

A New Art Form Emerging in Google Street View:

Secondary Use of Digital Content and Fair Use

Satoru Niwa

Virtual Environment and Avatar: MA Visual and Media Anthropology, HMKW Berlin

Prof. Dr. Undine Frömming

Christina Voigt, Dipl. Des. (FH)

September 20, 2020

A Solar Eye and a Flaneur

Google Maps is the world's most popular web mapping service with *WebGIS* that provides satellite imagery, aerial photography and interactive panoramic views of streets (Google street view, real-time traffic condition, and route planning). According to Google's official announcement, more than a billion people are using Google Maps every month as of 2019 (Google 2019). The huge numbers of user show that Google Maps is definitely having an impact on our lives. On a daily basis, we use it for practical purposes to enrich our lifestyles, for example, figuring out a destination and getting directions to it, or finding nearby shops and restaurants and saving favourite places. However, the appeal of the Google Maps does not stop with its practicality; the vast amount of terrain data accumulated in it from all over the world offers many possibilities for its use.

Since the era when paper was the only medium for a map, a map has had special appeal beyond their practicality and aesthetics, and more than a few people have been drawn to a map for its bewitching charm. As a digital counterpart, Google Maps has more attractive features than a paper map as the user can freely interact and manipulate. With its unique feature, Google Maps gives users special experiences and perspectives on topography. In Google Maps, you can instantly move to wherever you want from a bird's eye view, as if you got the "solar eye" (Certeau 1984). This transcendental perspective enables us to see anywhere, even on the frontiers of Antarctica or the Sahara Desert. With Google Maps, it's as you wish. And that experience makes us feel dominant over the landscape, or perhaps even the world? If you're tired of the solar eye, you can land on the ground with a single click and view a place from a perspective of a "flaneur" (Lefebvre 1991). In that virtual reality composed of millions of panoramic photos, you can walk through places as a voyeuristic observer. No one will disturb you, no one will stare back, it is a completely *free* first-person world. This virtual reality, which is an extension service to Google Maps called Google Street View ("GSV") is probably one of the biggest factors that make Google Maps the most successful among many other mapping apps. The function to provide an immediate transition from two-dimensional maps to three-dimensional virtual reality sufficiently satisfies "primordial human desire for spatial domination" (Certeau 1984).

Google Maps serves to convey its demonic appeal to not only map enthusiasts but also those who had never been interested in a map before. And, of course, artists who have a keen sensitivity are aware of this fascinating material for art. Exploring the overwhelming amount of archival spatial information that underpins the quality of Google Maps, many artists are trying to salvage values that lurk in it, and, through their artworks, they try to present us new perspectives on how a digitized map system really influences on

our society. At the same time, their works consequently highlight new issues that internet-based art/art-making in the digital age will face.

With such a contextual landscape, I will seek to examine the social validity and legal legitimacy of artworks with a secondary use of digital contents. By focussing on GSV's imagery in their artistic creation I will explore the concept of fair use and copyright through selected case studies.

Artworks Emerging in GSV

Google Street View ("GSV") is a programmatically auto-generated VR based on vast amounts of location-based photographic data which have been automatically recorded by a car equipped with a 360-degree astronomical camera called "Google car" that travels around the world and random contribution photos from spontaneous people (Google "Street View"). GSV is an image archive of landscapes that includes not only cities but also alleys, suburbs, countryside and the more extreme terrains.

The virtual field that serves us new feelings and experiences becomes an attractive place and a creative frontier for an artist who is always on the look for new sources of inspiration.

German photographer Michael Wolf is one of the artists who processed imagery from GSV and presented them as his artwork. A thematic photo series *A Series of Unfortunate Event* (Wolf 2010) that he photographed accidents and mishaps recorded by the robotic cameras of Google car. Through the series, he questions the implications of the indiscriminate, omniscient observer: Google, and of living in a surveillance society. This series won an Honorable Mention at the World Press Photo (WPP) 2011, and significantly equated that a prestigious photography organisation recognised the artist with secondary use of Internet/digital content. Through this bold but controversial awarding, the WPP intended to question society the



MICHAEL WOLF "UNFORTUNATE EVENT" 2010

emerging issue of the legitimacy of the artwork of secondary use of digital content. After Wolf won the prize, his work inevitably sparked debates, questioning the validity of his work as a photographer, the relevance to the category of photo journalism, and the authorship/copyright of the images.

Wolf says of his work, “It doesn't belong to Google, because I'm interpreting Google; I'm appropriating Google. If you look at the history of art, there's a long history of appropriation” (NBC News 2011). As an experienced artist, he was cautious about copyright issues, which can be seen in his production process as he explained, “I use a tripod and mount the camera, photographing a virtual reality that I see on the screen. It's a real file that I have, I'm not taking a screenshot. I move the camera forward and backward in order to make an exact crop, and that's what makes it my picture” (NBC News 2010). Thus, by putting a digital camera between him and a computer screen, he conceptualized GSV's imagery as his own original work. Employing this method he has produced six GSV photographic series (including *Interface*), and one additional with an alternate program.



MICHAEL WOLF “INTERFACE” 2010

Jacqui Kenny is another artist who was inspired by GSV. Her work, *Agoraphobic Traveler* (Kenny 2016), is a narrative work that departs from her personal experiences of agoraphobia and anxiety about not being able to go out freely, and as an alternative she travels and photographs virtually on GSV. When she first posted the series privately on Instagram, it attracted more than 50,000 followers in just a few months. Since then, with support, she has had the opportunity to exhibit the series in galleries and other venues. It's worth noting that her work is outwardly promoted by Google (Google 2017), and they have even given her permission to sell her work. Google's response to her could be viewed as a double standard under Google's general guidelines in secondary use of Google Maps, including GSV.

All uses of the content must provide attribution to both Google and our data providers. We require clear, visible attribution when the content is shown. You may not move the attribution to the end credits or fade it out after a few seconds.

(“General guideline,” Google Maps & Google Earth.)

Kenny's photos are a square cropped version of the screenshot image of GSV and the Google logo has been erased from them. At first glance, it's so "photogenic" that it's hard to recognize it's a GSV image. Obviously, her work infringes on Google's guideline in secondary use. Although, there may be an advertising strategy aspect to this, as the positive narrative of Kenny's work will help improve the company's image. This double standard in secondary use can be seen not only in Kenny but in other cases as well (see Google “Street View”).



JACQUI KENNY, “THE AGORAPHOBIC TRAVELLER - STREET VIEW PORTRAITS”

In other cases, such as Wolf and many other GSV-based artworks, how has Google reacted? For most cases, although Google doesn't mention or support them in any way, Google have been tactically accepting of those works, even if the works infringe on the guideline of secondary use. In understanding this Google's seemingly compromising attitude, the first thing to consider is the extent to which Google's guidelines of secondary use are covered, and secondly, to what extent these guidelines are legally valid. In other words, how seriously do artists have to be concerned about the company's own guidelines in secondary use?

Copyright and Fair Use

Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances (copyright.gov 2020). For example, in the United States where Google's headquarter is located, section 107 of *the Copyright Act in Copyright Law* provides the statutory framework for determining whether something is fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use. Section 107 calls for consideration of the following four factors in evaluating a question of fair use as follows.

1. *Purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes.*
2. *Nature of the copyrighted work.*
3. *Amount and substantiality of the portion used in relation to the copyrighted work as a whole.*
4. *Effect of the use upon the potential market for or value of the copyrighted work.*

(17 U.S.C. § 107 (1976).)

According to the four factors, what is seriously considered in determining how fair use is adapted is not only technical and methodological aspects but also the market effect and public benefit of the work (Raffetto 2006, 4).

Following the four factors, I want to examine the cases of Wolf and Kenny.

In the first factor, *Purpose and character of the use, including whether the use is of a commercial nature or is for non-profit educational purpose*, courts look at how the party claiming fair use is using the copyrighted

work, and are more likely to find that nonprofit educational and noncommercial uses are fair. This does not mean, however, that all nonprofit education and non-commercial uses are fair and all commercial uses are not fair. Instead courts will balance the purpose and character of the use against the other factors. Additionally, “transformative” uses are more likely to be considered. Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work (copyright.gov 2020). Most fair use analysis falls into two categories: (1) commentary and criticism, or (2) parody, a copyrighted work (Stanford university libraries “Copyright and fair use”). If the comment or parody is on original work, then there is an inevitability of secondary use and the work is subject to fair use. If it is not on the other hand, there is no necessity to make secondary use of the content, and it is deemed to be outside the scope of fair use.

Looking at the Wolf’s and Kenny’s works in the term of “transformative” use, it can be said that both impart a different message or concept to the original use of GSV. Regarding Wolf’s work, it is a critique and problematisation of the surveillance society implied by GSV, which is a direct comment on GSV. Kenny’s work would also be a direct comment on GSV, as it shows the new value and use of GSV in people with agoraphobia. Therefore, both works will be adapted as commentary or parody on the original work.

Another point to consider under the first factor is whether the purpose of secondary use is non-profit or not, which is a bit more complicated. With both Wolf and Kenny making secondary use of their work as art, they can be considered as a non-profit work, and there doesn’t seem to be a point of contention. However, artists are profiting as a result of the sale of their work, and it is certainly a point to consider in the context of the extremely capitalised art market in recent years and the rising value of art as an object of capital investment (Eräranta and Moisander 2019). For example, world-renowned artist Jeff Koons, lost his case on the issue of fair use because the court ruled that Koons’ act of reproduction was deemed to be for commercial use rather than purely artistic use and there was no necessity to use the original work (Rogers v. Koons, 960 F.2d 301(2d Cir. 1992).). Given Wolf’s and Kenny’s position in the art market, it is unlikely that the same ruling will be made as in Koons’ case, but every case depend on how courts decide in the individual context.

How would the second factor, *Nature of the copyrighted work*, be considered in Wolf and Kenny’s case? This factor reflects the degree to which the work used relates to copyright’s purpose of encouraging creative expression. Thus, using a more creative or imaginative work (such as a novel, movie, or song) is less likely to support a claim of fair use than using a factual work (such as a technical article or news item). In



ART ROGERS, PUPPIES, 1985 © ART ROGERS. RIGHT: JEFF KOONS, STRING OF PUPPIES, 1988

addition, use of an unpublished work is less likely to be considered fair (copyright.gov 2020). So if the content of a work conveys a fact or performs a function, there is a high probability of fair use of the work. Although maps are generally included in the category of a factual work (Moore 2020), there is still room for debate as to whether GSV, a digitised and multi-functional map, is a factual work or a creative/imaginative work.

Under the third factor, courts look at both the quantity and quality of the copyrighted material that was used. If the use includes a large portion of the copyrighted work, fair use is less likely to be found; if the use employs only a small amount of copyrighted material, fair use is more likely. That said, some courts have found use of an entire work to be fair under certain circumstances. And in other contexts, using even a small amount of a copyrighted work was determined not to be fair because the selection was an important part—or the “heart”—of the work(copyright.gov 2020). Following the point, we will see Wolf’s and Kenny’s cases. Neither is a collage or montage using small portions from GSV, but instead both artists use GSV images as they are. Both artists present a whole image, albeit with some cropping and technical manipulation. However, the “heart” of their works is obviously different from GSV. The heart of GSV can be thought of as a function of map or VR. On the contrary, the heart of Wolf’s and Kenny’s work is the art form itself, which tries to show new perspectives and values to the world. Hence, potentially, it is unlikely that the third factor would have any serious impact on the decision to adapt to fair use in those works.

In the fourth factor, courts consider whether the use is hurting the current market for the original work (for example, by displacing sales of the original) and/or whether the use could cause substantial harm if it were to become widespread (copyright.gov 2020). This is an important perspective to consider corporate profits and social impact. Therefore, it is a difficult point to judge as it is necessary to consider the long-term

causal relationship in the future. At least in the cases of Wolf and Kenny, as referred in the third factor, the works have different purposes and functions from its original work. Hence, they are unlikely to harm Google's market and interests.

At the end of the section, I would like to show how Google describes fair use in the guideline.

Apart from any license granted to you by Google, your use of the content may be acceptable under principles of "fair use." Fair use is a concept under copyright law in the U.S. that, generally speaking, permits you to use a copyrighted work in certain ways without obtaining a license from the copyright holder.

There are similar, although generally more limited, concepts in other countries' copyright laws, including a concept known as "fair dealing" in a number of countries. Google can't tell you if your use of the content from our products would be fair use or would be considered fair dealing; these are legal analyses that depend on all of the specific facts of your proposed use. We suggest you speak with an attorney if you have questions regarding fair use of copyrighted works.

(Google "General guideline.")

In the guidelines, they say that they "can't tell you if your use of the content from our products would be fair use or would be considered fair dealing." It would be because fair use is "an amorphous concept (Raffetto 2006, 3)" and "the most troublesome in the whole copyright" (Dellar v. Goldwyn, 104 F.2d 661, 662 (2d Cir. 1939)).

Conclusion

In the United States, there are very few court cases on fair use in appropriation artworks, all of which have been examined in detail on a case-by-case basis. Although fair use is the complex concept and courts have struggled with its application since its inception (Raffetto 2006, 3), past court rulings in the United States have shown, that many court decisions have prioritized the right to freedom of expression over copyright. This is not only because of the legal hierarchy in the United States, where the right to freedom of expression protected in the First Amendment to the Constitution, but also because, in the digital age, the doctrine of fair use naturally become broader, accommodating new technologies for the public benefit, rather than more narrow (Raffetto 2006, 11). However, the application of fair use is kept being in flux for now. The possibility that different court decisions will change the trend on fair use issues in the future must be taken into account.

In secondary use art of GSV, fair use is not the only thing to consider. There are issues of image rights and privacy rights of subjects in the vast photographic collection of GSV. This is a problem the GSV itself is

facing. GSV counteracts this problem by mosaicking the face of subjects so that individuals cannot be identified, but even so, it is not a perfect hedge against the risk, as they do not check all of the vast numbers of photos. An artist should obviously consider this point for secondary use as well. Even if subjects tolerate being identified on GSV, it's conceivable that they could change their mind and sue for infringement of their image/privacy right against a secondary use work because a secondary use art is often critical, political, and controversial.

Regarding the issue of image rights and privacy rights in secondary use of digital content, I would like to show one case in Japan. In the case, the subject claimed Google for infringement of the privacy right when Google car took a photo of her laundry, including her underwear, hanging on the balcony at her apartment without permission and published the image on GSV. The court followed provisions in *Act on the Protection of Personal Information* (Act No. 57 (2003)) that "whether the infringement of the subject's private peace can be said to exceed the scope of social acceptance." And the court eventually dismissed the plaintiff's argument because "the image shows a cloth-like object hanging on the balcony railing, but it is not possible to determine what it is" and "there is nothing in the image to identify the individual or the name of the apartment". In this case, the court also referred to the criterion for when it is illegal to take a person's appearance without his or her permission: the social status of the subject, the nature of the subject's activity, the location of the shooting, the purpose of the shooting, the style of the shooting, and the necessity of the shooting are taken into account in the totality of the circumstances, and are determined by whether it infringes on the subject's personality beyond the scope of social acceptance.

Although the notion of "the scope of social acceptance" is still ambiguous, at least in a case of a secondary use art of GSV, whether or not the subjects in the photographs can be identified as individuals and whether or not the concept of the work offends the dignity of the subjects would be considered.

Secondary use art actually stems from a long legacy of found imagery and photography that has a history of blurring the lines between fair use and copyright infringement (Nuta 2017); however, secondary use art of "digital content" is relatively an emerging topic. Digital spaces are expanding at an accelerated rate day by day, and in the age of the Covid-19, people are spending more and more time in digital spaces, then secondary use art of digital contents may accordingly come to be popular. That is a new realm that cannot be covered enough by existing laws and legal interpretations and will require further study.

A complication of this issue is that applied laws and legal interpretations in the issue of copyright/fair use are vary depending on regions/countries. For example, as mentioned so far, the doctrine of fair use is

generally adopted in the United States and the right to freedom of expression tend to be protected, but in Japan, the concept of fair use does not exist, and culturally, copyright, image right, and privacy right tend to significantly be treated than the right to freedom of expression.

Digital space is, with a few exceptions, an open space, unaffected by real boundaries and locality. But legally, there are many different criteria to be adapted. This would not be a very reasonable situation for users. In the future, there will be ample room for consideration of the pros and cons of the establishment of a universal guideline, international law, or decision-making body for issues in digital space(Gates and Ma 2018, 20).

Digital content is inherently easy to reproduce. Hence, the issue of copyright becomes more important and complicated in the digital space. This situation may sometimes cause artists to hesitate in challenging innovative creation. However, there is no need to be so cautious because copyright's chief aim is "to stimulate artistic creativity for the general public good" (Aiken, 422 U.S. at 156).

Wolf, Kenny and other artists' artworks that are secondary use of digital content certainly show us that digital content is not just something to be used passively but is something to be used actively, read and interpreted.

References

Certeau, Michel de. *The Practice of Everyday Life*. Berkeley, CA: University of California Press, 1984.

“Copyright and fair use.” Stanford university libraries. <https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/>.

Eräranta, Kirsi., Johanna Moisander. “Reflections on the Marketization of Art in Contemporary Neoliberal Capitalism.” *Museum marketization: Cultural institutions in the neoliberal era*, (2019): 19-33.

Gates, Melinda., Jack Ma. “the age of digital interdependence.” *Report of the UN Secretary-General’s High-level Panel on Digital Cooperation*, (2018).

Google. “9 Things to Know about Google's Maps Data: Beyond the Map.” Google Cloud Blog. Last modified September 30, 2019. <https://cloud.google.com/blog/products/maps-platform/9-things-know-about-googles-maps-data-beyond-map>.

Google. “Street View.” Google Maps. https://www.google.com/intl/en_uk/streetview/explore/.

Google. “The Agoraphobic Traveller shares her Street View portraits.” Google. Last modified October 10, 2017. <https://about.google/intl/ja/stories/agoraphobic-traveller/>.

Google. “General guideline.” Google Maps & Google Earth. <https://www.google.com/permissions/geoguidelines/>.

Kenny, Jacqui. 2016. “The Agoraphobic Traveller - Street View Portraits,” The Agoraphobic Traveller. Photograph. <https://www.theagoraphobictraveller.com/>.

Lefebvre, Henri. *The Production of Space*. Oxford: Basil Blackwell, Inc., 1991.

NBC News. “Photographs from Google Street View: Art, Journalism or Something Else Altogether?.” NBCNews.com. February 28, 2011. http://photoblog.nbcnews.com/_news/2011/02/28/6152140-photographs-from-google-street-view-art-journalism-or-something-else-altogether.

“More Information on Fair Use.” copyright.gov. Last modified April, 2020. <https://www.copyright.gov/fair-use/more-info.html>.

Raffetto, Joseph J. “Defining Faire Use in the Digital Era.” *bepress Legal Series*, Working Paper 1517(2006).

Moore, Steven. “Copyright and Fair Use in Story Maps.” *Copyright and Fair Use in Story Maps*. September 16, 2020. <https://storymaps.arcgis.com/stories/3241e7c99f9d4fb1b2b6555a2b70fc56>.

Nuta, Sara. “Google Map as Medium.” NYU GALLATIN, September 15, 2017. <https://confluence.gallatin.nyu.edu/context/advanced-writing-course/google-maps-as-medium#easy-footnote-bottom-3-11380>.

Wolf, Michael. 2010. “INTERFACE,” Michael Wolf Photography. Photograph. <http://photomichaelwolf.com/#INTERFACE/1>.”

Wolf, Michael. 2010. “Unfortunate Event,” Michael Wolf Photography. Photograph. <http://photomichaelwolf.com/#asoue/1>.”