

Misrepresentation and visual quotation in design and art: a pragmatic approach.

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Context

This paper is written from the perspective of United Kingdom legislation but the concepts are, broadly, applicable across the European Union (EU). Recently changes to UK legislation have been proposed that will, in line with an EU Directive, enhance harmonisation 'of certain aspects of copyright and related rights in the information society' (Commission Directive 2001/29/EC). However, significant legal and cultural differences remain within Europe and across the world (for example, World Trade Organization, 2014, World Intellectual Property Organisation, 2014 and Design and Artists Copyright Society, 2012).

Introduction

This paper addresses the issues of the designer who quotes from images when creating a composite to display their design work or to establish the context in which their creation might reside. This paper considers the two-dimensional image created to show a three-dimensional object often in an apparently photographically realistic and potentially misleading manner. In many cases, a fundamental component of the image creation is quotation; existing images are merged into a photo-realistic whole. Indeed, the sophistication of image manipulation now possible may leave few clues that are identifiable by individuals not familiar with the possibilities for falsification.

This is analogous to the re-using of materials to create an artistic *assemblage* first occurred long ago but in the early twentieth century surrealists Pablo Picasso, Georges Braque and Max Ernst became associated with the technique and the term *collage* was applied to several of their works. *The Oxford English Dictionary (OED)* defines *collage* as:

An abstract form of art in which photographs, pieces of paper, newspaper cuttings, string, etc., are placed in juxtaposition and glued to the pictorial surface; such a work of art. (Oxford English Dictionary, 2014a)

In the latter half of the twentieth-century proponents include Richard Hamilton (*Just what is it that makes today's homes so different so appealing*, 1956), Peter Blake (The Beatle's *Sgt Peppers* Album Cover (with Jann Haworth), 1967), and Tom Wesslemann (*Sunset Nude with Matisse Odalisque*, 2003). These artists make extensive use of photographic and graphic images cut and fixed to a background creating the final picture and, in the case of Wesslemann, incorporating his repainting of Matisse's *Odalisque with raised Arms* (1923) into an oil-painted composition. This latter work might be better described as an *assemblage* rather than a *collage* which has its etymology from the French *coller*, to glue.

The range of sources available and ability to technically manipulate digital images may, now, be adopted by virtually anybody with access to a computer and the relevant software. Initially in music but now more widely, this has gained the term *Remix*:

A new version of a recording in which the separate instrumental or vocal tracks are rebalanced or recombine; (also now) a reinterpretation or reworking, often quite radical of an existing music recording, typically produced by altering the rhythm and instrumentation ; a commercial release of such a recording. (Oxford English Dictionary, 2014b)

More widely; Kirby Ferguson has defined the term *Remix* as '[t]o combine or edit existing materials to produce something new.' He describes the activity as three stages 'copy – transform – combine' and notes that:

Remixing is a folk art but the techniques are the same ones used at any level of creation: copy, transform, and combine. You could even say that 'everything is a remix'. (Ferguson, 2012a and 2012b)



Progress in ideas, science, technology, and design is made by the new building upon past knowledge and understanding. Existing items may also be used as components and assembled into new art, artefacts, and services but verifiable acknowledgement is essential element for this process.

In the case of the creation of a *collage*, or *assemblage*, the purpose may also be to create a graphic illustration to explain but with artistic intent. For example, this *collage* created from two photographs of icebergs. This image was used by Wikipedia® as an illustration for an entry on icebergs and a cropped version was, for some years, used as the logo for Wikisource®.

Figure 1. 'What an Iceberg may look like.'
Wikipedia, 2014 (CC BY-SA 3.0).

While digital technology enables all to manipulate images easier falsification many be accomplished with analogue (film) and, without access to originals, may also be difficult to for the viewer to detect. Examples of image manipulation, with varying degrees of *successful deception* include the 'Cottingley Fairies' (Doyle, 1921); the removal of Peng Zhen when working alongside Chairman Mao at a Construction Site in 1958 (Jacobson, 2002, page122); the inclusion of a wall picture of Mao in a Commune in 1969 (Zhenshen, 2003, page 133) or the virtually unbounded state 'falsification of photographs and art in Stalin's Russia' (King, 1997).

Designers have often included quotations in their visual work but, with digital image manipulation this can be difficult to detect and, in the experience of the author, the sources are rarely acknowledged or rigorously referenced. Furthermore, unlike text where the acknowledged reproduction of a small proportion of copyright material may, by *custom and practice*, be accepted as *fair-dealing* this concept is not as established for visual material. The adoption and reproduction, even of small quantities, should have a statement of the creator's moral rights and also record the specific permission of the rights owner. Furthermore, in the case of student work the creative outcome will often be shown to the public while written assignments will usually remain within the institution. Publication, especially for profit, is an element that is now listed as possibly counting against an impression of *fair dealing* (Intellectual Property Office 2014a)

A consideration of the adoption of a look or style has been considered previously, Porter (2010a). This paper is, primarily concerned with the use of quotations to adorn or add gravitas to a design rather than to create the work, artefact, service or system itself. This paper is concerned with presentation and showcasing artefacts and how this might be interpreted or understood by others. It is not concerned with comparisons or critical comment concerning the creative work of others such as might be found in a discussion of the work of a particular designer or design movement.

Why quote?

In written work the identification and acknowledgement of quotations is well established and while variations of style are common the general principles are well known and accepted. Indeed, these are often outlined in the 'how to study guides' issued to students upon entering an institution, when taking a particular module or when studying with a specific tutor.

In written assignments four reasons for the inclusion of quotes may be identified:

1. To offer general orientation, and mood setting for the reader. These quotations are often found at the start of sections and article or book chapters and have been selected to influence the framing of the material that follows.
2. To provide the material that will be the subject of comment and/or academic criticism. This is fundamental to many articles and assignments in humanities; how might a poet be considered without specific reference to, and illustrations of, their work?
3. To acknowledge the work of authorities in the subject that either support the viewpoint of the author or upon which a new argument or concept is to be grounded. Establishing prior art and then developing the new is fundamental to progress in scientific and technological matters.
4. Adornment applied to a work to enhance beauty; perhaps imply erudition and reading with the intention to *spice up* the work and to promote favourable response within the reader.

Each of these four cases will now be illustrated with work submitted by design students. It should be noted that the students themselves did not wish to be acknowledged but the author of this paper respects the image rights held by others and presents these low resolution examples only to illustrate points for educational purposes.

Example of quotations in images submitted by students

1. To offer general orientation, and mood setting for the reader.

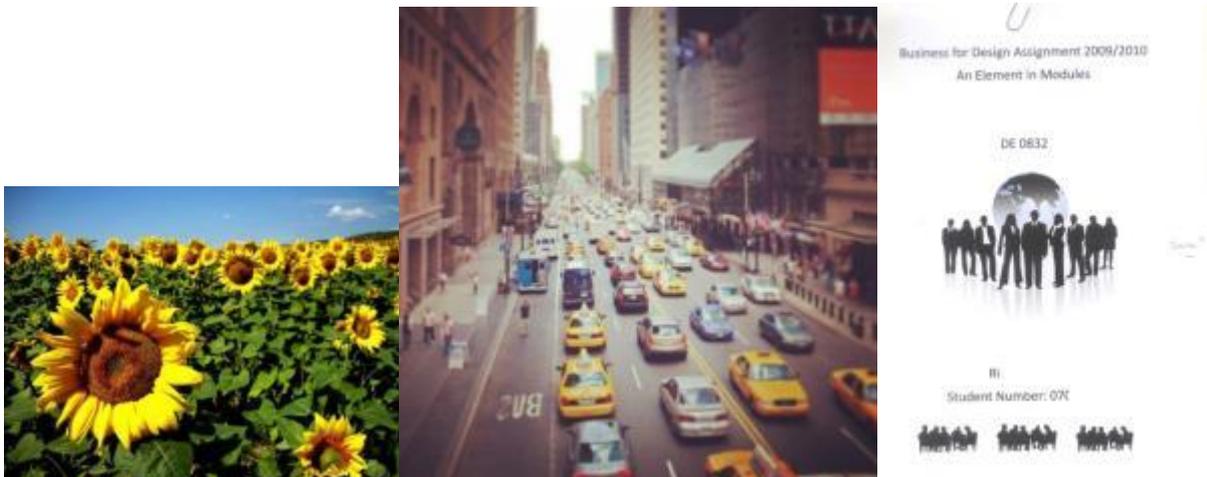


Figure 2, 3 and 4 (left to right). The first two images (possibly with retained copyright) were used to set mood/orientation on presentations for designs for garden products and an urban vehicle respectively. In the second example the image was reversed so that the traffic appeared to drive on the left. The final example, with name removed, was a cover for an assignment (apparently 'free to use' *clip art*). In none of these examples were the sources given.

2. To provide the material that will be subject to comment and/or academic criticism.



Composite figure 5. The left image (here slightly cropped) was the one submitted to show the re-designed cleanser (red ovals) apparently on sale in an Asian street market. The cleanser does not exist except as a digitally created rendered image. The other two images (figures 6 and 7), (copyright and here shown cropped) were used as sources and, together with a digitally created and rendered image of the proposed product merged to produce the final image. The submitted image was not declared as a *collage* and it may be assumed that, intentionally or not, some might think that the product is already on sale elsewhere in the world!



Figures 8 and 9. The shadow on the student submitted image (left) was obviously from a translucent original. An, uncredited, copyright source was

discovered with the *reverse image* searching software (<https://TinEye.com> and <http://www.google.co.uk/imgbp>) together with several other examples including one showing a bottle of fizzy Hungarian wine.

3. To acknowledge the work of authorities (implied).



Figures 10, 11 and 12 (left to right). These are all examples of models shown against backgrounds and in context. The left composite image shows a board of all the component and merged images which were, apparently, created by the student. The 3D model of the

fire appliance is shown against a found and adopted moorland image (copyright). If an editorial image, , for example of a moorland fire had been used then the limits on secondary use much stricter. The right-hand image shows a family relative of the student who normally uses a similar O₂ concentrator but is here carrying a non-functioning light-weight appearance model. This example came with details of the image construction and a copy of the signed, informed consent from the model. The student had taken the photograph used.



Figures 13 & 14. These two examples showed trademarks and number plate labelling (now obliterated); presumably without the knowledge of those that own the Intellectual Property (IP) Rights. Another common, but problematic, approach is to add specific advertisements to *dress* designs for bus shelters, rapid -transit stations, etc. Registered trademarks and trade-dress should never be used without permission a requirement that is often made clear when student design competitions are set.

4. Adornment.



Figures 15 and 16 use images imported from various internet sources to adorn the proposed interior design. Using Tineye[®] and Google[®] image search some of the adorning elements were be found however the search for the couple on the right of Figure 15 and two of the larger butterflies yielded no *hits*. The child with clenched fist (bottom right, Figure 16) was found on nearly 2500 webpages by Tineye[®] and Google[®]. Google[®] bizarrely also matched it with an image of Russian President, Vladimir Putin. Tineye[®] failed to find *Superwomen*[™] but Google[®] did, in adverts for dressing up and Halloween clothing. The original sources and the IP rights held were not identified. It is unlikely that these images would mislead anybody into thinking that they were a true representation of reality.

The, in-text, use of quotation marks to indicate the work of others and thus avoid any implication of an intention to deceive is not routinely possible within images. In the case of

design there may also be deception when, for example, an image of an appearance model is placed against a photo-realistic background implying, to those not familiar with the probabilities, that the artefact exists and is shown in use (Figure 12).

However, an excellent approach is to include an outline of the various image elements and against each a note of the source, Intellectual Property (IP), etc. This legend/key format is commonly used, for example in 'WIPO: Making IP Work' (World Intellectual Property Organisation, 2014). The composite images may be found on page 1 and the key and details are on pages 18 and 19, towards the end of the document.

The legal framework for the use of Intellectual Property will change – a little.

In the Imperial Copyright Act, 1911, the concept of *fair dealing* in copyright was recognised in British Law. However, as photography, film and sound recording were then in their infancy and broadcast wireless not yet created the concept needed to evolve and, in the past century, has done so by revisions to legislation and common law created by Court decisions.

[Fair dealing] In copyright law: the exception to the law of infringement allowing, in certain circumstances, excerpts of copyrighted material to be quoted without the permission of the copyright holder, for purposes such as private study, research, or criticism; an instance of this. (Oxford English Dictionary, 2014c)

There is no statutory definition of *fair dealing* - it will always be a matter of fact, degree and impression in each case. The question to be asked is: how would a fair-minded and honest person have dealt with the work? What would they think is fair and reasonable (HM Government, 2012, p3).

The copyright holder, who may not be the person who created the image, retain rights and may prohibit or licence the copying of segments outwith the *fair dealing* guidelines. In the case of creator they may waver their moral right to be identified but cannot transfer it.

Most of the Copyright related recommendations from the review into 'Digital Opportunity' (Hargreaves, 2011) are to be implemented (HM Government, 2012). On the first of June 2014 five draft Statutory Instruments (SIs), if approved¹, are due to come into force.

Current law restricts freedom of comment by preventing free use of quotations, even when a quote is very short. This means minor uses of copyright materials, such as the use of citations in academic papers and the use of quotes to identify web links, may currently be prevented by copyright owners, stifling freedom of expression.

Copyright law will be amended to give people greater freedom to quote the works of others, as long as this is reasonable and fair ("fair dealing").

(Intellectual Property Office, 2014b)

These new SIs amend the Copyright, Designs and Patents Act 1988 with the intention of increasing the range of exceptions, reducing limitations and harmonising the European context regarding non-commercial use, especially by and within educational institutions of copyrighted materials.

Deliberate infringement for commercial benefit or using the material in distasteful or derogatory *treatments* will never be acceptable but *grey areas* will be exposed that will require legal action to define. For example, when academic research is undertaken for, and in collaboration with, commercial sponsors or when student work is shown at public events that benefit the commercial activities of a University. Similarly, in design education where it is common to undertake sponsored projects or enter competitions with commercial

¹ This would appear to be the case, except for issues of parody, at the time of writing (20/05/14 (HM Government 2014)

implications the use of some copyright material may not be accepted as fair dealing albeit that the focus of the task is pedagogical and probably of minimal commercial value.

These changes will offer *regulation relaxation* for work other than images within education but offer little for the use/re-use of, editorial photographs especially if public presentation occurs. The use of copyright material for illustration, preferably of low resolution for educational purposes will now be permitted but the examples given are associated with assessment and course materials and only include distance learning, where access is restricted. It appears unlikely that public presentation or public publication will be included with the *relaxation*.

The SIs may, however, permit works of caricature, parody and pastiche to be created, without permission but as the laws of slander and libel are unchanged defamatory works will remain actionable. If the source material is offered for sale then the *remixer's* work must be non-commercial and not compete with the original by, for example, being made available, to others, via a web *blog*. The SIs relevant to this area are undergoing further review and may now not come into force in June (HM Government, 2014)

There might, however, some *lee-way* for quotations consisting of insubstantial elements from images that have not been offered for sale.

[...] [I]t is very unlikely that someone could copy a whole unchanged work, without permission from the copyright owner. [...]

The change will only allow use of materials where it is genuinely for the purpose of quotation, and only where the use is fair and reasonable (e.g. it does not replace a commercial sale. (Intellectual Property Office, 2014c)

However, in line with an argued desire not to 'weaken the photographers' rights' and their maintenance of a *unique* visual record photographs are to be excluded from the proposed 'relaxing' of copyright regulation and notions of *fair dealing* (HM Government, 2012, p27). The use of news/editorial images will usually require permission and the business of commercial news and picture agencies will continue to facilitate this requirement (e.g. gettyimages[®], 2014).

Copyright will be infringed when the owner's rights are breached and where there is not a legally established exception that permits this breach. The use might be of the whole or a 'substantial' part of the work. A small fragment may be regarded as 'substantial' if it is distinctive or critical to the whole. It is not simply defined in terms of the quantity copied.

It is, however, the intention of the defined exceptions to encourage private study, education, research and critical comment but also to 'protect the hard works and investment of those who create the films and music [...]' (Intellectual Property Office, 2014b and, 2014d).

Intellectual Property Office has published documents with 'Q&As' that outline how the new SIs are expected to operate, thus:

Is there any way I can be completely safe when I use an image from the internet?

Almost any image on the internet is likely to be protected by copyright, so it is only safe to use it if there is specific permission to do so through a licence or in the terms and conditions of the website supplying the image (assuming it is the copyright owner's website or another website which has the copyright owner's permission to allow other people to use an image). The use of licensed images ought to be much safer than using unlicensed images. (Intellectual Property Office, 2014e)

And historically:

Factors that have been identified by the courts as relevant in determining whether a particular dealing with a work is fair include:

- Does using the work affect the market for the original work? If a use of a work acts as a substitute for it, causing the owner to lose revenue, then it is not likely to be fair.
- Is the amount of the work taken reasonable and appropriate? Was it necessary to use the amount that was taken? Usually only part of a work may be used.

The relative importance of any one factor will vary according to the case in hand and the type of dealing in question. (Intellectual Property Office, 2014f)

A frequent concern and limitation is that the internet source of an image, discovered by a *reverse search*, may not be the original or even the only available version. Furthermore, it may not be the source of the adopted image nor might the site be using the image with the necessary authority. Before copying and using material the *remixer* must ensure *fair dealing* and that the location from which the image is sourced actually has the IP rights that they to be relied upon. This is a common issue with *social* web sites and *blogs* where items are often copied and adopted without permission or acknowledgment.

A proposed route to a solution

The wider issues concerning the design itself were, tentatively, considered in Porter, 2010a and 2010b. For example, does the use of exaggerated *Ben-Day Dots* to create a comic book style image too closely mimic work by Roy Lichtenstein for it to be sufficiently original when assessed? Boundaries need to be established which can inform the *academic judgement* of staff and analogous to the need to interpret a Turnitin® report on a written assignment before completing the assessment of the work.

This paper is concerned with the presentation of the designed product rather than concerns about the creative originality (authenticity) or otherwise of the artefact, service, environment or system itself. The pragmatic six step approach proposed in this paper is generalised and may be adapted to suit the specific customs, practices, and circumstances of creative design courses wherever they are delivered. This paper follows from the discussion at two workshops run in 2012 (Porter, 2012a & 2012b).

The designer will present formal representations of their work, engineering drawings that are used to rigorously communicate the technical details of the work. Generally they will also seek to communicate their concept in less rigorous but more emotively engaging ways; for example by creating presentational drawings and three dimension *appearance* models or prototypes. The choice of method of presentation and the audience may be critical as, for example, Rob Law discovered when he lost his action to defend his Community Design Right (CDR) for *Trunki*®. He may appeal this decision. (Magmatic v. PMS, 2014).

The formalised moral code that applies to the need to reference material and ideas drawn from the work of others is well established in written work and may be adapted to the design, creative, and artist disciplines. A six step process is proposed.

Step 1.

Regulations concerning plagiarism and other forms of academic misconduct are generally drafted with respect to text and while there may be a *catch-all* for other forms of academic misconduct specific references to images and artefacts are also desirable. Including specific reference to image incorporation and manipulation within the regulations that underpin awards is needed to establish the relevance and importance of such matters; especially to students of creative and artistic disciplines.

Step 2.

Include precise reference to these Institutional regulations in the documentation relating to the course and the associated assessment criteria.

Step 3.

The course team and External Examiner(s) must agree how the regulations are to be applied to the whole Course and to particular items of assessment. As discussed above, if the work stays within the Institution, it is possible to be more *relaxed* about the handing of the IP as a moral, not legal, perspective dominates. However, to do so may encourage poor academic practice and will limit the distribution for the submitted work. The work may not be available for use in any publically visible presentation; e.g. online student portfolios, course and university *show-reels*.

Step 4.

Pedagogically justified assessment may be set where the outcome must be limited in circulation. A common task is to ask a design student to identify the 'DNA' of a brand and then to create new products. What might, for example, a range of Maserati[®] themed luggage or *iFabs* look like? Is it just the logo that enables somebody to tell the difference between washing machines?

Design courses also, often, make use of commercially set competitions where the rewards for success can be monetary, experience opportunities and CV enhancement; often all three. Such competitions frequently place requirements and restrictions on the use of Trademarks and other registered design features (*trade-dress*) both for the competition entries and their subsequent use.

Step 5.

The agreed approach must be promulgated to the students and written into the assessment criteria for each assignment. The submission requirement must include comprehensive key listing and, for validation, digital files. It will always be preferable to require the professional standards of images sourcing and use that will be expected by future employers and to only relax such behaviour for the occasional assignment; albeit still expecting the Institution's standard of referencing throughout. Group or team assignments may also need specific attention; will they be considered and assessed under 'several or individual responsibility' for the work submitted?

Step 6.

Enforcement, of course, will be more complex and time consuming than it is for textual material. The convention that each item imported is referenced is fundamental to good academic practice and as with text, may not be easy for the staff member to recognise. An image of Newcastle used as a background for a representation of a car design might be the work of the student but was it? An image of our plant from space is not going to be the work of the student, perhaps NASA[®], but the blue Caribbean waters on which the proposed yacht appears to float could be adopted from a tourist board website or was it photographed, by the student themselves while on vacation?

When a URL is not given images may be traced. The technology of *reverse image* searching is improving and both TinEye[®] and Google[®] can be used together with the former appearing to cover commercial images better than the latter. Google[®], however, appears better with social media and blogging sites which are, in the author's experience, increasingly used by students as images sources in preference to commercial webpages or agencies.

Conclusion

It is critical that attitudes and cultures change and that the IP rights are respected. The World Intellectual Property Organisation (WIPO) is the United Nations agency that 'is the global forum for intellectual property policy, services, information and cooperation.' WIPO has the belief:

that – in every society – innovation is one of the most powerful forces for human progress. Our goal is to make IP [Intellectual Property] work. For everyone.
(World Intellectual Property Organisation, 2014).

The design student will always wish to contextualise and explain their work and the resources to do so will, inevitable be limited. However they must respect the moral obligations and entitlements of the academic community and, when they become a practising designer, the legal rights and duties applicable to their profession and work. Potential employers expect a comprehensive understanding of the legal rights/duties and the moral entitlements/obligations of working with IP especially as any infringement may result in catastrophic reputational or financial damage. They must accurately identify and rigorously acknowledge/reference all sources used; including visual images!

The course team has reputational benefits to be made from the preparation of graduates for professional practise and ensuring that the legal and moral complexities applicable are understood by the students. Design practitioners often seek new staff from known degree courses and avoid those that don't meet expectations; the creative practitioner disciplines generally give more credence to portfolios or work than the specific award gained.

The University itself has both marketing opportunities to be gained from the work of a design course but also the risk of legal action from IP infringements. Attempting to obtain redress from an *inactive* institution might appear more feasible and beneficial than dealing with a student or recent graduate who may have few resources and little reputation.

There remains, for historic, cultural and trade related reasons wide global variation concerning IP. These are issues for all but UK Universities with overseas campuses, franchised courses or with materials developed for distance learning and international students studying in the UK will need to give this matter special consideration.

Appendix. Image tracing and verification, a note for guidance

Tracing images is not quick and the search must be triggered; usually by informed by staff and their knowledge and experience. An image of a handbag carried by an individual might be a composite of the student designed bag photographed on the arm of their mother but with the housing-estate background replaced by a more glamorous hotel entrance. Using the whole image might not find anything but searching for the background alone may do. This will require a considerable effort to do for the complete cohort where each student submits a few *boards* each of which shows several images. The most workable approach is to require a comprehensive and rigorous legend to each image and to make this a requirement of the assessment.

How, without verifiable details of the source, might an image of the *Sage Gateshead*, taken from the Newcastle bank of the Tyne be identified as student created or sourced from elsewhere? Thus just as with essays before the days of Turnitin[®] and similar text finding software the knowledge and expertise of staff must be relied upon to identify if an image is missing acknowledgment or if one is not necessary.

The requirement for acknowledgement of images is critical and must go beyond that expected for text where it is only the quoted, adopted and crucially directing/informing that requires a reference. The requirement should be that all images and any elements that

make it up are referenced even if that is to the student themselves. Also recorded should be the reasons why the student believes they have the right/entitlement to use the material.

It might appear strict but an image taken by a parent and passed to a sibling contains moral rights that should be confirmed along with a note of their approval for use.

In the case of work imported from the web a statement that the image is free for others to use and what, if any conditions are attached to this secondary application. Not all Creative Commons[®] licenced images are free to use without acknowledgement and the photographer may also impose further limitations to commercial use or to the creation of derivative works.

Unfortunately, images may often be found on sites that appear to allow downloading when the site itself does not have the necessary permission to do this. A TinEye[®] search may help as when an image is found on both picture agency and personal blog sites the latter is unlikely to have the rights for image distribution and, perhaps, no rights at all. The new SI regulations will not prevent or resolve this opportunity for deceit.

These issues extend beyond design education as the author has been involved in several cases of alleged academic misconduct triggered by Turnitin[®] findings of quantities of unattributed text and in some cases the work also contained unacknowledged images that could also be shown to be plagiarised. It is clear that text based disciplines must be wary of the provenance of images used to illustrate or enhance work not least as staff and students may gain false comfort from the new legislation concerning educational use of text base materials. However, away from the visual creative disciplines the risks of discovery are slight as student work is unlikely to gain open public display except, rarely, as an example of past work shown to prospective applicants and their parents.

Acknowledgement

To my colleagues, staff and students, who, create desirable products and stunning presentations albeit often with an unnerving inability to, formally, reference the work of others! The low resolution images presented here contain elements that are untraced and/or of questionable provenance but are used with the approval of those students that created them. This, further, reproduction is only to illustrate and discuss, from an educational pedagogical perspective the need for acknowledgment of sources and is not intended to be detrimental to the moral, legal rights and commercial activities of those whose work has been *sampled* and incorporated.

The choice of images is solely that of the author who should be contacted if modification or removal of any image is, with authority, required.

The students who created the work shown were asked but did not wish to have their contributions acknowledged.

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