Copyright in Memoriam

An omnipresent, though often overlooked, art form is the memorial. From ancient Egyptian pyramids to modern cemeteries, people have used sculpture to celebrate lives well lived and to mourn those lives too soon lost. These monuments can be on a small scale, such as individual gravestones, or on a large scale, such as the Lincoln Memorial. Some are tributes to events, eras, or peoples. Regardless of size or purpose, memorials stand as silent sentinels to those they commemorate, existing for the most part until elements or humans take their toll.

In some cases, these changes to the landscape are willful. In Germany, for example, cemetery plots are not purchased, but leased, and all but a few of the ornate headstones are removed and discarded in a heap when the lease comes to an end. In California, the display of a large cross as a tribute to American veterans has sparked a decade-long debate over religion in government, with many citizens and courts calling for its removal. And Senegal’s recently-unveiled Monument to the African Renaissance, taller than the U.S. Statue of Liberty, is drawing sharp criticism regarding the depiction of an African woman—on one hand, because she demonstrates complete subjugation to a man; on the other, because her state of dress (or lack thereof) does not accurately depict the Senegalese Muslim culture. The artist has already suggested draping the woman in clothes to help quell critics.

At first blush, one might assume that these changes are and should be in the discretion of the owner of the geographic location where the monument rests. After all, when viewed from a “speech” standpoint, the art represents the property owner’s speech. However, many of the artists of memorials actively claim copyright protection in them. In the United States, several copyright registrations exist for headstones and tombs. Sculptor Felix De Weldon claims copyright in several public works, including the Iwo Jima Memorial. Some memorials themselves are copyright owners; the Australian War Memorial claims copyright in its website and all items in its National Collection. In Egypt in 2007, a bill was introduced that attempted to assert national copyright over all pyramids and the Sphinx. While it initially received much attention as being contrary to the Berne Convention, that bill is still pending.

Memorials, forming a quiet component of a living landscape, invite infringement. Even before digital distribution escalated the capability to create and copy, these monuments were infringed often in the form of photographs, miniature reproductions, and outright copies. While public, these works are not in the public domain. Many are works for hire, but many are not. If the artists or their heirs use copyright tools such as termination of transfer, moral rights, and antiquities laws to recapture or preserve lawful private rights in public memorials, the living landscape as we know it may come at a price.

This paper examines the current legal state applicable to monuments and memorials. It considers copyright, moral rights, antiquities, and other legal regimes that could apply to help or hinder access to already public works. Additionally, it considers the hypothetical of applying those laws to legal conclusion, determining whether ultimately, the ability of the artist to exercise rights over the monument would diminish the public domain by disallowing derivative access to those works, or expand the public domain by preventing any alteration to their intended display.