Ethical Dilemmas in Resistance Art Workshops with Youth

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ABSTRACT *In 2017 and 2018 The eQuality Project organized two transnational youth resistance art workshops with young people aged 15-22 who were interested in social justice activism. These educational and outreach workshops provided participants with background information about online social justice issues and explored ways to use art to push back against technology-facilitated violence and surveillance in networked spaces. Both during the design phase and the implementation of the workshops themselves, we were confronted by three dilemmas associated with these sorts of resistive social justice art projects. This article explores these dilemmas, which include how facilitators of youth art workshops can enable the production of digital art in a manner that is attentive to intersectional issues of digital literacy and access; respond to artistic appropriations of sexually explicit, discriminatory or hateful speech and their relation to cultural appropriation; and protect youth participants from liability for contravening defamation, privacy, copyright or trademark laws as part of their artistic appropriations. Throughout, we present examples of how the legal frameworks in our two jurisdctions (Canada and Puerto Rico) shaped the resistance and social justice opportunities available to our youth participants. We also discuss the decisions we made in consultation with our youth participants about how to navigate the law, and provide a list of suggestions for addressing these dilemmas for those who may wish to facilitate or engage in youth resistance art workshops in future.*

KEYWORDS privacy; inequality; technology; art; self-expression; digital; social justice; art activism; copyright

The eQuality Project is a seven-year partnership of academic reseachers, educators, civil society groups, policymakers and youth funded by the Social Sciences and Humanities Research Council of Canada.[1] Together, we are working to develop new knowledge about young people's experiences of privacy and equality in networked spaces. We also collaborate with youth on educational and outreach initiatives designed to help young people participate fully in the networked environment and develop their capacity to promote online social justice. Accordingly, our work is an example of social justice youth development practices as defined by Ginwright and James (2002): it is grounded in research co-conducted with youth to understand how power plays out in online social relationships; our intersectional focus gives identity a central role; our outreach initatives seek to dismantle systemic barriers to online equality (which we define as the ability to participate fully in networked spaces without discrimination or harassment); and we work to encourage collective action that is consonant with youth culture and values (p. 35).

As part of our educational and outreach initiatives, the authors conceptualized, organized, and facilitated two transnational workshops in 2017-2018, on artistic responses to online issues (The eQuality Project, 2019).[2] The workshops placed particular emphasis on artistic interventions to help push back against technology-facilitated violence and surveillance in networked spaces.

The first workshop was held on February 24-25, 2018, at St. Stephen's Community House Youth Arcade Studio in Toronto, Canada, which organizes art activism programs for youth and provides multi-media tools for self-expression. The second workshop was held on April 23-24, 2018, at Diagonal in San Juan, Puerto Rico, a space for exploring and exhibiting contemporary practices in art alongside the use of technology and digital mediums (Diagonal, n.d.). The workshop in Canada was a two-day stand-alone event. The workshop in Puerto Rico was preceded by four sessions of artistic mentorship provided by artists Carola Cintrón Moscoso and Migdalia Luz Barens-Vera to a pre-selected group of participants who then participated in the workshop directed by the forementioned artists and the authors.

In order to stimulate the creative process of the participants in the workshops, we worked with two youth research assistants, Grace Foran and Dillon Black, to created five "Imagination Primers" that introduced the issues and highlighted particular projects where young people had used art to respond to tech-facilitated violence, discrimination, and surveillance: (1) "What are Online Harassment & Tech Facilitated Violence Anyway?"; (2) "Resisting Online Harassment: #GAMERGATE"; (3) "What is Surveillance Anyway?"; (4) "Resisting Surveillance with Theatre: Surveillance Camera

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[1] The project is co-led by Valerie Steeves and Jane Bailey.
[2] The workshops were an educational and outreach initiative and not a research initiative. Accordingly, no data was collected. We made the decision not to collect data to ensure that the art participants produced was not coopted into adult frames of reference.

Players"; and (5) "Resisting Racism With Art." The eQuality Project later incorporated these primers into a lesson plan for use in classrooms.[3]

Following completion of the workshops, Carola Cintrón Moscoso, Migdalia Luz Barens-Vera and Georas organized an art exhibition entitled *eQuality Project*. It took place in Espacio Diagonal on June 1, 2018 and included works by participants of the Canadian and Puerto Rican workshops. In addition, Bailey, Georas and Steeves developed a Train the Trainer Workshop called *Youth, Art & Resistance: Facilitating Workshops for Change* based on our experience of organizing and facilitating these transnational resistance art workshops, and presented the workshop at the Human Rights Research and Education Centre (HRREC) at the University of Ottawa Faculty of Law on March 2, 2018.

This article addresses three dilemmas related to questions of social justice that we confronted as part of organizing the transnational resistance art workshops, which were of particular concern to us given the fact all three of us trained as lawyers and Georas completed graduate studies in art history and cultural studies. The first dilemma relates to the fact that enabling the production of activist digital art is necessarily connected with the question of digital literacy in ways that require transcending the narrative that universal access to technology will bring about equality. The second dilemma concerns the social justice implications of artistic appropriations of sexually explicit, discriminatory or hateful imagery and speech, and the related concern of cultural appropriation, all of which could arise as part of engaging in activist artistic resistance projects. The third dilemma is that workshop participants may create works that raise legal and ethical questions relating to defamation, privacy, copyrights, and trademarks, requiring organizers and youth participants to directly address the ways in which law can be used to repress artistic expression intended to promote social justice.

Here we focus on the three dilemmas to develop a deeper understanding of the social justice implications of our workshops. Although legal issues are obviously of concern in our art workshops and are addressed in this article, the ethical and social justice issues take centre stage. Furthermore, when we do address legal matters specifically, it is because legal questions arose in the design process for both workshops, invoking various jurisdictionally-specific doctrines and laws that shaped the opportunities for resistance in each location. Although we refer to the laws of Canada, the United States, and Puerto Rico as the United States' colonial territory, our main interest is to identify ways in which arts-based social justice initiatives such as ours are shaped by the regulatory frameworks that establish and protect the status quo, and not to conduct a comparative legal study of how the legal questions play out in each jurisdiction. For instance, when the workshop organizers

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[3] The primers, the lesson plan and videos and still photos of the art our participants produced are available on the The eQuality Project website at http://www.equalityproject.ca/resources/art-exchange/

discussed how to inform the participants of the potential legal risks associated with creation of their resistance artworks, we struggled between our desire not to chill their artistic expression, on the one hand, and, on the other hand, the need to inform them about the risks, particularly as the risk of criminalization is higher for members of marginalized groups, especially if they are engaged in particularly transgressive forms of expression.

Central to our social justice concerns regarding the workshops was how to enable the participants to understand the social, economic, and cultural systems of repression nested in the very process of digital content production. Creative agency itself is ambiguously enabled and compromised by the architectures of power materialized in the networked tools through which activist artistic content can be produced and distributed. The stakes for transgressive digital artworks are thus high in the hostile digital ecosystems that sustain the daily lives of youth, particularly when youth seek to undermine the power relations of the platforms where they create their art.

Digital Art and Digital Literacy: Questions of Access and Social Justice

The first dilemma we considered as we designed the workshops concerns enabling the production of digital art and its relationship to digital literacy. In part, this dilemma is grounded in important debates occurring within the field of digital art that raise questions about the workshop and possible future redefinitions of its scope and strategy. But it also reflects debates in the field of digital literacy that require a deeper enquiry into the relationship between art, technology, and social justice.

Many terms have been deployed to name art forms using digital technologies, such as digital art, multimedia art, cyberarts, new media art, social media art, tactical media art, hacktivist art, and even post-internet art. Contrary to the traditional notion of an artwork that is seen as a linear and finished work, digital art is "time-based, dynamic, and non-linear" (Paul, 2016). A digital artwork might not be repeatable or could reconfigure itself continuously. This makes the contextual understanding of a digital artwork more layered to the extent that it relates to the materiality of the artwork and the computational processes that transcend the work itself. Digital art, in this way, does not refer to an essentialist, ontological or phenomenological understanding of the digital, but instead refers to "social forms that involve electronic and digital communication technologies … such as different types of collaboration [that transcend] specific pieces of hard- and software" (Medosch, 2016, p. 357). Digital art is an umbrella term to name art that is "predominantly understood as digital-born, computable art that is created, stored, and distributed via digital technologies and uses the features of these technologies as a medium" (Paul, 2016, p. 2).

A critical distinction in this field is between works that make an instrumental use of digital technologies, merely as a tool of production, and

works that engage self-reflexively with digital technologies. The instrumentalist approach is limited for our purposes in two ways. First, it does not unravel the traditional conception of an artwork as a finite object (e.g., sculpture, print, painting or photograph). Second, it fails to interrogate the relations of domination that are embedded within the current market design of – and legal framework governing – networked tools (Toews, 2008, pp. 67-78). As Zuboff (2019) notes, the surveillance capitalism upon which these technologies are based approaches human experience, including artistic expression, as "free raw materials for hidden commercial practices of extraction, prediction, and sales" (p. vii). Whether an artist uses commercial software to create an artwork or simply displays it over the internet, the art itself will be captured in the data stream and used to fuel the information economy. The act of creating with networked tools is accordingly coopted into a system of wealth production that privileges the few at the expense of the many. David Toews (2008) warns that, unless social justice proponents unpack how the ongoing commodification of digitally produced content is "blurring the line between consumers and producers in order to extract labour from our most ordinary ways of interacting" (p. 68), then we risk using these tools in ways in which, "creative cultural agency becomes an imposition rather than a liberation" (p. 67).

Self-consciously digital artwork can help us unpack these dynamics precisely because it "employs these technologies as a tool for the creation of a less material, software-based form that utilizes the digital medium's inherent characteristics, such as its participatory and generative features" (Paul, 2016, p. 2). This affordance of participatory creation opens up a space for artists to make collectivist and cooperative works that can deconstruct the existing distribution of social goods and explicitly trouble the power relations embedded in the technological tools and platforms they use to create their art (Rizvi, 1998). In spite of the fact that the tools themselves are part of the infrastructure of commodification, artists can "build social justice from the ground up" by appropriating the tools "in a way that allows [the artist] to create something unique to him or her" that "bridges the gap between 'what is and what could be' in internet practices" (Toews, 2008, p. 70).

Digital art, however, poses the question of the technological and media literacy required to produce this kind of art. At first blush, social justice would seem to require that all members of society have access to the tools and skills they need to create digital content. Because of this, the majority of social justice interventions around online literacy to date have focused on redressing the digital divide between technology haves and have-nots (Toews, 2008, p. 71).

The digital divide debate can be helpful because it enables us to question "all the social stratifications, political conflicts, economic inequalities, and infrastructural development delays that have prevented the internet from reaching vast numbers of users" to better "understand the disparities in current global systems" (Toews, 2008, pp. 70-71). Certainly, women and

girls throughout history have been systematically excluded and dissuaded from understanding and studying technology-related fields and languages (Vitores & Gil-Juarez, 2016). This exclusion is further compounded by intersectional forms of inequality for racialized and other minorities, which resonates with one of the reasons why the St. Stephen's Youth Arcade Studio in Toronto was initially founded. Among other things, the Studio helps to support young people from BIPOC (Black, Indigenous, and People of Colour) and other marginalized communities to develop the portfolios necessary to gain admission to art schools by offering access to resources such as space and art supplies. In so doing, it helps to place them on a more even playing field with applicants from privileged communities for whom access to these resources is not a barrier.

According to María Fernández (1999), artists who work in media arts must struggle to keep abreast of the latest technological developments, putting artists "who cannot afford to join the race ... at a disadvantage," (p. 66) especially given the scarcity of funding for the arts. Despite the innovative forms of activism put forward by media art, Fernández (1999) is concerned with how the "technological imperative in the arts is creating a new and exclusionary universalism" (p. 69). If we combine the problem of access to art schools experienced by those at marginalized social locations with the systemic exclusion of girls and women from an understanding of the digital languages of technological and media platforms and software design, we can appreciate the stakes involved for them to produce digital art.

However, the notion of the digital divide may also restrict more meaningful social justice action by positioning equality-seeking groups as somehow "information or technology poor" (Eubanks, 2011, p. xviii), and therefore not able to articulate the myriad ways in which they experience and actively resist the technological domination that shapes their lives (Eubanks, 2011, p. 35). As Eubanks (2011) writes of poor and working class women, our participants' artistic interventions:

> directly contradict the widespread belief that [they] lack access to technology. In fact, they describe their lives as characterized by technological ubiquity – technology shapes their workplaces, community institutions, and political experiences. But, unlike many of their middle-class counterparts, their encounters with IT and the high-tech economy tend to be exploitative and limiting, increasing their economic vulnerability and political marginalization. (p. xix)

This lived experience underlines the need to challenge the narrative that universal access to technology will bring about equality (Toews, 2008, p. 72); it also suggests that social justice can perhaps best be advanced by helping young artists acquire a critical understanding of the ways in which digital content production is nested in social, economic and cultural systems of repression (Buckingham, 2008, pp. 73-90).

Our workshops were designed to enable an artistic process of resistance to surveillance and technology-facilitated violence that was informed by this

critical understanding. When we started the workshops, we explicitly addressed the possibility that our participants could choose to use digital or non-digital media to engage with the issues that concerned them; in the end, all of our participants created non-digital visual artworks. However, to make this a real choice, we also committed enough funding after the workshops to ensure that participants could access a variety of media – both digital and non-digital – to complete their artwork using whatever medium they choose. With participant permission, we also created digital works to exhibit their art online.

   Interestingly, as some of the participants of the workshops insightfully suggested when they were planning their projects, they felt that art-as-resistance may be more effective if artists use technologies subversively in order to unravel them from within. We believe that this raises important questions for reconceptualizing future incarnations of the workshop to further empower young people (particularly those at marginalized social locations) to produce digital and media artworks that critically engage with surveillance and technology-facilitated violence.

Artistic Appropriation of Sexually Explicit, Discriminatory or Hateful Speech and Its Relation to Cultural Appropriation

The second dilemma concerns the ways in which laws governing speech and images may constrain artistic appropriation of sexually explicit, discriminatory or hateful imagery and speech, and the related concern of cultural appropriation, both of which could arise as part of engaging in activist artistic resistance projects (Georas, 2021). Our workshop participants talked about their experiences of encountering sexually explicit, discriminatory or hateful imagery and speech and some were interested in repeating that imagery and speech as a means of resisting and criticizing technology-facilitated violence, discrimination and surveillance through their art. For example, some of the artworks our participants produced included the intentionally transgressive use of discriminatory terms such as "slut" to challenge imagery of sexual violence, sexually explicit slut-shaming, and racist hate speech. Similarly, in other contexts youth artists may choose to reproduce the "n" word or incorporate profanity into their works. While these kinds of images or speech may be offensive (and in some cases illegal) in one context, our youth participants felt that their repetition in the workshop could form part of an artistic project of activist recontextualization to confront audiences with these experiences. Although it did not arise in the context of our workshops, youth artists may similarly choose to express themselves by employing words and images specific to particular cultures in order to respond, raising issues around cultural appropriation versus cultural appreciation. Both of these actions could be affected by the legal frameworks in place to govern speech.

The following summarizes the legal concerns that we, as facilitators, considered before we conducted the workshops, and the approach that we took to mitigate constraints on our participants' participation and self-expression during the workshops.

Appropriation of Sexually Explicit, Discriminatory or Hateful Imagery and Speech

Historic examples: Dworkin, Langer and Ringley. As we designed the workshop, we were aware of the fact that artists who have chosen in the past to resist systems of repression by appropriating sexually explicit, discriminatory or hateful imagery and speech have been subjected to legal action when their works have not been clearly distinguishable from the material that their work was intended to criticize or challenge (Adler, 1996; Matsuda, 1989). Anti-sexual violence and women's rights activist Andrea Dworkin, for example, wrote several works of fiction describing graphic acts of sexual violence against women in order to critique sexual violence as a tool of misogyny. Some of these works were later detained at the Canadian border on the basis that they constituted obscenity, although Canadian customs agents ultimately released them (MacKinnon & Dworkin, 1994). Similarly, sketches and paintings that depicted children involved in sexually explicit activity which were created by Canadian artist Eli Langer and exhibited at a Toronto art gallery in 1994 were subject to a forfeiture application under the Canadian *Criminal Code*'s child pornography provision (Ryder, 2003, p. 128). Ultimately the court concluded that the artistic materials did not constitute child pornography because, rather than posing a realistic risk of harm to children, these works were meant to "lament the reality" of child sexual abuse (Ryder, 2003, p. 128).

The Dworkin and Langer cases represent just two of many examples of potential legal implications arising from artistic appropriation of sexually violent, discriminatory and hateful content that long pre-date the internet. These are not issues, therefore, that are new to the digital era. That said, the digital technologies that are the subject of our art workshops introduce certain additional complexity to the situation. For example, online display of artworks produced during the workshops expands opportunities for more interactive public engagement with art. At the same time, however, digital technologies allow for easy copying, modification, and redistribution of works that could, among other things, change the original artist's intended meaning by removing the work from its original context. In this way, art originally intended to appropriate discriminatory, obscene or hateful content in order to criticize it could be modified or relocated into a different context that valorizes it.[4]

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[4] We discuss how our participants resolved this issue in the section on copyright issues below.

Artworks actually created online can raise similar issues. For example, in 1996 US college student Jennifer Ringley set up a 24/7 webcam in her apartment as a "social experiment" with numerous objectives including challenging mainstream media representations of stereotypically "perfect" women (Bailey, 2009). One of the outcomes of Ringley's experiment, however, involved viewers searching through hours of relatively mundane video in order to cut out sexually explicit excerpts that were then used to "recreate material that shares many of the features of voyeuristic mainstream pornography" (Bailey, 2009).

Overall, the Dworkin, Langer, and Ringley examples help to illustrate the possibility of legal, ethical and social justice frictions that could arise in workshops designed to engage youth participants in artistic resistance against technology-facilitated violence, discrimination, and surveillance. Not only might these works attract unwanted legal attention, they could also be appropriated by others to convey meanings contrary to those intended by the original artist.

Legal limits on expression: Hate speech, obscenity, child pornography. As facilitators, we also struggled with the possibility that workshop participants' art could potentially violate hate speech, obscenity or child pornography laws. The imposition of legal constraints on artistic and other forms of expression is the subject of a long-standing debate, the parameters of which are too vast to fully articulate in this piece. Instead, our goal here is to loosely sketch two of the perspectives we considered as we sought to design a workshop to help youth participants advance social justice.

The first perspective asserts that legal restrictions on sexually violent pornography (MacKinnon, 1987), and on racist hate propaganda (Matsuda, 1989) can be understood as equality-affirming acts. Catharine MacKinnon (1987), for example, argued that mainstream pornography both involves sexual violence against women and children in its creation and also undermines the humanity and equality of women and children more generally through representations of their degradation and dehumanization (pp. 210-211). Similarly, Mari Matsuda (1989) argued that racist hate propaganda not only wounds targeted individuals and groups, but also paves the way to other acts of violence against targeted groups by stereotyping them as less than human. Viewed from these perspectives, legal restraints on these types of expression can be understood as equality-affirming social justice initiatives.

In contrast, the second social justice perspective we considered argues that words and images cannot be understood as having static meaning – their meanings are multiple and determined in context. As a result, postmodern scholars such as Judith Butler (1997) have argued that the artistic reappropriation and deployment of racist or sexist commentaries in new contexts can serve as an effective social justice tool for defusing hatred and discrimination. From this perspective, legal restraints on pornography and hate speech undermine social justice objectives by exposing to criminal

sanction those who seek to criticize violent pornography (or hate speech) by appropriating it into artistic expression (Adler, 1996). Seen in this way, legal restraints serve to chill transgressive expressive resistance.

In Canada, exposure to criminal sanction and the associated risk of chilling resistive expression, however, is constrained at least in part by relevant defences, such as: (a) the "public good" defence to obscenity charges (*Canadian Criminal Code*, s 163(3)); (b) child pornography charge defences of no undue risk of harm (*Canadian Criminal Code*, s 163.1(6)(b)), and legitimate purpose (*Canadian Criminal Code*, s 163.1(6)(a)); and (c) numerous defences to willful promotion of hatred charges (including truth, good faith opinion, public interest or benefit and intention to remove materials promoting hatred; *Canadian Criminal Code*, s 319(3)). That said, it is important to recognize that the risk of criminalization may be higher for our participants as they are members of marginalized groups, especially if they chose to engage in particularly transgressive forms of expression (Cossman, 2002). Further, the child pornography offence is particularly broad, prohibiting 12 different actions including accessing such content (*Canadian Criminal Code*, s 163.1(2) and (3)), and sets a relatively low threshold for violation. Because of this, we knew that the provision could, subject to available defences (*Canadian Criminal Code*, s 163.1(3)(a); *R v Sharpe*, 2001), expose our youth participants seeking to address social injustices to criminal intervention in relation to issues that may be of most expressive importance to them.

Ethical and social justice issues. In addition to considering how the law could impact our participants, we also considered the possibility that raising these issues with our participants *before* they began to work could risk chilling artistic expression. Such risk could be compounded in situations where power differentials based on race, age, gender, and other factors mean that discussions around these issues are likely to be understood more as warnings than as attempts at informed dialogue – especially where the issues are introduced by adult facilitators in sessions involving youth participants. However, we concluded that failing to discuss legal limits, as well as risks to participants such as others taking the content they have created in the wrong way or misusing it to support the very positions the participant seeks to critique through their art, seems unfair – particularly if (as discussed below) participants are asked to sign liability waivers relating to content they have consented to being posted online.

We also struggled with the possibility that the context in which the workshops take place may also impose limits with social justice implications. Here we draw on our own experiences with respect to educational modules created for use in schools. School boards censor modules that directly address many of the issues young people face online (e.g., hateful misogyny) and the language they use to express their experiences (e.g., profanity). Thus, educational modules intended to help them navigate online pitfalls tend to be

anemic and reinforce the impression that adults do not have a good understanding of what actually happens online. Such contextual constraints, by definition, threaten to limit the efficacy of exercises such as resistance art workshops by imposing *ex ante* restrictions on what kind of expression is considered acceptable. Moreover, these constraints may discourage participants from investing themselves in a process that appears so out of touch with their lived realities and experiences.

In the end, we decided that it was best to raise these issues with our participants so that they could make informed decisions about their own self-expression. We felt that a strict legal approach that laid down "ground rules" about what could and could not be said at the beginning of the workshop was inconsistent with the social justice aims of the initiative. Instead, we chose to facilitate the approaches our participants took so we could help them explore ways to amplify their own voices in ways that made sense to them.

Cultural Appropriation

Another ethical/social justice issue that we considered as we designed our resistance art workshop is cultural appropriation. We knew from previous work with youth that some participants might, for example, choose to address in their art attacks on marginalized communities of which they are not members, employing language or images from those communities in order to do so. There is some debate in the literature around what cultural appropriation is and whether, by definition, it entails a moral wrong (Matthes, 2016). However, it is well-accepted that a member of a dominant culture's use of an image, history or language specific to a marginalized cultural group is morally problematic because it interferes with the cultural autonomy of the marginalized group. Loretta Todd (1990) puts it this way:

> For me, the definition of appropriation originates in its inversion, cultural autonomy. Cultural autonomy signifies a right to cultural specificity, a right to one's origins and histories as told from within the culture and not as mediated from without. (p. 24)

Among the harms of cultural appropriation are the potential for misrepresenting the marginalized culture, exposing its members to discrimination, and potential loss of economic opportunity for members of marginalized groups (Matthes, 2016, pp. 348-349). Current discussions around cultural appropriation sometimes attempt to distinguish it from cultural appreciation, such that appropriation involves "the act of taking or using things from a culture that is not your own, especially without showing that you understand or respect this culture" (Cambridge Dictionary, as cited in Brucculieri, 2018), while cultural appreciation involves acknowledging cultural sources, paying marginalized communities for use of their cultural

capital, or collaborating with those communities from the outset (Brucculieri, 2018).

Although this issue did not arise during either workshop, we planned to bring it to the group's attention if it did and discuss it more generally as a form of "cultural plagiarism." We felt that this would pair reasonably well with the discussions of plagiarism (adoption and presentation of another's work as if it were one's own) that they would be familiar with as students. However, resistance art that "plagiarizes" from empowered sources in order to critique them (much like the process of using trademarks and other copyrighted material discussed below) is obviously distinguishable in social justice terms from members of dominant cultural groups' appropriation of culture from marginalized communities.

Defamation, Privacy, Copyright and Trademark Considerations of Artistic Appropriations

The third challenge we addressed as we planned the workshop was that participants may produce works that raise legal and ethical questions relating to defamation, privacy, copyright and trademarks. In other words, there could be a conflict between the resistance artwork method and the potential illegality of the works themselves, with important implications for the social justice potential of our workshops.

Defamation and Privacy Considerations

Since claims can also arise concerning the alleged defamation of a third party resulting from the publication of artworks produced by workshop participants, it is important to consider defamation and invasion of privacy as possible causes of action in addition to hate speech and obscenity. When considering defamation and privacy issues, the risks faced by schools in the US when publishing the works of students may be instructive. Irrespective of whether or not our workshops actually take place in a school setting, we concluded that the normative criteria developed in the case law on this matter can be helpful in understanding some of the risks our workshops may raise and the related level of care we should exercise to both protect the participants and organizers of workshops like ours from legal liability.

In the US school context, for example, negligence and defamation are common claims of liability that arise in relation to publication of student works. In order to avoid being found negligent, US school districts and teachers have an affirmative duty to take all reasonable steps to protect their students from foreseeable harm (*Dorlac v Clairmont Academy*, 2007). This affirmative duty entails taking precautions to avoid harm and offering proper instructions to students (*Pirkle v Oakdale Union Grammar School Dist.*,

1953; *Station v Travelers Ins.*, 1974). For the purposes of our workshops, if the publication of an artwork made by a participant could cause damage to the author, this doctrine suggests that there may be an affirmative legal duty to explain the risks of publication to the participants.

In one US case, *Warner v Lompoc* (2002), two families sued a school district and a newspaper advisor claiming that comments in the student newspaper on the effects of divorce that were attributed to their daughters were defamatory and an invasion of privacy. While the court ultimately rejected the claims it commented that school officials had engaged in poor judgment by using the students' names in the publication. These kinds of legal precedents could be relevant to workshops like ours in situations where participants seek to address technology-facilitated violence or surveillance by drawing on the experiences of others in ways that identify them.

Copyright Considerations

Since the participants in our workshops were minors, the questions of capacity to hold copyright and to licence use and publication of one's work by others arose. This issue was important to us because we hosted two exhibits of participants' artwork, one online and one offline.

Copyright legislation in both the US and Canada draws no distinction between minors and adults relative to copyright ownership (*Copyright Act,* 17 USC § 101 *et seq*; *Copyright Act*, RSC, 1985; Copyrightlaws.com, 2019). The US Copyright Office's website, moreover, specifically states that "minors may claim copyright, and the Copyright Office issues registrations to minors, but state laws may regulate the business dealings involving copyrights owned by minors" (US Copyright Office, n.d.). Similarly, US case law concerning this topic has operated under the assumption that minors can hold copyrights (*Mason v Jamie Music Pub. Co.*, 2009; *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 2009; *A.V. v iParadigms, LLC*, 2008). Overall, the absence of an adult/minor distinction in US and Canadian copyright legislation, existing US case law, and the guidance of the US Copyright Office's website support a minor's claim of copyright ownership in the works of authorship they create. Subject to legislation that limits the enforceability of contracts entered into by minors, minors themselves (or through their legal guardians) may enter into agreements with other parties for the use of their copyrighted works, including exclusive or non-exclusive licensing agreements.

The question of ownership is an important one from the perspective of social justice advocacy because it determines the extent to which the intellectual property of the artist seeking to trouble existing frameworks of oppression will be recognized and protected in law. It also governs the extent to which artists can re-appropriate the intellectual property of others (as discussed above) in order to deconstruct the power relationships that play out in networked spaces. Further, participants' copyright and their ability to

license others to use or publish their works must be taken into account by workshop facilitators who wish to exhibit, post or republish the works in other digital and non-digital fora.

Copyright law also raises important social justice concerns where workshop participants wish to incorporate pre-existing copyrighted works of others into their creations. The US Copyright Act of 1976, for example, establishes a series of exclusive rights or copyrights for authors, adult or minor, of original works. Copyrights only exist if a work has two essential characteristics, namely, originality and that it be fixed in some tangible form (*Copyright Act*, 17 USC § 106). The exclusive rights to control the use and distribution of a copyrighted work established by copyright law include the exclusive power to reproduce or make copies of the work; create derivative works based on the work (namely, to alter, remix, or build upon the work); distribute copies of the work; publicly display the work; perform the work; and, in the case of sound recordings, to perform the work publicly by means of a digital audio transmission.

Derivative works are of particular relevance to our art workshops. A derivative work is:

> a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.' (*Copyright Act*, 17 USC § 101)

A derivative work is subject to protection irrespective of whether the underlying pre-existing work is still subject to copyright. However, the protection for the author of a derivative work is only in relation to the creative expression in the derivative rather than over the original underlying work. In other words, a derivative work can have simultaneous copyrights related to the derivative expression and relative to the original work upon which the derivative was inspired (*Copyright Act*, 17 USC § 103(b)). Thus, if a participant in our workshops creatively appropriates a pre-existing work (such as an artistic representation used by a social media site) without requesting permission, they may violate the exclusive rights of the author of the original work. Also, if a participant appropriates a derivative work (such as a translation of a pre-existing work), they may violate the copyrights of the authors of both the derivative and the underlying original work of art.

Doctrines of fair use in the US and fair dealing in Canada counter the rigidity of the copyright regime (Schechter & Thomas, 2003, p. 213), which undermines the process of creative exchange. In the US, for example, in order to "promote the progress of science and useful arts," (US Const. Art. I, § 8, cl. 8) the doctrine of fair use was adopted to permit uses of copyrighted materials without having to request permission when considered beneficial to

society. The doctrine includes uses such as criticism, comment, news reporting, teaching, scholarship or research (*Copyright Act*, 17 USC § 107), but is subject to a number of conditions that can make it difficult to predict whether any given use will be considered by a court to be a "fair use." Similar sorts of concerns have been raised with respect to "fair dealing" in s. 29 of the Canadian *Copyright Act* (1985). Thus, using protected contents without requesting permission necessarily entails some level of risk. In this way, the inherent ambiguity of these doctrines can undermine the free exchange of ideas at the heart of cultural and artistic production.

In order to avoid copyright infringement claims, legal advisors often prefer to rely on the negotiation of contractual and licensing agreements, rather than on fair use or fair dealing. However, these agreements are highly complex, expensive, and generally inaccessible to young and struggling artists. Moreover, Lawrence Lessig (2014) has called the incentives to licence a "permission culture," whereby people feel pressured to request permission to use or modify protected works rather than rely on fair use. Permission culture is an expression of entrenched economic and class interests of, for instance, the entertainment industry's increasing proprietary claims over cultural production, which unravels the capacity to freely share artistic production and generate flourishing cultural spaces. According to Lessig (2014), "there has never been a time in our history when more of our 'culture' was as 'owned' as it is now. And yet there has never been a time when the concentration of power to control the uses of culture has been as unquestioningly accepted as it is now" (p. 12). The great irony is that the concentration of power associated with the increase in proprietary copyright claims occurs precisely alongside the emergence of the internet and digital technologies, which were initially celebrated for democratizing the access of cultural processes of production beyond traditional gatekeepers such as publishing houses and music companies. This dramatizes the disjuncture between the potentialities of new technologies and the ways in which the copyright regime works to protect the vested interests of the powerful.

The vulnerability of workshop participants to legal claims of copyright violations in the context of fair use in the US or fair dealing in Canada should not be underestimated. The main question is how to deal with this dilemma in terms of the workshop itself. The concern is whether to pre-censor the creative process with legal prescriptions, which we concluded would be counterproductive relative to the purpose of the workshop to enable forms of activist and critical expression. As already mentioned, this is complicated by the age and socio-economic status of our participants, who may feel doubly disadvantaged by the imposition of legal constraints that function to repress them or their expression at an event that is explicitly intended to give them voice.

The integration of legal waivers of responsibility into the licensing scheme of the workshops posed difficult ethical questions given that the workshop is designed to be a critical engagement with technology-facilitated violence and

surveillance in ways that could implicate its participants. On the one hand, workshops are intended to encourage participants to explore activist artistic engagements, but on the other (through legal waivers of responsibility) we as workshop facilitators would be distancing themselves from works that could pose controversial legal questions and which could be precisely a symptom of the transgressive and critical depth of their artistic proposal. Furthermore, the legally borderline nature of the work could be read as part of its performative deployment.

Whereas most of the artworks of the participants of the Canada workshop stayed within the realm of original visual works given time constraints, the participants of the Puerto Rico workshop were engaged in a more long-term process of artistic mentorship prior to the workshop in order to assist them in the conceptualization and materialization of their projects. In both workshops, we worked to give our youth participants a visual vocabulary to deconstruct the seemingly monolithic popular cultural representations that shape their lives without inhibiting their creative explorations with legal prescriptions. However, when we developed a lesson plan so teachers could conduct the workshop in a school setting, we kept the cases about school liability in mind and included precautions and background information about the level of care that should be practiced in the undertaking of workshops addressing social justice issues such as technology-facilitated violence and surveillance in schools. We did this because our prior work suggests that, if schools and other organizations are not offered insight on how to minimize exposure to liability for themselves and for participants, they may shy away from engaging with projects like our workshops, which are aimed at addressing social justice issues that are often, by definition, controversial.

In terms of the actual license we used to enable us to reproduce our participants' art, we discussed our desire to hold the exhibits with our participants and provided them with model documents using various legal appropraches. After a collective discussion, both workshop groups opted for the Creative Commons Attribution – NonCommercial – ShareAlike 4.0 International license (Creative Commons, n.d) because it explicitly seeks to provide a community-based response to balance the strictures of intellectual property with online creativity and speech.

Trademark Considerations

Similar to the copyright debate, the appropriation or transformation of trademarks in artworks is central to enabling a semiotic space for critical dialogue in relation to the companies whose pervasive cultural presence marks the technologically-mediated daily communications and habits of youth. However, once again, the space for resistive deconstruction will be shaped by domestic laws.

For example, US courts have extended First Amendment protections for parody and satire in trademark infringement lawsuits. Trademark rights, while providing protection for the integrity of trademarks, "do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view" (*L.L. Bean, Inc. v Drake Publishers*, 1987). Moreover, the US federal dilution statute establishes an exemption for criticizing and commenting on the "famous mark owner or the goods or services of the famous mark owner" (*False designations of origin, false descriptions, and dilution forbidden*, 15 USC § 1125(c)(3)(A)(ii)). Artistic expression, as well as criticism, commentary and reporting, therefore cannot be censored through the deployment of trademark law to the extent that important cultural dialogue and commentary of the trademark of a company, product or person "would be all but impossible if speakers were under" the constant "threat of an infringement lawsuit" (*The New Kids on the Block v News America Publ'g*, 1992).

However, such protections do not exist in every jurisdiction. In Canada, for example, "parody and satire are not defences to trademark infringement" (*United Airlines, Inc. v Jeremy Cooperstock*, 2017, para 83). The absence of such a defence in Canada raises a potentially important limit on the subversive use of trademarks by participants in workshops like ours given the pervasive presence of trademarks in the lives of young people and on the social media platforms they inhabit.

Given these realities, artistic appropriations of corporate trademarks and copyrighted works could be an important part of young people's critical engagement with institutional complicity in the technological facilitation of violence and discrimination. For example, one artist discussed the possibility of incorporating into her art work material in which the government asserted copyright. The assertion of copyright itself was interesting because it related to traditional patterns that had been created by Indigenous peoples, so that including it in the artistic work would make an important statement about colonialism and repression. Satiric, parodic and appropriative uses of trademarks and copyrighted materials can thus be seen as a crucial artistic strategy to publicly engage with the symbolic deployment of these digital architectures in young people's lives, but their use can be complicated by the legal rules that are in place to protect intellectual property.

Conclusion: Recommendations for Addressing Legal, Ethical and Social Justice Issues

This article has addressed questions concerning social justice that arose as we designed and held our transnational resistance art workshops, including dilemmas about how to enable the production of digital art in a manner that is attentive to intersectional issues of digital literacy and access; issues of artistic appropriation of sexually explicit, discriminatory or hateful speech

and their relation to cultural appropriation; and, lastly, concerns relating to defamation, privacy, copyright and trademark considerations of artistic appropriations.

As discussed, none of these issues is new to art workshops designed to support youth resistance to technology-facilitated violence and surveillance. Instead, and as demonstrated above, they represent matters of long-standing debate and controversy within the art world and more generally among the public at large. We do not purport within the confines of this paper, therefore, to resolve them. Our aim here is twofold: to raise awareness of the issues; and to offer the following modest suggestions for addressing them with workshop participants:

- those wishing to facilitate resistance art workshops should understand the risks the workshops may entail and the related level of care that should be exercised to protect workshop participants and minimize exposure to liability;
- workshop facilitators should specifically familiarize themselves with relevant legal issues in their respective jurisdiction;
- workshop facilitators should engage in *ex ante* discussions of legal, ethical, and social justice issues with workshop participants, while working to minimize the potential chilling effect of such discussions by, for example, engaging young people as facilitators to lead discussions in order to avoid the power imbalance arising between adult facilitators and young participants; and
- workshop facilitators and participants should make *ex post* decisions about which, if any, art produced at the workshop will be posted online or posted without identifying information relating to the artist, in light of associated legal, ethical, and social justice risks, with particular regard for potentially negative consequences to the young artist.

Acknowledgements

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