

Digitisation and Conservation: Overview of Copyright and Moral Rights in UK Law

Tate Legal and Copyright Department

In the context of Tate's research project into the legal implications of replication, initially with a US and UK focus, this note sets out a few general principles of copyright protection in the UK.

International framework

National copyright laws are derived from international framework treaties, negotiated by national government members of World Intellectual Property Organisation (WIPO), based in Geneva. The main treaty, the Berne Convention, establishes the core standard principles relative to the scope and nature of rights, limitations to rights, moral rights and beneficiaries of copyright.

A second layer of governance and regulation applies to EU countries under the European Union harmonisation directives, which provide some consistency across legal regimes and more detail on the protection of rights, duration of copyright etc, for member states. Despite this, there are historic structural differences: the UK protects the economic right of the copyright holder under common law whereas most European countries have a *droit d'auteur* (right of the author) system which is a more individual personal right tied to the identity and personality of the author. The area in which this difference is most closely seen is in the relative strength of protection for moral rights.

Territorially, copyright protection applies on a worldwide basis in all countries which have signed up to the Berne Convention. The original protection is granted to works based on where a work was first issued to the public. Rights to take action for infringement will depend on where the act of publication (and possible infringement) takes place and the law of that country. Any assessment of the legality of certain actions needs to consider the cross-border implications.

UK law

Copyright is an automatic right (meaning it applies from the moment of creation, without the need for registration) to an original work. There is considerable case law about what constitutes sufficient originality. The protection attaches to the expression of the work (as a text, painting, music) rather than the idea.

The relevant legislation is the Copyright Designs and Patents Act 1988 as updated by the Copyright and Related Right Regulations 2003, implementing international and EU rules on copyright to digital environment.

The nature of the rights confers on the author the right to authorise copying or making the work available to the public via publishing or internet (and other acts not explained here). An act of copying which requires the author's permission includes the photography of a work, which technically requires explicit permission even where the museum is the owner of the physical object. In practice, most artists enter into a copyright licence to grant the museum non-commercial rights to copy and publish the work for their own purposes. The museum will become the owner of the rights in the photograph, such rights co-existing with the rights of the author.

Further information sources for UK law:

[UK Patent Office](#)

[IP Portal: Index](#)

[Economic rights of the author](#)

Moral rights

In the UK moral rights are a statutory right conferred by the 1988 Act. Some moral rights can be waived and some can only be claimed where they have also been asserted. They basically comprise:

- Right of attribution (paternity): to be identified as the author of the work when a work is copied or communicated.
- Right to object to false attribution (being named in respect of a work not created by the author)
- The right to control the form of the work (right of integrity/to object to derogatory treatment)

These constitute a limited set of rights to which a number of conditions and exceptions apply, weakening their force. Other moral rights regimes, such as France, may also grant the right to publish or divulge work, to correct a work, to object to the alteration or destruction of the original of a work, to object to excessive criticism of a work and to withdraw a work from circulation on the ground that the author is no longer happy with it (whether that is an artistic view or on the basis the person who holds copyright has not exploited the rights).

Duration of moral rights in the UK is generally for the duration of copyright though, in the case of the right to object to false attribution, this is limited to twenty years after the author's death. The integrity and paternity rights last for seventy years post mortem.

The integrity right is the key focus for this overview. For the right of integrity to be infringed there has to be 'derogatory treatment' of the work.

'Treatment' means any 'addition to, deletion from, alteration to or adaptation' of the work. The textbooks give guidance that this must involve an interference with the internal structure (or sequence or organisation or meaning) of the work. Examples of likely derogatory treatment are given as chopping out a part of a painting to exhibit that; reproducing a drawing in reduced size and recoloured; colourising black and white film. It has been suggested that mere display in a new or inappropriate context will not be a 'treatment' for these purposes in the UK, whereas it could be in France.

To be 'derogatory', the treatment must be a 'distortion' or 'mutilation'; or if it is otherwise prejudicial or dishonours the reputation or profile of the author. There is almost no case law on these terms, so there is no certainty about how these rules will be applied. It does appear that it is increasingly interpreted as meaning that an impact on reputation is a pre-condition for a finding on derogatory treatment, even if they were originally meant to be alternatives (i.e. there is only a distortion if the reputation of the artist is threatened). This means publication, the circumstances and extent, could all be relevant factors in assessing the case. The test for the damage to reputation would be an assessment on reasonable likelihood and probably avoid the subjectivity of the author's own view. Nonetheless, there is so little case law it is impossible really to be clear on how these provisions would be applied by a court.

Since the right is tied to reputation it is not surprising that it is only triggered by the publication or communication of the work to the public and that would involve publication in research papers/internet site etc. Text books say it is not a right to object to spoliation or destruction of the work itself. Clearly, the extent of the public which it reached would be relevant to the scale of damages.

There are a few defences available, for instance if an act takes place in performance of a legal obligation. It is just possible that there could be an argument that the preservation of works of art for the nation could be asserted as appropriate grounds, though there might be issues as to whether publication of consequential research was justified.

The right of integrity cannot be transferred by the author but it can be waived by the author in writing, a practice which is common in broadcasting and media industries allowing them to edit works. Any relationship with the artist on acquisition or later through copyright licence could specifically cover moral rights issues.

Further information:

Moral rights www.intellectual-property.gov.uk/faq/copyright/moral_rights.htm

Bently and Sherman *Intellectual Property Law*, Chapter 10.

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