

Moral Rights and Site-Specific Artistic Works

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In 2004, Carl Jansen, a sculptor, was commissioned to create a sculpture of a snake for Sidewinders, a sports bar in Scottsdale, Arizona. The body of the snake, which took over a month to create, curls round to form a bar 24 feet long. Joe Kay, the new owner of the property, now called Tango Grill, wants to install a wall dividing the restaurant and bar area to protect diners from smoke and noise. This necessitates removing the snake. In the last fortnight, Mr Kay tried to sell the sculpture on Ebay, planning to donate the proceeds to charity. Mr Jansen objected, claiming that removal of the snake would infringe his intellectual property rights. He says that the snake was created specifically for that building and it also acts as a great ambassador for his business. Mr Kay has decided to remove the snake from Ebay pending legal advice.

This highlights the issue of the rights available to the creators of site-specific works such as installations and murals to prevent removal or destruction. Copyright gives no right to stop the purchaser of the physical work from selling or disposing of it. Moral rights may offer some assistance but their efficacy varies in different jurisdictions.

The term 'moral rights' describes a bundle of rights, separate from the copyright, that vest in the creator of a copyright work. In the UK, they comprise the right to object to derogatory treatment of the work (the integrity right); the right to be identified as the author and the right against false attribution of a work.

Artists' moral rights originated in civil law jurisdictions such as France where they are viewed as a basic human right. In common law jurisdictions, like the USA and the UK, traditionally copyright was justified on an economic basis and moral rights were regarded as less important.

In 1989, the General Services Administration dismantled Richard Serra's *Tilted Arc*, a steel sculpture in Federal Plaza in New York. At that time, Serra had no legal rights to prevent the destruction of his site-specific work. In 1980, the Bank of Tokyo removed Isamu Noguchi's sculpture, *Shinto*, from its Manhattan lobby by cutting it into pieces. Following this, New York enacted moral rights legislation. It was not until the Visual Artists Rights Act 1990 that these rights were enshrined in federal law. Today, artists in the USA can prevent or recover damages for the intentional or grossly negligent destruction of a work of 'recognized stature'.

In the UK, however, artists have limited rights to prevent the destruction of site-specific works. The right of integrity is only infringed if the work is subjected to derogatory treatment amounting to distortion or mutilation of the work or that is otherwise prejudicial to the artist's honour or reputation. Commentators are divided as to whether total destruction falls within the definition of treatment as 'any addition to, deletion from or alteration to' the work. In any event, private destruction may not be prejudicial to the reputation of the author.

In France, many artists have successfully contended destruction of their works infringes their moral rights. In 1974, Jean Dubuffet was commissioned to design a model for a large monumental work outside Renault's headquarters. The project was halted before completion and demolition started. Dubuffet won his moral rights claim. Renault was held to have committed contractually to a complete realisation of the work and were ordered to resume construction. The moral rights of the author thus took precedence over the right of property.

Conversely, destruction of a disintegrating sculpture in a Grenoble park was held permissible as it presented a risk to public safety. In *Aichouba v Lecole*, squatters relying on their right of integrity claimed compensation for mosaics they had created in building which the owner wanted to demolish. The French court rejected the claim concluding the building owner's rights could not be defeated by an unlawfully made work. Yet the squatters were granted two months to remove the work at their own cost.

In the UK, artists' rights to prevent destruction of a work are weaker than in many other jurisdictions. In Australia, there is a defence to destruction of a moveable artistic work provided the artist is given a reasonable opportunity to remove it. The right of integrity in artistic works attached to buildings is also not infringed by destroying the building provided notice is served on the artist and opportunity given to access the work to record it or to consult with the owner about relocation.

This strikes a fair balance between the rights of the property owner and those of the artist. Creators of site specific works in the UK may think it is time to lobby for a similar provision. Until then, where site-specific works are commissioned, artists' contracts should explicitly deal with moral rights in the event of demolition or removal of the work.

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