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éditorial *Nouvelles de la fondation*

Chères et chers Membres,

Une année hors du commun va bientôt s'achever, et nous espérons vivement que l'année 2021 sera plus sereine et positive, notamment pour les acteurs du monde des arts.

Compte tenu des circonstances incertaines dues à la pandémie, nous sommes d'autant plus heureux d'avoir pu maintenir en grande partie nos activités. Malgré les difficultés, notre conférence annuelle avec le Centre du droit de l'art qui cette année portait sur le nouveau droit d'auteur, ainsi que plusieurs événements de la Responsible Art Market initiative à Genève, Londres et New York ont été réalisés, pour certains virtuellement. Aucune interruption non plus dans la publication de notre Art Law Magazine qui vous est parvenu selon le calendrier habituel.

Cette nouvelle édition revient sur un arrêt du Tribunal fédéral concernant le traitement d'une

The Foundation's News

Dear Members,

An extraordinary year will soon be drawing to a close, and we very much hope that 2021 will be more serene and positive, especially for those involved in the world of the arts.

Given the uncertain circumstances due to the pandemic, we are all the more pleased to have been able to maintain a large part of our activities. Despite the difficulties, our annual conference with the Art-Law Centre, which this year focused on the new copyright law, as well as several events of the Responsible Art Market initiative in Geneva, London and New York were held, some of them virtually. There was also no interruption in the publication of our Art Law Magazine, which reached you according to the usual schedule.

collection d'art dans le cadre d'un divorce et la question épineuse de l'évaluation de cette collection pour les besoins d'une répartition entre les ex-époux. Le juge a préféré une expertise produite par l'un des conjoints aux moyens auxquels recourent généralement les marchands d'arts (prix de vente atteints précédemment pour les œuvres du même artiste). Cette décision démontre une fois de plus la dichotomie entre les réalités du marché et les principes qui s'appliquent devant le juge.

Vous trouverez également dans nos pages une analyse du régime juridique et fiscal de la détention d'une collection d'art par une entreprise, une structure qui bénéficie d'une plus grande latitude dans ses activités que les « structures classiques », principalement charitables, telles que les fondations et associations.

L'année 2021 débutera par notre traditionnel colloque annuel de la Responsible Art Market qui portera notamment sur les changements majeurs auxquels le marché de l'art a été confronté depuis le début de la pandémie, tels que la réalisation de ventes quasiment exclusivement en ligne, le rôle accru des nouvelles technologies, ou encore une communication à distance entre marchands d'art et clients. Ce colloque traitera également des

This new edition looks back at a decision of the Federal Court concerning the treatment of an art collection in the context of a divorce and the thorny question of the valuation of this collection for the purposes of a division between former spouses. The judge preferred an expertise produced by one of the spouses to the means generally used by art dealers (sale prices previously achieved for works by the same artist). This decision demonstrates once again the dichotomy between market realities and the principles that apply before a judge.

You will also find in our pages an analysis of the legal and tax regime for the holding of an art collection by a company, a structure that enjoys greater latitude in its activities than "traditional", mainly charitable structures, such as foundations and associations.

The year 2021 will begin with our established annual Responsible Art Market conference, which will focus on the major changes that the art market has faced since the beginning of the pandemic, such as the realization of sales almost exclusively online, the increased role of new technologies, and remote communication between art dealers and clients. This conference will also deal with the global perspectives of

perspectives globales du marché, en particulier liées au Brexit qui sera alors finalement consommé. Le programme détaillé de cette conférence qui aura lieu fin janvier vous sera adressé très prochainement.

Toute l'équipe de la FDA vous souhaite de très belles fêtes et se réjouit de vous retrouver l'année prochaine pour une nouvelle année riche en activités.

Avec tous nos meilleurs vœux pour 2021.

Pour la FDA :

Anne Laure Bandle, directrice

the market, in particular in relation to Brexit, which will eventually be consumed. The detailed programme of this conference, which will take place at the end of January, will be sent to you very soon.

The entire ALF team wishes you a very happy holiday season and looks forward to seeing you again next year for a busy new year.

With all our best wishes for 2021.

On behalf of the ALF:

Anne Laure Bandle, director

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Artwork has no “average price” – how Switzerland’s Supreme Court evaluates a divorcing couple’s collection of paintings

*By Josef Alkatout**



The following pages will comment a final decision of Switzerland’s Supreme Court published on September 1st, 2020, dealing with the interplay of art and family law.

At first sight it looks like one of Switzerland’s regular 16,000+ divorce cases per year which end up in court:¹ a husband and a wife in the canton of Bern separated after a marriage that had lasted for a quarter of a century.

The husband is an entrepreneur, whereas the wife “contributed” to his business without ever having received an arm’s length salary for her services. To ensure a yet reasonable interspousal allocation of the husband’s assets in case of a divorce, the childless couple had entered into a postnuptial agreement halfway through their marriage. Said agreement provides for a 50/50 partition of the husband’s separate property – voluntary and in equity.

During divorce proceedings, however, the wife asserted that her wealthy parents have been sending thousands of Deutschmark – the hard reserve currency at the time – from then Czechoslovakia to the couple. The monies were supposedly invested in “furnishings” of which the wife therefore claimed a higher share than just half at the time of divorce. Said postnuptial agreement, on the other side, records that these furnishings were sole property of the husband, acquired even before marriage. In case of divorce, the agreement allows for a 50/50 split – which is so ordered by the court.

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¹ Final divorce ruling of the Swiss Supreme Court TF 5A_550/2019 dated September 1st, 2020.

Artworks are “furnishings”

This is where art comes into play:² unlike “tens of kilos” of pure gold, apparently used by the couple for “day to day expenses” and classified by the judges as “financial assets”, the court included a collection of paintings in said shareable “furnishings” category. This does not go without saying given that the artworks were pieces by Harlamoff, Herring, Anker and Hague worth hundreds of thousands of Swiss francs. One could claim that artwork of a certain standing cannot be dealt with as mere decoration but is rather purchased, collected, stocked, traded and described as an investment with the expectation of an increase in value. Moreover, how would the court have categorized a domestically held Koi fish, an oil field hidden under a couple’s property, or a vintage Ferrari – all worth millions? And is it reasonable to qualify – as current law does – jewelry worth as much as a dwelling as part of personal belongings, amongst one’s T-Shirts?³ Be it as it may, in the case at hand there was indeed no particular interest for either spouse to put forward an alternative category for precious artworks, as the postnuptial agreement dealt with all kinds of their goods. However, the Supreme Court’s finding that such pieces are part of simple “furnishings” set a precedent

which might become pivotal in the future.⁴

Value to be determined by an external expert

Once established that half of the paintings’ fair market value was to be allocated to the wife, the judges were tasked to find a way to precisely determine the shareable amount (the husband did not want to sell the pieces, so, the court could not base itself on a transaction price). The ruling evokes Swiss procedural law which provides that for non-judicial questions that judges cannot answer from their general life experience, an external expert is to be commissioned. In most cases, this is about real estate specialists who determine the fair market value of a property; or business accountants that put a price tag on an unlisted company. Concerning realty, sales in the neighborhood are taken into account for comparison purposes, the amount of rental income is a reliable indicator, renovation bills are partly added, and a whole list of additional factors increasing (respectively decreasing) the figures is available. With respect to the ascertaining of an unlisted company’s value, the process is as standardized as it is mathematical,

² Section 8 of the decision.

³ Nuspliger, ZGB-Kommentar, ad. Art. 198, p. 378, N2, 2016.

⁴ For example, it is common that the spouse who obtains attribution of the formerly common dwelling also obtains the right to use its furnishings. We can also imagine a case where a prenuptial or postnuptial agreement provides for the “furnishings” to be attributed to one spouse and “investments” to the other. Finally, furnishings are insured under a different scheme than other valuables, which leads to a particular pricing model of insurance providers.

so that only in exceptional cases the accountants' calculation is even subject to discussion.

In the present case, the court duly mandated an independent expert to establish a report on the paintings' value. The final ruling does not disclose the result of said report but the reader learns that the wife repeatedly requested a second opinion – throughout the three instances – because in her view, the estimates are too low. In vein. The judges did give her the possibility to ask questions on the appraisal's foundation, but they refused to order a second opinion because the wife failed to prove “obvious deficits” in the expert's work.

Art price database is no reliable source

The wife saw no other way but to do her own research in order to support her claim. She filed extracts of a renowned art price database (Artnet) with the court. The online platform is used by sellers, buyers, brokers and galleries worldwide to access records of countless past and recent transaction prices as well as open offers. The extracts show that other paintings from the same artists have achieved sales prices that are significantly higher than the figures of the expert's report. But the judges remained unimpressed: they hold that different paintings from the same artist cannot be equalized, and that no matter

how similar paintings might be, there cannot be such a thing as an “average price” in the field of art. The market for artwork is supposedly extremely volatile and highly dependent on offer and demand. In any event, interpreting external information coming from the online platform and opposing it to the expert's findings would mean for the court to replace the expert's opinion by its own, which case law would not allow. According to the judges, their task could not be to check the expert's work as they have to act on the assumption that an expert applies the latest state of the art.

The court's arguments are worth being carefully examined: while a connoisseur might agree that two different paintings cannot be equalized from an artistic point of view, the court's task was a different one, namely to give a rationally satisfying answer to the question of the economic value of such paintings. While for some people a piece of art might be priceless, the rule of law does not allow a court to hide behind artsy contemplations, but obliges it to impose objectivity between the parties' competing monetary interests. In this respect, a comparison between several paintings of the same artist seems all but quixotic. It rather appears that the entire oeuvre of a specific artist is placed in the same price range. Neither a van Gogh nor a Gerhard Richter can be found on the flea market. And the other way around, no painter can sell only a small

selection of her work at skyrocketing prices while there is no demand for her other pieces. Moreover, once an artist has made it to the top tier, even her past yet unknown pieces all of a sudden increase in value. When it comes to the evaluation of single work of art, the idea of average prices might therefore sound more outrageous than it actually is.

Uniqueness of the art market

One also has difficulties to agree with the court's other arguments: neither the alleged volatility of the art market nor its dependency on offer and demand exclude a comparison with past sales. Are other markets really different? No house is like another but the pricing policy in real estate nevertheless relates to comparable transactions in the field. And as usual, the more luxurious the product, the less comprehensible the price. In the case at hand, it is likely that the author of the disputed report used some sort of comparative approach herself when she shaped her opinion on the pieces' market price – a fact which is neither denied nor confirmed in the ruling.

Ultimately, in order to prevent replacing the expert's opinion by the one of the judges, the court could have commissioned a second report; given the wife's express requests, she would have had to accept to cover the related costs. A similar outcome than the first

report would have deprived the wife of her grounds for appeal. In case of slight differences in value, the judges could have applied the midpoint of the two figures. However, if a second opinion had given a considerably different result from the first one, it would have been up to the parties to agree on a potential third expert.⁵

1000% price difference

The court, however, chose to ignore the fact that actual sales (and sales offers) of similar paintings published on the specialized platform and used by market actors achieved prices which are up to 1000% higher than the numbers put forward by its sole expert. When if not in such a case should judges dig deeper for an estimate that would be beyond reproach?

But there are more reasons why this final divorce judgment may leave the wife with a bitter aftertaste: at the time of drafting the postnuptial agreement, the couple meant well by itemizing parts of the list of assets supposed to be graciously divided between the two of them. However, what did they mean when they intended to exclude from sharing the "husband's shares in company X"? The 20% ownership

⁵ See hereto also Peter, Henry, Duvoisin, Paul-Benoît, *De la valeur et du prix des œuvres d'art*. In: Gabus, Pierre & Bandle, Anne Laure. *L'art a-t-il un prix ? L'évaluation des œuvres d'art, ses défis pratiques et juridiques* = The art of pricing the priceless: on the valuation of art, its challenges and liabilities. Geneva, 2014, p. 119-155, at 153.

that he had acquired at the time the postnuptial agreement was entered into, or the 100% husband held by the time he asked for divorce? And which loans did they wish to “deduct from the value of husband’s real estate” given that he has reimbursed them partially over the years and that one of the loans was granted to him by his own mother who – so the wife – has no intention to claim it back? The court ruled against the wife with respect to both questions and allocated her the smaller share.

Eternal court battle

What was envisaged as a gesture of fairness at a time when their marriage was still functioning, transformed into an eight years court battle, numerous interlocutory judgments and exorbitant lawyers’ bills. Disputes about money are one of the top three reasons for marriages to break down, therefore, couples with prenuptial or postnuptial agreements usually last longer and, as the case may be, manage to divorce more peacefully. However, how waterproof must an agreement be to dissuade the spouses from litigating at all? And how well can good faith drafting anticipate a change of economic circumstances in the lives of the parties for decades ahead? A rule of thumb which can be taken away from the present case is that when drafting a nuptial agreement, the devil is not only in the detail – it is in the numbers.

Implications juridiques et fiscales de la détention d'une collection d'art par un société commerciale en Suisse

Par Arielle Dubois*



1. Introduction : différentes structures juridiques

L'attribution d'une collection d'art à une société de capitaux peut paraître dénuée de bon sens, l'art et la recherche de bénéfices n'étant en principe pas liés. Néanmoins, pour des raisons commerciales, fiscales et successorales, ces entités juridiques procurent de véritables atouts, tels que la liberté économique (art. 27 al. 2 Cst).

Ces dernières années ont marqué la restructuration de certaines fondations

d'art en société de capitaux. La Fondation Beyeler fait dorénavant partie d'une société anonyme sous le nom de Beyeler Museum AG établie en 2007 afin que cette collection d'art soit exploitée à but non lucratif avec son restaurant et son art shop¹. Il en est de même pour le Musée Tinguely qui détient la collection de l'artiste défunt². Son but est de garantir le fonctionnement du musée et, comme indiqué sur son extrait du registre du commerce, «*ses tâches principales sont la présentation permanente et la supervision des œuvres de Jean Tinguely, l'organisation d'expositions spéciales et le prêt d'œuvres à d'autres institutions. La société peut exploiter une boutique de musée et un restaurant de musée, participer à d'autres entreprises et acquérir, gérer et vendre des droits de propriété intellectuelle et des terrains*»³.

Le but de la Hess Art Collection GmbH à Köniz (Berne), illustre la grande liberté dont peut bénéficier une collection d'art lorsqu'elle est détenue par une société de capitaux: «*L'objectif*

1 Registre du commerce du canton de Bâle-Ville, AG, DV Bern, Beyeler Museum AG <https://bs.chregister.ch/cr-portal/auszug/auszug.xhtml?uid=CHE-113.341.155> (consulté le 10 août 2020)

2 Idem.

3 Idem.

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de la société est de collecter, d'acheter, de vendre et de louer des objets d'art. La société peut créer des succursales et des filiales en Allemagne et à l'étranger et peut acquérir des participations dans d'autres sociétés en Allemagne et à l'étranger...»⁴.

La société anonyme (SA)

Le collectionneur bénéficie d'une liberté totale quant aux activités qu'il souhaite entreprendre avec sa société. Il peut ainsi organiser des expositions, vendre ou louer ses œuvres, soutenir des artistes, créer un musée ou des plateformes d'art. Ces activités sont néanmoins soumises au contrôle, certes limité, des actionnaires, qu'ils exercent à travers leur vote (art. 698ss CO).

Les sociétés anonymes peuvent être ouvertes ou fermées au public, dans ce dernier cas les actions étant détenues par un cercle limité d'actionnaires. En Suisse, la société anonyme fermée est la forme la plus répandue. De nombreuses petites et moyennes entreprises (PME) choisissent cette forme pour exercer leur activité contrairement aux pratiques étrangères⁵. En 2004, les entreprises familiales représentaient

88,14 % de ces entreprises privées⁶. Les sociétés à un seul actionnaire, appelées aussi sociétés unipersonnelles, sont soit des alter ego d'un entrepreneur individuel soit des filiales intégrées au sein d'un groupe de sociétés, et sont également un type de sociétés anonymes fermées⁷. Ces deux modèles de sociétés anonymes répondent aux attentes de certains collectionneurs.

Une collection d'art peut être l'objet d'un apport en nature à la société ou être transférée à titre de créance. Ainsi, une fois la collection attribuée à la société sous forme d'apports en nature, elle en sera propriétaire de manière définitive et pourra en disposer librement dès son inscription au registre du commerce (art. 634 al. 2 CO); le collectionneur en perdra définitivement la propriété. De plus, les principes propres en lien avec une fondation qualifiée⁸ seront appliqués⁹.

D'un point de vue successoral, le régime est particulièrement intéressant et constitue souvent, pour les petites entreprises, une des motivations principales au choix de cette forme

4 Registre du commerce du canton de Berne AG, DV Bern, Hess Art Collection GmbH, <https://be.chregister.ch/cr-portal/auszug/auszug.xhtml?uid=CHE-100.921.159> (consulté le 10 août 2020).

5 En Suisse, contrairement aux pays voisins, la forme de la société anonyme n'est pas réservée aux multinationales. Rouiller Nicolas, La société anonyme suisse : droit commercial, droit comptable, responsabilité, loi sur la fusion, droit boursier, droit fiscal, 2ème édition, Genève 2017, p.5.

6 D'après une étude faite par l'Institut suisse pour les PME de l'Université de Saint-Gall publiée ; Meier-Hayoz Arthur/Forstmoser Peter, Droit suisse des sociétés : avec mise à jour 2015, Berne 2015, §16 N 673.

7 Ibidem §16 N 39.

8 Une société anonyme fondée « avec apport en nature » (Sacheinlagegründung), est appelée une fondation qualifiée dans le cas où un des actionnaires ou tous libèrent leur apport en nature. Elle est tolérée pour les sociétés anonymes à certaines conditions strictes posées entre autres par l'article 628 al. 1 CO et 634 CO.

9 Rouiller (op. cit.), N 67a.

juridique¹⁰. Celle-ci permet de partager les actions entre les héritiers en fonction de leurs droits successoraux. De ce fait, la SA s'avère intéressante pour un collectionneur qui détient une œuvre d'art à forte valeur, qui serait impossible de partager (par ex. un van Gogh). Cette œuvre pourra être partagée entre ses héritiers en leur attribuant des parts à chacun. Une vente sera évitée. Le partage de l'entier de sa collection, à parts égales, entre ses descendants est également possible avec la société anonyme familiale. Au regard de la succession d'entreprise, attribuer des parts minoritaires à chaque actionnaire paraît pertinent. En théorie, ces dernières sont bien évidemment librement cessibles et transmissibles selon la théorie de la libre transmissibilité de l'article 684 al. 1 CO, malgré une convention d'actionnaires prévoyant des droits d'emption ou préemption réciproques. Des réserves statutaires peuvent être prévues dans les limites de la loi. D'un point de vue pratique, ces parts sont peu attractives sur le marché et ont peu de chances d'être vendues.

Au regard du droit comptable, l'amortissement d'une œuvre d'art jouera un rôle uniquement lorsque la valeur de l'œuvre diminue. En pratique, cette opération est très difficile, car la valeur vénale d'une œuvre est difficile à déterminer, et celle-ci augmente en principe avec le temps sauf dans le cas

où l'œuvre subit une décote importante, aspect qui devra être prouvé par le collectionneur.

La société anonyme, lorsque les dispositions précitées sont prises, apparaît comme un véhicule juridique qui répond à de nombreuses motivations du collectionneur : la pérennité du but initial, une liberté dans la conduite des opérations commerciales et un partage successoral adéquat.

La société à responsabilité limitée (Sàrl)

La Sàrl d'utilité publique est une forme nouvellement créée qui est particulièrement intéressante pour un collectionneur.

Un devoir de loyauté est prévu pour les associés de la Sàrl – différence majeure avec le droit de la SA, selon l'article 803 al. 2 CO. De plus, les associés gérants ont une véritable prohibition de concurrence (art. 803 al. 2 CO *in fine* et 776a al. 1 ch. 3 CO) et des prestations accessoires peuvent être imposées aux associés ; ainsi peuvent notamment être prévues une obligation de maintenir l'unité de la collection d'art, de l'entretenir et d'assurer son maintien, ou encore d'organiser des expositions.

À titre de synthèse, la Sàrl octroie au collectionneur d'une part une grande liberté dans le choix du management et des activités en lien avec sa collection d'art et d'autre part un certain contrôle

10 Meier-Hayoz/Forstmoser (op. cit.), § 16 N 675.

sur le destin de sa collection d'art. Cette «double facette» est très bénéfique et permet de répondre à diverses attentes du collectionneur.

2. Fiscalité

Transfert de la collection d'art à sa propre entité juridique : impôt sur les successions et donations

En principe, l'affectation d'une collection d'art à sa propre entité juridique entraîne nécessairement l'impôt sur les successions et donations et cela au plus haut barème, étant donné que cette structure est considérée comme un tiers par rapport au *de cuius*.

Partant, affecter sa collection à son propre véhicule juridique peut paraître dénué de sens lorsque des taux d'imposition sont très hauts. A titre illustratif : sous réserve de certaines législations cantonales qui prévoient des montants minimums exonérés d'impôts, les taux maximums d'imposition pour les tiers sont les suivants: à Bâle-Ville (49,5%), Berne (40%), Genève (26% + 110% de centimes additionnels en 2019: 54,6%), Grisons (10% + 25% communal: 35%), Nidwald (15%), Schaffhouse (40%), Vaud (25% + 100% de l'impôt cantonal au niveau communal: 50%), Zoug (20%) et Zurich (36%)¹¹.

Cependant, il existe quelques cas de figure où les successions et donations sont exemptées d'impôts ou sujettes à un impôt très bas, notamment :

- 1) Lorsque le transfert de la collection se fait sous forme d'apports en nature à la société de capitaux (avec ses contraintes juridiques : publication au RC, entre autres).
- 2) Lorsque le transfert se fait dans un canton ne connaissant pas d'impôts sur les successions et les donations, ou à des taux très faibles. En 2020, les cantons d'Obwald et de Schwyz sont les seuls à ne pas taxer les successions et les donations de manière générale¹². Le canton de Lucerne ne perçoit pas d'impôts sur les donations, sous réserve des donations effectuées dans les cinq années précédant le décès du donateur qui sont assujetties à l'impôt sur les successions¹³.
- 3) Lorsque la société de capitaux a un but d'utilité publique et est au bénéfice d'une exonération fiscale, l'affectation de la collection à ce véhicule est exonérée d'impôts sur les successions et donations, avec l'accord du fisc. Il faut noter que ce cas de figure est très rare.

¹² Idem.; Administration fédérale des contributions AFC, Brochures fiscales pour la période fiscale 2019: Impôts sur les gains de fortune et impôts sur les successions et les donations, pp. 1,5,7 et 8.

¹³ Idem.

¹¹ Credit Suisse, Aperçu des impôts cantonaux sur les successions et les donations, 2020.

Imposition de la détention par une personne morale : impôt sur le capital

À l'égard de l'impôt sur le capital, il faut distinguer les fondations et associations et les sociétés de capitaux, auxquelles des régimes fiscaux différents s'appliquent. Les fondations et associations à but idéal exonérées d'impôts ne sont pas taxées sur leur capital, ce qui peut représenter un gros avantage, en lien avec la détention d'une collection d'art.

Lorsqu'elles n'ont pas de but idéal et ne bénéficient pas d'une exonération fiscale, les pratiques cantonales varient. Selon les brochures fiscales de l'AFC¹⁴, il paraît nécessaire de séparer les pratiques cantonales en trois catégories :

- 1) Les cantons possédant le même taux pour toutes les personnes morales, comme Zurich, Berne, Lucerne, Obwald, Nidwald, Zoug, Bâle-Ville, Argovie, Soleure et le Tessin ;
- 2) Les cantons ayant un taux préférentiel pour les associations, fondations et autres personnes morales: Schaffhouse ;
- 3) Les cantons prévoyant un taux préférentiel pour les sociétés de

capitaux et coopératives, comme Fribourg, les Grisons, Genève, Vaud et el Valais.

Impôt sur le bénéfice des sociétés de capitaux

Les sociétés de capitaux peuvent avoir des buts idéaux et pourraient ainsi théoriquement également bénéficier d'une exonération fiscale sur demande selon la Circulaire n. 12 de 1994¹⁵. Néanmoins, dans la pratique, du fait de leur raison d'être commerciale, il est très rare de voir une société de capitaux au bénéfice d'une exonération fiscale. Les sociétés anonymes (SA) et sociétés à responsabilité limitée (Sàrl) ne bénéficient pas de traitement fiscal privilégié et sont ainsi imposées au taux usuel de l'impôt sur le bénéfice fédéral, cantonal et communal (si prévu), et sur l'impôt sur le capital également au niveau cantonal et communal. L'impôt fédéral direct est à 8,5 % sur le bénéfice net de la société (art. 68 LIFD).

En principe, les participations sont détenues dans la fortune privée du contribuable. Ainsi dans le cas où il vend ses actions, le gain en capital sera exonéré. Néanmoins dans le cas où le fonds de commerce de la société est vendu, selon une jurisprudence

¹⁴ Administration fédérale des contributions AFC, Brochures fiscales pour la période fiscale 2019, Impôt sur le capital pour les associations, fondations et les autres personnes morales ; Administration fédérale des contributions AFC, Brochures fiscales pour la période fiscale 2019, Impôts sur le bénéfice et capital des personnes morales.

¹⁵ Administration fédérale des contributions AFC, Circulaire no 12, Exonération de l'impôt pour les personnes morales poursuivant des buts de service public ou de pure utilité publique (art. 56, let. g LIFD) ou des buts culturels (art. 56, let. h LIFD); déductibilité des versements bénévoles (art. 33, al. 1er, let. i et art. 59, let. c LIFD).

constante¹⁶ les actions seront toujours considérées comme faisant partie de la fortune commerciale du contribuable; le gain résultant de la vente sera pleinement imposé chez le contribuable et sera assujéti à l'AVS¹⁷.

Il est important de mentionner qu'au moment de la rédaction de cette étude les pratiques cantonales en lien avec la nouvelle réforme des entreprises (RFFA) ne sont pas entièrement établies et la documentation y relative difficilement accessible, voire impossible. En la matière, les cantons se mènent une concurrence acharnée et un «classement définitif» des taux d'imposition des bénéfices ne devrait être disponible qu'à partir de 2025¹⁸. Certains cantons ont déjà mis en place cette nouvelle législation dès 2019¹⁹ ou au 1er janvier 2020. D'autres cantons comme Zurich et Berne prévoient des nouvelles votations populaires en lien avec cette réforme fiscale dans les mois à venir²⁰. Enfin, certains cantons n'ont pas encore publié leur nouveau taux d'imposition.

La moyenne suisse du taux d'impôt sur le bénéfice (Confédération, canton, commune) des sociétés de capitaux est de 14,13%²¹. Certains cantons ont des taux d'imposition²² très bas, comme c'est le cas de Lucerne (12,3%),²³ Schwyz (11,77%)²⁴ ou Zoug (11,91%)²⁵. Il faut noter qu'ils avaient déjà des taux bas avant la réforme fiscale. Des cantons comme Bâle-Ville (13,04%)²⁶, Genève (13,99%)²⁷ ou Vaud (13,79%)²⁸ ont baissé leur taux de près de 10% en général afin de pouvoir bénéficier d'une fiscalité attractive. Berne (21,64%) est actuellement le canton le moins attrayant fiscalement pour les entreprises sur le territoire suisse, sa population ayant refusé par votation le taux de 16,27%, une nouvelle révision est cependant en cours²⁹.

16 Arrêt du Tribunal fédéral 2A_431/2000 du 9 avril 2001.

17 Banque Cantonale Vaudoise, Service de la planification successorale, succession 1.0, 2011, p. 56.

18 Crédit Suisse, Concurrence fiscale: les cantons baissent les impôts sur les sociétés suite à la RFFA, <https://www.credit-suisse.com/ch/fr/unternehmen/unternehmen-unternehmer/aktuell/neuer-schwung-im-steuerwettbewerb-kantone-reduzieren-steuersaetze.html> (consulté le 12 août 2020).

19 Comme pour Vaud ou Bâle-Ville, idem

20 PwC, Implementation of Tax Reform and AHV Financing in the canton of Zurich, septembre 2019; Direction des finances, Rapport présenté par le Conseil-exécutif au Grand Conseil relatif à la modification de la loi sur les impôts, août 2019, p. 1.

21 22 Direction des finances, apport présenté par le Conseil-exécutif au Grand Conseil relatif à la modification de la loi sur les impôts, août 2019, p. 11.

22 Taux total (Confédération, canton, commune chef-lieu).

23 PwC, Implementation of Tax Reform and AHV Financing in the canton of Lucerne, juin 2019.

24 PwC, Implementation of Tax Reform and AHV Financing in the canton of Schwyz, avril 2020.

25 PwC, Implementation of Tax Reform and AHV Financing in the canton of Zug, avril 2020.

26 PwC, Implementation of Tax Reform and AHV Financing in the canton of Basel-Stadt, février 2019.

27 PwC, Implementation of Tax Reform and AHV Financing in the canton of Geneva, juin 2019.

28 Vaud Economie, Vaud - Economie - Fiscalité attractive, <https://www.vaud-economie.ch/atouts/pourquoi-investir-dans-le-canton-de-vaud/fiscalite-attractive> (consulté le 12 août 2020).

29 Direction des finances, Révision 2021 de la loi sur les impôts, Canton de Berne, août 2019, p. 11.

Depuis le 27 septembre 2020, suite à un vote cantonal, Nidwald connaît le taux d'imposition sur le bénéfice le plus bas de Suisse et probablement du monde avec un taux cantonal de 5.1%, inférieur à ceux applicables à Hong Kong et Singapour³⁰.

3. Conclusion

Grâce à la RFFA, les sociétés de capitaux bénéficient dorénavant d'un traitement fiscal très avantageux à l'égard des impôts directs, avec un taux moyen suisse de 14,13% sur leurs bénéfices. À titre de comparaison, le taux actuel le plus élevé d'impôt sur le bénéfice pour les sociétés de capitaux (Berne 21,64%) reste inférieur au taux le plus faible de l'impôt sur le revenu pour les personnes physiques (Zoug avec un taux maximal de 22,40%).

Pour cette raison, il est très intéressant pour tout collectionneur «investisseur», recherchant à obtenir du profit sur sa collection, d'affecter celle-ci à une société de capitaux (et non pas de la conserver dans son patrimoine privé). En la matière, le choix du canton importe peu puisque les différences intercantionales sont menues. On notera que le transfert – sous forme d'apport en nature – n'est pas assujéti à l'impôt sur les successions et donations.

On comprend aisément que ces

avantages s'appliqueront également au collectionneur «planificateur» qui aurait recours à une société de capitaux pour assurer un partage équitable de sa collection entre ses héritiers.

30 <https://www.steuern-nw.ch/nidwaldner-steuergesetz-wird-deutsch-angenommen/> (consulté le 2 novembre 2020); Garessus Emmanuel, Nidwald renforce sa place de champion de la fiscalité des entreprises, 29.09.20, <https://www.letemps.ch/economie/nidwald-renforce-place-champion-fiscalite-entreprises> (consulté le 30 septembre 2020).

Conference report - The world of arts confronted with new Swiss copyright law - 5th November 2020

*By Melanie Damani**



I. Introduction

On 1st April 2020, new copyright regulations came into force in Switzerland. The new Federal Act on Copyright and Related Rights (the “Law”), which aims to protect and grant artists the right to decide how their work can be used, has had to be adapted to the new norms of the technology era. The Law relates in particular to the protection of photographs, the use of artworks where the author is unknown, new limitations on copyright in relation to inventories of collections of art and

on searching them, and the breach of copyright on the Internet.

On November 5, the Art Law Foundation and the Art-Law Centre hosted experts in a range of disciplines in order to present the context in which this new Law was adopted, the importance of the changes, and to clarify the impact of these new regulations on the art world.

The aim of this article is to present and summarise the presentations made by each speaker and the discussions which took place during that day.

II. Insights into the adoption process for the new Law

The first speaker was Sabrina Konrad, a lawyer from the Swiss Federal Institute of Intellectual Property, who shared with the audience some insights and milestones achieved during the process of adopting the new Law. The entire process took about 6 years, whereas on average a process like this takes 4.5 years. Discussions in the Swiss Parliament were heated and the lobbies were more active than ever before. The situation got to a point where it appeared that the Law would never be accepted, and the solution

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came from a long-standing Swiss tradition: a compromise between all the parties involved. The compromise remained fragile throughout the adoption process, and on many occasions the hands of the Swiss Parliament were tied. At the same time, the European Union was also adopting new copyright regulations, which presented an additional challenge. The Government was asked to prove the efficiency of the Law in relation to the new European regulations. The Law that was eventually adopted, represented a move forward but it was by no means groundbreaking.

Konrad explained that the aim of the new Law was modernization, and as such the focus was on fighting hackers, enhancing the opportunities arising from the digital world, such as the extension of related rights, and the ratification of the international treaties of Marrakech and Beijing. The Government made three important clarifications, detailed in its Message (dated 22 November 2017) about the modification of the Law on copyright and the approval and implementation of two treaties of the World Intellectual Property Organization¹. First, the use of citations as an exemption to copyright protection, which usually applies to literary works, also applies to fine art. Second, citations cannot include the entire work per se and shall be limited to the parts relevant to

achieve the particular purpose of the user. Finally, the copyright restrictions relating to catalogues apply both to paper and electronic versions, and indeed to all types of media.

III. A revolution in the protection of photographs

The second speaker, Dr. Ralph Schlosser, a lawyer at Kasser Schlosser, discussed the impact of the new Law on protecting photographs. Until 1st April 2020, only photographs with individual character were protected. Schlosser outlined what is meant by “individual character” by reference to three important court cases². In essence, photographs with individual character differ from non-protected pictures which either already exist or could exist (statistical unicity) or which are ordinary or relate to pure routine (not an original work). In favor of a change in law, an influential group of photographers expressed the opinion that pictures which were reproduced many times should in fact be protected as this would serve the public interest and as such the individual character should be dismissed. This opinion was rejected many times by the courts, which had considered several depicted objects to be too common or to have been seen too many times to be protected. Lobbyists also argued that non-individual photographs would be

¹ FF 2018 559.

² Federal Court Rulings 130 III 168 and 130 III 714; HGer Aargau, 29.08.2012, sic! 2013, 344.

better protected by related rights which covers performances irrespective of their individual character.

Nevertheless, according to new Article 2(3bis), copyright protection now extends to photographs without individual character. However, two other conditions need to be met for photographs without individual character to be protected: i) the photograph needs to be taken by a human being, and ii) it needs to show a three-dimensional object.

Finally, Schlosser reminded the audience that this new protection applies to pictures taken before 1st April 2020, but not to pictures already in use before the change in law came into effect. In addition, the concept of individual character is still relevant to determine i) the length of protection and ii) the right of integrity, i.e. the possibility for the photographer to reject alterations to their work.

IV. Orphan works and new collective licenses

Dr. Vincent Salvade, Professor at Neuchâtel University and Deputy General Director at SUISA, reminded the audience that an orphan work is a work over which rights holder in relation to the work remains unknown or not found. The problems arising in relation to this type of work and the need for a legal framework had been well-demonstrated internationally by

the Google Books case³. In Europe, the Directive on orphan works⁴ requires the creation of a catalogue of orphan works, which can then be used without specific permissions.

In Switzerland, according to the new Law, the rights to an orphan work must be held by an authorised collective rights management organisation ("Management Organisation"). These organisations, among other duties, manage the use of any type of orphan works and in particular their use on the Internet. Management Organisations are therefore deemed to be authorised to act on behalf of unknown rights holders without an official mandate⁵. They are also asked to undertake all reasonable steps to identify the potential rights holders. With the new Law, this duty of identification has therefore now shifted from the user to the Management Organisation. The new Law also establishes an irrefutable presumption that divulgation rights shall not be an obstacle to the use of an orphaned work⁶. Finally, Management Organisations are entitled to receive payments for the use of the work, and such revenues shall be dedicated to social and cultural contingency, if

3 V. Salvade, « Droit d'auteur et technologies de l'information et de la communication », Geneva/Zurich/Basel 2015, p. 111.

4 Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

5 Federal Court precedents on « Prozessstandschaft » (Federal Court Ruling 124 III 489) applicable.

6 FF 2018 592.

the owner of the rights has not come forward after a period of 10 years has elapsed.

Salvade then moved on to discussing extended collective licences, according to which Management Organisations are allowed to grant authorisation to use large numbers of published works (even if they do not represent the rights holders) in order to enhance the legal security of users and generate revenues for rights holders. The Law therefore prevents new restrictions on copyrights or the reliance on a “fair use” system and allows the principle of legitimacy of use, which otherwise would not exist or would be exercised illegally⁷. Finally, the exploitation of extended collective licences relates to a strictly-defined legal framework now well described in the Law.

V. Exceptions to copyright: authorised uses

The first exception, which authorises the use of works without the permission of the rights holder relates to private use, i.e. the use of published works: i) for personal use, ii) for educational purposes, and iii) for internal information in an institution, explained Dr Anne Laure Bandle, a Lawyer at Borel & Barbey and Director of the Art Law Foundation. Third parties are allowed to make copies of works and in the last two situations

mentioned above, a remuneration is mandatory. Private use exceptions are, however, denied for the complete or substantial copying of a work. In practice, the copying of a complete work of art, photograph, television or radio show for educational purposes is governed by the Common Rate 7 by Management Organization ProLitteris and thus authorised.

The second exception relates to archived and back-up copies. The Law authorises one copy of a work to be made for conservation and preservation purposes. The new Law further specifies that these copies are permitted as long as they are not made for financial gain. Bandle then explored whether the archive copy is itself covered by copyright, and concluded that it is most likely not, in particular in relation to the point about “individual character”, unless it qualifies as a non-individual photograph.

The copying of public works is also now well-regulated and represents the third exception. In fact, the goal of the new Law was to permit the promotion of collections by allowing the publication of inventories and catalogues. However, inventories of works in public hands or accessible to the public can only publish short excerpts of works to serve the purposes of describing collections and making them accessible, whereas catalogues of collections accessible to the public,

⁷ FF 2018 606.

for example museum, exhibition or auction catalogues, are allowed to reproduce the works and more.

As per the ratification of the Marrakech Treaty⁸, the necessary changes to allow the reproduction, distribution and availability of a work in format accessible to people with disabilities is permitted for non-commercial purposes only. This exception already existed, but the new Law now also allows the export and import of these modified copies under specific circumstances.

Finally, the reproduction of a work for scientific research purposes is also permitted if the copy is created due to the use of a technical process and if the work to be copied can be lawfully accessed. This exception permits the processing of data on a large scale, which was already happening in practice.

VI. Related rights: consequences in practice

David Johnson, Head of SIG and Swissperfom for Romandie, explained that the main issue regarding related rights was the remuneration of artists and – in particular – so-called value gaps.

The music industry in particular can generate high revenues from works, but little goes to the artists. As such, the goal of implementing an efficient remuneration system was to address: i) the low negotiating power of artists, and ii) the online deployment of works.

The use of related rights is now subject to exclusive rights which help to make works available in a legal way. The new Law has been adapted to reflect the challenges of the current reality – where an audience can access audiovisual works anywhere, at any time – and imposes a direct obligation to pay artists. This new remuneration right is an additional right, which exists regardless of the rights of other rights holders. The objective is to divide, rather than duplicate, existing payments. In practice, this system has been used and proven to be efficient for a long time. The Law also sets out certain exceptions to these remuneration rights. Where there is any doubt, the burden is on the user to prove that no payment right exists. The Law also lists specific beneficiaries, who as a common ground must all bring a creative element to the work, not just technical aspects, i.e. a sound technician of a film is unlikely to be a beneficiary.

Finally, the new Law establishes a norm of reciprocity to avoid the double remuneration which may otherwise arise in an international situation, for example. From a practical perspective,

⁸ Marrakesh Treaty dated 27th June 2013 to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled, ratified by Switzerland on 11th February 2020 and entered into force on 11th May 2020.

films produced either in Switzerland or in a country with similar rights can benefit from the protections of the new Law, i.e. nationality or residence are not relevant. Last but not least, specific rules exist for music, for example in relation to the soundtrack of a film. No change was made as such regarding music and the rights are usually managed by Management Organizations, like SUISA.

Johnson concluded his presentation by highlighting the fact that the Law does not provide a definition of who is a producer, which in practice is rather an important question. The courts will have to decide whether the economic aspect is relevant as such to categorise someone as producer.

VII. How and where to enforce copyright through legal actions

Dr. Anne-Virginie La Spada, Lawyer at BMG Avocats, discussed the legal routes available in the event of copyright infringements.

From a civil perspective, the most common action is the preventive or prohibitory injunction to forbid or stop an infringement of copyright or related right. The new Law now also covers the violation of obligations by Internet hosting providers, such as the obligation not to put illegal content online. (Super-)provisional measures can be requested from the courts if the infringement is imminent and other

conditions are met, for example at an auction if the work is fake or wrongly attributed.

The second relevant action permits a claimant to request information about the source and quantity of elements violating copyright, as well as information about the recipient and the quantity of sold objects. The goal is to allow the victim to trace the source of the illegal operation and estimate the magnitude of the damage. This action is also possible against a hosting provider. Monetary actions of the Obligation Code are available for copyright infringement, although it is difficult to enforce them as claimants need to prove that they have suffered damages. Therefore, in practice, the remedy of disgorgement of profits is important as in this case the claimant only has to prove the violation of a right in relation to copyright⁹.

The new Law outlines those who are entitled to take legal action and those against whom such action may be taken. The challenge is often to establish the chain of rights to ascertain the status of the claimant as well as the defendant, in particular in relation to Internet access and hosting providers, as set out by the Federal Court¹⁰. The competent court is, in national and international cases, the one where the

⁹ See case “Cards” TF of 12 November 2019, 4A_88/2019.

¹⁰ See case “Blog”, TF of 14th January 2013, 5A_792/2011 and case “Swisscom”, ATF 145 III 72 (8.2.2019).

defendant is domiciled, i.e. the place where the violation took place or produced results. However, establishing where the violation took place is much more complex when the Internet is involved. The High court has, however, permitted the application by analogy of the principle of the necessity established in trademark law¹¹.

Violation of copyright can also lead to criminal sanctions. These are exhaustively listed in the Law, but in practice they are rarely applied. A material issue is identifying the person who has violated the law, in particular in peer-to-peer situations. The use of an IP address to identify the perpetrator of a violation was not permitted as these addresses constitute personal data; an exception was therefore necessary and one has been introduced with the new Law¹².

La Spada concluded her presentation by highlighting that the new Law has not brought particularly significant changes to proceedings. As before, the determination of the competent court remains problematic as well as the proof and claiming of damages. In most civil cases, the cost of instigating proceedings is still likely to be higher than the compensation that the claimant can reasonably be expected to be granted if successful.

VIII. Internet and copyright

The last speaker, Dr. Sevan Antreasyan, a lawyer at Lenz & Staehelin, began his presentation by stating that the new Law thought to address the lack of accountability of Internet service providers and Internet hosting providers. He illustrated the relevant issues with the famous case of the monkey Naruto, which was photographed by David Slater, who later sued Wikipedia (without success), for having allowed the picture to be uploaded without his consent. Antreasyan pointed out the importance of differentiating between access and hosting providers, the latter of which nowadays includes social media. Previously in Switzerland, access providers could not be held responsible for copyright infringements, as the High Court decided in the “Swisscom” case¹³. There was also no rule on the responsibility of hosting providers, but nevertheless, a civil and criminal responsibility could be claimed through the general norms of the Law (art. 62 (1)(a) (b)) and Obligations Code (art. 41ff and 50). Hosting providers could also freely commit to the Swico Hosting Code of Conduct, which provided a mean of self-regulation.

Today, the Law introduces a new norm (art. 39d), also known as the principle of “notice and stay-down”, which essentially requires hosting

11 See case “Merck”, TF du 29 avril 2020, 4A_335/2019.

12 See case “Logistep”, ATF 136 II 508.

13 ATF 145 III 71, sic! 2019 p. 376.

providers that store information entered by users to prevent a work (or other protected subject matter) from being unlawfully remade available to third parties through the use of its services, if: i) the work has already been illegally made available, ii) the provider has been notified of the infringement, and iii) the provider has facilitated particular risk of such infringements. Providers must take technical and economic measures to mitigate the risk of infringements, which will likely be difficult for smaller providers.

Antreasyan concluded that the new norm will be useful in practice and represents an additional layer of protection. However, several undefined terms in the Law remain problematic, as to the conditions for application, which are quite restrictive.

IX. Discussion

Dr. Peter Mosimann, a lawyer at Wenger Plattner involved in the Law adoption process, spent the last part of the conference engaging with the guest speakers on several themes discussed previously. The virtual audience also had a chance to ask questions of the experts. Interesting topics raised included the possibility of allowing contractual copyrights, the high costs of court proceedings in Switzerland compared with the small amounts of damages usually granted, as well as the rights and protections of tattoo artists.

Book review on the new edition of *Kultur Kunst Recht - Schweizerisches und internationales Recht*

*by Adrienne Bauer**



The subject of this book review is the work *Kultur Kunst Recht*, published in October 2020 at Helbing Lichtenhahn Verlag by three editors that are experts in the field of art law with an extraordinary depth of experience: Prof. Dr. iur Marc-André Renold¹, Dr. iur Peter Mosimann² and Dr. iur Andrea F.G. Raschër³, with the contributions from a great range of lawyers, legal scholars and experts.

* Adrienne Bauer is a Munich based lawyer and art historian.

1 Prof. Dr. Marc-André Renold is a lawyer in Geneva as well as a professor of art and cultural property law at the University of Geneva and director of the Art Law Center. Since 2012, he has also held the UNESCO Chair in international cultural heritage law at the University of Geneva.

2 Dr. Peter Mosimann was a long-standing partner of the law firm Wenger Plattner and has been working there as a consultant since 2016. He was also a lecturer for intellectual property and art law at the law faculty of the University of Basel.

3 Dr. Andrea F.G. Raschër manages his own legal consulting firm in Zurich. For many years, he headed the Legal and International Department of the Federal Office of Culture in Bern.

This is the second edition of the comprehensive reference work, which, with a total of around 1669 pages, provides a thorough introduction to the major issues of art law. Like the first one, this new edition also represents the outstanding standard work in this legal field.

Kultur Kunst Recht covers all relevant current legal issues in the fields of culture and the arts in a comprehensive and well-founded manner. It is not limited to the Swiss legal system, but also delves into international issues. Compared to the first edition, the second one has been extensively revised, and its content expanded. Starting with the subject of art and culture as a matter of law, with special emphasis on appropriation art, and the question of originality and copy, the first chapter concludes with an analysis of blockchain technology and its use in the art world.

Further on, the fundamental legal anchoring of art by explaining the foundations of artistic freedom as well as its legal limits are dealt with. The relationship between artistic freedom and other fundamental rights at national level is also discussed. By the example of the 2005 UNESCO Convention

for the protection and promotion of the Diversity of Cultural Expressions and the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, the authors analyse the topic of national cultural policy and its intersection with international law.



A separate chapter is devoted to cultural promotion and relevant funding opportunities, both at cantonal and federal level, with an excursus on the currently particularly relevant Covid regulation on culture. It also explains the concepts of protection of historical buildings and monuments and, in particular, deals with the legal protection of cultural assets in armed conflicts. Alessandro Chechi, senior researcher, and Marc-André Renold demonstrate the problems caused by the illegal trade in cultural goods worldwide and the legal instruments that exist to limit the financing of terrorism in these circumstances.

This is followed by comments on the transfer of cultural property and, in this context, on private international law and the civil law provisions governing the acquisition of cultural property. In connection with the acquisition of art objects under civil law, the problem often lies in the good faith of the acquirer and when such good faith can be assumed. This depends, among other things, on the obligations of the acquirer to make enquiries in the specific case. At this point, the reader is provided with valuable information on how duties of enquiry can be fulfilled. In principle, such an obligation exists only where there are specific reasons for suspicion. For example, the place of purchase may be suspicious or the seller's lack of reputation. The Cultural Property Transfer Act is presented in detail. It came into force in 2005 and regulates the import and export of cultural goods as well as duties of care in the transfer of ownership of cultural property. This chapter provides practical insights into the due diligence standard. Finally, lawyer and legal scholar Anne Laure Bandle examines the authenticity of works of art and the legal remedies available to buyers and sellers of misattributed art and of those seeking expert advice.

The book also picks up on the topical discussions regarding money laundering and looted art by examining selected Swiss looted art cases and places them in historical context. The book also addresses issues of State

immunity as a fundamental imperative of customary international law and its influence on cultural heritage. These considerations become relevant in the context of the illegal trade in cultural goods and their restitution. The archiving of works is also dealt with, whereby the question of data protection is of particular contemporary relevance. One chapter of the handbook is devoted exclusively to intellectual property and is divided into the treatment of copyright, trademark and design law and, finally, unfair competition law.

Kultur Kunst Recht also describes the relevant contractual relationships in the field of art and culture, namely in the context of private treaty sales, auctions, gifts, loans and deposits. This is preceded by considerations on dispute resolution, state jurisdiction and the alternative resolution mechanism of arbitration. Expert opinions and the complexity of art insurances are also analysed in terms of their bearing in contractual relationships and dispute resolution. The topic of art insurances is also covered by an assessment of the relevant contractual clauses.

Architecture is a key chapter in this comprehensive handbook through a discussion of the applicable copyright law and the relevance of monument protection. The chapter also discusses important foundations of architecture contracts. The fact that not only visual arts are taken into account in this new edition is also shown by the chapters

dedicated to performing arts such as theatre and musicals. Among other things, they deal with stage-specific labour law as well as the legal status of organisers and artistic directors.

The author Poto Wegener, director of the collecting society for neighbouring rights Swissperform, has authored a chapter on the legal assessment of the production of pop music, in which the individual parties involved, such as performers and producers of sound carriers, are examined with regard to their rights and obligations. *Kultur Kunst Recht* also deals in detail with the effective range of films, including a comprehensive description and legal assessment of its production and financing.

The density of the field of art law is further evidenced by the fact that literature is also given its own chapter. It discusses the legal regulations of the publishing contract as well as copyright contracts, licences or transfers of rights. Also, it examines the interests of authors and publishers, as well as their contractual basis. The legal status of libraries is also explained, their general importance and relevance in the digital era, as well as the challenges they might face in the future.

Finally, the handbook focuses on the tax treatment of art and cultural goods. In particular, this chapter reviews the legal basis of freeports. VAT, as well as gift and inheritance tax,

is also presented in the context of art and culture.

This great variety of addressed topics shows that art and cultural property law is a cross-sectional matter in which a wide range of legal aspects must be taken into account. The handbook is not limited to a description of the Swiss legal system, but also covers international law in a comprehensive manner. In this way, the reader is given the opportunity to take a comparative legal view of this diverse legal field.

This work is an absolute must for anyone who deals with legal issues concerning art and culture. The greatly expanded new edition provides the reader with comprehensive information and legal updates. The deep experience and knowledge of the editors and authors speaks for itself and is reflected throughout the chapters of the book. Especially the inclusion of relevant current topics such as blockchain technology and the creation of works by artificial intelligence makes this work unique in its form and is without equal. The reader can rightly be excited about this great book.

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Rendez-vous de la FDA *ALF's agenda*

Prochain Art Law Magazine / Next Art Law Magazine
juin 2021 / June 2021

Délai pour soumettre des contributions / Deadline to submit your contributions
1^{er} avril 2021 / 1st of April 2021

Événements / Upcoming Events

29 January 2021	Responsible Art Market Annual conference
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FDA en photos / ALF in pictures



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La révision au Parlement: réflexion



original source: Bild Bildschön

Sabrina Konrad

Sabrina Konrad



29 | 37

Durée

- photographies **individuelles**: la protection prend fin 70 ans après le décès de l'auteur (art. 29 al. 2 let. b LDA), 70 ans après le décès du dernier coauteur (art. 30 al. 1 LDA) ou 70 ans après la divulgation de l'œuvre si l'auteur est inconnu (art. 31 al. 1 LDA)
- photographies **non individuelles**: 50 ans après la confection (art. 29 al. 2 let. a^{bis} et al. 4 LDA)

Ralph Schlosser – Petite révolution en lien avec la protection des photographies

kasserschlosser avocats

Ralph Schlosser



II. Nouveaux droits à rémunération VoD – Champ d'application (art. 13a et 35a LDA)

Art. 13a LDA Mise à disposition d'œuvres audiovisuelles

¹ Quiconque met licitement à disposition une œuvre audiovisuelle de manière que chacun puisse y avoir accès de l'endroit et au moment qu'il choisit individuellement doit verser une rémunération à l'auteur qui a créé l'œuvre audiovisuelle.

Art. 35a LDA Mise à disposition de prestations dans des œuvres audiovisuelles

¹ Quiconque met licitement à disposition une œuvre audiovisuelle de manière que chacun puisse y avoir accès de l'endroit et au moment qu'il choisit individuellement doit verser une rémunération aux artistes interprètes qui ont participé à une prestation contenue dans cette œuvre.

FONDATION POUR LE DROIT DE L'ART | CENTRE DU DROIT DE L'ART | UNIVERSITÉ DE GENÈVE | FACULTÉ DE DROIT
Conférence - Le monde des arts confronté au nouveau droit d'auteur
5 NOVEMBRE 2020

David Johnson

I. Les actions civiles

Légitimation passive

- Contre qui l'ayant droit peut-il ouvrir action ?
 - L'auteur de la violation des droits
 - Les participants à l'infraction : instigateur et complice
- Quid des hébergeurs et fournisseurs d'accès ?
L'arrêt «Blog», TF du 14 janvier 2013, 5A_792/2011
L'arrêt «Swisscom», ATF 145 III 72 (8.2.2019)

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Anne-Virginie La Spada

Building
A Responsible
Art Market

Save the date

Innovation and Change in a Responsible Art Market

29 January 2020
Online Conference
1pm - 5pm (CET)



FDA fondation
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