

Art and cultural assets news – autumn: who owns commissioned artworks?

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Art history is replete with famous patrons who have commissioned artists to create artworks for their benefit: consider Pope Julius II commissioning Michelangelo to paint the ceiling of the Sistine Chapel (1508-1512) or the Russian textile merchant and art collector, Sergei Shchukin, commissioning Matisse to paint *The Dance* (1909). In the contemporary era there are similarly many collectors both public and private who commission artworks, including individuals and corporations, museums and city councils. Yet the ownership of commissioned contemporary artworks is, perhaps surprisingly, not always straightforward.

On the one hand, artists may benefit from what are known as moral rights attached to the artwork as well as other rights such as copyright and the resale royalty right. Moral rights are 'inalienable' and held by artists after the sale of their artworks. They may restrict what collectors can do with artworks. On the other hand, artists increasingly rely upon contracts to ensure they retain rights over their artworks once title to the commissioned artwork has been transferred. This often applies particularly to 'site-specific' artworks, where the artwork has been commissioned by a private or public collector to belong to a particular physical location, for example, a museum garden or city plaza. Well-known examples of site-specific artworks include sculptures by Richard Serra and installations by Claes Oldenburg and Coosje van Bruggen.

Authors' moral rights (including those of artists, writers and composers) were first established in France in the 19th century. The rationale is that authors have a non-financial interest in works of authorship which survives the transfer of ownership, in contrast for example, to copyright which can be fully transferred. The main moral rights for artists include the right to be recognized as artist when the work is exhibited or published (the 'attribution right'); the right not to have authorship of a work falsely attributed to one (the 'non false attribution right'); and the right to object to the derogatory treatment of the artwork (the 'integrity right'). Note that moral rights only apply to artworks where those works would otherwise be protected by copyright.

Like copyright, moral rights last throughout the author's lifetime, but vary in duration between jurisdictions after the author's death.

Historically, moral rights have been recognized for longer in 'civil law' countries such as France, Germany and Spain than in 'common law' countries such as England and the United States. Moral rights were only properly incorporated into English law in The Copyright, Designs and Patents Act in 1988 ('CDPA') and for artists only in the United States with the passing of the Visual Artists' Rights Act in 1990 ('VARA'). Civil law jurisdictions also generally offer artists with stronger moral rights' protection. French law for example, includes moral rights such as the right to retract the work and to divulge it to the public for the first time, which are absent in the UK and the US.

The integrity right is a potentially important restriction on owners of artworks. Under English law, the 'treatment' of an artwork means any addition to, deletion from, alteration to or adaptation of the artwork. Whilst 'treatment' includes internal physical changes to an artwork, for example, an owner could not physically alter the structure of the artwork and exhibit it, it is unclear whether this includes extrinsic changes. Would the way in which an artwork is framed or included in a particular type of exhibition be considered to be forms of treatment?

The treatment of an artwork must also be prejudicial to the artist's 'honour' and 'reputation'. In the rare cases in which the integrity right has been examined under UK law, honour and reputation have been interpreted objectively by the courts; that is in terms of how a reasonable person would view the treatment (not the artist). Thus when the cartoonist Bill Tidy complained about the exhibition of low quality, small scale reproductions of his cartoons in the Natural History Museum (1995), the court held that a reasonable person would not have considered the artist's reputation to have been damaged and refused to grant him an injunction against the trustees of the museum to prevent their public display.

This contrasts markedly from France, where the subjective viewpoint of the artist has far greater weight in determining whether there has been an infringement of this moral right.

If an artist is successful in establishing that the integrity right has been infringed under English law, he or she is entitled to obtain an injunction as well as damages from the court to prevent this misuse of their artwork. This is a potentially important weapon. In France, injunctions have even been granted to artists to enforce the completion of commissioned artworks though it is unlikely that this would apply in either the UK or US. In 1975, the French artist Jean Dubuffet was commissioned by Renault to create a two thousand square foot sculpture outside its company headquarters. After nine months, Renault refused to allow completion of the execution of the sculpture, claiming that it was too expensive to construct and to maintain. Dubuffet obtained an injunction from the French court ordering Renault to allow completion of the sculpture, though he eventually decided not to enforce it.

However, an artist's right to obtain an injunction to prevent the misuse of their artwork in the UK and in the US through the integrity right is limited if the owner displays a publicly visible disclaimer disassociating the artist from the artwork exhibited. In the case of *Christoph Buchel v Mass MoCA* (2007), this provision under VARA was successfully relied upon by the defendant museum before the court, when the museum decided controversially to exhibit an unfinished installation by the artist that had been abandoned by the artist in the museum.

An important question with the integrity right is whether it includes the right to prevent the destruction of artworks, including site-specific artworks. Throughout history dissatisfied owners have destroyed commissioned artworks. Clementine Churchill, Winston Churchill's widow, famously destroyed Graham Sutherland's portrait of her husband (1954) considering it to depict him as a 'gross and cruel monster'. It is unclear under English law, whether an artist could rely upon the integrity right to prevent such an act of destruction of an artwork by an owner. Whilst this has never been tested, it has been argued by commentators that the notion of derogatory treatment suggests logically, that an artwork must continue to exist and this would not be the case if it were destroyed. By contrast, VARA, like French law, explicitly recognizes the right of artists to prevent the destruction of their artwork, provided the artwork under VARA is deemed to be of 'recognised stature'.

VARA was implemented in the US through the incorporation of Art 6bis of the Berne Convention for the Protection of Literary and Artistic Works into US law. This followed the controversy caused by the removal and destruction of Richard Serra's site-specific sculpture, *Tilted Arc* (1981).

In 1979 Serra was commissioned by US General Services Administration (GSA) to create a large-scale sculpture for Federal Plaza, New York. His design, 'Tilted Arc' was a monumental 12 x 120 foot curving steel wall bisecting the Plaza - Serra's intention was that his sculpture would expand or contract depending on the viewer's movement around it. In its scale, disruption of Federal Plaza, and rust-like finish (it was executed in Cor-Ten steel) *Tilted Arc* provoked public controversy and hostility as well as admiration. This resulted in the GSA convening a hearing in 1985 to decide whether *Tilted Arc* should be relocated (the GSA produced a petition with 3,791 signatures in favour of relocation, and 3,763 against).

At the hearing, Serra argued that to remove the work would be to destroy it as it was conceived for the physical specificities of Federal Plaza. Unfortunately, the GSA rejected Serra's argument and the expert testimony of numerous art world witnesses and ordered *Tilted Arc* to be removed. Serra appealed through the US courts arguing that he had a contractual right to prevent *Tilted Arc* from being re-located and that to remove the artwork would also violate his First Amendment right to freedom of expression. The US courts (including the US Court of Appeal for the Second Circuit) disagreed and in 1989, *Tilted Arc* was finally removed from Federal Plaza.

VARA expressly prevents artworks from being destroyed by their owners without authorization, this includes artworks attached to buildings providing they were created after the Act's implementation. VARA has been used by artists to successfully prevent the removal of site-specific artworks. In *Carter v Helmsey Spear Inc.* (1994), three sculptors who had executed a large-scale installation commissioned for the lobby of a building in New York were able to prevent its removal by the owner relying upon VARA. The New York District Court held that that the artwork was covered by VARA (as a work of 'stature' and 'fine art' and was not a work for hire) and its removal would injure the artists' reputation. However, in *Phillips v Pembroke Real Estate* (2006) the US Court of Appeal held that VARA does not protect site-specific artworks when the artwork is not part of a building. In this case, the owner of a park in Boston was entitled to re-locate sculptures in the park made by the claimant artist. The court's decision in *Phillips* suggests troublingly that were Richard Serra to seek to rely upon VARA to prevent the removal of *Tilted Arc* today, he may not succeed.

It has become increasingly common for artists commissioned to design site-specific installations to insist that the commissioning contract contains conditions obliging the commissioner to maintain the artwork permanently and to prevent its destruction, including its removal from the site it was conceived for. In addition, the contract may also deal with the owner's rights (if any) to re-sell the artwork. In this way, a contract is a more effective legal mechanism for artists to rely upon to control the fate of their work than simple reliance upon moral rights' legislation.

In conclusion, it is clear that although commissioners of artworks may have property rights over commissioned artworks the law does not grant them full-unencumbered rights over these objects. This is with good reason: artworks are special types of cultural objects and owners of artworks have responsibilities to the artists whose work they commission, as well as to society at large, particularly when an artwork is of outstanding aesthetic and historical significance. Generally, owners of artworks are respectful of the intentions of artists. However, in those situations where the reasonable intentions of artists are not respected, it is right that artists should be able to rely upon the law. To what extent artists will be able to do this will depend upon the type of agreement between artist and commissioner and the law of the place the commissioned artwork belongs in.

Earlier this year, Withers advised on the commission and production of 'Tumbling Tacks' (2009), a site-specific installation by Claes Oldenburg and Coosje van Bruggen. This was to be van Bruggen's last work. She died in January 2009.

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