The Electronic Walls Have Eyes

Apple Store photo project sparks uncomfortable discussion about "privacy."

✎ By Kyle McDonald   ◷ October 1, 2011   ▭ Arts & Culture, Uncategorized

If you saw the images, you wouldn't think they were all that controversial. Slack-jawed, their eyes glazed over, the subjects of Kyle McDonald's "People Staring at Computers" appear deeply focused or even caught at a bad moment. How McDonald obtained the images is what has been subject to fascination and controversy in the electronic arts community in New York City since the project was shut down in July.

McDonald, a Brooklyn-based media artist, downloaded photo software to Apple Store computers and connected them to his own website. When the built-in iSight camera detected a face, it would snap a photo and then show it to the user. In an interview with Mashable, McDonald claimed that users would almost immediately shut down the photo slideshow, disinterested in what had just been shown to them. After the photo was taken, it was forwarded to McDonald and posted to Tumblr and Vimeo for public consumption. His intention, he told Mashable, was to "think more about our computers and how we're using them."

The project lasted only a few days before Apple discovered the program and the Secret Service showed up at McDonald's home, confiscating two computers, two flash drives and an iPod. When this project was first brought to F Newsmagazine's attention in early July, just the news broke, the work was justified under the pretense of aesthetics, but that conversation has been leapfrogged over to the far more serious concern of legal issues surrounding electronic art production. McDonald, it seems, is another electronic artist whose work has become a standard-bearer of the "Art vs. Law" argument.

It's an interesting position for McDonald to be put in, but not an enviable one. McDonald, who initially declined to comment for this story, was facing charges under 18 USC section 1030 of the US Code, a law that relates to computer fraud. McDonald, who seemed open to discussing the project in his Mashable interview, refrained from talking to the media while he was under investigation — advice given to him by his counsel, the Electronic Frontier Foundation. However, in a tweet from September 9, he wrote "@secretservice

Photo illustration by Joe Carpenter.

investigation of 'people staring at computers' is done. The us [sic] attorney's office has declined to prosecute." Just before press time, McDonald responded to the request from F Newsmagazine for a statement surrounding his work — a statement which has been included at the end of this article.

It seemed like McDonald's situation was a difficult one to stumble into, but not impossible. For artists working in electronic mediums, the boundaries are increasingly blurry.

Michael Dorf, an SAIC faculty and lawyer, explains that "part of it is that we're in unknown territory. Remember those old maps where it says, 'Beyond here be dragons.'? That's where we are in the digital age because the courts have not caught up with the technology. What the courts are trying to do is apply rules that worked fine when things were on paper — on something physical. They're trying to apply it to cyberspace and they're not there yet. I think artists are always at a greater risk now than they were before. You just don't know where the rules are going." I approached Dorf and his SAIC colleague Barbara DeGenevieve, using McDonald's case as an example to find out what an incident like this means to the artist and get some advice on how young artists can protect themselves from similar situations.

"It's a different world than what it was. … Even 15 years ago, no one was thinking about these things," explains Barbara DeGenevieve, an SAIC faculty member in the Photography Department, whose own work has led to an investigation of legal and ethical issues for artists.

DeGenevieve explains, "Saying 'I'm an artist, I can do whatever I want to do' … Well, that's true, you can do whatever you want to do, but know, that if you do whatever you want to do, and you do something that is illegal in some way, you're going to get arrested and it's not going to be fun. Your life is possibly going to be ruined by that."

The educational institution plays an important role in informing artists about their legal and ethical responsibilities. "If schools don't, they're irresponsible. At [SAIC], we do. There are a lot of classes that really address those issues," says DeGenevieve, noting that she

started a class called "Art Brains, Business Smarts" in the Photography Department, which is taught by one artist and one lawyer covering a lot of the issues artists face in their professional lives. Dorf, who also teaches a class on art and law, says there are plenty of ways for Chicago artists to keep up current legal and ethical issues in their field of practice. "The Chicago Artists Coalition is terrific and they're really good at practical advice and helping artists to survive as entrepreneurs in society. Lawyers for the Creative Arts is terrific also. They have pro bono programs for artists that meet certain financial criteria. If the artist is making a little more, they still have a list of people who will give them legal advice for a reduced rate." Dorf continues, "I think one of the things I'm seeing more and more at the School of the Art Institute is [that] the Alumni Network is starting to develop and we're starting to get an alumni network where people can call up other people in the field from the school. Everybody I've ever talked to has been really good about giving advice and helping out."

DeGenevieve adds, "All they have to do is Google it. If they're aware of the fact that there's problems, there's enough books and articles to read about it."

When asked how McDonald could have avoided his particular problem, both DeGenevieve and Dorf were clear.

"With his stuff it would have just been easy enough to ask consent from people. Some of them might have enjoyed it, some of them might say, 'I don't want my identity posted anywhere,'" says Dorf. "When [an artist] arrives at a concept and they know what they want to do, the artist needs to step back for a second and say, 'What are my ethical obligations here? What are my responsible obligations as a member of the community?' And then weigh that against 'What am I trying to accomplish?' and if the answer is 'I want publicity and I want self-promotion' — is that really the goal that outweighs what you may be doing to your subject?"

"In an art gallery they might have asked him for model releases," explains DeGenevieve. "[SAIC] won't let you put up a picture of someone unless you have a model release form. I've been telling my students this for years and years. I have several different model releases that I just hand out for different things. Ethically, it's just atrocious that he's done this."

The ethics of "People Staring at Computers" continues to re-emerge through my conversations about this project. It seems to strike a chord with everyone I mention it to, since, though Dorf and DeGenevieve are right, it still seems like the project is hinting at a larger hypocrisy in the domain of privacy, photography and facial recognition technology.

One of the nearly-missed points of interest was that, according to the same Mashable article, McDonald declined to put his code for the project online, specifying that it could be used for "less than benign" purposes. Indeed, when I first approached Michael Dorf, he noted that "[the American Civil Liberties Union is] going after the airports and these streetlamps because they've learned what things can be done with facial recognition software today. Not only how it can be used to arrest people for things they haven't done because the science isn't good enough, but it can be used for incredible identity theft. As we've all learned, when something is on a computer, it's there forever. Someone is always going to be able to find it if it's posted somewhere."

F Newsmagazine contacted the Electronic Frontier Foundation, who was representing McDonald in this matter and they declined to be interviewed, citing a conflict of interest. They did refer me to the Electronic Privacy Information Center, who connected me with John Verdie, Senior Council for the Washington, D.C.-based organization.

"What [this project] demonstrates is the ease with which individuals and companies can employ Facial Recognition Software," he explained in a phone interview from Washington, D.C.

"We're in a time where more computers and cell phones have built-in cameras than they did years ago," Verdie says, so "the opportunity is greater than it was years ago [and] the technology has advanced so that it's more useful than it was."
Verdie notes that large companies like Facebook are already using this software. For instance — post a group of photos online and Facebook will group them by person and ask you to confirm the identity of your friends.

"Anybody that conducts covert surveillance without consent is not being respectful," Verdie explains, "but it raises questions of what expectation people have of privacy in public spaces…and in this case I would say it's an egregious violation."

Verdie also cites a case in Lower Merion County, Pennsylvania, where, in 2010, a class-action lawsuit was filed on behalf of students from two high schools against the Lower Merion County School Board. Students were issued new laptops to allow them to work at home and at school, but the laptops included theft-tracking software that indirectly allowed lower-level school officials to monitor the student's webcams, chat histories and general computer usage. Though the software was originally installed to help with theft investigations, school officials accessed the program when there was no open theft investigation.

After the US Attorney declined to prosecute the School Board and selected officials, the family of Blake J. Robbins (a student within the school district) chose to file a class-action

civil law suit in the U.S. District Court for the Eastern District of Pennsylvania. Among the complaints listed in the suit was a violation of 18 USC 1030 — the same section that the US Attorney's office recently sought to charge McDonald under.

The Christian Science Monitor reported in May 2010 that a report filed by a consultant hired by the school board to investigate the allegations showed that "officials monitored more than 40 students who were issued laptop computers. Those incidents generated 30,881 webcam photographs of students and 27,761 screenshots. In the case of 10 of the students, the consultant was unable to determine any authorization for the monitoring activity, the report says. That monitoring generated 2,507 photographs and 2,212 screenshots. But the report says that images were only recovered for three of the 10 students."

McDonald's photographs seem minor in comparison.

All conditions aside, Verdie reminds us that "even when [you're] in public, [you] have a right to know if you're being recorded and when, where and how it is disseminated. I don't think anyone expects to be recorded when engaging in a commercial transaction," explains Verdie in regards to McDonald's project. "I think there's a breech of trust here and it highlights the ability of anyone to conduct surreptitious surveillance."

The question was posed to Verdie, "If the US Attorney had chosen to pursue McDonald for this case, would there be any ramifications for other individuals or organizations that record individuals without their consent?"

"I think a lot of folks would hope that it does. The courts have to decide if individuals have a reasonable expectation of privacy when in a public space." Another issue Verdie cites is the current issue with police officers being recorded by citizens in public when they're on duty. There have been a number of cases where police have ordered citizens to stop recording them but the question remains whether these individuals who are serving the public should expect not to be monitored. I do think that legally speaking, the courts are going to have to figure out what a reasonable expectation of privacy is."

For now, I'm sure Kyle McDonald is just happy to be able to move on to other pursuits.

A STATEMENT FROM KYLE MCDONALD

As mentioned, McDonald responded to F Newsmagazine's request for an interview with the following statement. After all the speculation and uncertainty about the issue, I think McDonald summarizes the issue:
I feel an affinity for the story Duchamp outlines in 'The Creative Act.' Once an artist gives

their work to the spectator, it's up to the spectator to make a decision about that work. And as artists we're not always aware of all the ideas and forces affecting us. …

Sometimes it's up to a single spectator to decide whether something is art or not, whether it moves them, makes them think, or has any other impact. but with "People Staring at Computers," I got to see something new. I saw a massive audience engaged in a collective decision-making via comment threads strewn across blog posts and news articles. Normally, larger cultural decisions are left to people in power: judges, law enforcement, gallery owners, curators, media theorists, but here we saw the audience engaging itself in making a decision about the culture they wanted to adopt.

This was a special moment. if Apple hadn't so vehemently opposed the project, it would have been resigned to live as just another FAT lab project and part of my ongoing research on human interaction. But because they got the project taken offline and had my computer confiscated, they managed to give it more attention than I could have ever attracted. There were reporters using headlines with "artist" in scare quotes – this got the media artists mad. The feeling of privacy invasion – or just the awareness of surveillance – got the privacy crowd mad. The censorship and search warrant got the freedom of speech people mad. Apple created an amazing discussion. Most of this discussion was out of the scope of the project I created. In a way it became Apple's work. but most importantly, it became the commenter's.

I feel very grateful that I was able to spark that conversation, and I'm relieved that I don't have to further defend the work. I'm very happy to let the commenters do that.

-Kyle McDonald

Resources:

- See pictures from McDonald's project on the Triangulation Blog
- An article about the project by McDonald at F.A.T. (Free Art & Technology), the original host of the photos