20. The decommissioning of *I See Red*: a case study in the relations between art and law*

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1. INTRODUCTION

The audience of a work of art typically offers a plurality of interpretations of the work. Some of them enrich our connections with the work and its historical context. Other interpretations are problematic because they elicit responses that thwart fundamental artistic freedoms and human rights. The latter include responses promoting the destruction of cultural heritage and the persecution of artists acting as political dissidents. There are also contested interpretations that have real legal consequences, such as classifying works as intellectual property infringements, obscene or defamatory, refusing to confer artistic status (see Section 3(iv)(a)), and exercising a legal power to decommission a work of public art. This chapter considers the problem posed by the decommission of a work best by contested interpretations – henceforth referred to as the ‘Decommission Problem’.

The Decommission Problem may be articulated as follows: what is the normative approach that ought to guide the decision making about the decommission of a contested artwork? In this chapter, the **decommission of a work of art** will be understood in a broad sense that includes any decision by a commissioning body to not proceed with a commissioned artwork.

In Section 1, the Decommission Problem will be illustrated by a case study of a 2015 site-specific public artwork entitled *I See Red*. This work was proposed by the first author in response to a call for proposals and was one of three winning submissions selected. However, the circumstances explained below prevented that artwork being completed, leading to its decommission by the public institution. In this case, the Decommission Problem connects to two key issues. The first issue is whether or not historical and artistic contextualisation ought to contribute to decision making about acts of decommissioning.

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an artwork. The second issue questions how the historical significance of a hosting site should be addressed in commission or decommission decisions.

Section 2 discusses *I See Red*, the proposed site and the criteria for the commission. First it attempts to explain why the artwork’s installation was contested by the judiciary of the Supreme Court of Western Australia, and as a result was decommissioned. Then, it contrasts a tentative reconstruction of the judiciary’s interpretation, with the meaning and consequences intended by the artist. The insight from this case study is then used in the next section to address the Decommission Problem from a broader legal and philosophical perspective.

Section 3 defends a heuristic principle according to which the historical context of the work and the artist’s intended meaning ought to be taken into consideration in decommission decisions. Following usage in decision theory, this chapter uses *heuristic* to mean a simple rule or pattern of behaviour that facilitates decision making about a complex problem. The rationale of the argument in support of this heuristic is that the decision maker ought to understand the psychological and social consequences of the work in the relevant historical context in order to make a just decision. This heuristic can be at odds with the view that the creator’s meaning can be ignored or rejected in the course of interpreting that artwork. Some scholars have gone so far as to proclaim the Death of the Author, while others restrict the meaning of an artwork to interpretations proposed by audience members. To rebut such objections and highlight the risks of decontextualised interpretations, Section 3 analyses different kinds of harms and injustice that result from them. This approach predicts that decision makers who are knowledgeable about the artwork context are more likely to develop a just comprehension of the work than a misinformed audience. The argument is illustrated with the analysis of the decommission of *I See Red* and other legal cases.

### 2. THE CASE OF THE DECOMMISSION OF *I SEE RED*

**i. Basic Facts**

The artwork project *I See Red* was a response to a call for proposals by the City of Perth, Western Australia, for a temporary public art installation within the central area of the city for its 2015 TRANSART festival. The theme for the commission was ‘Red’, which

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was to be interpreted by artists in ways that would align with their creative practice. In the artist brief, some of the key words provided were, ‘people rediscovering where they live, memory, exploration, surprise, disbelief, transformation and innovation, engaging people not buildings, street level activation and engagement, non-traditionalist thinking, humour/irony’.

As described in her proposal, the artist’s concept for *I See Red* was to install a red neon sculpture with the words ‘Sacred Scared Scarred’ on the entrance parapet of the Old Court House Law Museum (henceforth ‘Old Court’). This Old Court is located in the gardens adjacent to the Supreme Court of Western Australia. The use of a neon animator would have allowed the work to be read in two stages. The first stage would illuminate the entire words ‘Sacred’, ‘Scared’, ‘Scarred’ as illustrated in Figure 20.1; and the second stage would illuminate the last three letters of each word only ‘red’ (--- red --- red --- red).

The Old Court, constructed in 1836, was chosen by the artist as the site of her artwork because of the multiplicity of historical uses and roles the building had served. Awareness of this multiplicity would have enriched the set of possible interpretations of the text.

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Figure 20.1  Artist Impression *I See Red*, red neon, acrylic and electrics, Old Court House Law Museum, Perth, Western Australia, image copyright and courtesy of Lee Harrop

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7 City of Perth, TRANSART RED: Call for Proposals (2015).
8 Ibid.
on the site. As Perth’s oldest building, it was originally purposed as a court house. Like the other few grand buildings of the period, however, it came to have many uses over its history. These included as a church, school, immigration depot, store, meeting hall and concert hall. In 1846 Dom Salvado, head of the Benedictine Order, gave a piano recital there to raise funds for a monastery and the building was recognised as an important venue in the early musical life of colonists. It was also a theatre, with plays beginning in 1854.\textsuperscript{10}

As stipulated in the TRANSART call for proposals, artists were encouraged to interpret and approach the theme RED in ways that both connected with their creative practice and an approved public site in central Perth.\textsuperscript{11} The Old Court was a compelling site to the artist who has a law enforcement background and has completed a Master’s thesis on violence perpetuated through language. The artist had developed text-based artworks in restricted areas of a police station in Auckland New Zealand. She also had used infrastructure that embodies power like the Old Court to create resonant and layered works that encourage multiple readings and engagement from those that encounter them.\textsuperscript{12} The choice to use the Old Court also addressed key words set out in the artists’ brief such as ‘people rediscovering where they live’.\textsuperscript{13} In this vein, I See Red was inviting viewers to enquire about a site of considerable historical significance and reflect on the political relevance of the building and its foundational role in Western Australia’s history.

The commission was instigated by a formal letter of engagement, issued by the City of Perth to the artist, which contained the conditions that applied. A purchase order was also issued for the full commission fee to be paid in stages subject to completion of the schedule as outlined in the call for proposals and again detailed in the letter of engagement. One of the conditions of the formal letter of engagement stated:

Prior to the installation of the work, the concept design must be developed, discussed and approved by City of Perth staff to determine details including (but not limited to): dates, locations, any permits required, public safety and other risks, any special management requirements during period on display, methodologies for install and removal of the work. Once these details have been approved by the City, the Artist’s first invoice can be paid and fabrication can proceed.\textsuperscript{14}

Similarly, the call for proposals document stated: ‘There will be in-kind support available for the artist from City staff to assist with any permits or other procedural requirements.’\textsuperscript{15} These conditions implied that the City of Perth staff had an obligation to consult with and assist the artist in the pre-installation phase of the work. Therefore, initial discussions

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\textsuperscript{9} Neville Green, ‘The Old Court House 1837: A Brief History’ in The Law Society of Western Australia, Pamphlet (undated).
\textsuperscript{10} Amateur Theatrical Performances, The Inquirer (Perth, 26 July 1854) 2.
\textsuperscript{11} City of Perth (n 7).
\textsuperscript{12} Lee Harrop, Awful (lawful) 2009 vinyl installation 1.3m, court transfer holding cell Counties Manukau Police Station Auckland New Zealand, ‘Untitled’ (Help yourself) 2007 engraved glass, stainless steel rod installation, Sculpture in the Park, Waitakaruru, New Zealand.
\textsuperscript{13} City of Perth (n 7).
\textsuperscript{14} Letter of engagement from City of Perth to author [1] (16 March 2015).
\textsuperscript{15} City of Perth (n 7).
\end{flushleft}
with potential sites seeking approval for the installation of the work were made by the City of Perth public art program co-ordinator on behalf of the artist.

To install the artwork in accordance with the artist's proposal on the Old Court, the site approval process dictated that it was necessary to seek permission from the Department of the Attorney General (as owner of the Old Court building) and the judiciary of the Supreme Court of Western Australia. However, after being considered by the Premises Committee and the Management Committee of the Supreme Court of Western Australia, permission was denied. Both committees were 'firmly opposed to the proposed installation'. Consequently, the Department of the Attorney General was not approached following the decision also advising 'that the Department's attitude to the proposed installation will be significantly influenced by the view of the judiciary'. Following the refusal of permission to install the artwork, mediation and negotiation attempts to reverse the refusal were unsuccessful, including support for the artwork to be installed elsewhere in Stirling Gardens which is owned by the City of Perth.

With the impending logistical constraints, such as specified exhibition dates, the City of Perth invited the artist to revise the proposal to become a publication as a substitute contribution to TRANSART. The publication was not approved by the City of Perth Director. This was the final decision that brought the commission to an end. Immediately thereafter, the artist was offered a part payment on the commission in recognition of the time invested together with a letter confirming selection for TRANSART.

This case raises the Decommission Problem. What is the normative approach that ought to guide the decision-making about the decommission of a contested artwork such as I See Red? To address this problem, an examination of the interpretation by both parties is necessary to better describe the factors that should be considered when deciding to decommission an artwork.

ii. Methodology

To avoid biases, the methodology is based on a comparison between a set of evidence-based case studies and interpretations (introduced in Sections 2 and 3(iv)(b)) with several theories of justice (Section 3). The goal of this approach is to analyse the case of I See Red as a useful source of previously unpublished qualitative data. Section 3 presents a way to use the case in a broader analysis of the different possible interpretations for similar cases. Therefore, the primary aim is not to adjudicate the contentious case of I See Red.

A methodological problem encountered by this project is that there is a lack of information to elucidate the judiciary's interpretation. The main piece of evidence is a letter containing the decision to not approve the installation of the artwork. The letter also included a copy of a pamphlet, containing a brief history of the Old Court which was referred to in the letter. The same pamphlet was also part of the research material used by the artist in the creation of the artwork. The judiciary's decision letter gave

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16 Letter from Judiciary of Western Australia to City of Perth Public Art Program Coordinator (22 April 2015).
17 Ibid.
18 Green (n 9).
little disclosure of the reasons for the judiciary’s interpretation, or the inclusion of the pamphlet. Therefore, the authors made use of inference to the best explanation to offer a plausible elucidation where direct evidence of reasons for interpretation was lacking.19

The artist’s interpretation of the artwork was fully disclosed in the artist’s proposal to all institutions approached. A more detailed explanation of the artwork, including the selected words, was provided to the judiciary in preparation for the meeting seeking a revision of their decision. However, it remains unclear whether the meaning intended by the artist was overlooked, ignored, or rejected. Nevertheless, a number of plausible hypotheses can be inferred from the evidence available and its context.

iii. Interpretation by the Judiciary

The judiciary justified its opposition to the commission in the letter of decision as follows:

( . . . ) the Old Court House has a very significant place in the heritage of Western Australia. ( . . . ) the building has long been associated with the administration of justice in this State. Having regard to that history, it is the view of the judiciary that a neon light installation, however temporary, is entirely incongruent. It is also our view that the application of the words ‘scared’ and ‘scarred’ to a building so long associated with the administration of justice in this State is entirely inappropriate.20

The judiciary made two evaluative statements in the letter. It claimed that I See Red was ‘entirely incongruent’ with the planned site of installation and that it included two words that were ‘entirely inappropriate’. The letter indicated that the judiciary thought that the intended artwork would violate at least one fundamental norm associated with the building or the legal institution in Western Australia. The interpretive challenge posed by this evidence is, nonetheless, that the letter did not identify which norm(s) might have been violated by the artwork. Thus, we can only make reasonable conjectures about the norms that guided the decision made by the judiciary. Making inferences to the best explanation from this context, one finds that there are at least four plausible hypotheses.

First, the words ‘scared’ and ‘scarred’ may have been interpreted by the judiciary as parts of an attack against the legal institution. In this reading, the norms upheld by the judiciary would have been those that refer to and recognise the authority of the legal institution and rules.21 Note that the judiciary could have held that interpretation if the two words were placed on any other legal building of that jurisdiction. So, it is not uniquely triggered by the site of the Old Court.

Secondly, a hypothesis of harm and change minimisation could be advanced. The judiciary might have intended to prevent harms to social order that it perceived would have been caused by I See Red. Specifically, the judiciary might have been reluctant to allow an artwork that, as they might have seen it, drew the attention of the public to the traumatic

20 Judiciary of Western Australia (n 16).
history uniquely associated with that particular site and challenged conservatism in the Australian middle class. In that case, the norms upheld by the judiciary could have been those which aim to keep conservative order or prevent intergenerational psychological trauma. This attitude is opposed to the project of illuminating the history of the site through the word ‘scarred’, which can mean physical scarring or psychological scars as a result of fear or grief.

This hypothesis of harm minimisation is plausible because the Old Court has been associated with several traumatic events. These include the 1837 sentencing of Gear, an elderly Indigenous man, to 48 lashes and one month in jail for trying to steal some wheat. Another event was the 1844 sentencing of 15-year-old John Gaven, found guilty of murder, to be executed by public hanging on Easter Saturday in Fremantle. In addition, the Old Court House is positioned alongside gum trees with, ‘scars, worn deep by the chains of countless Aboriginal prisoners who sat waiting their turn in the dock’.

It is also within Stirling Gardens, named after Governor James Stirling who was responsible for the notorious Pinjarra massacre in 1834. When the historical context of the site is considered against the legal sanctioning of violent acts such as this massacre, the word scarred may have been interpreted as referring to a mark of an irreparable, violent past.

The information regarding some of these cases was contained in the pamphlet, attached to the letter of decision, and therefore easily discoverable by the general public. Given that this history is not hidden or denied by the judiciary, it is not likely the judiciary was reluctant to draw attention to it per se. But the members of the judiciary might have been reluctant to draw attention to this traumatic history for fear to unleash attitudes that would challenge its institutional power or conservatism. Thus, the hypothesis of harm-minimisation and attack against the judiciary are not mutually exclusive.

Third, the judiciary might have viewed the planned display of I See Red as an act of desecration of the Old Court, which might have been perceived as a majestic historical monument. Note that the judiciary’s letter did not object to the use of the word ‘sacred’. Thus, it is reasonable to infer that the word ‘sacred’ was not found inappropriate. It is also plausible that the judiciary regarded the building as a sacrosanct legal institution. If so, this could explain why a neon light installation installed on this building was deemed incongruent. This would be because neon is not a material traditionally associated with the symbols and architecture of infrastructures in which legal proceedings are administered.

Lastly, there is an explanation of the judiciary’s decision that does not appeal to norm violation. It is that the judiciary opposed the commission because it lacked knowledge regarding the forms and materials used in contemporary public art installation. However, this explanation could only be true if most or all decision makers in the judiciary had been ignorant of contemporary art, which is unlikely. Furthermore, given the close proximity of the Supreme Court to Council House, which has had a lighting scheme since 2009,

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22 Green (n 9).
23 Governor James Stirling led a group of police, soldiers and settlers to retaliate against natives of the Murray River tribe. The number of Aborigines killed, whilst contentious, is reported to be 14 and one police superintendent was also killed. For a brief biography of Stirling see FK Crowley, Australian Dictionary of Biography (Vol 2, MUP 1967).
that colourfully transforms the entire exterior of the building to acknowledge significant events, it seems reasonable to infer that the artistic illumination of buildings was not unknown.

iv. Interpretation by the Artist and Intended Meaning

The creator’s interpretation of *I See Red* significantly differs from the possible interpretations just discussed. For the artist, the artwork was never intended to be an attack against the legal institution. The meaning of the three key words was intentionally left infra-propositional. That is to say, the string of words did not form a complete sentence or utterance capable of asserting a proposition. Specifically, the title *I See Red* invites multiple interpretations. The title was polysemic in that it could be interpreted as referring to the visual experience of something red or to feelings experienced in response to the site and its history (e.g., anger, disgust, pain, grief). The colour red can be used to signal danger and serves as a warning through which to interpret the words within the artwork. The title offers an encounter in the first person as a provocative statement to prompt viewer participation. Placing *I See Red* on the Old Court provided spectators with a multi-layered context inviting them to freely reflect on both the artwork and the site history. Viewers might consider the words in isolation and/or in relation to the site. They might rely on their existing knowledge in their interpretation or be encouraged to find out more about the history and significance of both the site and the artwork.

The words ‘sacred’, ‘scared’, ‘scarred’ were carefully selected for their relevance to the site whilst responding to the theme ‘red’. They also continued the first author’s artistic program aimed at exploring how words can be instrumental in the perpetration of violence and developing an artistic critique of institutions that have perpetrated violence. The work evoked the history of the site in different ways. For example, ‘Sacred’ points to the historical use of the building as a venue for church services. It also may prompt reminiscing of the role of the judicial system in making determinations about what constitutes a sacred site for Aboriginal people in the eyes of the law. The artist also anticipated less literal interpretations such as the reverence, awe and power that might reference the building’s history of multiuse and the importance of that to the people of Western Australia.

The word ‘Scared’ was intended to prompt thoughts about the fear some people would have experienced when awaiting trial, sentencing, school masters, fervent sermons, any of which they may have encountered in this building. For example, the trials of Gear and Gaven.25

The word ‘Scarred’ could have acted as a reminder that, during the time when the Old Court functioned as a court, capital and corporal punishment would have been an integral part of the delivery of justice in Western Australia.26 Scarring can also refer to the chain marked trees surrounding the site as described in Section 2(iii). These are examples of the psychological and emotional effects that can be meted by the justice system.

The contents of the red neon and the words admittedly is a provocative idea. But it

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25 Green (n 9).
26 Ibid.
was an attempt to use a mild provocation as a way to trigger critical thinking and encourage creative and constructive social engagement. Placement of a neon installation on a heritage building may be perceived as confronting. However, the choice of this medium was not intended as a means for desecration. It was intended to stage contrasts based on the juxtaposition of the old and the new, or the traditional and the modern, in a context inviting the modern viewer's attention to the building's history. The choice of a neon installation also signals that the work is a temporary artistic intervention rather than an 'official' addition to the structure. This approach has been used elsewhere in international public art. An example is Martin Creed's temporary neon installation entitled *Everything is Going to be Alright*.\(^{27}\) Creed's work shows that the neon is an obvious new addition and clearly distinct from the heritage fabric of the building.

The previous readings are just a few examples of the numerous interpretations that may have been made by the public when construing the words on the site. In its letter, the judiciary's focus on particular words in isolation omitted to take into account critical aspects of the artwork, such as the interrelationship of the three words, and their reference to the history of multiuse of the Old Court. In contrast to the judiciary's interpretation, the artwork was intended to acknowledge and invite enquiry into the diverse social and historical traditions associated with the past and present of the site.

According to the artist's conception of the meaning of her artwork, the words emphasised by the judiciary are not considered in isolation of their artistic context. The words are not propositional utterances. Notwithstanding this infra-propositional character, 'scared' and 'scarred' were interpreted by the judiciary and deemed inappropriate. This suggests that the judiciary opted for a narrow interpretation, which viewed the words in isolation, and as either an attack or a potential social harm. If this was indeed the judiciary's view, then they would also have considered the proposed artwork as having been created specifically about the history of the administration of justice and therefore also viewed it as a critique of the institution of justice. This reading of the artwork omits its sensitivity to evidence of the building's history of multiuse.

3. JUST INTERPRETATION AND CONTEXTUALISED COMPREHENSION

To further the examination of the Decommission Problem, let us broaden our case study and turn to the ethical and legal issues raised by the act of decommissioning a work of public art. One of the lessons that can be drawn from the case study is that a just approach to the interpretation of contested site-specific work ought to rely on an accurate historical contextualisation of the work and an accurate examination of its consequences. This idea can be synthetically expressed in a normative heuristic. There is ample evidence that heuristics are used in social and legal decision making.\(^{28}\)

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\(^{27}\) See e.g. <http://martincreed.com/site/works/work-no-289>.

The decommision of I See Red: a case study

i. The Heuristic of Contextualised Decision-making

According to the heuristic of contextualised decision-making (hereafter ‘contextualisation heuristic’), which we propose, the decision maker facing the Decommission Problem ought to comprehend the work in its historical context and examine its psychological and social consequences in order to make a just ‘commission or decommision’ decision. In what follows, reasons to adopt this heuristic are reviewed and possible objections are pre-empted.

ii. Consequentialist Justification of the Heuristic

A general rationale that justifies the contextualisation heuristic pertains to consequentialist ethics. To make a just commission decision about a contested work of public art, a consequentialist approach recommends that the decision maker ought to minimise socially harmful consequences and maximise socially beneficial consequences (including artistic flourishing) of the commission decision. To learn about consequences of an artwork that are actually or potentially beneficial or harmful, the decision maker needs to learn about the historical and artistic context of the assessed artwork. Thus, a consequentialist approach invites decision makers to engage in learning activities described by the heuristic of contextualised decision making. Consequently, the contextualisation heuristic can be inferred from an application of the core normative idea of consequentialist ethics – harm minimisation and flourishing maximisation – to the decision of commissioning or decommisioning a work.29

The philosophical justification of consequentialism is a task that goes beyond the scope of the present research. Thus, assume for the sake of the argument that consequentialism is a robust foundation for normative decision-making in practical matters.30 But it is important to note that it would be possible to appeal to non-consequentialist theories in ethics to justify the contextualisation heuristic. For example, this idea of minimising harm may also be justified on the grounds of a deontological ethics guided by a (non-consequentialist) theory of rights, such as the Kantian concept of respect of the person as an end in itself. This is because the aim of an ethical decision maker motivated by the concept of respect for the fundamental rights of a person will be to avert harms caused by instrumentalisation and disrespect.31

iii. Contextualist Justification of the Heuristic

A contextualist tradition in art theory has investigated the identification of that which ought to count as art and artistic value.32 It follows from the contextualist approach that identifying beneficial and harmful consequences of an artwork requires that the decision maker comprehend the work in its historical and intentional context and uses relevant inferences33 to identify its extant or potential social consequences. These include psychological and emotional effects, and the effects of contestation or social influence.

According to contextualist approaches to art, a historically situated comprehension of a work is necessary in order to identify it as art and, subsequently, interpret the work as conforming to specific artistic categories. These include style categories (for example, impressionism, cubism, abstract expressionism), genres (for example, dance, literary writing, digital arts), and historically recent practices (including the practice of site-specific installations such as I See Red). That is, the contextualist approach in art theory suggests that we should recognise art as resulting from intentional actions performed in a context shaped by social, economic and cultural interactions.

To return to the interpretation of I See Red, and as earlier noted (see Section 2(iv)), a historically situated comprehension of the work enables the decision maker to learn that the work pertains to specific traditions in contemporary visual art. It also informs the decision maker of the artist’s intention to encourage the audience to generate multiple interpretations of the artwork through its placement on a building of great historical significance. And, it makes clear the chosen words were relevant and carefully considered.

Whilst it is possible to interpret works of art without cognisance of these contextual factors, contextualist accounts suggest that such decontextualised interpretations are more likely to misread the key classificatory and expressive characteristics of the artwork. An example in the case of I See Red was the judiciary’s interpretation that the use of the words ‘scared’ and ‘scarred’ were inappropriate. Thus, considered in the context of the Decommission Problem, the contextualist approach suggests that a decision maker engaged with a commissioning task ought to develop an historically and socially situated comprehension of the work in order to make a just decision (Sections 3(iv)(a) and (b)). The contextualist learning about the work in its historical and social distinctiveness will enable the making of robust inferences about its psychological and social consequences (Section 3(iv)(c)). This defence of the contextualisation heuristic is psycho-historical in

the sense that it examines the relations between historico-social contexts and psychological consequences.\textsuperscript{34}

iv. Correlation Between Unjust Decisions and Decontextualisation

Another reason in support of the heuristic comes from an analysis of the harms of decontextualisation in artistic and commissioning decisions. Some of the commissioning decisions which violate the heuristic of contextualised decision-making are biased and lead to socially harmful consequences. The following sections analyse how these decontextualised decisions can cause harms and injustice by: (a) prematurely declaring the ‘death of the author’; (b) imposing legal trial and costs; and (c) committing testimonial injustice fostering economic inequities and psychological harms.

a. Harms caused by the premature announcement of the ‘Death of the Author’

A number of theories would object to the defence of the contextualisation heuristic. In contradistinction, objectors to this account would argue that it is legitimate to omit historical meanings and effects intended by artists in the interpretation and decision making about a work of art. Some objectors would restrict the meaning of an artwork to interpretations proposed by audience members.\textsuperscript{35} These views conflict with the contextualisation heuristic and its prediction that decisions about an artwork made in the absence of contextual information about the work are more likely to be ill-informed and lead to misunderstandings.\textsuperscript{36}

An example in point here is Roland Barthes’ thesis of the ‘Death of the Author’,\textsuperscript{37} which asserts that it is the reader alone that interprets the meaning of a work, the existence of which occurs in the text independently of an author. Barthes wrote that linguistics provides ‘a valuable analytical tool by showing that the whole enunciation is an empty process, functioning perfectly without there being any need for it to be filled with the person of the interlocutors (. . .) language knows a “subject”, not a “person”.’\textsuperscript{38} Similarly, in philosophy of art, anti-intentionalist theories hold that it is not necessary to take the intentions of artists into account when interpreting an artwork.\textsuperscript{39}

Barthes and others who support anti-intentionalism encourage us either not to require the presence of an artist, or to disregard their intentions when interpreting artworks. However, as noted above, interpretations of a work of art that ignore contextual information – including the intentions of the artist – can result in misunderstandings about the artwork, which can in turn occasion contested interpretations. Then, from a practical standpoint, contested interpretations combined with misunderstandings can

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\textsuperscript{34} For a discussion of the psycho-historical approach, see Reber and Bullot (n 28); and related accounts of interpretation include Dworkin (n 1), Carroll (n 3), and Levinson (n 3).

\textsuperscript{35} Davies (n 6); Levinson (n 6).


\textsuperscript{37} Barthes (n 5).

\textsuperscript{38} Ibid 145.

\textsuperscript{39} Davies (n 6); Levinson (n 6).
result in harmful consequences such as the destruction of artworks, the removal of artworks from display, and decommissions such as occurred with *I See Red*. In this case, the decommission decision further impacted the artist by removing the opportunity to participate in a public art exhibition and other related benefits. As a female artist, already disadvantaged by the income disparity, the loss of the commission significantly impacted potential financial benefit. The Australia Council for the Arts 2017 report revealed average female Australian artists’ incomes are a mere $15,400 compared to the $22,100 earned by her male counterpart.\(^{40}\)

b. **Social harms of decontextualisation in a legal trial (the case of *Brancusi vs United States*)**

The historic trial, *Brancusi vs United States*\(^{41}\) provides an apt illustration of how interpretations of the artwork ignoring contextual information can result in misunderstandings, which in turn can lead to contested interpretations and social harms. This trial related to a sculpture entitled *Bird in Space* being sent by Paris-based artist Brancusi to an exhibition in the United States. The artwork was interpreted as a utilitarian object by airport personnel who failed to recognise it as an artwork. The consequence of this contested interpretation resulted in a tax levy being applied to what would have been otherwise an exempt item (art objects were exempted from the tax in question). The point of contention was whether or not the object was art. Consequently, the court had to consider the object according to a definition of what constitutes a work of art. Consistent with the contextualisation heuristic, the legal enquirers developed a process of historical contextualisation that included an analysis of Brancusi’s intentions and their cultural context. In this process the court acknowledged legal precedent\(^{42}\) that it was not qualified to enter into aesthetic debates and thus relied on evidence and facts presented by expert witnesses. This enabled the court to maintain the authority to make the final legal judgment based on that evidence. The court found that the legal definition in use at the time was outdated because it failed to account for changes in the way artists created and expressed their ideas, and the new styles and materials they used as communication media.\(^{43}\) Consistent with the contextualisation heuristic, this aspect of the case exemplifies the necessity to comprehend the context of an artwork to offer an appropriate and just interpretation of that work.

Although the judiciary was not adjudicating whether *I See Red* is a piece of art, there are similarities in the debates that took place in the case of *Brancusi vs United States* and the interpretations and subsequent decisions made by the judiciary in the case of *I See

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42. See conclusion by Cristina S. Martinez on her analysis of the *Deseñans vs Vandergeach* trial in 1787 England, including the quote by J. Saunders in 1553: ‘if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns’, in *Buckley vs Rice-Thomas* (1554) 1 Plowd 118 6 ConLR 117; as cited in Cristina S Martinez, ‘The Painter’s Eye and the Lawyer’s Tongue: The Artist as Witness’ in Daniel McLean (ed), *The Trials of Art* (Ridinghouse 2007) 119.

Red. For example, the interpretation that the neon construction was not appropriate for heritage buildings associated with the administration of justice failed to historically contextualise the work. As was the case in the legal debate about Brancusi’s Bird in Space, the rejection of the proposed placement of the neon on the Old Court by the judicial representatives might have stemmed from a lack of familiarity with contemporary practices of art. In Brancusi v United States, the court took judicial notice of the evidence of art experts thereby avoiding decontextualisation in their legal decision making.\(^{44}\)

c. Decontextualisation as a trigger of epistemic and cascading injustice

The processes of harmful decontextualisation can be identified in the debates that led to the decommission of I See Red. First, several actual or potential harmful consequences were associated with the decision to decommission I See Red. One of these was that audience members were prevented from receiving information from the artist. They were impacted by not having the opportunity to experience an artwork that was intended to draw them to a place of cultural significance. Furthermore, the decommission prevented a public debate about the complex history of the chosen site.

With respect to the psychological consequence on the artist, the creator of I See Red was inhibited in articulating the meaning of her work and also inhibited in making contributions to society via critical ideas vis-à-vis artwork. Miranda Fricker’s instructive analysis of epistemic injustice describes this as a form of testimonial injustice.\(^{45}\) This type of injustice prevents some audience members from receiving information and knowledge from the speaker because these audience members have biased perceptions about the speaker. The harmful consequence of the decommission of I See Red was epistemic injustice engendered by testimonial injustice – art being the form of testimony.

Examining the different levels of testimonial injustice, including incidental and systematic cases may, as Fricker argues, expose other kinds of injustices.\(^{46}\) Incidental injustice is associated with cases where its social significance is highly specific to a historical context.\(^{47}\) In the case of I See Red, the judicial representatives’ resistance to the art project pertained to this one particular application alone and therefore might only have caused an incidental testimonial injustice within this context.

According to Fricker, the concept of systematic injustice refers to specific types of ‘identity prejudice’, such as ‘tracker prejudice’, which ‘track the subject through different dimensions of social activity – economic, educational, professional, sexual, legal, political, religious, and so on’.\(^{48}\) The importance of systematic injustice, in relation to Fricker’s study, is its capacity to reveal the serious implications of prejudice in testimonial injustice. Systematic testimonial injustice obstructs a speaker’s capacity to contribute knowledge.

\(^{44}\) Judge Waite stated ‘we hold under the evidence that it is the original production of a professional sculptor and it is in fact a piece of sculpture and a work of art according to the authorities above referred to’: Magrit Rowell and André Paleologue (eds), Brancusi vs United States: The Historical Trial 1928 (Vilo Publishing 1999) 115; as cited in Daniel McLean (ed), The Trials of Art (Ridinghouse 2007) 53.

\(^{45}\) Miranda Fricker, Epistemic Injustice: Power and the Ethics of Knowing (OUP 2007).

\(^{46}\) Ibid ch 1.

\(^{47}\) Ibid.

\(^{48}\) Ibid 27.
to society, which Fricker refers to as '( . . ) a serious form of unfreedom in our collective speech situation'.

Artists, and particularly female artists, are vulnerable to tracker prejudices that affect their professional and economic activity. For example, views such as the ‘Death of the Author’ and anti-intentionalism encourage us to either not require the presence of an artist, or to disregard their intentions when interpreting artworks. Female artists are underrepresented in most major international art galleries. In the case of I See Red the exclusion of the artwork could have affected the perception of the artistic profession, and therefore we might suspect that it could indicate a degree of prejudice towards the social activity of an artist qua profession. The case of I See Red provides an example of where disregarding the artist’s intention (testimonial injustice) resulted in the subsequent interpretation which misunderstood the work and led to its decommission.

Fricker is developing a view of epistemic injustice that examines forms of testimonial injustice that may ultimately result in severely unjust outcomes, such as oppression. Whilst I See Red had a less severe outcome, it nevertheless provides opportunity for consideration of the forms and consequences of injustice that may occur in an everyday Western democratic society. In the case of I See Red, the decontextualised interpretation comprised of tracker prejudice and prejudice relating to social identity. These prejudices, combined with other disadvantage-eliciting views (e.g., the ‘Death of the Author’ and anti-intentionalism), can have harmful consequences. Thus, the decontextualised interpretation becomes epistemically culpable.

The harmful consequences of decontextualised decision making are highlighted in the case of I See Red. The defensible justification for the decommission exposes how the seemingly innocuous act of interpreting an artwork precluded from the historical context and the artist’s intended meaning can engender insidious forms of systematic testimonial injustice. Returning to the Decommission Problem, it can be concluded that any justification for the decommissioning of a contested work of public art is likely to benefit from an adoption of the heuristic of contextualised decision making.

4. CONCLUSION

This chapter investigated the impact of decisions relating to contested interpretations of public art and addressed the Decommission Problem. It argued that decontextualised

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49 Ibid 43.
50 Throsby and Petetskaya (n 40).
51 Barthes (n 5).
52 Davies (n 6); Levinson (n 6).
54 Fricker (n 45) refer analogy 58.
55 Barthes (n 5).
56 Davies (n 6); Levinson (n 6).
interpretation and decision-making about a contested work of public art are less likely to generate socially just decisions regarding commission or decommission (harmful decontextualisation). This was justified by a contrast with the heuristic of contextualised decision-making, which invites an integrative psycho-historical interpretation of artworks. Contextualised processes of decision-making have the propensity to enable socially just commissioning decisions— that is, decisions that minimise harm and maximise social benefits. In turn, this approach offers an elegant strategy to address the Decommission Problem. Accordingly, the justification for the decommission of a contested work ought to contain an accurate consideration of the historical context and intended artistic meaning and an accurate examination of its psychological and social consequences.

In the case of *I See Red*, the interpretations positing an attack against the legal institution, desecration of the Old Court, and general lack of familiarity with contemporary art, might have been avoided through use of the heuristic of contextualised decision-making. The judiciary’s decision was, in significant ways, decontextualised from the contemporary artworld. As predicted by our analysis of the harms of decontextualisation, the decontextualised decommission of *I See Red* led to socially harmful consequences such as depriving the audience from viewing the artwork and receiving information from the artist. These findings raised philosophical and ethical concerns regarding the consequence of epistemic injustice in the artworld.

These insights, gained from the case study of *I See Red* and related cases, may be of assistance to improve the decisions regarding the commission or decommission of a contested artwork. The findings from this chapter could be incorporated into standards of procedural fairness for administrative decisions about art not dissimilar to the ‘requirements of procedural fairness’ in law regarding administrative decisions. Furthermore, the conclusion could be used to encourage decision-makers in authoritative positions to practice epistemic trust to ensure that artists (via their public art) have the opportunity of ‘putting knowledge into the public domain’.

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57 According to Deane J, the term ‘requirements of procedural fairness’ is used ‘when referring to the fairness and detachment required of a person entrusted with statutory power or authority to make an administrative decision which may adversely and directly affect the rights, interest, status or legitimate expectations of another in his, her or its individual capacity’. *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 366 (Deane J).

58 Fricker (n 45) 43.