



Human Rights and Technology Issues Paper response

Feral Arts welcomes the opportunity to comment on the Australian Human Rights Commission's *Human Rights and Technology Issues Paper*. It is timely and important that the Commission has focused on the impacts and interconnections between technology and human rights. We commend the Commission for taking national leadership on this important issue.

This submission does not directly respond to all of the questions set out in the Issues Paper. Rather it provides some relevant but additional ideas focused in particular on culture and the arts for consideration by the Commission.

In sketching out some of the interconnections between culture and the arts, technology and human rights our aim is to highlight the importance and potential value of a deeper exploration and embedding of culture and arts into the Human Rights and Technology initiative. As an example, we would advocate for a more prominent consideration of rights as they relate to culture and the arts than is currently reflected in the Issues paper.

Feral Arts looks forward to being an active participant and contributor to the work of the Commission. The strong alignments between the Human Rights and Technology initiative and the Arts Front project¹ open up the potential for mutually beneficial collaboration in 2019/2020.

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About Feral Arts and Arts Front

Established in 1989, Feral Arts⁴ is a national arts service organisation with a focus on supporting campaigns, connectedness and capacity building across the arts and cultural sectors. Arts Front is a four-year project of Feral Arts (2017–2020) that supports artists to take the lead in shaping the future of culture and the arts in Australia. Feral Arts and Arts Front have received funding through the Australia Council for the Arts⁵ and Arts Queensland,⁶ the Federal and Queensland State arts funding bodies respectively.

Like the Commission, Arts Front is applying a rights-based approach⁷ to addressing a problem. In the face of increased politicisation of government funded arts Arts Front identified that artists need to take greater responsibility for leadership and policy visioning in Australia and that the cultural and arts sectors needed to develop shared visions for the future for itself.

The work is long-term, but Arts Front has adopted a Values Statement⁸ to guide future work. The Statement unabashedly outlines our aspiration for an Australia that has a vibrant and secure cultural future; a future that recognises, appreciates and invests in the role that art and culture plays in informing the richness of Australia’s diverse cultural identities. Arts Front knows that the diverse cultures of Australia’s First Peoples must be a central foundation of this future.

In adopting a ‘First People First’ approach, Arts Front acknowledges and champions the fundamental rights that First People have in managing their culture as set out in the United Nations Declaration on the Rights of Indigenous Peoples.⁹ This led us to realise that many of our other aspirations were also reflected in international rights frameworks. As such, Arts Front has adopted a rights-based approach for visioning the future of arts and culture in Australia.

⁴ <http://feralarts.com.au>.

⁵ <http://www.australiacouncil.gov.au>.

⁶ <http://arts.qld.gov.au>.

⁷ See <http://artsfront.com/rights-tree>.

⁸ ‘Values Statement’ (nd). Brisbane, Australia: Feral Arts. <http://artsfront.com>.

⁹ ‘United Nations Declaration on the Rights of Indigenous Peoples’ (2007). Geneva, Switzerland: United Nations. Available at <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

Introduction

A representative of Arts Front attended the Human Rights & Technology conference in Sydney on Tuesday 24 July 2018 run by the Australian Human Rights Commission (the Commission). The focus on human rights and technology was the rationale for Arts Front attending. Art Front is using rights frameworks to vision a future for culture and the arts in Australia. One of the many Arts Front working groups specifically looks at culture and the arts, technology and the future.

In the Issues Paper launched at the conference the Commission states that it is seeking to ‘... seize the opportunities [new technology] presents to advance human rights by making Australia fairer and more inclusive ... [while recognising] ... that new technology could worsen inequality and disadvantage.’ The Commission will ‘develop a practical and innovative roadmap for reform’ that “... appl[ies] the existing [human rights] standards to address the technological challenges that confront us.’

Many of the technologies that impact human rights have already been identified by the Commission.¹⁰ Likewise the Commission has identified a number of human rights instruments that are also relevant.¹¹ Arts Front agrees that these technologies and rights instruments should be the focus when exploring the impact of technology on human rights. The only additions Arts Front suggests the Commission also explicitly consider are the rights instruments related to intellectual property and in particular copyright and technologies such as GPS and geolocation services, encryption, and software related to copyright enforcement and others should also be explicitly considered by the Commission.

¹⁰ See AHRC (2018) ‘Human Rights and Technology Issues Paper’. Sydney, Australia: Australian Human Rights Commission, Table 1 and section 3.4. Available at <https://tech.humanrights.gov.au/sites/default/files/2018-07/Human%20Rights%20and%20Technology%20Issues%20Paper%20FINAL.pdf>.

¹¹ AHRC (2018), page 12 and 13.

Summary – culture and the arts, technology and human rights

There are many ways culture and the arts and human rights intersect. At a broad level culture and the arts and human rights are universally applicable. They provide opportunities for new ways of seeing and new ways of thinking. More specifically, culture is the subject matter of several international rights instruments.

While culture and the arts is only nominally identified by the Commission in the Issues Paper, Arts Front would like to draw to the Commission's attention the relationship between culture and the arts, technology and human rights. In particular, this response to the Issues Paper will look at the following ideas:

- For some artists their creative practice utilises experimental methodologies to engage with other fields of inquiry such as science, medicine and technology.
- The arts, like technology, are often seen as crucial to the complete enjoyment to freedom of expression.
- Copyright – which is also a human right – can come into direct conflict with artistic freedom of expression and this can be exacerbated by technology.
- Artists have the potential to be a vulnerable group in terms of human rights.
- Access to, enjoyment of and participation in culture and the arts is an important area of human rights and technology and the internet has the potential to exponentially increase people's ability to do so.
- Access to, enjoyment of and participation in culture and the arts also is fundamental to realising a number of other social, cultural and economic rights.

Creative practice and technology

As the Australia Council for the Arts – the Australian Government's arts funding and advisory body – puts it: ‘experimental practice take new approaches to nurturing, creating and presenting art’ and often ‘explore challenging new concepts in the creation and experience of art and culture.’¹² Often referred to as experimental arts, this type of creative pursuit is categorised by intersectionality, often applying methods and techniques from other disciplines (such as science, medicine, technology, etc) to one or more artform and to the development, production, distribution or presentation of works.

In Australia there is a wide network of artists and arts organisations engaging with ‘... art/science research collaborations, bio art, live art, socially engaged practices and new technologies ... explor[ing] ecology, sustainability, urban renewal, and other cultural issues.’¹³ This experimental arts network in Australia is made up of many players:

- There are hundreds of artists and arts collectives who make experimental arts in Australia.¹⁴
- Experimental arts practice is funded by the Australia Council for the Arts.
- Organisations such as the Australian Network for Art and Technology (ANAT)¹⁵ and Experimenta Media Arts¹⁶ have a long history working with and creating opportunities for this kind of artistic experimentation.
- Performance Space,¹⁷ pvi collective,¹⁸ d/Lux Media Arts,¹⁹ Liquid Architecture,²⁰ Other Film,²¹ Critical Path,²² ACE Open²³ and Science Gallery Melbourne²⁴ are a few of many organisations that create or present artistic programs of work which merge experimental methodologies and artistic practice.

¹² Australia Council for the Arts (nd) ‘Emerging and Experimental Arts Frequently Asked Questions’. Sydney, Australia: Australia Council for the Arts. Available at <http://www.australiacouncil.gov.au/artforms/emerging-and-experimental/emerging-and-experimental-arts-frequently-asked-questions>.

¹³ Australia Council for the Arts (nd) ‘Emerging and Experimental’. Sydney, Australia: Australia Council for the Arts. Available at <http://www.australiacouncil.gov.au/artforms/emerging-and-experimental>.

¹⁴ And Australian experimental artists engage with arts and non-arts collaborators in Australia and from overseas.

¹⁵ <http://www.anat.org.au>.

¹⁶ <https://experimenta.org>.

¹⁷ <http://performancespace.com.au>.

¹⁸ <http://pvicollective.com>.

¹⁹ <http://www.dlux.org.au>.

²⁰ <https://liquidarchitecture.org.au>.

²¹ <http://otherfilm.org>.

²² <http://criticalpath.org.au>.

²³ <http://aceopen.art>.

²⁴ <https://melbourne.sciencegallery.com>. It should be noted that the Science Gallery Melbourne has not opened at its future location but has been presenting pre-launch exhibitions and public programs in other locations.

- A small but dedicated group of media organisations publish articles, reviews and other content related to this kind of creative pursuit – including long-running Realtime²⁵ as well as Runway Australian Experimental Art,²⁶ Assemble Papers²⁷ and other niche media outlets²⁸.
- Experimenta’s triennial exhibition, Next Wave,²⁹ Liveworks,³⁰ Underbelly Arts³¹ festival, Proximity Festival,³² You Are Here³³ and other ongoing and one-off events³⁴ are all examples of Australian events showcasing work at the nexus of art and technology.
- And a number of academic bodies examine creative experimentation with technology within reputable institutions – National Institute for Experimental Arts (NIEA)³⁵ at the University of New South Wales, SymbioticA³⁶ at the University of Western Australia and QUT Creative Lab³⁷ at Queensland University of Technology are just a few examples.

Experimental artists in Australia and around the world are tackling big questions through their art. Performance artist Stelarc³⁸ extensive body of work is renowned for ‘probing, extending, modifying, suspending, and pushing the limits of the body’.³⁹ Using just a single example from Stelarc extensive practice serves to illustrate – the infamous ‘Ear on Arm’ – ‘a “biocompatible scaffold” was surgically inserted into his left forearm in 2006, creating the shape of an ear ...’⁴⁰ When interviewed about the potential future of the project in 2012 Stelarc explained, ‘In any Wi-Fi hotspot it will become internet-enabled ... So if you’re in San Francisco and I’m in London, you’ll be able to listen in to what my ear is hearing, wherever you are and wherever I am.’⁴¹ This type of creative practice necessarily identifies and pushes the boundaries of technology.

Curator, musician and artist Joel Stern is Co-Artistic Director (with Danni Zuvela) of Liquid Architecture, whose current exhibition and performance series ‘Eavesdropping’⁴² at The Ian Potter Museum of Art⁴³ at the University of Melbourne explores ‘contemporary resonances of ‘eavesdropping’ under conditions of

²⁵ <http://www.realtime.org.au>.

²⁶ <http://runway.org.au>.

²⁷ <http://assemblepapers.com.au>.

²⁸ The Australian Network for Art and Technology published Filter magazine from 2009–2012. See .

²⁹ <http://nextwave.org.au>.

³⁰ <http://performancespace.com.au/events/liveworks-2018>.

³¹ <http://underbellyarts.com.au>.

³² <http://proximityfestival.com>.

³³ <https://www.youareherecanberra.com.au>.

³⁴ For example, the Australian Network for Art and Technology is presenting Spectra (<https://spectra.org.au>) in October which will include a symposium, exhibition and public program exploring art and science. Also Australia has hosted the International Symposium on Electronic Art (ISEA) twice: in Sydney in 2013 (<http://www.isea2013.org>) and in 1992.

³⁵ <http://www.niea.unsw.edu.au>.

³⁶ <http://www.symbiotica.uwa.edu.au>.

³⁷ <https://research.qut.edu.au/creativelab>.

³⁸ <http://stelarc.org>.

³⁹ Lawler-Dormer, S (2018) ‘Redefining The Human Body As “Meat, Metal and Code”’: An Interview with Stelarc’ in *Sleek*. Berlin, Germany: Sleek. Available at <https://www.sleek-mag.com/article/stelarc-interview-posthumanism>.

⁴⁰ Dayal, G (2012) ‘For Extreme Artist Stelarc, Body Mods Hint at Humans’ Possible Future’ in *WIRED*. San Francisco, United States of America: Condé Nast. Available at <https://www.wired.com/2012/05/stelarc-performance-art>.

⁴¹ Dayal (2012).

⁴² See <https://liquidarchitecture.org.au/events/eavesdropping-exhibition>.

⁴³ <http://www.art-museum.unimelb.edu.au>.

the modern surveillance state, post-Snowden.⁴⁴ Through the project Stern wanted to, ‘bringing together a suite of works that articulates a politics of listening’⁴⁵

Another example is Australian sound artist, composer and researcher Dr Leah Barclay,⁴⁶ who ‘creates complex sonic environments that draw attention to changing climates and fragile ecosystems.’⁴⁷ Talking to Vanessa Hughes on ABC Classic FM, Leah explains:

‘The more I recorded the environment and the more I listened the more I started to hear these ecosystems as music – these complex, rhythmic sonic environments – and it just seemed natural to try to bring these to a concert hall and to listeners ... in new way. I use mobile technologies with geolocated sound walks and immersive installations where we kind of reconstruct the canopy of the Amazon rainforest or the floor of the Great Barrier Reef.’⁴⁸

Barclay’s numerous projects – such as Biosphere Soundscapes⁴⁹ which ‘inspire[s] communities across the world to listen to the environment and explore the value of sound as a measure for environmental health in UNESCO biosphere reserves’⁵⁰ – are more than an artistic experience. Her work uses art, technology and community engagement to raise awareness of real world environmental issues.

These are just three examples of artists working with science and technology as part of their creative practice. This network of artists and arts organisations represent a significant body of socially engaged research, much of which deals directly or indirectly with issues raised by the Commission.

⁴⁴ See ACCA (nd) ‘Uncommon Knowledge: Joel Stern on Eavesdropping’. Melbourne, Australia: Australian Centre for Contemporary Art. Available at <https://acca.melbourne/program/uncommon-knowledge-joel-stern-eavesdropping>.

⁴⁵ Kidel, S (2018) ‘AP x Liquid Architecture: Eavesdropping’. Melbourne, Australia: Assemble Papers. Available at <http://assemblepapers.com.au/2018/07/05/ap-x-liquid-architecture>.

⁴⁶ <https://leahbarclay.com>.

⁴⁷ See <https://leahbarclay.com>.

⁴⁸ Barclay, L (nd) ‘Biosphere Soundscapes’. Brisbane, Australia: Leah Barclay. Available at https://leahbarclay.com/portfolio_page/biosphere-soundscapes.

⁴⁹ <http://www.biospheresoundscapes.org>.

⁵⁰ <http://www.biospheresoundscapes.org>.

Artistic freedom of expression

One of the most obvious overlaps between culture and the arts and human rights is in relation to freedom of expression. Artistic freedom is an aspect of freedom of expression and culture and the arts is a means through which one can express themselves. Acknowledgement that freedom of expression includes artistic freedom has been enshrined in rights instruments including the Recommendation concerning the Status of the Artist⁵¹ and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005.⁵² Recently the Jakarta Declaration,⁵³ adopted at the UNESCO World Press Freedom Day Conference in May 2017, boldly calling for the ‘promot[ion by UNESCO of] artistic freedom as a pillar of freedom of expression and as a cornerstone of participatory democracy...’ and encouraging ‘support [of] artistic creation and ... access to cultural life for all members of society’.

Arts Front supports this call. To see an Australia with a vibrant and secure cultural future that recognises, appreciates and invests in the culture and the arts artistic freedom must be paramount. Arts Front also supports robust copyright laws that protect and incentivise creativity. In saying that, Arts Front recognises that these two ambitions can and do not always operate in tandem. These friction points between artistic expression and copyright protection are exacerbated by technology.

Copyright and artistic freedom of expression

There is a large body of international law that relates to copyright. The World Intellectual Property Organisation (WIPO)⁵⁴ identifies Article 27 of the Universal Declaration of Human Rights (UDHR)⁵⁵ as the primary recognition of IP rights as human rights.⁵⁶ In particular, Article 27.2 provides that: ‘Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’ This is further supported by Article 15 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)⁵⁷ and Article 19 of the International Covenant on Civil and Political Rights 1966 (ICCPR),⁵⁸ as well as other rights instruments.⁵⁹

⁵¹ ‘Recommendation concerning the Status of the Artist’ (1980). Paris, France: UNESCO. Available at http://portal.unesco.org/en/ev.php-URL_ID=13138&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁵² ‘2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions’ (2005). Paris, France: UNESCO. Available at <https://en.unesco.org/creativity/convention/texts>.

⁵³ ‘Jakarta Declaration’ (2017). Paris, France: UNESCO. Available at https://en.unesco.org/sites/default/files/jakarta_declaration_4may2017_en.pdf.

⁵⁴ <http://www.wipo.int>.

⁵⁵ ‘Universal Declaration of Human Rights’ (1948). Geneva, Switzerland: United Nations. Available at <http://www.un.org/en/universal-declaration-human-rights>.

⁵⁶ WIPO (1999) ‘Intellectual Property and Human Rights’. Geneva, Switzerland: World Intellectual Property Organisation. Available at http://www.wipo.int/edocs/pubdocs/en/intproperty/762/wipo_pub_762.pdf.

⁵⁷ ‘International Covenant on Economic, Social and Cultural Rights 1966’ (1966). Geneva, Switzerland: Office of the High Commissioner for Human Rights. Available at <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>. See in particular Article 15.1(c): ‘The States Parties to the present Covenant recognize the right of everyone: To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’

⁵⁸ ‘International Covenant on Civil and Political Rights 1966’ (1966). Geneva, Switzerland: Office of the High Commissioner for Human Rights. Available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. See in particular Article 19.2: ‘Everyone shall have the right to freedom of expression; this right shall include

Copyright is one of the intellectual properties. It is a set of exclusive rights to control the use of material that vest in the copyright owner. The use of copyright protected material without the permission of the copyright owner is an infringement of copyright unless an exception to copyright applies. In Australia, our copyright system provides of a number of fair dealing exceptions, in tandem with a number of other exceptions that apply in prescribed circumstances.

Arts Front is not calling into question the importance of protecting creative expression. But we are mindful that situations can arise gaining permission to use copyright protected material can limit artistic expression. To summarise the findings of a recent research report published by Queensland University of Technology: seeking permission to reuse copyright material can be a barrier to creating new work.⁶⁰ The research was looking at licensing and reuse practices and sought to understand how creators engage with copyright laws in the course of their creative practice, and to explore any barriers experienced by these creators seeking to use copyright protected material when creating new cultural goods.

One of the findings was that securing copyright permissions was regularly cited as a reason to alter or abandon a creative project.⁶¹

In some cases the copyright owner cannot be identified,⁶² in others they are no longer commercially available⁶³ but are still protected by copyright. Where the owner can be contacted, the time and effort required to negotiate a licence⁶⁴ or the fees associated with that licensing⁶⁵ may preclude use of certain material. In other case others permission may be denied. Withholding permission can be for a range of

freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.’

⁵⁹ See WIPO (1999) ‘Intellectual Property and Human Rights’. Geneva, Switzerland: World Intellectual Property Organisation. Available at http://www.wipo.int/edocs/pubdocs/en/intproperty/762/wipo_pub_762.pdf.

⁶⁰ Pappalardo, K, et al (2017) ‘Imagination foregone: A qualitative study of the reuse practices of Australian creators’. Brisbane, Australia: Queensland University of Technology. Available at <https://eprints.qut.edu.au/115940>. See also Rostama, G (2015) ‘Remix Culture and Amateur Creativity: A Copyright Dilemma’ in *WIPO Magazine*, Issue 3. Geneva, Switzerland: World Intellectual Property Organisation, page 22–25. Available at http://www.wipo.int/export/sites/www/wipo_magazine/en/pdf/2015/wipo_pub_121_2015_03.pdf.

⁶¹ Pappalardo, et al (2017), page 28.

⁶² This type of scenario is referred to as ‘orphan works’. As Professor Lawrence Lessig said:

‘For one of the hardest things about the current system for people who want to license content is that there is no obvious place to look for the current copyright owners. Since registration is not required, since marking content is not required, since no formality at all is required, it is often impossibly hard to locate copyright owners to ask permission to use or license their work.’

Lessig, L (2004) *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York, United States of America: The Penguin Press, page 249. Available at <http://www.free-culture.cc/freeculture.pdf>.

Additionally, the Australian Law Reform Commission (ALRC) in their ‘Copyright and the Digital Economy Discussion Paper’ noted that, ‘The inability to use orphan works means that their productive and beneficial uses are lost.’ The ALRC also noted that, ‘While orphan works are normally associated with older ‘analog’ works, the problem also arises in the digital environment where works are often placed online without identifying rights information.’

ALRC (2013) ‘Copyright and the Digital Economy Issues Paper’. Sydney, Australia: Australian Law Reform Commission, Available at <https://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79>.

See also Productivity Commission (2016) ‘Intellectual Property Arrangements Productivity Commission Inquiry Report’. Canberra, Australia: Productivity Commission, page 8 and 115. Available at <https://www.pc.gov.au/inquiries/completed/intellectual-property/report>.

⁶³ Productivity Commission (2016), page 116.

⁶⁴ Pappalardo, et al (2017), page 28. See also Productivity Commission (2016), page 667.

⁶⁵ Pappalardo, et al (2017), page 20.

reasons – one of which can be censorship.⁶⁶ The research revealed that complexities in the copyright system means many ‘creators were worried, rather than empowered, by copyright law.’⁶⁷

Former United Nations Special Rapporteur in the field of cultural rights Farida Shaheed warned the UN General Assembly in 2013 of the potential to use copyright to stifle artistic freedom: ‘copyright holders can abuse their rights by threatening litigation.’⁶⁸ As Siva Vaidhyanathan put it, ‘... cease-and-desist letters carry inordinate cultural power and can chill if not directly censor expression.’⁶⁹

Finally, it is also worth noting that there is a body of creative material that sits in a copyright a grey area. Works which re-contextualise material in ways that do not easily fit within existing copyright exceptions can become risky endeavours for the artist.

The recent film *TERROR NULLIUS* by Soda_Jerk⁷⁰ is an interesting example. The film was made⁷¹ with financial support from the Ian Potter Moving Image Commission,⁷² a joint initiative of The Ian Potter Cultural Trust⁷³ and the Australian Centre for the Moving Image (ACMI).⁷⁴ The artists provide the following synopsis for the film:

‘Part political satire, eco-horror and road movie, *TERROR NULLIUS* is a political revenge fable which offers an unwriting of Australian national mythologies. Binding together a documentary impulse with the bent plotlines of Australian film texts, Soda_Jerk’s revisionist history opens a willful narrative space where cinema fictions and historical facts permeate each other in new ways. The apocalyptic desert camps of *Mad Max 2* become the site of refugee detention, feminist motorcycle gangs rule the highways, and flesh-eating sheep are recast as anti-colonial insurgents.’⁷⁵

The Ian Potter Cultural Trust released a statement distancing themselves from the film in the lead up to the premier screening at the ACMI – allegedly because it was not in line with their political values.⁷⁶ While copyright was not raised as an issue, it very easily could have been. The film incorporates

⁶⁶ See for example Vaidhyanathan, S (2001) *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*. New York, United States of America: New York University Press, page 355. See generally: Nazer, D (2018) ‘Copyright, The First Wave of Internet Censorship’, Deep Links. San Francisco, United States of America: Electronic Frontier Foundation. Available at <https://www.eff.org/deeplinks/2018/01/copyright-first-wave-internet-censorship>. Nazer, D and Stoltz M (2017) ‘Copyright Shouldn’t Be A Tool of Censorship’, Deep Links. San Francisco, United States of America: Electronic Frontier Foundation. Available at <https://www.eff.org/deeplinks/2017/01/copyright-shouldnt-be-tool-censorship>.

⁶⁷ Pappalardo, et al (2017), page 20–21.

⁶⁸ Shaheed, F (2013) ‘The right to freedom of artistic expression and creativity’. Geneva, Switzerland: United Nations, page 18. Available at https://digitallibrary.un.org/record/755488/files/A_HRC_23_34-EN.pdf.

⁶⁹ Vaidhyanathan (2001), page 355.

⁷⁰ <https://www.sodajerk.com.au>.

⁷¹ See for example UNSW Art & Design (2016) Soda_Jerk wins the \$100,000 Ian Potter Moving Image Commission’. Sydney, Australia: University of New South Wales. Available at <https://artdesign.unsw.edu.au/whats-on/news/sodajerk-wins-100000-ian-potter-moving-image-commission>.

⁷² <https://www.movingimagecommission.org.au>.

⁷³ <https://www.ianpotterculturaltrust.org.au>.

⁷⁴ <https://www.acmi.net.au>.

⁷⁵ See https://www.sodajerk.com.au/video_work.php?v=20180223211319.

⁷⁶ See for example: Buckmaster, L (2018) ‘Terror Nullius: ‘controversial’ Australian film loses funders’ support’. Sydney, Australia: The Guardian. Available at <https://www.theguardian.com/info/2013/may/26/contact-guardian-australia>. Francis, H (2018) ‘Artists warn of ‘chilling effect’ as donor withdraws support for film’. Sydney, Australia: The Sydney Morning Herald. Available at <https://www.smh.com.au/entertainment/movies/artists-warn-of-chilling-effect-as-donor-withdraws-support-for-film-20180319-p4z51g.html>.

hundreds of segments from recognisable and more obscure Australian movies, reconfigured to challenge narratives about contemporary Australia. As Alexandra Heller-Nicholas, writing in *Artlink*, puts it: ‘Soda_Jerk do not attempt anything so ambitious or ultimately futile as an alternate canon, but rather achieve something far more urgent: they reveal the gaps, the hypocrisies and the biases active within the canon we already have, reflective of a whole spectrum of issues and questions white Australia needs to desperately address.’⁷⁷

When sampling from, mashing up and remixing popular films to tell new and different narratives to the original would be considered fair dealing within current Australian copyright law can be a complicated question. Potential copyright issues aside, the messages within *TERROR NULLIUS* are an important contribution to civic discourse in this country. Arts Front commends Soda_Jerk for their boldness and their willingness to stand behind their work and its messages – but we also recognise that not all artists are able or willing to take the same kind of risk in order to enjoy their artistic freedom.

Copyright, technology and artistic freedom of expression

The internet and technology explodes this rights paradox to epic proportions. Copyright enabled by technology has extreme potential to impact artistic freedom of expression.⁷⁸ Software is increasingly being used to identify and respond to copyright infringement (actual or alleged). Digital rights management, automated scripts to issue notice and take down requests and automatic copyright detection software are some of the types of technologies enabling assertion of copyright in the digital environment. Writing in the American Bar Association’s *Landslide* journal, Caleb Donaldson, copyright counsel at Google, stated that, ‘As we move into a world where artificial intelligence can learn from vast troves of data ... we will only get better at using the information to better fight against piracy.’⁷⁹

While identifying and stopping infringements is important, the same technology can also be used to block legitimate uses of copyright material. Criticism and review has long been a fair dealing exception in Australian copyright law and, since the *Copyright Amendment Act 2006*, we have had a fair dealing for parody and satire. These and other exceptions create circumstances in which reuse of copyright protected material is legitimate without the permission of the copyright owner.

Increasingly the assertion of copyright online is occurring in semi- or fully-automated ways. Take for example the emergence of ‘robo-takedown’ notice and takedown requests – the preferred cease and desist of the internet age – where ‘... requests are issued pursuant to a largely—if not fully—automated review process, meaning that there is no human actor reviewing the content to verify that it is in fact copyrighted before requesting that it be removed.’⁸⁰ On the flip side, the volume of requests that ISPs

⁷⁷ Heller-Nicholas, A (2018) ‘Soda_Jerk: TERROR NULLIUS’. Adelaide, Australia: Artlink. Available at <https://www.artlink.com.au/articles/4667/soda5Fjerk-terror-nullius>.

⁷⁸ See Goggin, G, et al (2017) ‘Digital Rights in Australia’. Sydney, Australia: University of Sydney, page 8. Available at <http://digitalrightsusyd.net/research/digital-rights-in-australia-report>.

⁷⁹ Donaldson, C (2017) ‘Beyond the DMCA: How Google Leverages Notice and Takedown at Scale’ in *Landslide*, Vol 10, No 2. Chicago, United State of America: American Bar Association. Available at <https://www.americanbar.org/content/dam/aba/publications/landslide/2017-nov-dec/beyond-dmca.authcheckdam.pdf>.

⁸⁰ Carpou, Z (2016) ‘Robots, Pirates, and the Rise of the Automated Takedown Regime: Using the DMCA to Fight Piracy and Protect End-Users’ in *Columbia Journal of Law & the Arts*, Vol 39, No 4. New York, United State of America: Columbia University Libraries and Columbia Law School, page 552–553. Available at <https://journals.cdrc.columbia.edu/wp-content/uploads/sites/14/2016/06/4-39.4-Carpou.pdf>.

receive coupled with the timeframe in which they must do something about them⁸¹ necessarily has prompted a move to streamline the removal of content identified in takedown requests (Google's Trusted Copyright Removal Program (TCRP)⁸² is an example of this in practice). This automation at both ends of the request's life cycle means that no person is involved in any part of the decision making process (ie. what content to target with a takedown request and what content to remove as a result of a takedown request). While in many cases this is impacting illegitimate content, it can also result in legitimate material being removed.⁸³ German politician and member of the Pirate Party Germany Julia Reda posted about a number of concerning situations (and a few less serious ones!) where content filtering can lead to unsubstantiated copyright infringement claims, suppression of marginalised voices and political speech and unintended claims of copyright over material in the public domain.⁸⁴

Similar outcomes can occur as platforms move towards machine learning and artificial intelligence to proactively identify infringing material. Google, as a single example, has a suite of copyright-related software and processes including and Content ID⁸⁵ and Copyright Matching Tool⁸⁶ related to content published on YouTube. Automated copyright scanning is very effective at identifying illegitimate use of copyright protected material but its shortcomings become particularly acute when creators are relying on copyright exceptions to make legitimate uses of copyright protected material.⁸⁷ While Google does have an initiative to indemnify creators of selected YouTube videos deemed to be 'clear examples of fair use' from legal costs related to copyright claims,⁸⁸ for the vast majority of users their content is removed and they are left to seek to have it restored.

⁸¹ Carpou (2016), page 554.

⁸² See Google (nd) 'How Content ID works'. Available at <https://www.youtube.com/t/contentid>. See also Alfshawi, T (2012) 'Improving Content ID', YouTube Blog. Available at <https://youtube.googleblog.com/2012/10/improving-content-id.html>.

⁸³ Carpou (2016), page 554.

⁸⁴ Reda, J (2017), 'When filters fail: These cases show we can't trust algorithms to clean up the internet'. Berlin, Germany: Julia Reda. Available at <https://juliareda.eu/2017/09/when-filters-fail>.

⁸⁵ See <https://www.youtube.com/t/contentid>. See also Alfshawi, T (2012) 'Improving Content ID', YouTube Blog. Available at <https://youtube.googleblog.com/2012/10/improving-content-id.html>.

⁸⁶ See Google (nd) 'Copyright Match Tool' <https://support.google.com/youtube/answer/7648743>. See also Magagna, F (2018) 'Helping creators protect their content', YouTube Creator Blog. Available at <https://youtube-creators.googleblog.com/2018/07/helping-creators-protect-their-content.html>.

⁸⁷ See for example Banker, D (2017) 'Perth's 'Ozzy Man' hits out after promoters block his Mayweather v McGregor parody over copyright'. Perth, Australia: The West Australian. Available at <https://thewest.com.au/news/wa/perths-ozzy-man-hits-out-after-promoters-block-his-mayweather-v-mcgregor-parody-over-copyright-ng-b88584179z>. See also <https://twitter.com/ozzymanreviews/status/754868637668814848>.

⁸⁸ See 'YouTube's Fair Use Protection' in Google (nd) 'What is fair use?'. Available at <https://www.youtube.com/intl/en/yt/about/copyright/fair-use/#yt-copyright-protection>.

Technology's impact on artists

There are a number of human rights related to survival – for example Article 25 of the UDHR and Article 11 of the ICESCR both afford everyone the right to and adequate standard of living which explicitly includes adequate food, clothing, housing and medical care as well as access to social services and welfare. Low-income particularly impacts these rights.

Income insecurity and housing affordability are realities for many artists. Artists are often low-income earning. Arts Front directs the Commission's attention to the report *Making Art Work: An economic study of professional artists in Australia*⁸⁹ authored by Distinguished Professor David Throsby and Katya Petetskaya published by the Australia Council for the Arts. This is part of an ongoing series of independent research independently over thirty years by Throsby which tracks trends in the lives and working conditions of Australian artists.

Looking first at artists incomes; Throsby and Petetskaya take into account income from creative work in the artist's principal artistic occupation, income from other arts-related work (such as teaching) and non-arts income, (earned income derived from some occupation not connected to the arts).⁹⁰ Throsby and Petetskaya summarise the situation thus:

‘It is clear that artists’ income from creative work in their chosen profession is far below that earned by similarly qualified practitioners in other professions. Even when other arts-related earnings and non-arts income are added in, the gross incomes of artists, from which they must finance their professional practice as well as the demands of everyday living, are substantially less than managerial and professional earnings. Indeed their total incomes on average are lower than those of all occupational groups, including non-professional and blue-collar occupations.’⁹¹

And, despite rhetoric that suggests there is an increase in demand for creative and artistic skills, artists are not seeing better incomes. As Throsby and Petetskaya put it, since 1987 ‘... artists’ incomes have increased sufficiently in nominal terms to keep pace more or less with inflation, but no more.’⁹² They go on to say, ‘Meanwhile, artists’ relative position in comparison with other professionals has deteriorated, since these other groups have enjoyed a rising trend in their real incomes over most of the period covered.’⁹³

Artists incomes are further jeopardized by new technologies. For example many artists draw part of their income from non-arts sources and some of these non-arts income sources come from industries that may be displaced by automation.

⁸⁹ Throsby, D and Petetskaya, K (2018) *Making Art Work: An economic study of professional artists in Australia*. Sydney, Australia: Australia Council for the Arts. Available at <http://www.australiacouncil.gov.au/research/making-art-work>.

⁹⁰ See Throsby and Petetskaya (2018), page 72.

⁹¹ See Throsby and Petetskaya (2018), page 78.

⁹² Throsby and Petetskaya (2018), page 174.

⁹³ Throsby and Petetskaya (2018), page 174.

It is also important to recognise that gender inequality in the arts exists.⁹⁴ Regardless of equal pay mandates in both the UDHR⁹⁵ and ICESCR,⁹⁶ female artists often experience pay disparities as compared with their male counterparts. The *Making Art Work* also reveals this alarming reality for female artists: ‘...female artists on average spend about the same amount of hours working in their creative work as male artists. The fact remains that, however interpreted, the earnings gap is particularly acute for women artists.’⁹⁷

Throsby and Petetskaya report that ‘... while both genders spend approximately the same amount of hours per week on their creative work (22 hours for women and 23 hours for men), on average men earn 44 percent more from this type of work.’⁹⁸ And when creative income, arts-related income and non-arts income is combined ‘women are underrepresented among artists earning more than \$50 thousand in any type of work compared to men, and overrepresented among artists earning less than \$10 thousand across all types of work.’⁹⁹ However it should be noted that the data suggests that the pay gap is narrowing.¹⁰⁰

⁹⁴ Throsby and Petetskaya (2018), page 123.

⁹⁵ Article 23(2): ‘Everyone, without any discrimination, has the right to equal pay for equal work.’

⁹⁶ Article 7(a)(i): ‘The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.’

⁹⁷ Throsby and Petetskaya (2018), page 131.

⁹⁸ Throsby and Petetskaya (2018), page 131.

⁹⁹ Throsby and Petetskaya (2018), page 132.

¹⁰⁰ See Throsby and Petetskaya (2018), page 133.

Audiences and engagement with culture and the arts

Another area where culture and the arts, human rights and technology overlap is in relation to audiences and their enjoyment of and participation in culture and the arts. There is much written about cultural rights. Arts Front recommends the reports to the UN General Assembly and the Human Rights Council by the Special Rapporteur in the field of cultural rights. These comprehensive documents articulate the related rights and the complexities around them. For example, Farida Shaheed wrote in 2012 in the third report titled ‘The right to benefit from scientific progress and its applications’:

‘Human rights issues related to cultural heritage are numerous. They include questions regarding who defines what cultural heritage is and its significance; which cultural heritage deserves protection; the extent to which individuals and communities participate in the interpretation, preservation/safeguarding of cultural heritage, have access to and enjoy it; how to resolve conflicts and competing interests over cultural heritage; and what the possible limitations to a right to cultural heritage are.’¹⁰¹

Technology has the potential to positively impact some of these concerns. Digitisation of cultural heritage items and making them available to view online increases access and enjoyment of this material. Tools such as wikis facilitate multiple narratives associated to cultural heritage. Encouraging user-submitted and user-generated contributions submitted online diversifies what is considered ‘worth remembering’.

Recent changes to the preservation rules¹⁰² in the *Copyright Act 1968* have consolidated and streamlined the exceptions allowing libraries and archives to make copies of copyright material for preservation purposes and changes to copyright duration¹⁰³ that commence from Tuesday 1 January 2019, introducing a duration for unpublished works and orphan works, pave the way for increased digitisation of cultural heritage.¹⁰⁴ Importantly the preservation rules do not only apply to institutional collections. They apply equally to non-profit archives, allowing other keepers of cultural heritage – such as RSLs, local

¹⁰¹ Shaheed, F (2012) ‘The right to benefit from scientific progress and its applications’. Geneva, Switzerland: United Nations, page 5. Available at https://digitallibrary.un.org/record/755488/files/A_HRC_20_26-EN.pdf.

¹⁰² See *Copyright Amendment (Disability Access and Other Measures) Act 2017*. Available at <https://www.legislation.gov.au/Details/C2017A00049>. The Act replaced the former sections 51A and 110B with a new preservation exception (section 113H).

¹⁰³ See *Copyright Amendment (Disability Access and Other Measures) Act 2017*, Schedule 2.

¹⁰⁴ The *Copyright Amendment (Disability Access and Other Measures) Act 2017* will introduce a copyright term for unpublished works. The Act sought to end the outdated concept of perpetual copyright for unpublished works. It also clarifies the term of copyright on orphan works – including anonymous works, pseudonymous works and works whose copyright owner has become unknown for other reasons (eg. due to lack of information) – by relying on the creation date of the work and/or the date when the work was made public. When these provisions come into effect thousands of unpublished works such as diaries, letters, theses and other historical unpublished works held in cultural collections will enter the public domain, adding significant amounts of new material available free for anyone to access and use. For more information of the changes to copyright duration see Department of Communications and the Arts (2017) ‘Upcoming changes to copyright duration’. Canberra, Australia: Department of Communications and the Arts. Available at <https://www.communications.gov.au/documents/fact-sheet-upcoming-changes-copyright-duration>. See also see Department of Communications and the Arts (2018) ‘Duration of copyright’. Canberra, Australia: Department of Communications and the Arts. Available at <https://www.communications.gov.au/copyright/duration-copyright>.

non-profit historical societies and other community organisations that maintain an archive – to preserve their collections.

These changes are an important step in opening up more cultural heritage collections for the enjoyment of the public, but funding to digitise cultural collections administered by institutions and other non-profits is needed.

First Peoples culture, arts and knowledge

Arts Front endorses calls for standalone legislation recognising and protecting Aboriginal and Torres Strait Islander arts, culture and knowledge in Australia. Arts Front also supports calls for an independent First Peoples-led National Indigenous Arts and Cultural Authority and welcomes the start of consultation around the establishment of such a body.¹⁰⁵

Arts Front's First Peoples First approach is underpinned by these principles that we recommend for broader use and application:

PRINCIPLE 1: WE THE FIRST PEOPLE OF THIS LAND.

- 1.1 That Australia's First Nations are given recognition and respect as the first peoples of this land and our unique connections to land and country.
- 1.2 That Australia's First Nations develop and maintain structures for our own distinct cultural identities.
- 1.3 That there is acknowledgement and respect that Australia's First Nations belong to our own communities and that we define what those communities are.
- 1.4 That Australia's First Nations as a collective, define the responsibilities of the individual.

PRINCIPLE 2: OUR CULTURAL CONTINUUM.

- 2.1 That Australia's First Nations continue to protect, preserve and practice our culture, both now and into the future, by developing effective measures with all.
- 2.2 That Australia's First Nations have privacy to maintain, protect and access our culture in our own ways.
- 2.3 That Australia's First Nations revitalize our culture for the future through defining our past, current and future cultural identities and practices.
- 2.4 That Australia's First Nations maintain our spiritual relationships as our responsibility to future generations through the ongoing connection with our traditional lands and waters and cultural resources.

PRINCIPLE 3: OUR WAY, YOUR WAY – THE WAY TO A SHARED CULTURAL FUTURE.

- 3.1 That Australia's First Nations can operate free from assimilation and cultural disruption and destruction
- 3.2 That Australia's First Nations can operate free from discrimination
- 3.3 That acknowledgement and effective actions for cultural safety are made to address the impacts of

¹⁰⁵ See 'Working towards a National Indigenous Arts and Cultural Authority'. Available at <https://niaca.com.au>.

intergenerational trauma and pressures on our cultural identities felt by Australia's First Nations.

3.4 That Australia's First Nations participate in decision making by choosing our representatives in accordance to our own procedures and principles.

3.5 That before adopting legislative and administrative measures that impact both directly and indirectly on Australia's First Nations, free informed and prior consent is achieved.

3.6 That Australia's First Nations have the right to the improvement of their economic and social conditions through the arts and cultural sector through the development of effective measures. In addition, special measures are undertaken for Elders, women, children and youth, disabilities, and LGBTQ parts of our communities.

3.7 That Australia's First Nations are provided transparent processes for restitution / compensation for their cultural continuity.

Arts Front also acknowledges the experiences of different stakeholder groups – including First Peoples, children and young people, older people, women and girls, LGBTIQ+ people, people of culturally and linguistically diverse backgrounds and people with disability – are different. Arts Front has established sub-projects related to these areas and employs the ethos 'nothing about us without us', adopting a community-led approach. Arts Front recommends the Commission consider adopting a community-led approach.