

The BRITISH ART *Journal*

EUROPEAN UNION DIRECTIVE ON COPYRIGHT

Article 14 ('Works of visual art in the public domain') of the European Union Directive 'on copyright and related rights in the Digital Single Market' (Chapter 4) issued on 15 April 2019 states: 'Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.'

We have long argued in these pages that there can be no copyright in reproductions of works of art that are themselves out of copyright. Such things are 'in the public domain'. The UK government voted for the EU Directive on Copyright, and indeed Article 14 is very much in line with the way in which the interpretation of the law on copyright in the UK has been tending. Member states have two years to incorporate the ruling into local law but whether the UK leaves the EU or stays will not, we think, make any difference.

We have drawn attention in the past to the pointlessly restrictive attitude of the Tate, and to the fact that it appears, alas, to have persuaded the British Museum, National Portrait Gallery and National Gallery to imitate it to an unfortunate degree (although they offer some concessions for academic publication). How very welcome and timely, in contrast with these institutions, is the launch by Birmingham Museums Trust of a superb open-access website dedicated to offering the unlimited use of digital images of out-of-copyright works of art in its care, which it states are in the public domain: <https://www.birminghammuseums.org.uk/collection> (go to Digital Image Resource). On page 79 we reproduce just one of the Trust's tens of thousands of magnificent images and look forward to reproducing many more.

The Tate, in contrast, produces torrents of verbiage in attempts to restrict the use of such images. Indeed, the Tate is still asserting copyright in copyright-expired works of art, while implying 'related rights' that are also expressly excluded by the Directive above, as this section of its 'terms and copyright' shows:

Reproducing content from the Tate website

Website content that is Tate copyright may be reproduced for the non-commercial purposes of research, private study, criticism and review, or for limited circulation within an educational establishment (such as a school, college or university).

The following uses of Tate copyright content are also permitted, except where other terms apply:

Reproducing Tate copyright content, and Tate owned copyright expired artworks, for non-commercial research, private study, criticism and review, or for the purposes of teaching and instruction within an educational establishment. Where any artworks are published, the source of the content must be identified and the copyright status of the content acknowledged, e.g. 'Title, Artist, Date of Work, Photo: © Tate, London [current year]'.

The Directive means it would be wrong, in the case of 'Tate owned copyright expired artworks', to 'acknowledge', as the Tate insists, its assertion of 'copyright status' and to attach 'Photo: © Tate' to a published image, since an 'act of reproduction' of a copyright-expired work of art 'is not subject to copyright or related rights'. An accurate photographic reproduction of a work of art cannot, of its very nature, count as 'the author's own intellectual creation'.

The Tate complicates things further with the simply staggering command that viewers of its website *must stop looking at it* if they don't agree to all the terms and conditions – which can only be viewed, of course, on the website. Supposing you do not agree to the terms and conditions (if indeed you do look at them), it is already too late, because you have already accessed the website that you 'must not' access. We are in Wonderland.

By using our website, you accept that you will be bound to the terms and conditions of use in full. If you do not agree to any of these terms and conditions, you must not access, use and/or contribute to our website. [!]

... Tate may change these terms from time to time so we recommend that you should check them regularly... Your continued use of tate.org.uk will be deemed acceptance of the updated or amended terms. If you do not agree to the changes, you should cease using this website. [!]

Well, either a website is public or it is not. Of course, you can issue commands and say whatever you like on your own public website, but anyone looking at it is free to ignore what you say, unless restrictions are in place as is the case with, for example, some newspapers, where registration and often a subscription are needed to access full content. Alas, that is where the Tate has gone. The reduction in the resolution of the images on the Tate website, and absence of any zoom facility, is a scandal. But you *can* see things more clearly on the Tate website – if you register. In this, it is unfortunately matched by the National Gallery, which used to have the most wonderful zoom system. To its shame, it has followed the Tate in imposing restrictive terms and conditions for close study of a painting. This is in perverse defiance of the trend in the rest of the digital world, which is to make works of art more visible and easier to study than ever before. You can examine works of art in detail in the gallery: why not on the website? To get the flavour of the Tate website, try this:

You may not copy, reproduce, republish, disassemble, decompile, reverse engineer, download, post, broadcast, transmit, make available to the public, or otherwise use tate.org.uk content in any way except for your own personal, non-commercial use. In certain prescribed circumstances, you may adapt, alter or create a derivative work from any tate.org.uk content for your own personal, non-commercial use, with the prior written permission of Tate which will be indicated against the relevant tate.org.uk content.

What a deplorable waste of time and money on the part of an institution that has evidently lost sight of its purpose.

The truth is that it really does not matter whether the Tate believes its assertions about owning copyright in its images of works out of copyright. The point at issue is what the Tate intends to do with its digital images. If it believes its own assertion that its mission is to promote the knowledge and enjoyment of the works of art that it cares for, then it should publicly acknowledge that images of its copyright-expired works are free for use. It should also desist from attempting to create, in the absence of copyright, other 'related rights' through supposed implied contracts or other means.

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