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**The Need to Imbibe Fair Use Doctrine on Illustrations among Graphic
Artists in Nigeria**

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Abstract

This study in its opinion looks at the Nigerian graphic artists and their copies attitude of illustrations, downloaded from the internet or copied from magazines. Which come in total disregard to the doctrines of fair use. Fair use tries in its entirety to strike appropriate balance between authors and publishers on one hand and users and consumers at the other. Fair use considers four weighing balance, which are, nature of these use, nature of the work, extent of use and its economic effect. These the Nigerian graphic artist does not consider. This inconsideration may be coming from uncertainties of the artists, publishers, and users on criticisms of the fair use doctrine, that fair use was amouphous vague and difficult to apply. The intellectual property of the first author must not be taken for granted, this spells out originality. However, the dual-grant theory as proposed by Bell and Pernhomysky, (2016), see's the limitation of the author and the limitless users, the public; that the author must be encouraged to do more, by profiting in his work, and there should efficient use of work by users. They write that as more rights are given to users, the more it curbs the right of authors. By simple observation it has been noticed that most Nigerian graphic artist do not care about the authors and therefore, we find copied illustration on posters, flex banners and sometimes on billboards on streets in Nigeria. This must be brought to note and policy makers should take steps to avert this copious attitude that might lead to litigations. From these submissions, it was recommended that teachers should insist on where or how illustrations are generated, copied illustration must be acknowledge and seminars, workshops must organized for all lecturers and graphic artist.

Keywords: *Fair Use, Copyright Laws, Artist, Illustrations and Originality.*

INTRODUCTION

It is common practice all over the world that copyrighted materials especially academic or scientific research are cited with dates within the body of literary works and at the end, detailed references are stated. Citations are also made on criticism, commentaries and media reporting. It is also noted that within literary works illustrations which are placed as plates or figures which are copyrights, sources are also cited. This is in obedience to the doctrine of fair use and copyright laws. In Nigeria's case, the download and copying of illustrations from the internet for advertising or other purposes has become the order of the day, without the recourse to think of the author or creator of the used illustrations. Here the doctrine of fair use does not come to mind with no recognition of it at all. Is it that, fair use has never being taught or because of the uncertainties in the doctrine? However, Shahshahani (2015), writes that the school of scholarship criticizes fair use doctrine for providing too little certainty to users of copyrighted works and second generation creators, largely in support of Shashahani Ibid, Bell and Parchomovsky (2016) argued that the fair use doctrine was amorphous, vague, and notoriously difficult to apply. Possibly based on the uncertainties, there seem to be a total disregard of the doctrine of fair use or the total absence of its knowledge by graphic artist or generally artists in Nigeria or possibly around the world, when it comes to copyright of illustrations on outdoor advertisements.

No matter what the criticisms of fair use may be, would the author of any intellectual property not glory in his or her work, if extensively used by another to make profit. Patterson (1992) argues that it would but unfair that much of the fruit of the compilers labour may be used by others without compensation. In the same vain he says that "for a second author to reap what he or she did not sow was deemed to be unfair". Here in lye's the problem, there must be fairness in all dealings that would make creativity worthwhile. This unfairness which negates the rights of the first author is what the United Nations Charter of 1948 states in article 27/2 that everyone has the right to the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author. The author and user has moral justification to be protected in the copyright law. In the theory as proposed by Bell and Perchomovsky (2016), the dual-grant theory of fair use, sees fair use as an upshoot from copyright laws, which tries in its entirety to protect the author and the user. According to them dual-grant theory has two parts to it, hence dual; which indicates the author and the public in the matters of fair use doctrine. They indicate that the authors are limited, they create and stop, but the public, the other part of the dual is not minimized by time, they continue to use the authors work when necessary for themselves and In some occasions profit from their use. But for Bell and Perhomovsky Ibid, the authors must profit from his expressions to make it worthwhile. They write that, rights to authors and privileges to users is designed to meet the dual goals of incentivizing authors to create works and encourage efficient use of works by users, but these rights exists with some tension. The more rights are given to usage, the more it curbs the right of authors. To what extent has the authors right been taken for granted in Nigeria?

In Nigeria the rights of authors has seriously being infringed on, especially with the coming of the internet. There is a reckless use of copyrighted illustrations on posters which are commercial. By observation of this researcher illustrations in Nigeria are downloaded from the internet or copied from magazines or books without the need to think of originality. These could easily be seen on the streets of Nigeria as one moves from location to location. See figure 1, where all illustration are lifted from the internet. Or magazines, even when the illustration from scratch to finish in originality. This suggests that the observatory method was used as instrument for this research as the researcher moved from city to city. However, a small environment of the streets of Calabar, Cross River State, Nigeria was used as sample in figure 1.

The big time advertisers in Nigeria are aware of matters of illustrations and originality to avoid litigations; the small timers do not care. It may not be surprising therefore when one's face appear on an advertising poster for a program or product without their permission. These small posters are everywhere in Nigeria, appearing in roundabouts, street corners and sometimes on business signposts or banners. The ingenious use of downloaded or copied illustrations in Nigeria has more or less become habitual which is even done by the so called professionals. This copious attitude has been made easy by the presence of the latest technologies in graphics; which are CorelDraw, Photoshop and the presence of computer scanners and internet on phones. These technologies are really useful but sometimes misplaced usage.

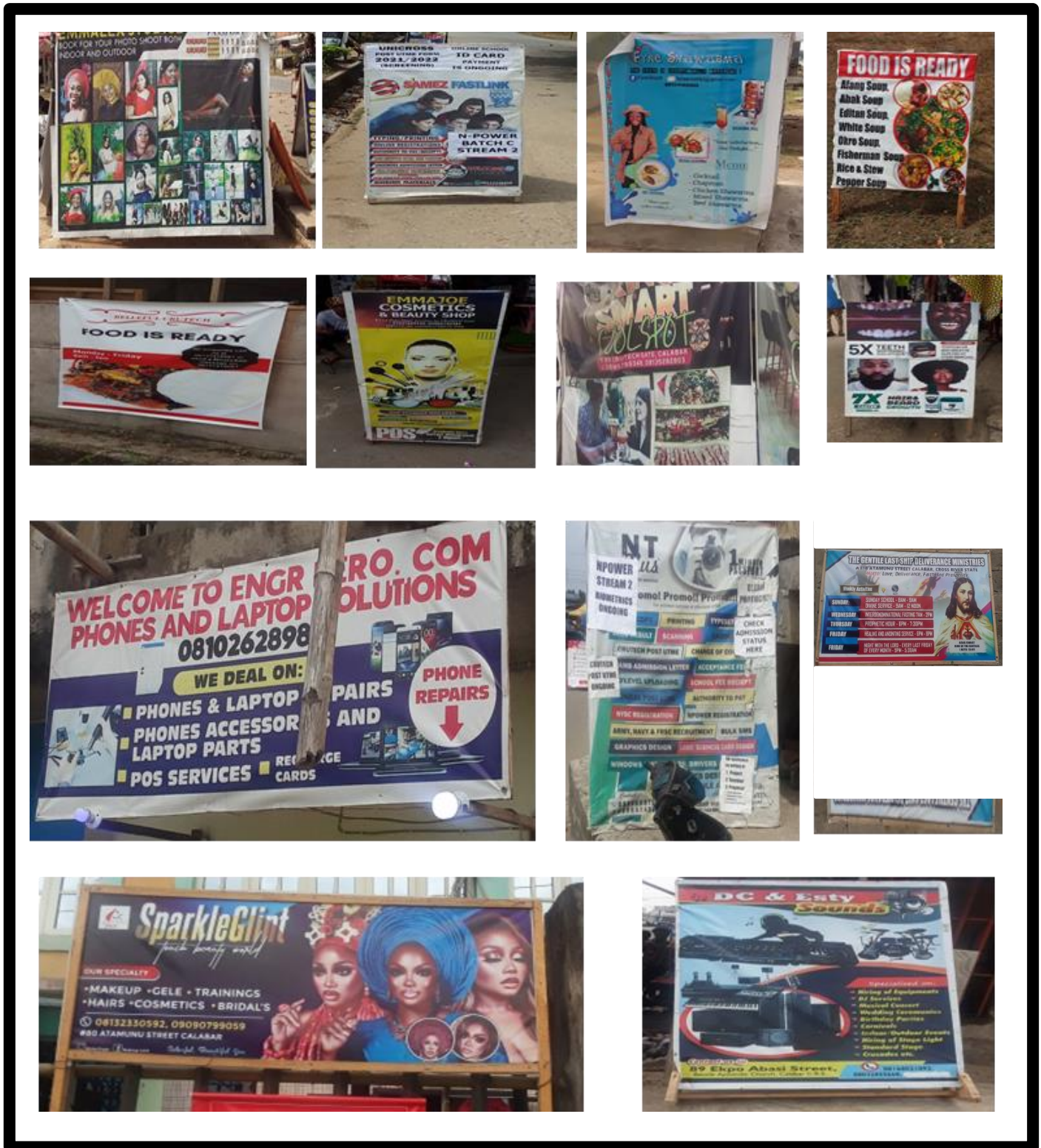


Fig. 1: Posters from the streets: Source: Uti F. 2021

The Seoul Agenda (2010) in goal 1a (i) talks about enacting policies to sooth all, one important fact to be fitted into policies of nations should be the teaching of the Doctrine of Fair Use as it applies to illustrations on adverts. To ensure well rounded development of the artist according to agenda 1a (iii) it is important however to stress originality in the process of learning, were it would be taught alongside the doctrine of fair use. Graphic artists in Nigeria do not see the possibility of recognizing sources of illustrations on advertising posters, this is realizable. This copious practice has become an unfair use of illustrations for commercial purposes. This anomaly could be corrected by wide spread education which should begin from the trainee graphic artist in all tertiary institutions where coping has become habitual and to seminars held outside campuses. The doctrine of fair use must be taught in all tertiary institutions as a course so that its implications to downloading and coping of illustrations against copyright laws are made bare to our students and artists alike.

The Doctrine of Fair Use

The doctrine of fair use has its origin from copyright laws. Copyright laws try in its entirety to protect the rights of authors and any creative work which strives from originality. Howard (1992) tried to explain what copyright law is, when he said that the law seeks an appropriate legal balance between authors and publishers on one hand and the right of users and consumers on the other. This law requires that a work be original to qualify for copyright protection. In order for a work to be original, according to Ryan (2015), the work must have the quality of newness; never done before and not derived from something or somewhere. Now for anyone to use such works there must be fairness to use; there-in lye's the doctrine of fair use. To achieve well-rounded development of art students according to Seoul agenda goal 1a (iii) it is important to teach them how to be original. Questions would then be asked; to what extent can one use another person's original work? Was the person acknowledged appropriately or well cited? Was it used with the purpose of profit? What then is fair use?

The Boston College Libraries (2017) says "fair use is a doctrine under copyright law that permits certain uses of a work without the copyright holder's permission" and another definition by LibGuide (MIT) (2015) says that fair use in copyright laws allows the use of copyrighted materials on a limited basis for specific purposes. And the third says according to Jaszi and Aufdeide (2010), fair use is the "right to use copyrighted material without permission or payment under some circumstances". Stim (2013) averred that fair use in a most general sense is any coping of copyrighted material done for a limited and transformative purpose. These definitions have commonalities which includes, free use without permission from the copyright owners, the use of material on a limited basis for specific purposes and must be for a transformative purpose. Stim, Ibid says fair use "is a defense against claim of copyright infringement". That is to say if your use qualifies as a fair use, then it would not be considered an infringement. Akpotaire (2013) says that one does not always need permission to copy or use copyright materials: That the Nigerian law allows for a limited use of copyright material without acquiring the permission from the copyright holder where the use is for non-commercial or educational/research purposes. She however insists that the copyright owner must be acknowledged.

In his publication Bryant (2017) calls fair use "fair dealing", which he says it is entrenched in the Nigerian Copyright Act but not defined. He also says it is incorporated in section 107 of the United States copyright act and they call it "fair use". In his discussion he interchangeably used fair dealing and fair use since the words mean the same thing. He averred that fair dealing is mentioned under the second schedule in the Nigerian Copyright Act. According to him this Act is extensive but unclear and wonders whether it is in practice in Nigeria. He says however that "in practice much

reliance is placed on the English position in determining whether a particular use is fair deal by the Nigerian courts”. There is also consideration by Nigerian Judges to adapt fair use cases from other jurisdictions around the world.

For anyone to freely use another’s original work, the purpose must be considered and this according to Stim, (2013), falls into two categories, it must either be for commentary and criticism or for parody. If one comments upon or critique a copyrighted work for instance, writing a book review, fair use principles allows you to reproduce some of the work to achieve your purpose. For example quoting a few lines, summarizing or copying a few paragraphs may be allowed. This subsists that using a whole page or a whole section or possibly the whole might be an infringement against copyright. That means there was no fair use.

Jaszi and Aufdeide (2010) wrote that, fair use could also be applied to the social sciences, empirical research; both qualitative and quantitative” studies. Scholars who also work on the humanistic side in any discipline, especially history, depend more on citation and quotation of closely read sources, archiving data relating to their research from the internet, analog or digital formats for long periods of time which may be re-used for a different research. Copyrights may be taken on limited bases from published journals, books on-line or from media products. Copyright requires that the doctrine of fair use can applied on hard copy, digital or online. They suggest in their conclusion that any how copyright is used “scholars must provide citations in a form and manner typically used in communication scholarship for the material used in any publication of shared results of study”. LibGuides (2014) supports this when they said that properly citing sources, protects against plagiarism, and furthermore they see plagiarism as “using someone else’s work without giving them credit and “this is a form of academic dishonesty that is considered a serious offence and handled by university processes”, in the university system. Stim, (2013), still mentioned parody as a second category; in his word he says that parody is a work that ridicules another, usually a well-known work, by imitating it in a comic way. When writers or film makers try to poke fun at another’s original write-up or film, fair use allows that to be as long as financial again is not involved. Parody is common with films, dramas and plays.

Fair use authors commonly write of transformation as a purpose for applying fair use. This according to Stim, (2013), has to do with “purpose and character of your use”. The material used; has it been taken to create something new or copied verbatim into another work? He now recommended two questions that one should ask while thinking of applying fair use. One; “has the material you have taken from the original work been transformed by adding new expression or meaning? Or two; “was value added to the original by creating new information, new aesthetics, new insights and understanding”? These questions bring one to re-think on how to use another person’s original work. In critiquing works, expression and meaning is considered, but the right citation must be made. Where an original was taken, was it to add value to whatever work you were doing. If these questions are answered well, then the original has been fairly used. As discussed before, Stim averred that purposes such as scholarship research on education may also qualify as transformative use, because the work is the subject of review or commentary.

Weighing Balance for Measuring Fair Use

There is a general agreement by all authors to four weighing balance for measuring fair use by judges according Jaszi and Aufdeiden (2010), they include:

- 1 The nature of the use
- 2 The nature of the work used
- 3 The extent of the use; and

4 Its economic effect

Stim (2013) mentioned that the above four factors are used in the United States of America to judge fair use cases, that they are usually guidelines and no hard and fast rules. Jaszi and Aufdeide (2010) agreed with this when they said that fair use is flexible, that it is not unreliable; that “in fact for any particular field of critical or creative activity, lawyers and judges consider expectations and practice of what is fair within that field”. This implies that when it comes to cases in the creative arts as in this research, what is obtainable in the fine arts would be considered, for example when it comes to the use of pictures. Authors also agree when using any factual work it is important to make a self-assessment using the four factor test. These four factor test are discussed below.

(1) **The Nature of the Use**

Stim (2015) calls this the transformative factor. Was the material used such that something new was created out of it or was it copied verbatim into another work? Surely copying a work verbatim, especially if it was substantial and worst still no proper acknowledgement made would bring an infringement and litigation. “Has the material you have taken from the original work been transferred by adding new expression or meaning”? This connotes that any expression or meaning removed out of content from that of the original could bring litigation. Was value added to the original by creating new information, new aesthetics, new insights and understanding? This is particularly very important for researcher’s who look for facts to support their work, which most of the time bring in new ideas, new information, insight and understanding and would therefore want to cite past original works. In this case authors agree that research qualify as being transformative, because the work is the subject of review and commentary”.

Boston College Libraries (2017), say that educational use does not automatically render a use fair and that fair use cannot be relied upon to make these works free. This indicates that if that educational use is profit driven or commercial it is possible to attract litigation. For this reason, Boston College libraries asked that one should consider if what you are using is “education or for a commercial” purpose. Is the use “non-profit use or a use for profit”? “Is the use transformative or interactive”. They insist that these questions are essential to making your work fair use.

(2) The second factor is **the nature of the work.**

Stim (2015) says there is a “more leeway to copy from factual works such as biographies than from fictional works such as plays or novels”. What he tries to say here is that it is easier to make reference from articles or books published for educational purposes. To copy words directly from a play or film verbatim may attract litigation. If one copies word, directly from an original of a play, novel or film, how does one single it out from the whole. Even when a work is unpublished Stim, Ibid says “the author has the right to control the first public appearance of his or her expression”. This is supported by Jaszi and Aufdeide (2010) when they said that the copyright “law provides copyright protection to works of authorship in order to foster the creation of culture”.

The Boston College (2017) is in agreement to the fact that unpublished works generally receive protection because the courts consider the copyright holder’s right to first publication. They also noted “the fact that a work is unpublished does not bar a finding of fair use, but it makes the other factors important”. When an unpublished work is used without permission or acknowledgement especially depending on the substantiality of the work taken, the case of infringement may be adjudged to be a case of theft. The Boston College also adds that “the more a creative work is, the

stronger the copyright” and that “the selection and arrangement of factual data with some modicum of originality may also attract copyright. “ This brings this study to the third factor.

(3) **The extent of use or the amount of substantiality** of the portion taken.

For fair use to be considered as fair the amount of usage would be considered, that is if the amount was more than substantial. It would be against Copyright Laws. Stim (2013) in his discuss of measuring fair use he opined that “the less you take, the more likely that your coping will be excused as a fair use”. Taking small portions may not be problematic especially if reference could be made to the original author. But what if reference cannot be made as in taking a small portion of a popular music? For example using the first note; how do you reference that? But in reference to this study LibGuides (MIT) (2014) commented on the use of images. They said that “properly citing sources protects against plagiarism”. Citing sources for the purpose of research or transformation may be easy, but what about a situation where images are used for advertisements and graphic artists do not care about finding a place to cite the original author. This is plagiarism, and must be checked especially in our University system. LibGuides mentioned that to help support a fair use case of images – It was important to use a lower resolution or thumbnail version where possible; place the image on a new context or use it for a new purpose; use only the parts of the images needed for that purpose. The above signifies that the image is used on a very small scale for a different purpose and probably not all the part of the image be used. This may be judged as fair use. But if such images are used for commercial purpose, it may attract litigation. This brings this study to the fourth factor.

(4) **The economic effect of the use or the effect of the use upon the potential market**

Anything that has to do with financial or commercial gain is important to everyone especially when an original work from one person is used by another to make money without consent from the original owner. This smells trouble. Stim (2013) asked a question: Does the use deprive the original owner of income or undermines a new potential market for the copyrighted work? And he concludes that depriving a copyright owner of income is very likely to trigger a lawsuit. He gave a good example of a classic case of a photographer and a sculptor that went to court:

An artist used a copyrighted photograph without permission as the basis for the wood work sculptures, copying all elements of the photo. The artist earned several hundred thousand dollars selling the sculptures. When the photographer sued, the artist claimed his sculpture was a fair use because the photographer would never have considered making sculptures. The court disagreed stating that it did not matter whether the photographer had considered making sculptures; what mattered was that a potential market for sculptures of the photograph existed (Rogers V. Koons 960 f.2d 301 (2dcr.1992)

The artist knowing that a potential market existed should have sought permission from the photographer before using them for sculptures’ probably the photographer would have made some gains out of the deal. LibGuides (2014) recognised the above fact when they said that copyright infringement can occur when using someone else’s copyrighted work without permission. Stim (2015) suggested a **fifth** factor which may not be popular with the other authors or judges which is: the “Good or Bad” judge or jury. He mentioned that fair use involves a subjective judgment which is usually handled by judges or juries. His example was that a morally offended judge or jury may rationalize its decision against fair use. This takes into cognizance that human beings could be

corrupt. A good judge would not take bribes while a bad one would, not minding who was being hurt.

Illustrations and Fair Use

LibGuides (2014) advised that special consideration must be made on images before usage; which has a bearing on this study. People do not like their photographs appearing in unwanted places, if it appears on advertisements it would be assumed that permission would have been sought, especially photographs of popular people. LibGuides suggested that “photographs of people may involve rights of privacy or publicity, state or federal laws limit the use of a person’s likeness”. They gave a list of things to consider when one thinks of using images for any art work.

- The first is to consider fair use using photographs of people taken in large public scenes may be allowed. There the focus is not just on a personality, but on the crowd, so this might be a fair use.
- Avoid photographs of famous people, or people engaging in private activities. Famous people are usually consulted before their photographs are used for advertisements, otherwise it would attract litigation.
- Being aware that publicity rights limit commercial uses.

When it comes to publicity or commercial usage, factor number four, which talks about the economic effect of usage must be considered, as in the case between the photographer and the sculptor above (Rogers V. Koon). They also comment that “photographs of works of art may involve the rights of the works creator or copy holder”. If one must photograph works of “public domain”, like sculpture pieces, photographs of two dimensions must be considered and must be transformative. That is to say that, one should not photograph another artwork for the purpose of reproducing it.

LibGuides (2014) also mentioned that the buildings designed after December 1 in 1990 in the USA are copyrighted; they therefore recommended that taken photo shoots be rather done from public places in fair use. The time factor usage may not matter so much, as far as a work has been copyrighted, for if one still has a certificate attached to any work, there can still be litigation after a decade. Meyer (2015) opines that “fair use can evolve over time” which also means that according to him “to find out if something is fair use, is to ask a federal court”. However as regards the length of time copyright protection, according Akpotaire (2013) literary, musical or artistic works can last up to 70 years after the death of the author: While that of corporate bodies and governments is 70 years after the work was first published. 50 years for firms and photographs after the date of first publication and 50 years for sound recording after the recording was first published.

Sourcing Illustrations

For any work to be of fair use, serious thought must be given to illustrations that were copied especially for commercial purposes. The most important of all is to avoid image or whole copying of originals for commercial purpose. For the artist, originals could be developed from fresh sketches or photographs from scratch to finish especially when it has to do with advertising purposes. Hodge (2008) mentions seven steps to which an artist could create originality in his illustrations:

- 1) Plan for originality of concept
- 2) Experiment and capture random experiences
- 3) Consider one source versus many sources of influence
- 4) Develop your passion and unique artistic vision
- 5) Refine your process and skill set
- 6) Set obtainable goals and challenges; and
- 7) Achieve self-direction through hard won success.

This study suggests that if the above directions are followed, one can achieve originality, without having to copy the originals of others.

Conclusions

The copious use of illustrations adopted from the internet or any other source without citation is stealing and this is a punishable crime. This could be worse if illustrations are copied for advertising purposes. This attitude becomes habitual with time. To stop this or at least slow the attitude down, it will be safer teaching the doctrine of fair use at the tertiary level of study. This would according Seoul to agenda 1c (iii) safeguard knowledge and foster intergenerational understanding. Fair use must be a driving force to avoid clash of interests. This would ensure that copyright laws are not taken for granted. Originality of illustrations is actually a panacea to fair use, one would not have to make references or cite someone else on a poster if every factor of that layout design is original. To be original in the use of illustrations it is of note to consider Hodges seven point suggestions above.

Recommendations

From the above submissions; the following recommendations are made:

1. To curtail the habitual attitude of plagiarizing illustrations, copyright and fair use must be taught not only in our universities but also all higher schools where fine and applied art exist as a course. It must be taught as a one unit course at the point of specialization.
2. Lecturers must insist on where or how illustrations are generated.
3. If illustrations are copied for academic purposes, students must learn to acknowledge their sources.
4. Sources must be acknowledged on the bottom right or left corner of their posters. For example to read: Illustrations adopted from – Uti (2019), www.waae.conference.com (after date topics written on pages could be cited). These citations could be made small and insignificant at the recommended corners. If for commercial purpose, permission must be sort first and then citation must be made on the body of the work for it to be fair use. See figure 2.
5. Seminars and workshops must be organized for lecturers and graphic artists.

EXAMPLE OF COPIED ILLUSTRATIONS THAT IS CITED

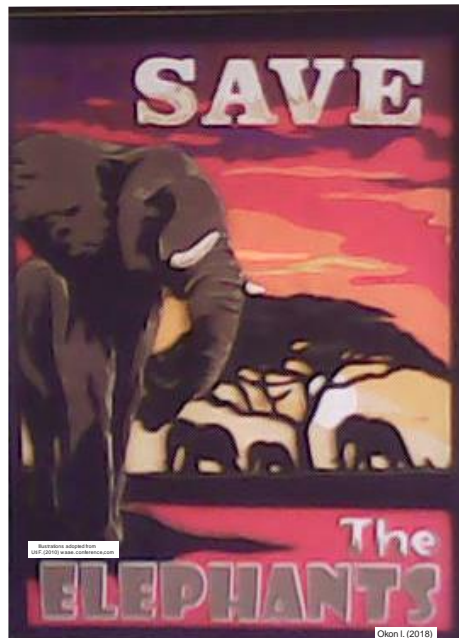


Fig. 2: Save the Elephant

Source: Okon L. 2008

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