

Replication of Sculpture / Works of Art: Legal Guidelines

Tate Legal and Copyright Department

These guidelines aim to clarify the UK legal position on copyright and the replication of works of art such as modern and contemporary sculpture within the museum context. An aspect of the *Inherent Vice* workshop is to examine the ethics of the reproduction of works of art and in what context museums are permitted to make replicas of deteriorating works (such as [Naum Gabo's](#) plastic sculptures).

Whilst the need to restore and preserve deteriorating works of art by way of replication is a pressing one, it is imperative that within that context an institution such as Tate acts in accordance with the Copyright, Designs and Patents Act 1988 (CDPA) and seeks permission to produce a replica of a work of art from the copyright holder or, if deceased, the copyright holder's estate in order to avoid a claim for copyright infringement. This will apply where the work is still within copyright as there are no exceptions in the CDPA for unauthorised copying of artistic works by a museum for the purposes of preservation of such works. Where the copyright in a work of art has expired, however, a museum will be free from any restrictions in creating replicas and will not be obliged to seek permission to copy the work.

The Copyright, Designs and Patents Act 1988 – The Legal Guidelines

Sculptures and other works of art are specifically mentioned in section 4 of the CDPA as being works in which copyright subsists. The rights conferred on the 'author' of a work of art and the acts restricted by third parties in relation to copyright works are listed in Chapter II of the CDPA. Sections 16 and 17 of the Act are reproduced below (key sub-sections are highlighted in bold):

RIGHTS OF COPYRIGHT OWNER

The acts restricted by copyright

s16 The acts restricted by copyright in a work

(1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom –

- (a) to copy the work (see section 17);
 - (b) to issue copies of the work to the public (see section 18);
 - (ba) to rent or lend the work to the public (see section 18A);
 - (c) to perform, show or play the work in public (see section 19);
 - (d) to communicate the work to the public (see section 20);
 - (e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21);
- and those acts are referred to in this Part as the 'act restricted by the copyright'.

(2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.

(3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it

- (a) in relation to the work as a whole or any substantial part of it, and

- (b) either directly or indirectly;
- and it is immaterial whether any intervening acts themselves infringe copyright.
- (4) This Chapter has effect subject to –
 - (a) the provisions of Chapter III (acts permitted in relation to copyright works), and
 - (b) the provisions of Chapter VII (provisions with respect to copyright licensing).

s17 Infringement of copyright by copying

- (1) The copying of the work is an act restricted by the copyright in every description of copyright work; and references in this Part to copying and copies shall be construed as follows.
- (2) Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form.
 - This includes storing the work in any medium by electronic means.
- (3) In relation to an artistic work copying includes the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work.
- (4) Copying in relation to a film, television broadcast includes making a photograph of the whole or any substantial part of any image forming part of the film or broadcast.
- (5) Copying in relation to the typographical arrangement of a published edition means making a facsimile copy of the arrangement.
- (6) Copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work.

It is assumed that most of the twentieth-century works of art earmarked for restoration in the Sculpture Replication Project are still within copyright, as generally copyright will not expire in an artistic work until seventy years from the death of the author, or if such work has been made available to the public then copyright will expire seventy years after the date the work was first made publicly available. The duration of copyright in an artistic work is dealt with at section 12 of the CDPA:

Duration of copyright

12 Duration of copyright in literary, dramatic, musical or artistic works

- (1) The following provisions have effect with respect to the duration of copyright in a literary, dramatic, musical or artistic work.
- (2) Copyright expires at the end of the period of seventy years from the end of the calendar year in which the author dies, subject as follows.
- (3) If the work is of unknown authorship, copyright expires –
 - (a) at the end of the period of seventy years from the end of the calendar year in which the work was made, or
 - (b) if during that period the work is made available to the public, at the end of the period of seventy years from the end of the calendar year in which it was first made available,
 subject as follows.
- (4) Subsection (2) applies if the identity of the author becomes known before the end of the period specified in paragraph (a) or (b) of subsection (3).
- (5) For the purpose of subsection (3) making available to the public includes –
 - (a) in the case of literary, dramatic or musical work –
 - (i) performance in public, or
 - (ii) communication to the public;
 - (b) in the case of an artistic work –
 - (i) exhibition in public,
 - (ii) a film including the work being shown in public, or
 - (iii) communication to the public;
 but in determining generally for the purposes of that subsection whether a work has been made available

to the public no account shall be taken of any unauthorised act.

(6) Where the country of origin of the work is not an EEA state and the author of the work is not a national of an EEA state, the duration of copyright is that to which the work is entitled in the country of origin, provided that does not exceed the period which would apply under subsections (2) to (5).

(7) If the work is computer generated the above provisions do not apply and copyright expires at the end of the period of fifty years from the end of the calendar year in which the work was made.

(8) The provisions of this section are adapted as follows in relation to a work of joint authorship –

(a) the reference in subsection (2) to the death of the author shall be construed

(i) if the identity of all the authors is known, as a reference to the death of the last of them to die, and

(ii) if the identity of one or more of the authors is known and the identity of one or more others is not, as a reference to the death of the last whose identity is known;

(b) the reference in subsection (4) to the identity of the author becoming known shall be construed as a reference to the identity of any of the authors becoming known;

(c) the reference in subsection (6) to the author not being a national of an EEA state shall be construed as a reference to none of the authors being a national of an EEA state.

(9) This section does not apply to Crown copyright or Parliamentary copyright (see sections 163 to 166B) or to copyright which subsists by virtue of section 168 (copyright of certain international organisations).

To summarise the law described above, the author of a sculptural work has copyright in the artistic work and it is the author alone who has the exclusive right to copy the work or issue copies to the public, without restriction. In order for a third party to copy the work, for example, make a replica of a work of art, express permission or licence to do so by way of a legal agreement must be obtained from the copyright holder. If such permission is not obtained then this would amount to an infringement of copyright and would expose the person or institution making the unauthorised copy to legal action.

Legal agreements authorising replication

Legal agreements which enable Tate to make replicas of works of art can take the form of one of the following types of legal document:

- Acquisition agreement (for use on acquisition of the work)
- Copyright licence
- Letter of agreement

The issue of Tate and other museums or arts organisations obtaining permission from a copyright holder's estate for the replication of a work of art arose in the context of a work by László Moholy-Nagy *Light Prop for an Electric Stage*. The work was replicated by Tate in 2005 in preparation for the 2006 [exhibition *Albers & Moholy Nagy: From the Bauhaus to the New World*](#) on the understanding that that copy would be owned by Harvard University Art Museums, who own the fragile original. Below is a template of the letter of agreement between Tate and Harvard, together with the owners of two earlier replicas and the copyright holder:

LETTER OF AGREEMENT

[Insert name of work, date and artist's name]

This letter serves as a binding letter of agreement between The Board of Trustees of the Tate Gallery ('**Tate**'), Harvard University Arts Museums ('**Harvard**'), Van Abbemuseum Eindhoven ('**VAE**'), Bauhaus Archiv Berlin ('**Bauhaus**') and [inset name of copyright holder] (together the '**Parties**') in respect of the replication of the above-mentioned work of art (the '**Work of Art**').

Whereas:

(A) [Copyright holder] is the sole copyright owner in the Work of Art and will assign the benefit of this copyright to his/her successors on his/her death;

(B) the Parties wish to record in writing for the future the circumstances in which a replica of the Work of Art may be commissioned or made; and

The Parties agree the following:

1. Except in the circumstances set out under Clause 2 below, no further replica of the Work of Art shall be made or commissioned by any Party from and including the date of this Letter of Agreement.

2. A Party may seek the consent of [Copyright holder] (and on his/her death his/her assignees/successors in title) to commission or make a replica of the Work of Art, providing supporting evidence as appropriate, where that Party reasonably believes that:

2.1. the replica owned by that Party is worn out or about to wear out; or

2.2. the replica owned by that Party has become or is about to become too fragile to operate or lend to third party museums or galleries for exhibitions; or

2.3. the replica owned by that Party has been in some way(s) irreparably damaged or its condition has otherwise deteriorated to such an extent that it needs to be replaced.

3. [Copyright holder] agrees to give fair and due consideration to any request for consent to commission or make a replica under Clause 2. [Copyright holder's] decision shall be final and conclusive.

4. If any Party commissions or makes a replica of the Work of Art in breach of this Letter of Agreement, that Party shall:

4.1. unless directed otherwise by [Copyright holder], destroy the replica, any study models, photographs thereof, drawings, any documentation or data stored in electronic form or in any media in its possession relating to the proposed replica immediately, in the manner specified by [Copyright holder] and provide evidence of their destruction;

4.2. indemnify [Copyright holder] against any costs, losses, damages or other adverse effects arising directly or indirectly from the breach.

5. Each Party agrees to require any future buyer of the Work of Art or a replica of the Work of Art to comply with the terms of this Letter of Agreement as a Condition of the contract of sale and shall provide evidence of compliance with this Clause 5 to [Copyright holder] prior to entering into the proposed contract of sale.

6. [Copyright holder] may cancel or waive any provisions of this Letter of Agreement at any time by notifying the Parties in writing to that effect.

The Parties have read, understood and agreed to the above

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