TATE PAPERS

ISSN 1753-9854

TATE'S ONLINE RESEARCH JOURNAL

Posthumous Legal and Ethical Issues

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This paper briefly discusses key legal and ethical issues involved and arising at the colloquium held at Tate on 18–19 October 2007, *Inherent Vice: The Replica and its Implications in Modern Sculpture*. It explores distinctions, if any, between the works of living and dead artists.

The first and paramount reason for distinguishing between the works of living and dead artists – in the context of conservation, restoration and replication – is legal: artists have intellectual property rights over the physical treatment and reproduction/replication of their works, which last for their lifetimes plus (in most countries) seventy years *post mortem*. Let us first consider those rights in relation to living artists, before exploring their posthumous application.

Under most international and national laws, artists have the statutory 'moral right' to object to what UK law calls 'derogatory treatment' of their works. This means they can legally object to any addition, alteration, amendment to, or deletion from, their original works that damages their 'honour, integrity or reputation'; and could therefore include any or all conservation or restoration treatment. In the case of living artists, permission should therefore be sought from the artist for express consent to any proposed treatment, which has the distinct advantage not only of complying with the law but also of eliciting the artist's original and current artistic intentions for their work.

Similarly, most countries have copyright laws that give artists the statutory right to prevent their works being reproduced (and/or such reproductions being merchandised); and would therefore include any replication. Express consent from living artists should therefore be sought, for the reasons given above.

The estates, trusts or foundations of dead artists usually inherit their statutory moral rights and copyright, which normally last for the same length of time *post mortem* – with two notable exceptions: under US federal law, statutory moral rights generally last only for the artist's lifetime; under French law statutory moral rights last indefinitely. As with living artists, therefore, express permission should be sought from the artist's estate for 'treatment' or replication, in most cases for at least seventy years *post mortem*. In those circumstances, dead artists' intentions can only be gleaned second-hand from their chosen heirs and successors – which raises important issues for living artists planning the future of their artistic estates, and whether they wish to make written records (for their immediate successors and for longer term posterity) about whether, and if so how, their works should be 'treated' or replicated.

In the case of artists who have been dead for more than seventy years, all of the issues discussed above should nevertheless be considered by those wishing to undertake 'treatment' or replication of works – but for professional ethical, rather than legal, reasons. In the case of the works of French artists, both legal and ethical reasons continue indefinitely *post mortem*; in the case of the works of US artists, whilst the replication issue remains for seventy years *post mortem*, the 'treatment' issues become purely professional and ethical after death.

It is also important for museums and collectors to understand that the statutory moral rights and copyright of artists (and their estates) are determined by the artist's legal 'intellectual property status'. Different countries may have different rules, but generally the intellectual property status of a rights owner is normally their nationality, legal domicile or residency – at the material time. This would normally be when the work was made or, if uncompleted, when the artist abandoned the work or died. For example, UK statutory moral rights and copyright laws would govern the completed and uncompleted works of an artist who lived and died

as a UK national. It follows that museums and collectors of works need to note the 'intellectual property status' of the artists whose works they own, and act accordingly.

A related, less certain and even more complex issue, is the impact on the market value of works from their being replicated. The issues involved and arising chiefly relate to the seller (be it the original artist, or any subsequent re-sellers). A seller or re-seller (especially an art market professional) would normally be required, by the laws of most developed countries, to describe a work accurately. For example, an offer of a work for sale must state if it is one of an artist's limited edition or series – because such information will affect the work's market value, and it would be misleading not to provide the buyer with such important economic information. In relation to works offered for sale that are not expressly limited editions or series, it would be reasonable and proper for a buyer to assume that their purchase was of a unique work, and that replicas, reproductions, or further versions of that work would not be made – such further versions, after the sale, are likely to diminish the work's market value in relation to any subsequent versions.

It is therefore important that anyone (artists, their estates, museums and collectors) contemplating replicating or authorising the lawful replication of work bears in mind the potential economic damage that may befall owners of the original pre-existing work(s). Similarly, sellers and re-sellers of lawfully replicated work should make expressly clear to potential buyers that work is a lawful replica, by whom it has been authorised and made, and how many other 'versions' exist; they should also have appropriate documentation of their original purchase and its provenance, and give to the new buyer their own documentation adding to the provenance chain they inherited.

This paper was written as a short discussion document for the Inherent Vice: The Replica and its Implications in Modern Sculpture Workshop*, held at Tate Modern, 18–19 October 2007, and supported by The Andrew W. Mellon Foundation. Other papers produced for this workshop can be found in issue no.8 of* Tate Papers.