Winter December, 2014

The Google Art Project: An Analysis from a Legal and Social Perspective on Copyright Implications

Katrina Wu, University of San Diego

Available at: https://works.bepress.com/katrina_wu/1/
THE GOOGLE ART PROJECT: AN ANALYSIS FROM A LEGAL
AND SOCIAL PERSPECTIVE ON COPYRIGHT IMPLICATIONS

Katrina Wu\textsuperscript{a1}

Abstract

The Google Art Project is an ambitious attempt by Google to curate worldwide artwork online in
the highest resolution possible. Google accomplishes this by partnering with museums where
museums provide access to art collections and Google provides the technology to capture high
quality images. Under this existing model, Google places the burden of copyright clearances on
museums and removes images from online if requested by copyright owners. An endeavor like the
Google Art Project is not unprecedented however, when Google attempted to put the world’s books
online under the Google Books Project, scanning millions of titles and offering snippets for users
to view online. The legal strategy seen in the Books Project differs drastically from the Art Project,
where Google proceeded aggressively with the Books Project, going forward without preemptively
obtaining copyright clearances from authors and relying on fair use as a defense against
infringement liability. As a result of a more restrained legal strategy for the Art Project, a lot of
contemporary and modern art is absent from Google’s collection as newer works tend to be still
under copyright protection.

The paper addresses the question of what the best legal strategy for the Google Art Project is,
considering Google’s previous strategy with the Books Project as well as various stakeholder
interests such as the artists, museums, Google, and the public. An evaluation of the pros and cons
leads to the conclusion that a restrained legal strategy is more suitable for the Art Project as
opposed to an aggressive one used in the Books Project. Followed by the legal analysis, the paper
addresses major arguments against the Google Art Project from a societal perspective, including
concerns for Google’s monopolistic power, displacement of traditional museums, and potential
exploitation of museums. In addressing the problem of missing contemporary art, the paper
proposes two measures: monetizing the Google Art Project to obtain funding for copyright
clearances and enhancing the terms and conditions for use on the Google website.

TABLE OF CONTENTS

I. INTRODUCTION ................................................................................................................................. 1
II. THE GOOGLE ART PROJECT: AN OVERVIEW ................................................................. 3
III. STAKEHOLDER ANALYSIS: BALANCING FOUR DISTINCT INTERESTS AT
PLAY: ARTISTS, MUSEUMS, THE PUBLIC, AND GOOGLE..................................................... 5
   A. Artist/Underlying Rights Holder: Enforcement of Rights and Protection of Work .... 5

\textsuperscript{a1} The author is a JD/MBA/LLM in Taxation candidate at the University of San Diego School of Law. The author
would like to thank Professor Ted Sichelman and Professor Marcel Saucet from the University of San Diego School
of Law for their inspiration and assistance with this paper.
Consistent with Google’s overarching mission to “organize the world’s information and make it universally accessible and useful,” the Google Art Project was launched in 2011 with the endeavor to curate artwork online by partnering with a dozen of museums globally. This paper

---

seeks to address the question how Google should cope with copyright issues over the Art Project by underscoring the optimal legal strategy and balance of stakeholder interests.

Part II of the paper introduces the Google Art Project including its features of high-resolution artwork images and “virtual tour” abilities of museums captured by the Google Street View technology. Part III of the paper explores the tension among various stakeholders and social goals such as the artists, the general public, the museum administrators, and Google itself. At times, the nuances in legal rights and interests (such as copyright holders’ antagonism against Google and museums) place the Art Project in an intricate position where forces of different stakeholders can be pulling in opposite directions, creating legal and social strife. In other instances, stakeholder interests can be aligned towards the same end, such as museums’ public purpose in promoting artistic awareness aligning with the Art Project’s central mission. Part IV of the paper examines potential copyright issues with the Google Art Project and argues from a legal perspective that Google, in its self-interest, should operate defensively (as it has been) rather than offensively (as it has for the Google Books Project) in exercising reasonable care with respect to copyrighted works and only falling back on the fair use defense as necessary. Weighing the disadvantages of an aggressive/offensive legal strategy for the Art Project (ambiguity in the law, hazards of litigation, and situational differences between books and art) against the advantages such strategy (potential of building the collection faster and eliminating the need to collaborate with artists and representatives), the analysis shows a clear indication towards a defensive legal strategy for Google.

The final Part of the paper sets forth an analysis of the arguments for and against the Art Project from a societal perspective and proposes several measures to alleviate copyright tensions. This Part addresses three primary concerns over Google’s (1) monopolistic power, (2) threat
towards the existence of traditional brick-and-mortar museums, and (3) potential exploitation of museums under the current model where Google places copyright clearance burdens on museums.

In support of the defensive/restrained legal strategy with the Art Project, the paper proposes two measures in alleviating copyright tensions by (1) monetizing the Art Project to fund collaboration with artist representative agencies and (2) strengthening the terms and condition to warn against infringement. In conclusion, the paper argues that Google should act within the legal boundaries of copyright while further realizing the potential of the Art Project through the proposed means of easing copyright tension and expanding the database.

II. THE GOOGLE ART PROJECT: AN OVERVIEW

The Google Art Project was started in 2010 as a “20% project” where employees of Google are encouraged to invest 20% of their time on side projects of personal interest that are community-gared.3 Amit Sood, director of the Google Cultural Institute, founded the Art Project as part of his 20% project to curate high-resolution images of artworks online.4 The founder described his mission with the Project as building a “museum of museums on the web.”5 The Google Art Project does not have a separate mission statement, but the project’s goal can be aligned with Google’s overall mission to “organize the world’s information and make it universally accessible and useful.”

After eighteen months of pre-launch preparation, the Google Art Project was launched in February 2011 initially with seventeen museum partnerships6 in nine countries, hosting 1,061 high-resolution image results.

5 Id.
resolution images on the website.\textsuperscript{7} By the end of 2013, the collection on the Art Project grew to 40,000 pieces across forty-four countries with 300 institutional partnerships (see Exhibit A for the Art Project’s expansion timeline).\textsuperscript{8}

\begin{center}
\textbf{Exhibit A: Google Art Project Expansion Timeline}
\begin{tabular}{|c|c|c|c|}
\hline
Year & Museum Partnerships & Countries & High-Res Images \\
\hline
2011 founding & 17 & 9 & 1,061 \\
2012 & 151 & 40 & 32,000 \\
2013 & 300 & 44 & 40,000 \\
2014 to date & 401 & 50 & 70,199 \\
\hline
\end{tabular}
\end{center}

The Google Art Project is a Python-based Google App Engine application built using all publicly available Google Application Programming Interfaces (APIs).\textsuperscript{9} After its initial beta testing, the Art Project under stable stage has several key interface capabilities including “museum view” to virtually tour museums, high resolution zooming for most artworks, “gigapixel” resolution for selected paintings, and a “my gallery” feature for users to customize their own collections (see Appendix A for screenshots of the Google Art Project interface).

On the Project interface, artworks are organized and searchable by museum collections, artist, artworks, and user galleries. Using the “museum view” function, users are able to navigate through museums much like Google Street View. “Museum view” consists of panoramic images

\textsuperscript{7} Id. (”The Art Project in numbers: 11 Cities, 9 Countries, 17 Museums, 17 ‘gigapixel’ pictures, 385 gallery rooms, 486 artists, 1061 high res artwork images, more than 6,000 Street View ‘panoramas’”); Theodore Feder, President, Artists Rights Soc’y, Remarks at the ABA Forum on the Entertainment and Sports Industries presentation: the Picasso Problem—Copyright and the Google Art Project (Feb. 19, 2013) (audio recording on file with author).


\textsuperscript{9} Technology behind the Art Project, GOOGLE, https://sites.google.com/a/pressatgoogle.com/art-project/technology-behind-the-art-project (last visited Aug. 19, 2014); What is Google App Engine, GOOGLE, https://developers.google.com/appengine/docs/whatisgoogleappengine (last visited Aug. 19, 2014) (Google App Engine is a platform as a Service (PaaS) offering services that allow users to build and run applications (cloud computing) on Google’s infrastructure).
of museum interiors captured via Google’s Street View technology.\textsuperscript{10} Each museum selects its own featured painting which the Art Project presents in gigapixel format.\textsuperscript{11} For instance, the New York Museum of Modern Art has chosen to feature Van Gogh’s “Starry Night” and the Munch Museum in Oslo selected “The Scream” by Edvard Munch as the gigapixel paintings. The high-resolution images (non-gigapixel images) contain on average 700 million pixels while selected gigapixel paintings have on average 7 billion pixels.\textsuperscript{12} The “my gallery” function on the Art Project allows users to “collect” desired artworks into individualized galleries viewable by other users. Users are able to annotate and comment on collected artworks as well as share the artwork on Facebook, Google Plus, Twitter, and Google Hangout.

III. STAKEHOLDER ANALYSIS: BALANCING FOUR DISTINCT INTERESTS AT PLAY: ARTISTS, MUSEUMS, THE PUBLIC, AND GOOGLE

There are four major pillars of stakeholders in the assessment of the Google Art Project: the artist/original creator, the museum/institution, the general public, and Google.

A. Artist/Underlying Rights Holder: Enforcement of Rights and Protection of Work

As the original creator, artists are naturally concerned with potential exploitation of the fruits of their labor and creativity. In the case of deceased artists whose works are still under the posthumous 70-year-protection, copyright is continued to be enforced by the artist’s heirs, estate, attorney, or other agents.\textsuperscript{13} The original creator and legal representatives are referred to broadly as


\textsuperscript{11} Id.

\textsuperscript{12} Id. For reference, digital cameras have on average 16 megapixels in 2013 (16 million pixels). CONSUMER REPORT NEWS, New digital cameras have even more megapixels—which still doesn’t mean they’re better, www.consumerreports.org (Feb. 06, 2013).

the “underlying rights holders” because the act of gifting, assigning, licensing, or sale of an art to entities such as museums does not necessarily convey the underlying copyright.\textsuperscript{14} This duality creates a distinction in legal rights where it is necessary to distinguish the rights of an artist (underlying copyright) and institutional rights (museums in possession of artwork but do not own the copyright have certain display rights).\textsuperscript{15} A possible discrepancy between the artist’s motivation and representatives of the artist should be noted at this point. A likely scenario involves a deceased artist with altruistic intentions with a profit-driven estate/heirs or vice versa. Museums and institutions often have to contract with representatives of deceased artists whose interests are not necessarily aligned with those of the deceased artist’s.\textsuperscript{16}

Similar to the Authors Guild, the Artists Rights Society (ARS) and the Visual Artists and Galleries Association (VAGA) are two prominent organizations representing visual artists’ IP rights by offering assistance with licensing and copyright monitoring services.\textsuperscript{17} The Artists Rights Society represents over 6,000 artists including prominent names like Pablo Picasso, Henri Matisse, Wassily Kandinsky, Andy Warhol, and Jackson Pollock.\textsuperscript{18} Under the current model, Google works independently with museums as it refused to work with the ARS to achieve one harmonized

\begin{enumerate}
\item[\textsuperscript{14}] Steven C. Schechter, \textit{Understanding the Rights of Visual Artists}, 231 N.J. LAW. 20, 23 (2004) (“\textasciitilde \textsuperscript{C}opyright does last for decades after the artist’s death, and the role of “artist” is subsequently played by heirs, executors, lawyers, and agents . . . .”).
\item[\textsuperscript{15}] \textit{Id.} at 23 (“Under the Copyright Act, once an artist sells his or her work, the artist gives up the right of possession of the work, and also transfers the right to display the work to viewers present at the location where the work is located, such as in a gallery, museum or store.”).
\item[\textsuperscript{16}] Kenneth Crews, \textit{Google Art Project: Copyright and Beauty}, COLUMBIA LAW COPYRIGHT ADVISORY OFFICE (Feb. 11, 2011), http://copyright.columbia.edu/copyright/2011/02/11/google-art-project-copyright-and-beauty/ (“\textasciitilde \textsuperscript{C}opyright does last for decades after the artist’s death, and the role of “artist” is subsequently played by heirs, executors, lawyers, and agents whose views may not match the motivations of the original creator of the aesthetic masterpiece.”).
\end{enumerate}
licensing agreement.\textsuperscript{19} The ARS indicated that it is willing to work with Google to assist with obtaining copyright clearances, but prefers to make one arrangement with Google that covers the ARS’s substantial list of protected artists.\textsuperscript{20} Google remains adamant in its position to negotiate independent contracts with each participating museum and strictly enforces confidentiality of such agreements.\textsuperscript{21} It can be speculated that Google’s refusal to work through the ARS is due to a lack of leverage over the ARS. Museums are speculated to receive beneficial web traffic feedback from Google in return for participating in the Art Project.\textsuperscript{22} If Google uses its traffic data as bargaining chip when negotiating with museums, Google does not wield the same power if it deals through the ARS for the ARS presumably does not care for web traffic data. Incidentally, works of some of the prominent artists listed above, whose interests are represented by the ARS, are missing from the Google Art Project.

\textit{B. Museum: Treading between the Interests of the Public and Artists/Donors}

Museums operate under the concept of public trust, where museums legally hold objects such as artworks in trust for the benefit of the public, an act known as “accessioning.”\textsuperscript{23} Museums are legally obligated to care for objects entrusted to them by providing the necessary economic,

\begin{footnotesize}
\begin{enumerate}
\item Theodore Feder, President, Artists Rights Soc’y, Remarks at the ABA Forum on the Entertainment and Sports Industries presentation: the Picasso Problem—Copyright and the Google Art Project (Feb. 19, 2013) (audio recording on file with author) (“[The Artists Rights Society] prefer to make one arrangement with Google directly, in covering protected artist repertoire . . . , but Google, adamant in its position, wants to have separate agreements with each participating museums.”).
\item Id.
\item Id. (expressing concern that the licensing agreements between Google and the museums are not publically available, and that museums are bound by confidentiality to not release such agreements, that the “public trust” notion may be disturbed).
\item See infra Part III.D; Ramirez, infra note 47.
\item Accessioning Activity, AM. ALLIANCE OF MUSEUMS, http://www.aam-us.org/docs/continuum/acquisitions-activity.pdf?sfvrsn=2 (last visited Sept 7, 3014) (“Accessioning is the formal act of legally accepting an object or objects to the category of material that a museum holds in the public trust, or in other words those in the museum’s permanent collection. Because it commits staff time, space and other resources to the proper care of this material, it is important that acquiring material for the collections be done in a thoughtful, inclusive way that reflects the best interests of the museum and its audiences, and can be sustained by the available resources.”).
\end{enumerate}
\end{footnotesize}
security, copyright and environmental controls (e.g. routine maintenance and temperature control for optimal storage) and cannot dispose of these objects at will.24

Though with the core of the public trust philosophy unchanged, museums and institutions have varying mission statements. Depending on a museum’s mission statement, museums can have varying levels of enthusiasm or antagonism towards the Google Art Project. The Museum of Modern Arts (MoMA) of New York states in its mission statement that it seeks to make art “accessible to a public that ranges from scholars to young children.”25 The Museum of Fine Arts, Houston states that it is “dedicated to excellence in collecting, exhibiting, preserving, conserving, and interpreting art for all people.”26 The MoMA and the Museum of Fine Arts, Houston along with a long list of other museums emphasize accessibility and egality to an immersive art experience. This theme is consistent with the Google Art Project, which strives to provide equal and unfettered access to artworks. However, museums also need to balance the interests of donors and artists and need to tread carefully with investor/artist-relationships as to not utilize or display artworks in any way that may contradict the artist or artist’s estate’s wishes.27

The museum selection of artworks for the Google Art Project is therefore often limited to works which they own the copyright to through gift or contract or those in the public domain. IP

---

24 Alexandra Darraby, Partner, the Art Law Firm, Remarks at the ABA Forum on the Entertainment and Sports Industries presentation: the Picasso Problem—Copyright and the Google Art Project (Feb. 19, 2013) (audio recording on file with author) (describing the public trust concept of museums, that in return for the preferential tax treatment, institutions hold artworks and other objects for the benefit of the public. Museums do not have the right to dispose it anyway it wants—a concept known as “accessioning.” Accessioning includes other obligations to secure and to maintain the work, e.g., take care of the assets with certain economic controls, environmental controls, security, copyright controls).

25 Mission Statement, MoMA, http://www.moma.org/about/index (last visited Aug. 18, 2014) (“In sum, The Museum of Modern Art seeks to create a dialogue between the established and the experimental, the past and the present, in an environment that is responsive to the issues of modern and contemporary art, while being accessible to a public that ranges from scholars to young children.”).


27 Kenneth D. Crews & Melissa A. Brown, Control of Museum Art Images: The Reach and Limits of Copyright and Licensing 4 (2010) (“[M]useums are motivated to maintain good relationships with artists and their estates, and so want to prevent uses of an image that would be objectionable to the artist.”).
audits are necessary for museums before joining the Google Art Project. Many unexpected issues with copyright ownership are complicated by possible restored rights and termination. A mere search and due diligence through the US Copyright Office will likely not be sufficient to uncover these potential surprises. Most museum administrators select artworks for the Google Art Project with litigation/dispute-avoidance in mind. Opinions from the museum side on the Art Project is generally very split, with some deeming the Project as revolutionary and others deeming it futile (see Exhibit B for museum costs-benefits participating in the Google Art Project).

**Exhibit B. Costs and Benefits to Museum’s Participation in the Art Project**

<table>
<thead>
<tr>
<th>Benefits to Participating in Art Project</th>
<th>Costs to Participating in Art Project</th>
</tr>
</thead>
<tbody>
<tr>
<td>Help promote awareness in art and perpetuate museum mission statement</td>
<td>May affect museum visitor count (this remains an open question, however)</td>
</tr>
<tr>
<td>Museums can only display about 10% of the collection at any given time (referred to as letting artworks “sleep” due to fragility of the artwork). Art Project allows 100% display for museums</td>
<td>Disproportionate selection of public domain artworks (issue can be resolved by obtaining clearances on more modern art)</td>
</tr>
<tr>
<td>Opportunity for museums to present artwork in the best resolution possible which was not previously possible without the technology assistance provided by Google</td>
<td>Subject to potential copyright infringement penalties and dilemma (however, a large number of contemporary art images are already out there, e.g. Andy Warhol artwork images from Google search)</td>
</tr>
<tr>
<td>Art Project avoids curatorial judgment (viewers can view art freely without being subject to curatorial description/museum judgment)</td>
<td>Need to be cautious with user-generated annotations/comments on the Art Project (disseminating incorrect information)</td>
</tr>
</tbody>
</table>

---

28 Carlotta Ramirez, Compliance Director, Museum of Fine Arts Houston, Remarks at the ABA Forum on the Entertainment and Sports Industries presentation: the Picasso Problem—Copyright and the Google Art Project (Feb. 19, 2013) (audio recording on file with author) (describing the process of a museum acquiring artwork, involving an IP audit process where auditors categorize art pieces into three “piles”: what they think is out of copyright, still under copyright, and a middle pile where it is uncertain whether the work is copyrighted).


31 Leslie Gordon, It’s Google, but is it art? It’s Google, But Is It Art? Museums Wonder Whether They Should Open Their Galleries to Digitizing, ABA JOURNAL (Feb.1, 2013, 4:29 AM), http://www.abajournal.com/magazine/article/its_google_but_is_it_art/ (citing Troy Klyber, IP Manager at the Art Institute of Chicago, “[o]ur selection was designed to avoid disputes” for works to be included in the Google Art Project).

32 See generally Id. (providing various accounts of museum administrators’ opinions on the Google Art Project).
C. The Public: Benefit from Increased Access

The benefit of vast availability of the arts to the public is heightened cultural enlightenment and increased educational exposure. The public reception of the Google Art Project is less mixed than the museums, with mostly positive feelings towards the new exposure and access brought by the Project. There are some criticisms of the Google Art Project, but mostly suggestions to improve site usability. Comments from article and blog discussions were aggregated and organized to reflect the following sentiment about the Google Art Project.

There are mostly positive comments about the Google Art Project on the official blog of Google, where readers expressed gratitude and interest in the art collection.33 Some feedback noted with appreciation for the Google Art Project’s high fidelity and gigapixel image of some art works.34 In other discussions, some users noted the ability to zoom-in close-up on a painting allows art students to study the fine details of a masterpiece unreservedly.35 The Art Project created a buzz in the art education community, with discussions centered on new possibilities to teach art using the Project. An art teacher commented on the Google Art Project that “it is good to be able to access the work of well-known artists” as a positive avenue to inspire her students to be creative.36

The art education community is eager to maximize the potential of the Google Art Project as

---

34 Id. (“You can zoom in to see Van Gogh’s famous brushwork or watch how previously hard to-see elements of an artwork suddenly become clear.”).
35 Gordon Anderson, Comment to Why the Google Art Project is Important, E-LITERATE (June 17, 2012, 4:39 AM), http://mfeldstein.com/why-the-google-art-project-is-important/ (“[F]or serious students of oil painting, it makes a huge difference to be able to see the fine detail.”).
36 Correll Corbett, Comment to It’s Google, But Is It Art? Museums Wonder Whether They Should Open Their Galleries to Digitizing, ABA JOURNAL (Mar. 1, 2013, 3:21 PM), http://www.abajournal.com/magazine/article/its_google_but_is_it_art/ (“As a teacher it is good to be able to access the work of well-known artists, to promote good examples for my students.”).
college professors design the Project into curricula of art courses, having activities where students engage in museum tours on the Project and compose reflections and critiques on art pieces.\textsuperscript{37}

Aggregating negative feedback on the Art Project, some pointed that the Project interface is “static and dull,”\textsuperscript{38} “not user-intuitive,”\textsuperscript{39} with more room to grow in terms of interactivity and bringing educational value. A user pointed out the “compare” function on the Art Project does nothing more than putting two images side by side with little value added.\textsuperscript{40} One possible way to enhance user experience and improve interactivity on the Google Art Project is to introduce a dialogue feature, allowing a discourse among users to foster appreciation for the arts.\textsuperscript{41} Others have given feedback on the construction of the “museum view” as intrusive on the museum experience, with one particular satirical comment from a user stating that “Google’s grainy ‘Street View’ photography reminds [him] of the kind of handheld footage in horror movies.”\textsuperscript{42}

\begin{footnotesize}
\textsuperscript{37} Debbie Morrison, Comment to \textit{Why the Google Art Project is Important}, \textsc{E-Literate} (May. 29, 2012, 11:34 PM), http://mfeldstein.com/why-the-google-art-project-is-important/ (“I work with college professors to develop online curriculum for general education courses. Recently I worked on a[n] ‘Introduction to Music and Art’ three credit college course. For one learning activity, we created a virtual field trip, where students ‘visited’ the Boston Museum of Fine Arts, where they were directed to the interactive tours, page (http://www.mfa.org/explore/interactive-tours), where the student selects four or five ‘tours’ to view. Once they explore, they are to select his or her favorite piece, and write about the piece, why they chose it, what elements of art (as studied in the course) were apparent, and post this ‘are reflection’ in a discussion forum where the students then read and dialogue together. In another activity, students upload a favorite art piece from a specific era, to a ‘glossary’ type tool . . . describing why they chose the piece, and then comment on other classmates’ selections.”).

\textsuperscript{38} Asli R. Semadli, Comment to Matthew Caine’s interview with Amit Sood, director of the Google Cultural Institute, \textsc{The Guardian} (Dec. 4, 2013, 11:33 PM), http://www.theguardian.com/culture-professionals-network/culture-professionals-blog/2013/dec/03/amit-sood-google-cultural-institute-art-project#start-of-comments (“For the moment, [the Google Art] project is static and dull, maybe because there is still limited content. Also, as a user, I want more learning and interaction. The features you have are dull and what "compare" button actually does than putting two images next to each other?”).

\textsuperscript{39} Morrison, supra note 37 (May. 29, 2012, 11:34 PM) (“The Google Art project is indeed exciting – though I do hope they will enhance the site to be more intuitive for the user . . . believe there needs to be some kind of dialogue, even starting with why the user chose a given piece of art to feature in his or her museum. The next phase might be an opportunity for others to comment and engage in dialogue about the piece. This is where art appreciation really begins.”).

\textsuperscript{40} Id.

\textsuperscript{41} Id. (“I believe there needs to be some kind of dialogue, even starting with why the user chose a given piece of art to feature in his or her museum. The next phase might be an opportunity for others to comment and engage in dialogue about the piece. This is where art appreciation really begins.”).

\textsuperscript{42} Alastair Sooke, \textit{the Problem with Google’s Art Project}, \textsc{The Telegraph UK}, (Feb. 2011), http://www.telegraph.co.uk/culture/art/art-news/8296251/The-problem-with-Google’s-Art-Project.html (“Google’s grainy ‘Street View’ photography reminds me of the kind of handheld footage favoured in horror movies such as...”)
\end{footnotesize}
D. Google: Philanthropy alongside a Business Agenda

Google’s mission to “organize the world’s information and make it universally accessible and useful” is a driving force behind the Google Art Project. Google has a philanthropic interest in the Art Project with a potential to develop goodwill and reputational acclaim which is beneficial to its core business activities. Though not-for-profit, a positive byproduct from the Google Art Project is a parallel increase in the use of Google’s other products such as Google Scholar, Books, and News. These positive byproducts could raise profit-generating implications. However, with a philanthropic focus, Google is keen on having an expansive database with as many artists, countries, and museums represented.

The current model for Google is negotiating independent agreements with museums and placing the burden of copyright clearance on museums. Google strictly enforces the confidentiality of those agreements, therefore little is known about the content of those agreements. However, when inquired about the specific terms in the agreement with Google, most museum representatives incidentally respond with the same diplomatic answer, that “[Google is] a large company and they are aware of their bargaining powers.” It can be deduced that Google has leverage and bargaining power over museums and is able to offer museums something quite irresistible in return for participating in the Art Project. A legal representative of a

The Blair Witch Project – a ‘look’ that is surely anathema to the carefully orchestrated clarity of the galleries in reality.”).

43 GOOGLE, supra note 1.
44 the Google Art Project: A Work in Progress, INFORMATION SYSTEMS AND THE VISUAL ARTS (Sept. 24, 2012), http://nyuisva.wordpress.com/2012/09/24/the-google-arts-project-a-work-in-progress/ (“Users who are used to Google’s increasing efforts to integrate its services across platforms will be puzzled that there’s no G.A.P. tie-in for Google’s Blog, Scholar, Books, and News aggregators (for further reading) and Google Calendar . . . .”).
45 Feder, supra note 19; Cohen, infra note 55 (citing Feder “Google is placing the burden and onus on the museum, which is unfair to them and unfair to the artists.”).
46 Id.
47 Gordon, supra note 31 (“They are a large company and they are aware of their bargaining power” when asked about the terms of the agreement with Google); Ramirez, supra note 28.
participating museum stated that it is possible that Google is providing feedback and traffic data back to the museum, showing the number of hits per art piece and other highly valuable data.\(^{48}\) Due to binding confidentiality, the legal representative refused to answer directly as to whether Google gives feedback to the museum.\(^{49}\) However, having access to web data can be of paramount value to museums, with the possibility of obtaining demographic information on donors, as donations are an important source of revenue for museums.

### IV. COPYRIGHT ISSUES IMPLICATED IN THE GOOGLE ART PROJECT

Copyright law defines protection as applicable to any “original works of authorship fixed in any tangible medium of expression.”\(^ {50}\) Copyright protection subsists for the life of author plus seventy years for works created in or after 1978.\(^ {51}\) Copyright owners have exclusive rights to reproduce, distribute, and prepare derivative works of the copyrighted work.\(^ {52}\) Google’s use of images points to a strong inkling of copyright infringement by reproducing digitally high-resolution images, raising concerns for the downloading and commercial exploitation of artworks. The “share” function on the Project where users can publish artworks through for-profit entities such as Facebook is another feature that alarms copyright owners. In dealing with probable infringement liabilities for the Google Art Project, an assessment of the pros and cons of an aggressive strategy against a defensive one warrants a more restrained legal strategy for the Art Project (See Exhibit C for advantages and disadvantages of a restrained legal strategy).

---

\(^{48}\) Ramirez, supra note 28 (expressing that she is uncertain when asked the question whether Google gives feedback to the museum. The representative then indicated that she believes there is some tracking ability and the museum is possibly get information back from Google about the number of hits they get).

\(^{49}\) Id.

\(^{50}\) 17 U.S.C. § 102(a) (2012).


\(^{52}\) 17 U.S.C. § 106.
A. Consideration: Legal Ambiguity with Fair Use

As one important limitation on copyright, the fair use exception calls for an evaluation of four factors enumerated in 17 U.S.C. §107: (1) the purpose and character of use (commercial or nonprofit), (2) nature of the copyrighted work, (3) proportion of copyrighted work used, and (4) the effect of use on the value of copyrighted work.\footnote{17 U.S.C. § 107.} Even though Google can advance a potential fair use defense with the Art Project, but perhaps affected by ongoing litigation, namely Authors Guild v. Google Inc., Google has undertaken a different strategy with the Art Project than the Google Books Project. As mentioned previously, the Google Art Project’s current model places the burden of copyright clearances on museums.\footnote{Feder, supra note 19; Cohen, infra note 55 (citing Feder “Google is placing the burden and onus on the museum, which is unfair to them and unfair to the artists.”).} Google removes on demand any images when requested, as is the case with Picasso and Matisse’s works.\footnote{Patricia Cohen, Art is Long; Copyright Can Even Be Longer, N.Y. TIMES (Apr. 24, 2012), available at http://www.nytimes.com/2012/04/25/arts/design/artists-rights-society-vaga-and-intellectual-property.html?pagewanted=all&_r=0 (“The Toledo Museum of Art recently asked the Google Art Project to remove ‘Dancer Resting’ (1940), by Henri Matisse, as well as 20 other images from its collection that were posted but are still under copyright.”).} This approach differs from the more aggressive approach with the Google Books Library Project, where Google scanned millions of books onto its database and offer snippets of books online.\footnote{Google Books, GOOGLE, http://books.google.com/googlebooks/library/index.html (last visited Sept. 8, 2014).} With the Books Project, Google asserts its fair use ground from the onset and did not go through any copyright clearances. The Author’s Guild (nonprofit organization perpetuating authors’ rights) sued Google for copyright infringement over the Book Project in 2011. At the district level, the court rejected the proposed $125 million dollar settlement between the Author’s Guild and Google, and certified class action for plaintiff groups including various authors, publishers, photographers, illustrators, and associations representing authors’ rights.\footnote{Authors Guild v. Google, Inc., 282 F.R.D. 384, 386 (S.D.N.Y. 2012) (holding that the associations had standing to bring claims on behalf of their members; numerosity prerequisite for class certification was met; commonality}
more superior approach in addressing the question, the case was partially vacated by the 2nd Circuit by reason of immature class certification. Though the district judge held in favor of Google’s fair use defense on remand, the Author’s Guild will challenge this latest ruling on appeal. The substance of the case is therefore yet to be settled and Google should not rely on the court ruling to proceed ambitiously with the Art Project uninhibitedly, especially in an area of law that is largely unsettled.

B. Consideration: Hazards of Litigation

Google can achieve its ultimate goal in expanding its art collection without the hazards of litigation because of the inherent differences embedded in museums/art and library/books.

prerequisite for class certification was met; typicality prerequisite for class certification was met; adequacy prerequisite for class certification was met; common issues presented in the litigation predominated over any individual ones; and class action was a superior method for resolving the litigation.”).

58 Authors Guild, Inc. v. Google Inc., 721 F.3d 132 (2d Cir. 2013), 135 (“For the reasons stated above, we VACATE the June 11, 2012 order of the District Court certifying plaintiffs’ proposed class and REMAND the cause to the District Court for consideration of the fair use issues, without prejudice to any renewal of the motion for class certification before the District Court following its decision on the fair use defense.”).

59 Authors Guild v. Google, Inc., 954 F. Supp. 2d 282, 292 (S.D.N.Y. 2013) (“Here, plaintiffs argue that Google Books will negatively impact the market for books and that Google’s scans will serve as a “market replacement” for books. It also argues that users could put in multiple searches, varying slightly the search terms, to access an entire book. Neither suggestion makes sense. Google does not sell its scans, and the scans do not replace the books. While partner libraries have the ability to download a scan of a book from their collections, they owned the books already—they provided the original book to Google to scan. Nor is it likely that someone would take the time and energy to input countless searches to try and get enough snippets to comprise an entire book. Not only is that not possible as certain pages and snippets are blacklisted, the individual would have to have a copy of the book in his possession already to be able to piece the different snippets together in coherent fashion.”).

60 Joe Mullin, Google Books Ruled Legal in Massive Win For Fair Use (Updated), ARS TECHNICA (Nov. 14 2013, 8:32 AM), http://arstechnica.com/tech-policy/2013/11/google-books-ruled-legal-in-massive-win-for-fair-use/ (citing Author’s Guild Executive Director Paul Aiken “Google made unauthorized digital editions of nearly all of the world’s valuable copyright-protected literature and profits from displaying those works . . . . In our view, such mass digitization and exploitation far exceeds the bounds of the fair use defense” and that the Guild is going to appeal.”).

61 Kenneth Crews, Copyright Duration and the Progressive Degeneration of a Constitutional Doctrine, 55 SYRACUSE L. REV. 189, 192 (2005) (arguing a central point that the law of copyright duration has often failed to function in a reliable manner); Kenneth Crews, Google Art Project: Copyright and Beauty, COLUMBIA COPYRIGHT ADVISORY OFFICE (Feb. 11, 2011), http://copyright.columbia.edu/copyright/2011/02/11/google-art-project-copyright-and-beauty/ (“Who can know for sure [whether a work has entered the public domain]? The law on that issue is a mess, and determining the copyright status requires scrutiny of the law and the facts surrounding the creation and publication of each work one at a time. Some works are protected—others not.”).
1. Museums and Libraries are Not Alike

The role of museums for art differs from the role of libraries for books. Because of this situational difference, museums can act as a legal buffer for the Google Art Project while libraries cannot effectively do so for the Google Books Project. In addition to fair use, the first sale doctrine is another limitation on copyright which applies to purchaser of copyrighted works, allowing the purchaser to freely transfer, sell, lend without infringement liabilities.\(^{62}\) Libraries operate under the first sale doctrine almost exclusively as they purchase the copyrighted materials (books, periodicals, journals etc.).\(^{63}\) Most importantly, because of the first sale doctrine, libraries do not deal with authors and copyright clearances. Where book titles usually are published in mass, artworks are regarded with provenance and elaborate processes of authentication. Mass publication of books render it possible for libraries to purchase and lend under the first sale doctrine whereas artworks housed at museums need to be ascertained as genuine and thus come with hefty price tags. Museums consequently only purchase a small percentage of their collection, and mostly possess artworks under various licensing agreements that fall outside of the first sale doctrine.

Partnering with libraries for the Books Project is hence not viable since libraries do not deal with copyright clearances, being spared by the first sale doctrine. Museums on the other hand, deal with copyright clearances on a regular basis and can therefore serve as a cushion between the

---


\(^{63}\) *Copyright, American Library Association*, http://www.ala.org/advocacy/copyright (last visited Aug. 19 2014) ("The first sale doctrine enables libraries to lend books and other resources. Fair use allows for the use of copyrighted works for purposes of criticism, comment, news reporting, scholarship, or research. Libraries are permitted to make reproductions of copyrighted works for preservation and replacement purposes."); *Marketing to Libraries, American Library Association*, http://www.ala.org/tools/libfactsheets/alalibraryfactsheet05 (last visited Aug. 19 2014) ("Libraries purchase books for adults, young adults, children, and special readers (emerging literates, large print, braille). They also purchase newspapers and magazines, reference sources, scholarly journals, electronic resources (individual and aggregate online databases, computer software, ebooks and ebook readers), audiovisual materials (DVDs and online streaming video, audiobooks and music recordings in various formats including streaming and digital downloads), and microforms.").
Art Project and underlying rights holders. Google should and has taken advantage of this structural difference in utilizing museums as a legal buffer by placing the clearance burden on them.

2. Books and Art are Not Alike

Books also differ from art within the context of this discussion. There is a stronger emphasis in antiquity and authenticity present in the arts than in books. Books and periodicals on the other hand, have an associated temporal element where “currentness” of content is critical. The Google Books Project therefore faces a greater sense of urgency in having the most current collection of literature. Though the missing genre of contemporary art is a problem for the Art Project, missing books from the last decade will patently wreak greater havoc than missing art from the same timeframe. While this may have been a justified rationale behind the aggressive strategy for the Books Project, Google faces considerably less pressure and urgency to build the Art Project.

Artworks are also subject to the Visual Artists Rights Act (1990) which grants special rights to artists atypical to usual copyright law, such as the right to claim authorship and to prevent mutilation and destruction of work.64 Given these additional artist’s rights, it is ideal for Google to work through museums, the Artists Rights Society, and other middleman entities to minimize infringement liabilities.

C. Consideration: Reputational Impact

By operating defensively, Google can avoid perpetuating any negative perception of its monopolistic corporate image and minimize allegations of possible “bullying” behavior.

D. Disadvantages of a Defensive Legal Strategy

In pursuing a defensive legal strategy, Google may have to work with the Artists Rights Society in order to expand its current collection. Since the Artists Rights Society is unlike museums and presumably not interested in the same incentives such as web data, Google may need to provide direct monetary payments to the Artists Rights Society under a licensing agreement. This paper recommends Google monetizing the Google Art Project in order to obtain necessary funding to work with the Artists Rights Society.\(^6^5\) Going through copyright clearances can lead to slower expansion of the site’s collection, but as extrapolated earlier, the Art Project does not face the same urgency in updating its database as the Books Project and can afford to gradually build up the collection.

### Exhibit C. Advantages and Disadvantages of a Defensive/Restrained Legal Strategy

<table>
<thead>
<tr>
<th>Advantages of Defensive Strategy</th>
<th>Disadvantages of Defensive Strategy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avoid dealing with ambiguous law</td>
<td>Need funding/incentive to work with ARS</td>
</tr>
<tr>
<td>Achieve goal without hazards of litigation</td>
<td>Slower to build and expand site collection</td>
</tr>
<tr>
<td>Avoid stigma of aggressive monopolistic entity</td>
<td>- Counter: monetize Art Project</td>
</tr>
<tr>
<td></td>
<td>- Counter: acceptable because books ≠ art</td>
</tr>
</tbody>
</table>

In sum, a more restrained legal strategy for the Art Project is warranted because Google can achieve its ultimate goal in expanding its art collection without the hazards of litigation. Google should therefore stay within legal boundaries and gradually expand its collection by working with the Artists Rights Society and continue building museum partnerships.\(^6^6\)

\(^6^5\) See infra Part V.D.1 (recommending Google work with through and with the Artists Rights Society in order to expand their online collection of artworks. Working with the Artists Rights Society requires funding for copyright clearances, for which Google can obtain funding from monetizing the Google Art Project interface).

\(^6^6\) See infra Part V.D.
V. SOCIETAL ARGUMENTS FOR AND AGAINST THE GOOGLE ART PROJECT AND ANALYSIS

Some general arguments for the Google Art Project has been advanced in the Stakeholder Analysis in Part III supra, including the public benefit of increased aesthetic exposure and education.67 This Part of the paper is formatted to address existing and possible arguments against the Google Art Project from a societal perspective. See Exhibit D for a summary of arguments for and against the Google Art Project from a societal perspective.

A. Concerns for Google’s Monopolistic Power

Some view Google increasingly as a form of content control, and are not receptive of the idea to having images of artwork freely available online.68 Others put forth reminders that Google is a commercial entity and society should guard against its market power from seizing “world dominion” over every aspects of our lives.69

1. Defense: Google Is in the Best Position to Develop a Capital-Intensive Public Purpose Project

Some stakeholders such as the public may be concerned with the longevity of the Art Project and whether Google is in it for the long haul. Developing the Art Project and working with museums through various copyright and legal obstacles requires an entity with sufficient resources to ensure the project’s sustainability. Google makes an ideal candidate in this respect as existing art digitization remains very piecemeal and generally done at a museum-level.70

---

67 See supra Part II.C.
68 Feder, supra note 19 (pointing out this is a common “European perception” of Google).
B. Displacement Issue for Museum Visitors; Google Will Kill Museums

A prevailing argument against the Google Art Project is that the systematic digitization of art will threaten the existence of traditional brick-and-mortar museums and eventually render them obsolete.71

1. Defense: Digitized Art Is Not a Replacement of Actual Art

Putting the in-person museum experience vis-à-vis the Google Art Project “museum view” function, the virtual tour online can hardly replace the actual museum experience. Some critics of art digitization argue that the human eye is binocular and the art experience is restrictive to two-dimensional images online and one is unable to experience the “aura” of the painting live.72 This criticism, however, works in favor of the Art Project in defending against the argument that it will displace traditional museums. The Google Art Project is not meant to displace museums with static images online. The founder of the Google Art Project conceded to this view that his intention in founding the Art Project was never meant to replace or compete with physical museums. In the founder’s word, with art and culture “the more it’s in front of you, the more exposed [you are to it], the more inclined you are to want to go and see the real thing.” The Google Art Project is

[provided by Google] is neither easy nor cheap. Museums are unlikely to digitize large percentages of their collections in this way in the near term.”).

71 Sarah Rothbard, Will the Laptop Destroy the Coffee Shop?, THE GETTY IRIS (Sept. 4, 2014), http://blogs.getty.edu/iris/will-the-laptop-destroy-the-coffee-shop/ (hosting a discussion on the relationship between the physical and the digital. Speakers address whether digital technology is threatening the existence of public spaces such as art museums); Pete Brook, See Some Art While You Still Can—Google Will Eventually Replace Museums, WIRED.COM (Sept. 27, 2013, 6:30 AM), http://www.wired.com/2013/09/see-some-art-whir-you-can-google-will-eventually-replace-museums/.

72 Sebastian Smee, In the End, Google’s Close-ups Intrude on the Art Experience, THE BOSTON GLOBE (Feb. 10, 2011), http://www.boston.com/ae/theater_arts/articles/2011/02/10/google_art_project_is_underwhelming/?page=2 (“[I]t is because your eyes are attached to your body with all its nerves and weight and appetites. They can rove around as they like, independent of the movements of a handheld mouse. They are sensitive to changing light conditions, to atmosphere, to space—in short, to what people like to call “aura.” All of this is what gives the experience of looking at art so much meaning and interest.”).

arguably more of a complement than substitute to traditional brick-and-mortar museums. To argue otherwise would be falling in the trap of false dichotomy in suggesting there is a zero-sum correlation between museums and digitized art and that there is nothing to be gained from one another. In support of the view that digitized art and museums can have a symbiotic relationship, some users of the Art Project have indicated that the “museum view” function is helpful for planning a visit to the museum or as a “follow-up” refresher after a museum visit. Several reputable industry reports hold the same view, stating that it is believed digitized art collections are not likely to replace traditional museum visits.

The second defense against the displacement argument is that the Google Art Project will likely not displace two major segments of museum visitors: those with higher-education and tourists. Factors influencing demand for the museum industry include disposable income and education level (a positive correlation for both factors). Consumers with higher education levels, particularly those with a bachelor’s degree and beyond, tend to be more likely to visit museums. Tourism is another major factor contributing to demand for museums. The internet and digitized art like the Google Art Project will likely not displace tourists and higher education segments of museum patronage. For tourists, those in the vicinity of museums will likely visit the museum regardless of whether having seen the collection online and those visiting especially for the museums will, needless to say, visit the museums. For the higher education segment, visitors are

---

74 Guo XinXin, Impressions of Google Art Project, INFORMATION SYSTEM IN THE VISUAL ARTS (Feb. 2013), http://nyuisva.wordpress.com/tag/google-art-project/ (“Much more successful, and interesting, to me, is the ‘Museum View’ virtual gallery tour that is modeled on Google’s highly popular and useful Street View. This is helpful for planning visits and getting a sense of what to expect. Or, as a follow-up to a visit, it provides an excellent jog to one’s memory.”).

75 DMITRY DIMENT, IBISWORLD INDUSTRY REPORT: MUSEUMS IN THE US, at 11 (IBISWorld 2014) (on file with author) [hereinafter IBISWORLD MUSEUMS].

76 IBISWORLD MUSEUMS, at 14.


78 IBISWORLD MUSEUMS, at 15.
more likely to visit physical museums to witness and immerse in the majesty of art. This higher-education, higher-disposable income segment also has less financial motivation to replace a museum visit (with admission fee) by viewing images online. Though online collections has the potential to save time (consider time a valuable opportunity cost), whether the time-saving element will displace high-education visitors depends on the underlying intention and motivations to visit museums. If high-education visitors do not consider online collections a proper substitute to the immersive museum experience, the time-saving factor will likely not deter visits. There is currently no data to support this hypothesis, but stakeholders interested in statistical support can implement visitor surveys at museums to identify major motivations and reasons for visits. Similarly, the Google Art Project can survey its users to collect data for interest/intentions on visiting a physical museum in the future. Digitized art like the Google Art Project, however, can potentially displace low income visitors where consumers with lower disposable income face a higher opportunity cost of traveling and museum admission fees.

It can also be argued that digital platform not only does not displace traditional museum visits, online images might work to elicit interests and awareness, thereby increasing the number of visitors to the museum. Records show that museums have experienced increased revenue and a record high visitor count in 2013. Though there is no evidence for correlation between increased visitors and the Google Art Project, Google can survey its users to pinpoint the effect online images have on users (whether the images prompt users to plan or desire a visit to museums to see the real work).

79 Smee, supra note 72 (“The Google Art Project is one more development in this story and, at the very least, it is likely to increase the appetite of people to get off their padded swivel chairs and hightail it to a museum.”); Proctor, supra note 70 (“I predict that Street Views of gallery installations will only fuel the desire to visit in person and increase the power of the museum pilgrimage to unleash the poetry of the encounter with the artwork.”).
80 IBISWORLD MUSEUMS, at 6.
C. Museums Are in an Unfair Position and Are Exploited

Under the current model, instead of negotiating with the Artists Rights Society or individual artists, Google places the burden on the museums to obtain copyright clearances. Opponents to this model have expressed fear of a looming presence of corporate Google and that museums are in an unfair bargaining position and ill-equipped to negotiate with Google.\textsuperscript{81}

1. Defense: Museums are Sophisticated Entities

However, museums are sophisticated entities with a longstanding history in handling copyright issues, many of which have capable legal teams consisting of attorneys from various disciplines. Museum administrators are likely to have done extensive cost-benefit analyses before participating in the Google Art Project. Google is fair to place the burden of copyright clearance on museums, who may be in a better position (with the know-how and relationship-building) to negotiate for copyright contracts with artists and estates. It is also cost-intensive for Google to host gigapixel and high resolution images\textsuperscript{82}, therefore the current “responsibility-sharing” model seems justifiable.

Exhibit D. Arguments For and Against (Societal Perspective) the Google Art Project

<table>
<thead>
<tr>
<th>For Google Art Project</th>
<th>Against Google Art Project</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art should not be exclusive; public benefit of increased exposure to art</td>
<td>Art Project’s collection is sparse and unevenly represented with a lot of modern art missing</td>
</tr>
<tr>
<td>Will increase interest and museum visitors</td>
<td>Competes with and displaces museum visitors</td>
</tr>
<tr>
<td>Google is in the best position to do this for the long run/sustainably with its resources</td>
<td>Google has monopolistic power over content/information</td>
</tr>
<tr>
<td>Museums are sophisticated entities with legal resources</td>
<td>Museums have an unfair bargaining position</td>
</tr>
<tr>
<td>Art Project never meant to replace traditional museums</td>
<td>Human eye is binocular, Art Project is static</td>
</tr>
<tr>
<td>High fidelity and gigapixel images is valuable to the studying of art</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{81} Darraby, supra note 24. 
\textsuperscript{82} Gordon, supra note 31 (citing Joe Brennan, General Counsel of Field Museum of Natural History in Chicago, noting that “it’s very expensive to host giant-resolution images and, as a result, it’s fair for Google not to expose itself to copyright liability.”).
D. Proposals to Ease Copyright Tensions and Expand the Art Project’s Coverage of Artworks

1. Monetize the Google Art Project to Fund Copyright Clearances

Google can legitimately display works of art in the public domain and ones with permission granted on the Google Art Project database. The issue then is the length of copyright protection (life of author plus seventy years) which limits the collection of art that can be put onto the Project, leading to a large era of missing art, namely modern and contemporary art. Google’s current solution to the copyright dilemma is to blur the copyrighted images when approached in “museum view” and leaving out artworks that are still under copyright altogether. With the rapid expansion rate of the Project, it is difficult to justify the missing collection of contemporary and modern art and makes the Google Art Project incomplete. While contacting individual artists to obtain clearances is inefficient, it may be desirable for Google to work with the Artists Rights Society to achieve an agreement. Given the ARS’s vast representation of artists including many contemporary artists like Picasso and Kandinsky, working with the ARS allows Google to tap into this untapped area of art still under copyright protection.

To finance licensing agreements with the Artists Rights Society, the Google Art Project’s website can be openly monetized, with the revenue stream directed to fund copyright clearances. It can be argued that the monetization of a nonprofit entity is inconsistent with the public purpose of the Art Project. However, Google’s use of revenue to cover for copyright clearances in order to add more artwork perpetuates the public purpose and mission of the project. The reinvestment of

---

84 IBISWORLD MUSEUMS, at 17.
83 Id.
profits back into the Art Project is consistent with the requirements laid out by the Internal Revenue Service for a not-for-profit organization. Though there is commonly stigma with monetization and presence of advertisements for nonprofit organizations, it is not uncommon for nonprofit organizations to monetize their websites. Nonprofits can be selective with advertisements on the webpage, with emphasis on advertisements that is somewhat aligned with the nonprofit organization’s mission (e.g. advertisements for pet grooming services on an animal rights advocacy website). Google can accept placement of advertisements from museums or other art-related purposes on the Art Project’s website.

2. Fortifying the Terms and Condition on the Google Art Project

Currently on the Google Art Project website, the only terms and condition of use are listed under an obscured section of “Frequently Asked Questions” on the Google Cultural Institute page, accessible from the Art Project by way of a similarly obscured “Powered by Google Cultural Institute” logo at the bottom right corner of the webpage. The infringement warning under the same section states that “all imagery on this site is not intended for download and is provided for the sole purpose of enabling you to use and enjoy the benefit of the Cultural Institute site, in the manner permitted by Google’s Terms of Service,” with the terms of service as a clickable hyperlink. The Google’s Terms of Service contains two lines on terminating repeat infringer following the procedure based on the U.S. Digital Millennium Copyright Act. Having a set of

85 I.R.S. Publication 4220 (Rev. 8-2013), available at http://www.irs.gov/pub/irs-pdf/p4220.pdf, (a 501(c)(3) organization “must ensure that its earnings do not inure to the benefit of any private shareholder or individual” and “not operate for the benefit of private interests such as those of its founder, the founder’s family, its shareholders or persons controlled by such interests.”).
87 Google Terms of Service, GOOGLE, http://www.google.com/intl/en-GB/policies/terms/ (last modified Apr. 14, 2014) (“We respond to notices of alleged copyright infringement and terminate accounts of repeat infringers according to the process set out in the US Digital Millennium Copyright Act. We provide information to help copyright holders manage their intellectual property online. If you think that somebody is violating your copyright
more explicit terms and conditions for use of the Google Art Project can offer a peace of mind for artists and museums. For instance, the largest online catalog of Picasso’s work—the Picasso Online Project developed by Dr. Enrique Mallen at the Sam Houston State University—successfully worked through thorny copyright issues with the Artists Rights Society. The most apparent difference between the Picasso Online Project and the Google Art Project other than the Art Project not containing a single piece of Picasso’s work, is the conspicuous copyright notice that greets user entering through the homepage of the Picasso Project. The notice warns users to only use the images for educational purposes and lists the contact information of the Artists Rights Society for any copyright inquiries.

Furthermore, Google also asserts copyright to images captured for “museum view”. By virtue of owning copyrights to images Google captured and placed on the Art Project, this claim can function as a second layer of copyright protection. Google can leverage this as a form of reassurance when negotiating with museums and addressing their concerns over mass distribution of images.

In sum, Google can expand its Art Project collection by working with the Artists Rights Society using revenue generated from monetizing the Art Project website. To facilitate clearance negotiations, Google should enhance its terms of use and infringement warnings on unlawful uses of images.

89 Frequently Asked Questions, Google Cultural Institute, http://www.google.com/culturalinstitute/about/ (last visited Aug. 19, 2014) ("Are the images on the Cultural Institute and Art Project site copyright-protected? The high-resolution imagery featured on the site is owned by their respective museums or collections, and these images may be subject to various copyright laws around the world. The Street View imagery is owned by Google.")
VI. CONCLUSION

Google’s mission to organize the world’s information can test existing possibilities and boundaries. Naturally, these endeavors can be disruptive to existing laws, notably copyright law. The law in the area is unsettled as it is currently, and it is advisable for Google to proceed gradually in expanding its online collection and only falling back on the fair use defense as necessary rather than using it as a weapon to make way. A holistic evaluation of stakeholders to the Art Project renders much debate from both sides. But perhaps what is significant with the Google Art Project development is the symbolic gesture of change: the Art Project has initiated a change in a traditionally very closed and conservative environment in the museum industry.
Appendix A: Google Art Project Interface

Exhibit 1. Homepage of the Art Project shows daily featured items

Exhibit 2. “Museum View” function, viewing the inside of MoMA New York

Exhibit 3. Image zooming with the “American Gothic” by Grant Wood
Exhibit 4. Close-up of a gigapixel painting the “Starry Night” showing brushwork and cracks
Exhibit 5. User Galleries on the Art Project are visible to others