

# LEGAL COMMENTARIES

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## A Registry for Movable Cultural Property of Significant Importance to Switzerland: Limit to the Cross-Border Movement and Right of Ownership

**Abstract:** Switzerland now has a federal registry of its movable cultural property of significant importance. This measure is based on the national legislation implementing the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Only Swiss cultural property or property with a close link to Switzerland is targeted. The registry includes, *inter alia*, archaeological objects, sculptures by Alberto Giacometti, paintings by Ferdinand Hodler, and also a correspondence by Albert Einstein from the period when he lived in Berne and discovered the theory of relativity. The inclusion of cultural property in the federal registry has two major effects: it restricts both cross-border movement and property rights. On one hand, the permanent export of a listed cultural property is prohibited. Although a temporary export may be authorized for research, conservation, or exhibition purposes. On the other hand, registered cultural property becomes *res extra commercium*: acquisitive prescription, even in good faith, does not apply. As a result, registered cultural property benefits from enhanced protection against permanent loss due to theft and illicit export.

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## Introduction

In 2003, Switzerland became the 102nd State to ratify the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“1970 UNESCO Convention”).<sup>1</sup> By adhering to this text, each Member State undertakes to preserve its movable cultural heritage by enacting concrete norms intended to protect this cultural heritage, in particular from theft, looting, and illegal exports or imports.<sup>2</sup> Amongst others, the Convention recommends the identification of the inalienable cultural heritage of each State and its inventory as a concrete means of protection.<sup>3</sup>

The 1970 UNESCO Convention is non-self-executing; hence each Member State is responsible for transposing its content into national law. Switzerland assumed this responsibility by adopting the Cultural Property Transfer Act (CPTA)<sup>4</sup> and its implementing ordinance (CPTO),<sup>5</sup> both of which entered into force in 2005. Both pieces of legislation provide for the establishment of a registry for cultural property owned by Switzerland. To enable its implementation, Switzerland has also adopted the Cultural Property Registry Ordinance (CPRO)<sup>6</sup> (entered into force in 2014), which sets out the criteria and procedure for registration and cancellation.

The imminent publication of the registry of movable cultural property of significant importance to Swiss cultural heritage was first announced at the international symposium held in Geneva in November 2018 entitled *Cross Border Movement of Works of Art in Europe: Freedom or Constraints*.<sup>7</sup> Today, the registry, online since December 2018, contains 76 records.<sup>8</sup>

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<sup>1</sup> 14 November 1970, 823 UNTS 231. As of today [November 2019], 140 States have become parties to the Convention.

<sup>2</sup> See Article 2 of the 1970 UNESCO Convention.

<sup>3</sup> See Articles 5(a) and (b), 6, and 13(d) of the 1970 UNESCO Convention.

<sup>4</sup> *Bundesgesetz über den internationalen Kulturgütertransfer*, 20 June 2003, Systematische Rechtssammlung 444.1.

<sup>5</sup> *Verordnung über den internationalen Kulturgütertransfer*, 13 April 2005, Systematische Rechtssammlung 444.11.

<sup>6</sup> *Verordnung über das Kulturgüterverzeichnis des Bundes*, 21 May 2014, Systematische Rechtssammlung 444.12.

<sup>7</sup> See the programme of the symposium: <https://www.art-law.org/fr/archives/conf-9novembre> [accessed: 25.09.2019].

<sup>8</sup> See the website of the Swiss Federal Office of Culture: <https://www.bak.admin.ch/bak/en/home/cultural-heritage/transfer-of-cultural-property/federal-registry.html> [accessed: 25.09.2019].

One may ask which kinds of cultural goods are recorded in the registry and what the effects of the registration are. This present contribution – a summary of the information presented by the author during the symposium – aims to answer these questions. In doing so, it will start by giving the legal requirements for registration and cancellation. Following this, the legal effects of registration on cross-border movement, as well as those on the right of ownership, will be addressed. Both elements constitute key effects of the registration of a cultural property in the federal registry.

## The Legal Requirements for Registration or Cancellation

Movable cultural property belonging to Switzerland<sup>9</sup> and of significant importance for its cultural heritage is recorded in a federal registry.<sup>10</sup> Cultural property is defined by Swiss law as significant property from a religious or universal standpoint for archaeology, pre-history, history, literature, arts, or sciences and belonging to the categories listed in Article 1 of the 1970 UNESCO Convention.<sup>11</sup> Cultural property registered in the federal register therefore falls into one of these categories.

According to the definition set by the CPRO, cultural property is of significant importance for Switzerland if it fulfils one of the following criteria: artistic, art historic, or art scientific importance; uniqueness or rareness; importance of craftsmanship; iconographic importance; historic importance; relevance in the context of a collection or of material value.<sup>12</sup> In practice however, every registered object meets several of these criteria. Only Swiss cultural objects or those with a very close link to Switzerland have been registered. Thus, not only are there archaeological or ecclesiastical pieces, sculptures by Alberto Giacometti, and paintings by Ferdinand Hodler, but also a correspondence of Albert Einstein dating from the period when he resided in Berne while writing his theory of relativity.

Furthermore, the content of the registry is not immutable. There are three situations where the cancellation of a cultural property from the federal registry is possible. First, if it loses its significant importance for the Swiss cultural heritage, for example in the case of a forgery or of a reattribution.<sup>13</sup> Secondly, grouping within

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<sup>9</sup> According to Article 1(c) CPTO, the following Swiss federal institutions are concerned: The Swiss National Museum, its branches and field offices; The Swiss National Library as well as the Swiss Literary Archive and the Dürrenmatt Centre; The Oskar Reinhart Collection “Am Römerholz” in Winterthur; The Museo Vela in Ligornetto; The Graphics Collection from the Federal Institute of Technology, Zurich; The Art and Cultural Property Collection of the Federal Gottfried Keller Foundation; The Art Collection of the Confederation (Art and Design); The Funds of the Federal Archives for Historical Monuments.

<sup>10</sup> See Article 3(1) CPTA.

<sup>11</sup> See Article 2(1) CPTA.

<sup>12</sup> See Article 2(2) CPRO.

<sup>13</sup> See Article 3(3)(a) CPTA.

a set can be another reason for cancellation.<sup>14</sup> In this case, the cultural property resumes its place in its initial context (a collection, a series, a building, etc.). Lastly, cancellation is possible if Switzerland loses its property rights or renounces them,<sup>15</sup> when for instance provenance research shows that the cultural property has come from a theft or looting.<sup>16</sup>

## The Legal Effects of Registration on Cross-Border Movement

In principal, works of art are intended to move. However, the definitive export from Switzerland of the cultural property registered in the federal registry is prohibited.<sup>17</sup> Nevertheless, a temporary export may be possible when it occurs for the purposes of research, conservation, exhibition, or for similar reasons.<sup>18</sup> In this case, a temporary export authorization must be requested from the Swiss Federal Office of Culture, at the latest 30 days prior to the intended export from Switzerland.<sup>19</sup>

Without the required export authorization, a cultural property is deemed to have left Switzerland illegally. In such a situation, the Swiss Government can claim the right of repatriation vis-à-vis all States having ratified the 1970 UNESCO Convention.<sup>20</sup> Moreover, the export being illicit, the person responsible for the customs declaration is liable to criminal prosecution ranging from a simple fine to one year's imprisonment.<sup>21</sup>

Thus, the registration of a cultural object in the federal registry restricts its cross-border movement in order to strengthen its protection, particularly in the event of theft and illegal export.

## The Legal Effects of Registration on the Right of Ownership

The registration of a cultural property in the federal registry also affects the right of ownership.<sup>22</sup> The cultural property may neither be acquired by adverse possession nor in good faith. This is an exception to the rules governing the acquisition

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<sup>14</sup> See Article 3(3)(b) CPTA.

<sup>15</sup> See Article 3(3)(c) CPTA.

<sup>16</sup> *Botschaftüber die UNESCO-Konvention 1970 und das Bundesgesetzüber den internationalen Kulturgütertransfer (KGTG)* [Message on the 1970 UNESCO Convention and the Cultural Property Transfer Act (CPTA)], 21 November 2001, Bundesblatt 2002 505, p. 545.

<sup>17</sup> See Article 3(2)(c) CPTA.

<sup>18</sup> See Article 5(2)(b) CPTA.

<sup>19</sup> See Articles 5(1) CPTA and 3(1) CPTO.

<sup>20</sup> See Articles 2(3) and 6(1) CPTA. The CPTA does not mention return claims against non-signatory States of the 1970 UNESCO Convention, which suggests the application of their national law.

<sup>21</sup> See Article 24(1)(d) CPTA.

<sup>22</sup> See Article 3(2) CPTA.

of cultural property in good faith through the passage of time (in Switzerland a 30-year period).<sup>23</sup>

The acquisition of ownership rights is also excluded through the passage of time in the case of an illicit sale of a cultural property registered in the federal registry. In such cases, the buyer, even if having made a purchase in good faith, will at no time become the rightful owner and may assert his or her rights for breach of warranty of title.<sup>24</sup>

Moreover, the Government's claim for return in the case of an illegal export is not subject to a statute of limitation. The imprescriptibility of this action is an exception to the period applicable to all other cultural property ownership claims, which is time-barred by one year from the moment when the owner has knowledge of the location of the object and the identity of the possessor, and at the latest by 30 years since loss of its possession.<sup>25</sup>

Thus, the protection of Switzerland's right of ownership of registered cultural property is strengthened, in particular in the event of theft and illegal export.

## Concluding Remarks

By publishing a federal registry of Swiss cultural property of significant importance, Switzerland has taken a further step towards the effective implementation of the 1970 UNESCO Convention. It confirms its willingness to strengthen the protection of its national cultural property by limiting its cross-border movement and illegal appropriation.

In doing so, Switzerland has first taken the decision to register only Swiss cultural property or property with a particular historical or artistic close link with Switzerland, thus excluding cultural property from abroad. Secondly, the cultural property must be of significant importance for Switzerland's cultural heritage, in accordance with the criteria laid down by Swiss law. Finally, cultural property so classified benefits from enhanced protection against illicit export and illegal appropriation. Its definitive export from Switzerland is forbidden and it becomes *res extra commercium*.

The registry not being immutable, cultural property that no longer meets the legal criteria for registration will be removed, although it should be noted that such a case should remain rare. At the same time, the registration of a new cultural object remains possible at any time. The federal registry is a new means to enhance

<sup>23</sup> See Article 728(1) and (1ter) of *Schweizerisches Zivilgesetzbuch* [Swiss Civil Code], 10 December 1907, Systematische Rechtssammlung 210 (SCC).

<sup>24</sup> See Articles 196a and 210(1bis) of *Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht)* [Federal Act on the Amendment of the Swiss Civil Code (Part Five: Swiss Code of Obligations)], 30 March 1911, Systematische Rechtssammlung 220.

<sup>25</sup> See Article 934(1bis) SCC.

protection of Switzerland's national cultural heritage, which shall become part of the global mosaic protecting world cultural heritage.

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