at § 6:3. For the distinctions between publicity rights and copyright in the US, see § 11:52.

17 See, for example, *Grant v Esquire, Inc* 367 F Supp 876 (SDNY 1973); *Hoffman v Capital Cities/ABC, Inc*, 255 F 3d 1180 (9th Cir 2001).

18 Winick, above n 1, at 152.

19 Susan Corbett “The Case for Joint Ownership of Copyright in Photographs of Identifiable Persons” (2013) 18 MALR 330 at 331-332. For further discussion of other causes of action in New Zealand see 333-336, 344, 348.

20 See above n 6.

21 Professor Ursula Cheer was quoted with regard to defamation law as follows: “there’s an identity issue and [the plaintiff] would have to argue that people would think worse of her”. Smith, above n 6, at 3. As further analysed in Part V.C below, a copyright infringement lawsuit would also not have been successful due to ownership issues.

22 See, for example, *Grant v Esquire, Inc* 367 F Supp 876, 878 (SDNY 1973); *Charleston v News Group Newspapers Ltd* [1995] 2 WLR 450 (HL). See also Dinika Roopani “The Scope and Content of a ‘Publication’ on the Internet for the Purposes of Defamation Law” (2015) 20 MALR 33.

23 For a discussion of the relationship between privacy law and copyright law in New Zealand, see Susy Frankel “The Copyright and Privacy Nexus” (2005) 36 VUWLR 507. On the limitations of New Zealand privacy law in the context of unauthorised use of photographs, see Corbett, above n 19, at 331, 334-335, 339, 348.

24 See Smith, above n 6, at 3.

This is highlighted by many real-life instances of head-swapping—including the Lee Tamahori head-swap, where no contractual limitation seemed to exist. Moreover, even photograph subjects that do contractually limit photo-alteration may find that the contractual language does not account for future technological developments.²⁵

Another potentially useful legal area in New Zealand is the moral right to object to derogatory treatment of a work. This right encompasses alterations that are prejudicial to the honour or reputation of the work's author or director.²⁶ The usefulness of this cause of action can be limited, however, since the photograph's subject would often not be the author or director of the photograph or underlying film.²⁷ Moreover, New Zealand moral rights in general have been criticised because “the limitations of the rights are so severe that they are rarely of much utility”, with this particular (derogatory treatment) moral right described as “unduly limited in New Zealand”.²⁸ This approach seems to follow that of several other common law jurisdictions. For instance, the UK has been described as a jurisdiction “that take[s] a grudging attitude toward moral rights”.²⁹

The above discussion is not intended to suggest that copyright law will *always* be applicable to *all* instances of head-swapped photos. This article will go on to identify potential challenges in attempting to address head-swapping by means of a copyright infringement action. It is true, however, that despite these challenges, copyright law holds certain comparative advantages. For instance, copyright persists even after the creator's death. Copyright protection can last considerably longer than the life of the author who created the photograph.³⁰ Consequently, heirs of a copyright owner may be able to utilise copyright law to prevent use of a photo even after that person's death. This is not the case with some other causes of action, such as defamation: “the dead cannot be defamed”.³¹ Furthermore, New Zealand authors and copyright owners do not need to take any affirmative steps (such as registration) in order to obtain this posthumous protection. There is in fact no government-run copyright registry in New Zealand. This can be contrasted with registered trade marks, which can last indefinitely but require registration renewals every ten years.³² Copyright law can therefore be an administratively simpler way to ensure long-term protection.

25 See Winick, above n 1, at 181-183.

26 Copyright Act 1994, s 98(1). Exceptions apply: see ss 100-101.

27 See Part V.C below.

28 Susy Frankel *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, New Zealand, 2011) at 300.

29 David Vaver “Moral Rights Yesterday, Today and Tomorrow” (1999) 7 IJLIT 270 at 272. On the Canadian approach to moral rights, see also at 275-276.

30 Copyright durations for different types of photographs are further discussed in Part V.B below.

31 Christina Michalos “Virtual Actors and the Law: Protection Provided by Intellectual Property Law Against Use of Computer-Manipulated Images of Performers” (1997) 8(6) Ent LR 205 at 209.

32 Trade Marks Act 2002, ss 57, 58.

The third main reason for copyright's usefulness in this context is its ability to provide a comparatively broad scope of protection, particularly with regard to non-commercial uses. As noted in the previous section, this article assumes that appropriate legal protections should apply to a broad group of people and contexts. Copyright protection applies to photographs in both commercial and non-commercial contexts. A photo disseminated by a personal social media account could receive the same level of copyright protection as a photo plastered on an advertising billboard. Due to this aspect of copyright law, it can be a useful tool for plaintiffs who are not celebrities and who do not use their image for any commercial gain. This can be contrasted with the common law tort of passing off and with registered trade marks, both of which usually require some use in a commercial or business context. A registered trade mark may be revoked if:³³

... at no time during a continuous period of three years or more was the trade mark put to genuine use in the course of trade in New Zealand ... in relation to goods or services in respect of which it is registered.

Similarly, passing off can be used to prevent unconsented use of a person's image—but usually only when that person has previously utilised her image for merchandising or endorsement.³⁴ This is due to the passing off requirement of business-related goodwill.

Another advantage of copyright for plaintiffs is its applicability to both online and offline dissemination of a copyrighted work. The scope of copyright law as a legal tool is broad and not limited to digital misuse. This is in contrast to laws that target various harms created only by digital or online means, such as the Harmful Digital Communications Act 2015.³⁵

Finally, a review of New Zealand copyright legislation was launched in June 2017, with an issues paper due to be released for public consultation in 2018.³⁶ Discussions of New Zealand copyright law are therefore especially timely.

As explained in this section, copyright law can be an advantageous tool for New Zealand plaintiffs attempting to counter head-swapped photos. On the other hand, copyright law can pose challenges due to ownership issues, as well as due to how the test for infringement is structured. First, however,

33 Section 66(1)(a).

34 See *Fenty v Arcadia Group Brands Ltd*, above n 15; *Irvine v Talksport Ltd* [2003] EWCA Civ 423 (1 April 2003). As one commentator notes: "passing off can quickly dispose of claims where the plaintiff is not a well-known individual who has a commercially valuable reputation to exploit". David Tan "The Fame Monster Reloaded: The Contemporary Celebrity, Cultural Studies and Passing Off" (2010) 32 Syd LR 291 at 301.

35 For a general critique of the Harmful Digital Communications Act 2015, see Stephanie Frances Panzic "Legislating for E-Manners: Deficiencies and Unintended Consequences of the Harmful Digital Communications Act" (2015) 21 Auckland UL Review 225.

36 "Review of the Copyright Act 1994" (Ministry of Business, Innovation and Employment, 20 September 2017) <<http://www.mbie.govt.nz/info-services/business/intellectual-property/copyright/review-copyright-act-1994>>.

it is useful to examine how a photograph may be defined for purposes of copyright protection.

IV. PHOTOGRAPHS AS DEFINED BY NEW ZEALAND COPYRIGHT LAW

Under the New Zealand Copyright Act 1994, copyright exists in certain defined types of copyrightable works. A photograph would usually be classified as an “artistic work”³⁷ since artistic work is defined to include “a ... photograph ... irrespective of artistic quality”³⁸

A photo that is the result of capturing a still image from a film is classified differently for copyright purposes. According to the statute:³⁹

... photograph means 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* (emphasis added).

For this purpose, “film means a recording on any medium from which a moving image may by any means be produced”.⁴⁰ Accordingly, a few-seconds-long YouTube video and a two-hour-long movie could both be films for copyright purposes. Making a still image photograph from such a copyright-protected film could infringe the film copyright by means of copying, as the statute defines “copying” to “include[], in relation to a film ... the making of a photograph of the whole or any substantial part of any image forming part of the film ...”⁴¹

As a result of these statutory definitions, a still image photograph created from a movie or other video would not be classified as a photograph (an artistic work) for copyright purposes, but rather as part of a film.⁴² The creation and dissemination of such a video-still (even without any alteration) could infringe copyright in the underlying film. Since in reality many photographs are created in this way, video-still photographs are included in the scope of this discussion in addition to directly-taken photographs.

There are some relevant differences in how New Zealand copyright law treats directly-taken photographs as against video-stills. Some of these differences are described below.

37 Copyright Act 1994, s 14(1)(a).

38 Section 2(1), definition of “artistic work”, para (a)(i).

39 Section 2(1), definition of “photograph”.

40 Section 2(1), definition of “film”.

41 Section 2(1), definition of “copying”, para (d).

42 Frankel “The Copyright and Privacy Nexus”, above n 23, at 517; Paul Sumpter *Intellectual Property Law: Principles in Practice* (2nd ed, CCH New Zealand, Auckland, 2013) at 29.

V. HEAD-SWAPPED PHOTOGRAPHS & COPYRIGHT INFRINGEMENT

When a photograph is altered and disseminated without the subject's consent, the copyright-related considerations can be different in comparison with unaltered photographs. This part of the article will explain how copyright in a photograph could be infringed by head-swapping and subsequent dissemination of the head-swapped photograph. By means of this discussion, the article identifies potential challenges in attempting to address head-swapping by means of a copyright infringement action.

In examining the relevant copyright concerns, the following discussion will use a real-life head-swapping incident as an example scenario. This incident is henceforth referred to as the "Tamahori head-swap".

The Tamahori head-swap occurred after New Zealand film director Lee Tamahori was arrested in the US for allegedly soliciting as a prostitute while wearing a black dress and wig.⁴³ In reporting this event, New Zealand newspaper *Sunday News* illustrated its news article with a photograph that appeared to be Lee Tamahori wearing a black dress.⁴⁴ In fact, however, this was a head-swapped photograph. The head was of Lee Tamahori and the body was of a female performer from Wellington (who did not wish to be identified but was unconnected with Lee Tamahori).⁴⁵ The photo from which the body portion was sourced was originally published in the fashion pages of another newspaper, the *Dominion Post*.⁴⁶ The subject of this fashion photograph claimed she had only given permission for her photo to be used for that purpose.⁴⁷ However, this photo had been digitally-altered by attaching Lee Tamahori's head to her body (the source of the Lee Tamahori head-shot is unclear).

The subject of the body portion was not pleased about the head-swapping. With respect to the photos taken for the *Dominion Post's* fashion section, the subject stated:⁴⁸

I just thought they were specifically for what we agreed to use them for. I think it is quite scary the way the media can take things and use them for whatever they want.

43 The prostitution-related charges were later dropped when he pleaded no contest to criminal trespass "007 director makes sex case deal" (BBC News, 24 February 2006) <<http://news.bbc.co.uk>>.

44 Kristian South "Tamahori Shock New Sex Claims" *Sunday News* (5 February 2006) at 1-3.

45 See Smith, above n 6, at 3.

46 At 3.

47 At 3.

48 At 3.

The editor of the *Sunday News* offered an apology⁴⁹ and there was no indication of any legal action. In future head-swapping situations, however, it is possible that a subject may initiate legal action. It is therefore useful to analyse the likelihood of success such a subject may have in an action for copyright infringement under New Zealand law.

The remainder of this section will examine whether head-swapped photos could constitute copyright infringement under New Zealand law, using the Tamahori head-swap as an example scenario. Since the source of the Lee Tamahori head-shot is not clear, the potential plaintiff in this example scenario will be the subject of the body portion (the performer photographed for the *Dominion Post* fashion section). The unaltered *Dominion Post* photo from which the body portion was sourced will be referred to as the “fashion photo”, to distinguish it from the *Sunday News* “head-swapped photo” featuring Lee Tamahori’s head and the performer’s body.

To establish copyright infringement in New Zealand, a plaintiff would usually need to establish the following:

- (1) there is a work in which copyright can subsist;
- (2) copyright does subsist in the work;
- (3) the plaintiff owns the copyright in the work [or is an exclusive licensee]; and
- (4) the copyright in the work has been infringed.⁵⁰

In the Tamahori head-swap scenario, the “work” would be the fashion photo (from which the subject’s body portion was sourced for the head-swapped photo).

Taking these points in turn:

A. Was there a work in which copyright can subsist?

As described in Part IV above, under s 14 of the Copyright Act a photograph could be either part of a film (if a still-image from a video) or an artistic work (if directly taken). Here the fashion photo was directly taken and was not a video-still. It accordingly qualifies as a photograph and therefore an artistic work.

49 At 3. The *Sunday News* editor was quoted as stating: “We endeavour to be as careful as possible and if we have slipped up this time we would apologise for any offence caused.”

50 These requirements were laid out in *PS Johnson & Associates Ltd v Bucko Enterprises Ltd* [1975] 1 NZLR 311 (SC) 315. This case was decided under an older version of the Copyright Act, and involved industrial designs. Under the current Copyright Act 1994, matters relevant to industrial designs and underlying drawings can be different from other aspects of copyright law.

B. Did copyright subsist in the work?

Copyright would not subsist if the copyright owner had given up copyright or if the copyright had expired. As discussed above, the fashion photo is an artistic work for copyright purposes and therefore copyright in it would only expire “50 years from the end of the calendar year in which the author dies”.⁵¹ (Copyright in a video-still photo would have a different expiration date that is not dependent on when the author died.⁵² Many of these durational periods may in future be increased to 70 years.⁵³) Thus, any copyright in the fashion photo would not have expired. The photo would also not fall under a category of works that cannot be copyright-protected under New Zealand law.⁵⁴ Neither is there any evidence of a Creative Commons licence or other waiver of copyright. It seems therefore that, at the point of publication of the head-swapped photo, the fashion photo was in copyright.

Another requirement for copyright subsistence is that the photograph has a relevant link with New Zealand or a prescribed foreign country. This could be via the author’s legal status (such as citizenship or domicile) or via the country where the work was first published.⁵⁵ Regarding the fashion photo in this scenario, the author for copyright purposes would likely be the person who took the fashion photo.⁵⁶ That person’s identity, and therefore legal status for copyright purposes, is unclear. Still, we can assume that the fashion photo qualifies via the country where the work was first published⁵⁷ as it was published in a New Zealand newspaper.

For copyright to exist, the potentially-infringed work must also be original for copyright purposes. In New Zealand, this means it must be neither a copy of another work nor copyright-infringing,⁵⁸ and “must be the product of more than minimal skill and labour”.⁵⁹ There is no indication that

51 Copyright Act 1994, s 22(1). For artistic works (including photographs) that are not computer-generated, the ‘author’ is the person who created the work, ss 5(1), 5(2)(a). If the author of the photograph is unknown, 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” s 22(3).

52 Copyright in a film expires the later of (i) 50 years from the end of the calendar year in which the film was made, or (ii) 50 years from the end of the calendar year in which the film was made available to the public by an authorised act, if so made available before the end of period (i). Copyright Act 1994, s 23(1).

53 Trans-Pacific Partnership Agreement Amendment Act 2016, ss 5, 6. These legislative changes can only come into force when the Trans-Pacific Partnership Agreement enters into force for New Zealand. Section 2. Following the United States’ withdrawal, other member countries are consulting on next steps for the Agreement. “Trans-Pacific Partnership” (New Zealand Ministry of Foreign Affairs & Trade) <<https://www.tpp.mfat.govt.nz/>>.

54 These include items like statutes, court judgments and some government reports - so photographs would not fall under this category. Copyright Act 1994, s 27.

55 Copyright Act 1994, ss 17-19. “Prescribed foreign country” is defined in s 2(1). “Publication” and “publish” are defined in s 10.

56 See Part V.C below.

57 Copyright Act 1994, s 19. “Publish” is defined in s 10.

58 Section 14(2).

59 *Henkel KGaA v Holdfast New Zealand Ltd* [2006] NZSC 102 (30 November 2006) at [37].

the fashion photo was copied from another work or that it was copyright-infringing. The fashion photo is also likely to meet the requirement of being the product of more than minimal skill and labour, especially given that a photo taken for a newspaper's fashion pages would entail set-up, lighting choices and so on. Note that an artistic work is defined to include "a ... photograph ... irrespective of artistic quality".⁶⁰ The reference to "irrespective of artistic quality" suggests that even a photograph taken by means of a hasty point-and-click could be copyright-protected under the "low"⁶¹ threshold for originality in New Zealand. However, in some other instances the level of originality may be more questionable.⁶²

In the Tamahori head-swap scenario, therefore, copyright most likely does subsist in the fashion photo. The analysis of whether the fashion photo was infringed by the alteration can therefore proceed.

C. Is the plaintiff the copyright owner or an exclusive licensee?

Actions for copyright infringement can usually be brought only by the copyright owner or by an exclusive licensee.⁶³ In many instances, the photograph's subject is neither. Therefore, the subject is often unable to sue for copyright infringement. This is one of the biggest challenges with respect to using copyright to protect against photo-alteration.

The first owner of copyright in a work is usually the author of the work,⁶⁴ who in turn is defined as the person who created the work.⁶⁵ In the case of a film as statutorily-defined, the person who created it (that is, the author, and therefore the default copyright owner) is "the person by whom the arrangements necessary for the making of the ... film are undertaken".⁶⁶ This would apply to video-still photographs. With directly-taken photos (that are not video-stills) the person who created it (the author) would usually be the

60 Copyright Act 1994, s 2(1), definition of "artistic work", para (a)(i).

61 *Henkel*, above n 59, at [38]. This can be compared with the American standard for copyright originality which requires "at least some minimal level of creativity". *Feist Publications Inc v Rural Telephone Service Co Inc* 499 US 340, 345 (1991). See also Susan Corbett "The Worth of a Picture: Photography, the Media and the Law of Copyright" (2000) 2 *New Zealand Intellectual Property Journal* 201 at 201-202.

62 See Susy Frankel, above n 23, at 518 (mentioning that under New Zealand copyright law, "[a] security camera film may not reach the requisite originality threshold, but each case must be assessed on its facts.>").

63 Copyright Act 1994, ss 120(1), 123(1). Section 2(1) provides that: "exclusive licence means a licence in writing, signed by or on behalf of a copyright owner, authorising the licensee, to the exclusion of all other persons (including the copyright owner), to exercise a right that would otherwise be exercisable exclusively by the copyright owner."

64 Section 21(1).

65 Section 5(1).

66 Section 5(2)(b). For films the "author" for copyright purposes may be either a natural person or a body corporate, at s 5(3).

person who took the photograph.⁶⁷ The author and therefore copyright owner of a directly-taken photograph would thus usually be the photographer. We can see therefore that, unless the photo is a selfie, the copyright owner in New Zealand would generally be the photographer and not the photograph's subject.

This often means the photographer has exclusive rights to copy, alter and disseminate the photo⁶⁸ and the photograph's subject does *not* have these rights (absent a licence from the photographer). And unless the subject is either the copyright owner or an exclusive licensee, she would not be able to sue for infringement,⁶⁹ even if the photo is used without her consent.

There are, however, a few exceptions under which someone besides the photographer could be the copyright owner. These include:

- The photographer or other copyright owner could legally transfer copyright ownership to the subject by contractual assignment.⁷⁰ As an example: an American author purchased the copyright in her photo from the photographer and posted the photo on her website.⁷¹ Under New Zealand law such a copyright assignment must be "in writing signed by or on behalf of the assignor".⁷²
- For certain types of works (including statutorily-defined photographs, but not films) made by an employee in the course of employment, the employer can be the copyright owner.⁷³ In real-life situations this exception is less relevant for photographs of non-celebrities used for non-commercial purposes.
- For certain types of works (including both photographs and films) made in pursuance of a commission, the commissioner can be the copyright owner.⁷⁴

The two exceptions for employers and commissioners are subject to any agreement to the contrary,⁷⁵ so the relevant parties can contract out of these default rules. For example: imagine the subject commissions a professional photographer to take a photograph of her. As the commissioner, the subject would likely own the copyright in that photo. However, the photographer's

67 For such works, the author must generally be a natural person. Clive Elliott, Jeremy Finn and others, *Intellectual Property Law* (LexisNexis 2013) at [COP5.2]. However, it is possible that in some instances the person who created the photograph may be someone besides the person who took it. See Corbett, above n 19, at 340-341 (comparing the New Zealand and Australian statutory definitions of a photograph's author); Kevin Garnett and Alistair Abbott "Who is the 'Author' of a Photograph?" (1998) 20(6) EIPR 204 at 206-208.

68 Copyright Act 1994, s 16(1)(a)-(h).

69 See above n 63.

70 Copyright Act 1994, s 113(1)(a).

71 See Jemison, above n 13.

72 Copyright Act 1994, s 114. Section 2(1) defines "writing".

73 Copyright Act 1994, s 21(2).

74 Section 21(3).

75 Section 21(4).

standard contract may specify that the photo's copyright belongs to the photographer. Many photographers' standard contracts contain such a clause to allow the photographer to charge customers for prints.⁷⁶ Now imagine that the subject agrees to this standard contract—perhaps not reading it as thoroughly as she should have. In this instance, the subject has contracted out of the usual commissioning rule such that the photographer still owns copyright in the photo.

Even in this situation, the subject could still have some rights to limit the copyright owner's use of the photo under the section 105 moral right.⁷⁷ To return to the above example: under s 105, without the subject's consent the photographer may not issue copies of the photo to the public, and may not exhibit, show or communicate the photo to the public—if the subject commissioned the photo “for private and domestic purposes”⁷⁸. If the subject did *not* commission the photo for private and domestic purposes, the photographer would *not* face such restrictions since as the copyright owner s/he has the exclusive right to do acts of copying, showing and so on.⁷⁹

In the Tamahori head-swap scenario, the copyright in the initial, unaltered fashion photo was in fact owned by the newspaper that printed it, not by the photographer or the subject of the photo. This could be because the photographer who took the photo was commissioned by the newspaper, or was an employee, or because the copyright was assigned by the photographer to the newspaper.⁸⁰ As the copyright owner, this newspaper could sue the other for copyright infringement regarding the head-swapping, but did not seem to have any interest in doing so. This may be because both newspapers were ‘sister publications’ of the same company.⁸¹

As for the subject (who did have an interest in preventing the head-swapped photo) there is no evidence of an employment or commissioning situation that would result in her owning the copyright. There is also no evidence of an assignment of copyright to her or that she was granted an exclusive licence. The subject therefore could not sue for copyright infringement. The subject also could not make use of the section 105 moral right, because she did not commission the fashion photo for private and domestic purposes. Even if the subject had commissioned the fashion photo, it would have been for purposes of the fashion page of the newspaper, which is neither private nor domestic.

76 Frankel, above n 23, at 516.

77 Copyright Act 1994, s 105.

78 Copyright Act 1994, s 105(1). As of March 2017, no reported New Zealand case was found that analysed the meaning of “private and domestic purposes”.

79 Section 16.

80 The *Dominion Post* was reported as the copyright owner of the fashion photo, with no further details. See Smith, above n 6, at 3.

81 The *Sunday News* and the *Dominion Post* are described as “sister Fairfax publications” in an article published shortly afterwards. David Cohen “Newspaper exposes sister rag’s cross-dressing” *National Business Review* (3 March 2006). As of March 2017, both newspapers are still listed on Fairfax Media Ltd’s website “Fairfax Daily & Sunday Newspaper Subscriber Contacts” (2017) <www.fairfaxmedia.co.nz>.

(1) Addressing the challenge of the ownership issue

The above analysis demonstrates how these rules relating to copyright ownership can pose a challenge for a photograph's subject who wishes to bring an infringement action. While copyright can be a useful tool for individuals whose photos have been digitally manipulated, the issue of ownership can often block their ability to sue for infringement. This is more likely to be a problem for those who are not celebrities and/or do not utilise their images in a commercial context. Individuals with a business interest in their image would likely have received legal advice to secure copyright ownership by means of the commissioning rule or by assignment.⁸²

One solution to this issue involves joint authorship. It has been recognised that:⁸³

[i]n relation to photographs, where it is sometimes more difficult than in the case of works of fine art to identify the originator of the work, there is ... clearly scope for increased application of the principles of joint authorship.

In the New Zealand context, it has been proposed that copyright in certain kinds of photos (where a person is identifiable and non-incidental) should be jointly owned by the subject/s and the photographer.⁸⁴ Conversely, the idea of property rights for New Zealand photograph subjects has been criticised as inappropriate on the basis that subjects would usually not have invested the skill and labour necessary for originality.⁸⁵

In New Zealand, a copyright work of joint authorship is defined as "a work produced by the collaboration of 2 or more authors in which the contribution of each author is not distinct from that of the other author or authors".⁸⁶ The work must also be made in furtherance of some common design.⁸⁷ As a general rule, the authors of a work of joint authorship would jointly own the copyright.⁸⁸ Accordingly, if copyright in a photo is jointly owned by subject and photographer, the subject would have more control over how the photograph is used.

In order to minimise uncertainties over the scope of the subject's control, any such legal reforms regarding joint copyright ownership should be placed

82 This is probably more accurate for directly-taken photographs than for video-stills taken from a commercial film, as the film studio would usually own copyright in the latter. See Navin Katyal "The Unauthorized Dissemination of Celebrity Images on the Internet ... In the Flesh" (2000) 2 *Tulane Journal of Technology and Intellectual Property* 1 at 6-7.

83 Garnett and Abbott, above n 67, at 209.

84 See Corbett, above n 19. Corbett suggests exceptions for when there is an outweighing public interest in freedom of information and for professional commissioned photographs. See at 332 n 16, 348-349.

85 See Frankel, above n 23, at 520.

86 Copyright Act 1994, s 6(1).

87 Clive Elliott, Jeremy Finn and others, above n 67, at [COP6.2], citing *Glogau v Land Transport Safety Authority of New Zealand* [1997] 3 NZLR 353 (HC).

88 At [COP6.2].

in the statute. For instance, the relevant United Kingdom statute provides that:⁸⁹

Where copyright (or any aspect of copyright) is owned by more than one person jointly, references in this Part to the copyright owner are to all the owners, *so that, in particular, any requirement of the licence of the copyright owner requires the licence of all of them* (emphasis added).

The italicised wording specific to licences is not present in the equivalent New Zealand statutory section.⁹⁰ Relevant commentary suggests that in New Zealand too, all joint copyright owners would need to consent in order to license an otherwise-infringing act.⁹¹ Commentary also suggests that if the photo's subject is a joint owner, the subject could sue another joint owner (such as the photographer) for a potentially infringing act⁹² (such as head-swapping). With respect to a joint owner's ability to sue a third party (that is, not another joint owner) for infringement: it is likely, though not entirely clear, that this can be done even without the consent of other joint owners.⁹³ If so, the subject could bring an infringement action against a third party who has altered and disseminated the photo even if the photographer or other copyright owner has no wish to be involved in the suit.

If implemented, such a reform involving joint ownership may solve many of the above-described problems relating to ownership. It may not, however, be a solution for another problem: uncertainty over whether the head-swapped photo has been changed to the extent that a substantial part has been taken. This issue is examined in the next section.

D. Has the copyright in the work been infringed?

Even if a photograph subject can sue for infringement, in head-swapping situations there may be other challenges with respect to whether the copyright has in fact been infringed.

For primary copyright infringement in New Zealand, a work's copyright is infringed when someone who is not the copyright owner or a licensee does a "restricted act" in relation to the whole work or a substantial part of the work.⁹⁴ The restricted acts are the potentially infringing acts which the copyright owner has the exclusive right to do in New Zealand.⁹⁵ One issue with head-swapped photos is that the types of potentially infringing acts can

89 Copyright, Designs and Patents Act 1988 (UK), s 173(2).

90 See Copyright Act 1994, s 8(1).

91 See Elliott, Finn and others, above n 67, at [COP6.2]; Paul Sumpter *Intellectual Property Law: Principles in Practice* (2nd ed, CCH New Zealand 2013) at 48.

92 See Elliott, Finn and others, above n 67, at [COP6.2].

93 At [COP120.4].

94 Copyright Act 1994, s 29.

95 The restricted acts are listed in Copyright Act 1994, s 16, and further detailed in ss 30-34.

be more limited than for an unaltered photo. The most relevant restricted (that is, infringing) acts with respect to photographs include: copying the work, issuing copies to the public by sale or otherwise, showing or communicating the work to the public, and making an adaptation of the work.⁹⁶

The question at this stage is which of these restricted acts could constitute infringement in a given head-swapping situation. The answer depends on the type of photo. Both directly-taken photographs and video-stills can involve copyright infringement by the restricted act of copying. This is because “[t]he copying of a work is a restricted act in relation to every description of copyright work.”⁹⁷ Indeed, the statute expressly defines copying to “include, in relation to a film ... the making of a photograph of the whole or any substantial part of any image forming part of the film ...”⁹⁸ Similarly, copyright in both directly-taken photographs and films can be infringed by means of issuing copies to the public⁹⁹ and by communicating the work to the public.¹⁰⁰ In contrast, showing the work in public is a restricted act for films, but not for artistic works such as directly-taken photographs.¹⁰¹

Infringement by means of making an adaptation is not a restricted act for either films or directly-taken photographs. This is because making an adaptation is a restricted act only for literary, dramatic and musical works.¹⁰² This limitation with respect to infringement by adaptation is especially relevant for head-swapped photographs. It indicates that the act of head-swap photo-manipulation by itself cannot constitute infringement by making an adaptation. Therefore, a plaintiff arguing copyright infringement for an altered photograph would need to show infringement by means of some other restricted act.¹⁰³ As discussed above, this could be copying, issuing, communicating and so on.

As mentioned earlier, primary infringement by means of *any* restricted act refers to the doing of that act “in relation to the work as a whole or any substantial part of it.”¹⁰⁴ In the case of altered photographs, the issue of whether a substantial part was taken is especially pertinent because the act of alteration itself cannot constitute infringement by making an adaptation.

Even if the subject is still identifiable and recognisable in the head-swapped photo, a defendant could argue there was no infringement because a substantial part of the initial photo was not involved. This would be relevant for the act of altering the photo, as this act could infringe the initial photo

96 Section 16(1)(a)-(b), (e)-(g).

97 Section 30.

98 Section 2(1), definition of “copying”, para (d).

99 Section 31. “Issue to the public” is defined in s 9.

100 Section 33. Section 2(1) states: “communicate means to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system, and communication has a corresponding meaning”.

101 Section 32(2). “Showing” is not defined in the statute’s interpretation section, s 2.

102 Section 34(1). “Adaptation” is defined in s 2(1).

103 See Frankel, above n 28, at 282.

104 Copyright Act 1994, s 29(2)(a).

by copying a substantial part of it when creating the head-swapped version. It would also be relevant in the subsequent dissemination of the head-swapped photo, as there could be infringement by issuing or communicating (or *showing*, for a video-still) a substantial part of the original photo when disseminating the head-swapped version.

With regard to infringement by copying, case law has established that:¹⁰⁵

- (a) The reproduction must be either of the entire work or of a substantial part.
- (b) There must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof.
- (c) There must be some causal connection between the copyright work and the infringing work. The copyright must be the source from which the infringing work is derived.

Among these three requirements, the “causal connection” aspect would likely be satisfied in many head-swapping situations, including the Tamahori head-swap. For “objective similarity”, the requirement is for similarity between the allegedly infringing work (that is, the head-swapped photo) and a *substantial part* of the copyright work (that is, of the fashion photo). If what was copied is considered a substantial part, establishing objective similarity would be straightforward in many head-swapping scenarios. This is because what was copied would be identical, not just objectively similar. For instance, it seems the body portion in the Tamahori head-swapped photo was identical to the body portion in the fashion photo. (Following the scope of photos examined in this article, this is assuming that the copied portion is not further modified when creating the head-swapped photo. If it is further modified, the objective similarity analysis would be more complex.)

The main issue is, therefore, whether a substantial part was taken. As discussed above, this would be relevant for other forms of infringement too, not just by copying. While the level of the work’s originality is relevant to the infringement analysis,¹⁰⁶ the analysis below proceeds on the basis that the Tamahori fashion photo is sufficiently original (as discussed above under Part V.B) for this not to be an issue.

According to the New Zealand Supreme Court, assessing whether a substantial part was taken “can sometimes be a difficult matter of evaluation and is usually the most difficult question which arises in copyright cases”.¹⁰⁷ The “substantial” aspect does not refer solely to the amount; it can be a

105 *Wham-O MFG Co v Lincoln Industries* [1984] 1 NZLR 641 at 666 (CA).

106 *Henkel*, above n 59, at [38], [41]; *Land Transport Safety Authority of New Zealand v Glogau* [1999] 1 NZLR 261 (CA) at 271.

107 *Henkel* at [44].

qualitative analysis.¹⁰⁸ This is especially the case if the allegedly infringed work is an artistic work, since “[w]hat amounts to a substantial part in an artistic work case depends more on qualitative visual impression rather than on quantitative analysis”.¹⁰⁹ Therefore, the defendant’s altered photo may be infringing even if it retains only a quantitatively small part of the plaintiff’s photo—if the part retained is qualitatively a substantial part. This analysis is contextual and “is a subject upon which, in borderline cases, minds can reasonably differ”.¹¹⁰ The New Zealand Supreme Court has described this qualitative “substantial part” analysis in terms of whether what has been copied “is the essence of the copyright work”.¹¹¹

It is important to note that the question here is whether a substantial part of the plaintiff’s copyrighted work features in the defendant’s work—*not* on whether a substantial part of the defendant’s work is from the plaintiff’s.¹¹² A head-swapped photo could be copyright-infringing even if most of it consists of aspects entirely unrelated to the plaintiff’s photo—as long as a substantial part (or the whole) of the plaintiff’s photo is to be found in the head-swapped photo. This approach has been followed by the copyright law of several other jurisdictions such as England¹¹³ and the United States.¹¹⁴ A commentator justifies this approach by means of the economic-incentive theory, stating that:¹¹⁵

[t]he economic incentive provided by this [copyright] monopoly would be rendered meaningless if others could take existing images without permission and use and manipulate them at will, even if their alterations add some value to the original.

108 As the New Zealand Court of Appeal stated: “Whether a part of a copyright work is a substantial part must be decided by its quality rather than by its quantity.” *Wham-O MFG Co v Lincoln Industries*, above n 105, at 666 (CA). See also *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 276 (HL).

109 *Henkel*, above n 59, at [44], citing *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 279 (HL).

110 At [44], citing *Designer Guild Ltd v Russell Williams (Textiles) Ltd* [2000] UKHL 58, [2000] 1 WLR 2416 (HL).

111 At [44], citing *Bleiman v News Media (Auckland) Ltd* [1994] 2 NZLR 673 at 678 (CA).

112 See *Bleiman v News Media (Auckland) Ltd* [1994] 2 NZLR 673 at 679 (CA) (“The fact that separate original work has been added to an infringement does not make it any the less an infringement.”).

113 See *Designer Guild Ltd v Russell Williams (Textiles) Ltd*, above n 110, at 2425 (HL) (“But while the copied features must be a substantial part of the copyright work, they need not form a substantial part of the defendant’s work”). On the influence of European Union law on the English ‘substantial part’ analysis, see below Part V.D.

114 According to a leading US copyright treatise, “[i]t is entirely immaterial that, in many respects, plaintiff’s and defendant’s works are dissimilar, if in other respects, similarity as to a substantial element of plaintiff’s work can be shown”. Melville B Nimmer & David Nimmer *Nimmer on Copyright* (Matthew Bender, 2015) at § 13.03[B][1][a]. This is with respect to the US ‘substantial similarity’ analysis of copyright infringement (which is similar to, but not the same as, the New Zealand ‘substantial part’ analysis). See also Winick, above n 1, at 154.

115 Winick, above n 1, at 154.

To illustrate this with the Tamahori head-swap: the question is whether the head-swapped photo contains a substantial part of the fashion photo. If so, the copyright in the fashion photo could be infringed, even if the head-swapped photo also contains a lot of other aspects entirely unconnected with the fashion photo.

Interestingly, it is not entirely clear how a court would rule in situations like the Tamahori head-swap. The part of the fashion photo that featured in the head-swapped photo was the subject's body. On the one hand, the subject's body could be interpreted as a substantial part of the fashion photo (compared with the totality of her body plus her head). On the other hand, a person is usually recognisable and identifiable by means of facial features, so perhaps if the head is removed then the remaining body-only could be interpreted as *not* a substantial part of the original. To counter the latter approach, the subject could argue that in a photo used for fashion purposes, the body (wearing the fashion-relevant clothing) is in fact the *most* substantial part, that is, the "essence".¹¹⁶ This particular subject in fact stated that when she saw the head-swapped photo, "I recognised the shot *and particularly the dress*"¹¹⁷ (emphasis added).

The Tamahori head-swap highlights this potential uncertainty in relation to copyright infringement of head-swapped photographs. When the subject is considering whether to bring a legal action under copyright law, it could be difficult to predict how a court will rule on the substantiality question.

If the plaintiff does succeed in establishing infringement, defences to copyright infringement in New Zealand are specific and narrow. An infringing defendant must usually fit its conduct into one of the specific "permitted acts"¹¹⁸ in order to receive a defence. These specific statutory defences provide New Zealand courts with less discretion than, for instance, an American-style "fair use" infringement defence under which several factors are considered to determine whether a particular use is fair.¹¹⁹

It has been argued that New Zealand too should adopt a fair use style defence.¹²⁰ Until then, however, the New Zealand approach to copyright defences can result in comparatively more certainty in terms of whether a particular use constitutes infringement. In the context of photo-manipulation, the New Zealand approach is also arguably more advantageous to plaintiffs since many of the statutory defences are very narrow and specific. A defendant's infringing head-swap may therefore be unable to satisfy any of the defences. For instance, there is no specific defence for parody.¹²¹

116 *Henkel*, above n 59, at [44].

117 *Smith*, above n 6, at 3.

118 Copyright Act 1994, Part 3. For a discussion of common law public interest defences, as preserved by s 225(3), see *Frankel*, above n 28, at 338-343.

119 See 17 USC § 107.

120 Alexandra Sims "The Case for Fair Use in New Zealand" (2016) 24 *IJLIT* 176. Besides the United States, other jurisdictions with fair use style copyright defences include Israel, Singapore, South Korea and the Philippines. At 177 n 4.

121 *Sims*, above n 120, at 178, 188-189.

New Zealand's statutory defences include incidental copying; criticism, review and news reporting; research or private study; and defences for educational purposes.¹²² Among these, at first glance the news reporting defence seems applicable to the Tamahori head-swap. The head-swapped photo was used to illustrate a news story. However, the fair dealing defence for news reporting is limited in the context of directly-taken photographs. This is because if such a photo is used for purposes of reporting current events, the defence only applies if the relevant current events are reported *by means of* a sound recording, film, or communication work.¹²³ Therefore, if a photograph is used for purposes of reporting current events in any type of work *except* a sound recording, film or communication work—that cannot be fair dealing for purposes of reporting current events.

The result is an inability to use this defence if a directly-taken photo is used without the copyright owner's consent in a literary work (such as a newspaper) for news-reporting purposes. This would be the case even if the copyright owner is acknowledged.¹²⁴ However, this restriction would not seem to apply to video-stills, given that they fall outside the statutory photograph definition.¹²⁵

In the Tamahori head-swap scenario, the head-swapped photo could be copyright-infringing if a court considered it to contain a substantial part of the fashion photo. If so, the defendant could not use this defence even though the infringing photo was used to illustrate a news story, since the defence is inapplicable for directly-taken photos used in a newspaper.

(1) Addressing the challenge: what should be considered a “substantial part”?

The above discussion highlighted the importance of the “substantial part” analysis in a copyright regime with very specific defences, such as New Zealand. The ensuing question is: what *should* be considered a substantial part in relation to head-swapped photographs? As with the rest of the article, this is with regard to instances where neither the head nor the body is further modified when creating the head-swapped photo.

A useful approach to this issue would be as follows.

- If the “substantial part” inquiry is in relation to the subject's *head*, the head should ordinarily be considered a substantial part of the photo from which the head was sourced. This is because a person is usually recognisable and identifiable by means of facial features.

122 Copyright Act 1994, ss 41-49.

123 Section 42(2)-(3).

124 This is due to the wording of Copyright Act 1994, s 42(3), which mentions “sufficient acknowledgement” as a requirement but excludes photographs in this context.

125 See Corbett, above n 61, at 201, 204.

To apply this to the Tamahori head-swap scenario: the head-swapped photo should be considered to have taken a substantial part of the unidentified photo from which Lee Tamahori's head was sourced.

- If the “substantial part” inquiry is in relation to the subject's *body*, the inquiry should include a purposive analysis of the (unaltered) source-photo from which the body portion was sourced. The court should accordingly take into account the purpose of that source-photo's creation and dissemination in determining whether the body portion is a substantial part of that photo.
- This purposive analysis builds on English case law that predates changes influenced by European Union law. Under the influence of EU law, the “substantial part” inquiry in English copyright law asks whether the part allegedly copied contains elements that are the expression of the plaintiff-author's intellectual creation.¹²⁶ As mentioned in a pre-Brexit edition of a leading UK copyright treatise, the full impact of these changes is unclear.¹²⁷ Some of these changes do not seem suitable imports into New Zealand law. For instance, the aforementioned treatise suggests that under the EU-influenced English “substantial part” analysis, the importance of the part allegedly copied in relation to the whole work may be irrelevant.¹²⁸ This approach does not seem to align with the New Zealand concept of “substantial part” as discussed above. Indeed, the term “*substantial* part” itself implies that the part must be looked at in comparison with the whole. Therefore, New Zealand should continue to consider “old” (pre-EU-influenced) English copyright law when helpful to the New Zealand context—particularly in the current post-Brexit world.
- In determining what is a substantial part of an artistic work, “old” English cases have asked what part of the work would be “visually significant to the person to whom the work would normally be addressed”.¹²⁹ For instance, in a case involving design drawings of a laminating machine, “visually significant” was interpreted to mean visually significant to an engineer and not a layperson.¹³⁰ This aspect of the English case has been applied by the New Zealand High Court.¹³¹

126 *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482; [2014] RPC 8 at [38], citing *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569; [2009] ECDR 16 (Court of Justice of the European Union) at [39].

127 Gillian Davies and others (eds), *Copinger and Skone James on Copyright* (17th ed, Thomson Reuters (Professional) UK, London, 2016), paras 7-40, 7-46, 7-47.

128 At para 7-46.

129 At para 7-106, citing *Billhofer Maschinenfabrik GmbH v Dixon & Co Ltd* [1990] FSR 105.

130 *Gillhofer Maschinenfabrik GmbH v Dixon & Co Ltd* [1990] FSR 105 at 121-122.

131 *Hammar Maskin AB v Steelbro New Zealand Ltd* HC Christchurch CIV-2006-409-977 (8 October 2008) [182]-[190]. While the Court of Appeal subsequently reversed on patent infringement grounds, the High Court's copyright infringement decision was not appealed. *Hammar Maskin AB v Steelbro New Zealand Ltd* [2010] NZCA 83 [20].

It has also been applied by the English Patents County Court even while acknowledging the impact of EU law.¹³²

- Such an approach could be used in the “substantial part” inquiry for the subject’s body suggested above. Using this purposive analysis, the court should take into account the purpose of the source-photo’s creation and dissemination to determine whether the body portion would be visually significant to the persons to whom the source-photo was addressed. Who would be the relevant persons to whom the photo would normally be addressed? This would depend on why the photo was taken and distributed: that is, the purpose behind it.

To apply this to the Tamahori head-swap scenario: a main purpose of the fashion photo’s creation and publication seems to show the subject wearing the dress. It is therefore arguable that given this purpose, to readers of the newspaper’s fashion section the subject’s body (wearing the clothing) would be a substantial part (the ‘essence’¹³³) of the fashion photo. Recall that even the subject “recognised the shot *and particularly the dress*”¹³⁴ (emphasis added) even though her head was not included. Under this analysis, the head-swapped photo should be considered to have taken a substantial part of the fashion photo.

The conclusion could be different if the purpose of the fashion photo was instead the subject modelling headwear, such as a hat or a tiara. Since a hat or a tiara would be worn on the head, the body portion of such a photo could be perceived as being less significant—to the same readers—given the headwear-modelling purpose of the photo. Therefore, a court could be comparatively less inclined to consider the body a substantial part of this type of photo.

If the subject of the source-photo is a celebrity, the result of this “substantial part” analysis for the body portion would be less certain. In such cases there are several questions a court should consider. Is the purpose of the photo to highlight the celebrity, or the clothing worn, or both? Where is the photo displayed: in which newspaper section, or on what type of online blog? The answers would help identify the photograph’s purpose and the relevant persons to whom it is addressed. Any accompanying text would also assist in this analysis. For instance, a photo of the celebrity Rihanna on a gossip website titled *Rihanna goes to the mall to buy nail polish* would be different in many ways from a photo on the BBC news website titled *Rihanna arrives at BRIT Awards wearing Alexander McQueen dress*. Furthermore, in the modern internet age a photo can be quickly reposted in many different places and contexts. In such instances, the relevant viewer is likely to be an ordinary member of the public even though the initial photo may have been targeted to a specialist audience.

132 *Temple Island Collections Ltd v New English Teas Ltd* [2012] EWPC 1, [2012] ECDR 11.

This case did not involve a head-swapped photograph.

133 *Henkel*, above n 59, at [44].

134 *Smith*, above n 6, at 3.

It is acknowledged that this suggested approach for the body portion is contextual and that in some instances different judges could come to different conclusions.¹³⁵ However, this contextual nature exists with the current approach too. As the New Zealand Supreme Court has stated, assessing whether a substantial part was taken “is usually the most difficult question which arises in copyright cases” and “is a subject upon which, in borderline cases, minds can reasonably differ”.¹³⁶ In the head-swapping context, therefore, it is posited that the suggested purposive analysis for the body portion could be helpful to focus the court’s analysis in such cases. It would also provide some guidance to future photo-subjects and photo-alterers.

There are interesting policy implications of the suggested approach for head-swapped photographs involving naked or sexually-explicit body portions. In an American case,¹³⁷ an employee distributed to co-workers two photocopied images featuring his supervisor’s head superimposed on sexually-explicit female bodies. The supervisor’s head-photo was taken from her campaign postcard for a union election. The bodies were taken from pornographic magazines and were “two different photographs of women striking lewd or masturbatory poses”.¹³⁸ The employee’s actions were held to constitute infliction of emotional distress under state law.

Copyright issues were not discussed in the opinion, but we could imagine how it may be resolved as a New Zealand copyright infringement action following the “substantial part” approach suggested in this article. Let us first assume that the ownership rules allowed the suit to be brought, or that the law has been changed to allow for joint copyright ownership by the subject. With regard to the “substantial part” analysis, it is not entirely clear from the court decision how much of the subject’s body was visible in the photo from which the head was sourced. This photo could have featured only or mainly the head. Even if the body was visible, however, under the suggested approach taking the identifiable head portion of this photo would be considered taking a substantial part of it. Therefore (if other infringement requirements are satisfied) under New Zealand law the defendant has likely infringed copyright in this photo by copying the head portion.

Now let us turn to the sources of the body portions. Again, we will assume that ownership is not an issue. Given the purpose of pornographic magazine photos and the intended addressees, the body portion of such a photo should be considered a substantial part under the suggested approach. Therefore, the copyrights in these photos have also likely been infringed.

No defence seems to apply under New Zealand copyright law for copying either the head or the body portions in this latter example.

135 This is of course even likelier if there was further modification to the head or body portions before inclusion in the head-swapped version.

136 *Henkel*, above n 59, at [44].

137 *Bowman v Heller*, above n 9.

138 At 520.

This has important policy implications relating to websites displaying allegedly naked photos of well-known individuals. In many instances, these photos are in fact head-swapped photos of these individuals' heads on others' bodies.¹³⁹ And as highlighted by the American case discussed above, this type of head-swapping also occurs in relation to those who are not celebrities.

VI. CONCLUSION

Head-swapped photographs are likely to become more frequent with increasing advances in photo-manipulation technology. This article examined to what extent New Zealand copyright law can protect against the unauthorised creation and dissemination of head-swapped photographs. Copyright in a photograph could be infringed by the act of head-swapping as well as by the subsequent dissemination of the head-swapped photo. As explained in this article, copyright law can be an advantageous tool for New Zealand plaintiffs attempting to counter head-swapped photos. On the other hand, relying on copyright in such contexts can pose challenges. This article identified and evaluated some of those challenges, drawing on a real-life New Zealand head-swap as an example scenario.

One challenge when using copyright law in such situations is that the photograph subject may not be able to bring an infringement action due to the copyright ownership rules. Under these rules, the owner of copyright in the source-photograph is often the photographer, not the subject. The article considered and commented on some ways in which a subject could nevertheless be able to bring an infringement action.

Another challenge involves how the test for copyright infringement is structured. The main challenge here is the uncertainty over whether the head-swapped photo contains a substantial part of a source-photo. The article analysed this issue and posited a suggested approach specifically applicable to the infringement analysis of a head-swapped photograph. While this suggested approach is with reference to New Zealand law, it may also be helpful in other copyright regimes with a similar combination of a "substantial part" infringement analysis and specific fair dealing defences.

139 Winick, above n 1, at 151-152. For a recent example, see Cross, above n 7.