Literature Review : Esther Zysset, Data Protection and Provenance Research

Lucile Pasche, le 23 septembre 2026

Esther Zysset, Data Protection and Provenance Research : Solving the Conundrum, in : Vanessa Rüegger et al. (ed.), Art & Law, Conference Proceedings 2025, Basel 2025, pp. 99 – 120.

I. Introduction

Works of art often come with an incomplete ownership history. Provenance research aims to fill these gaps, which is necessary both to ensure the legitimacy of the current possession and to allow the restitution of unlawfully transferred works. However, reconstituting the ownership history of a work of art means collecting and disclosing information about individuals — former owners, heirs, dealers. This is, in essence, processing of personal data.

Last March, the 2025 edition of the Art & Law collection was published, featuring a contribution by Esther Zysset on the intersections of data protection and provenance research. Her analysis maps out the applicable legal framework under the Federal Act on Data Protection adopted on 25 September 2020 (FADP) and raises several questions that, in our view, deserve further discussions.

The question Zysset raises is therefore straightforward : can provenance research be conducted in compliance with data protection laws ?

To answer this question, Zysset dissects the processing of personal data occurring in the case of provenance research. As the author explains, the disclosure of information regarding the ownership of a work of art is one such processing (Art. 5 let. e FADP). This argument raises two questions, which will be developed in the following sections, before delving into the difference between public and private controllers.

II. Identification

The first question is whether the information processed in provenance research constitutes personal data at all. In many cases, the identity of previous owners is not explicitly recorded :

a provenance entry may simply read “private French collection” or “acquired in Geneva, circa 1942,” without naming anyone. Such fragments may appear insufficient to identify an individual.

However, as Zysset points out, identification must be assessed through both an objective and a subjective component (BSK DSG-Blechta/Dal Molin/Wesiak-Schmidt, Art. 5 DSG n^{os} 30–31 ; Zysset, p. 103). The decisive question is not whether the entity conducting the research can identify the person, but whether anyone could do so on the basis of the available information (e.g. a family member, a specialist, another market participant). Where this is the case, the information qualifies as personal data, and data protection law applies, regardless of the researcher’s own inability to identify the individual.

This is particularly relevant given the growing number of publicly accessible provenance databases. Information that may appear non-identifying in isolation can become identifying when cross-referenced with other entries or external sources (cf. Swiss Federal Office of Culture, List of databases of confiscated works, April 2024). While these databases are intended to help rights holders locate works, they also provide information about those potential rights holders ; therefore, the FADP and the cantonal data protection law must apply. We mention that, under Art. 2 par. 4 FADP, public registers dealing with private-law matters are governed by any special federal law that applies to them ; the FADP only steps in when no such law exists. The register of cultural-property assets is an exception because it is created by Art. 3 of the Cultural Property Transfer Act adopted on 20 June 2003 (CPTA), so the CPTA – not the FADP – governs that register.

III. Sensitive Personal Data

A second question concerns the type of personal data processed in provenance research. Zysset argues that, in practice, the proportionate disclosure of personal data in the context of provenance research will rarely encompass sensitive personal data (Zysset, p. 110). We agree that in many cases, provenance information is indeed limited to names, dates, and transactions, none of which qualify as sensitive.

However, we would suggest that the likelihood of processing sensitive personal data is higher than this analysis implies, particularly in the areas where such research matters most.

Indeed, a significant portion of provenance research today concerns works that were confiscated or forcibly transferred during the National Socialist era, or, more broadly, works lost in circumstances linked to the owner’s religious or ethnic identity. In these cases, the prove-

nance record does not merely state that person A sold a painting to person B. It reveals (or at least strongly implies) that the former owner was persecuted based on their religion or ethnicity, which constitutes sensitive personal data within the meaning of Art. 5 let. c FADP. Furthermore, criminal sanctions can be part of the acquiring of the work of art (Federal Council, Message regarding the 1970 UNESCO Convention and the Federal Act on the International Transfer of Cultural Property [CPTA], FF 2002 505, 511 ff. [version in french] and BBl 2002 535, 540 ff. [version in German]). Indeed, the information that an art dealer obtained works of art through unlawful appropriation can be considered as sensitive personal data (Art. 5 let. c n° 5 FADP ; Art. 137 ff Swiss Criminal Code, RS 311.0. However, Art. 5 let. c n° 5 FADP only covers data relating to criminal or administrative proceedings or penalties. Where no proceedings were initiated and no penalty was imposed, the data does not qualify as sensitive under this provision. The relevance of sensitive data protection in the context of provenance research is confirmed by the amendment to Cultural Property Transfer which permits the Swiss Commission for Historically Problematic Cultural Heritage to disclose sensitive data (Art. 18*a* par. 3 CPTA).

IV. Private Controllers

Zysset raises another central aspect of data protection : Who is the controller ? The answer will impact the regime applicable to the processing. A private entity, such as a broker, must comply with a restrictive legal framework as they must only process data in a lawful manner (Art. 30 par. 1 FADP). Public entities (or private entities carrying out public tasks, cf. Art. 5 let. i FADP), on the other hand, need a legal basis to process data (Art. 34 ff FADP). Both regimes are relevant in the context of provenance research, as this activity is carried out by private actors (dealers, auction houses) and public institutions (museums, the aforementioned Commission) alike. This distinction matters in practice : a data protection solution that is valid for one type of actor may not be transposable to another. In this regard, we consider Zysset's decision to analyse both regimes in detail particularly valuable.

Regarding private entities, the author concludes that the disclosure of personal data in connection with provenance research carried out by private actors does not, in most cases, infringe upon the data subject's personality rights. Where such an infringement does occur, however, it is often justified by an overriding public or private interest. Zysset points out that data processing based on an overriding interest, as opposed to consent or an explicit legal basis, is generally harder to establish in a context of legal uncertainty (p. 116, Art. 31 FADP). However, in April 2025, the Federal Office of Culture published Recommendations expressly stating that, in its view, provenance research on cultural property may, *a priori*, be presumed

to serve an overriding public interest (Recommendations available in French and in German). This document does not constitute a legal basis or a judicial decision ; however, it may help private controllers in their argument to establish an overriding public interest. In our view, however, this presumption merely shifts the problem towards the general principles of the FADP (Art. 6 FADP), in particular proportionality and purpose limitation. Therefore, the question of how to determine whether a given act of data processing serves an overriding public interest remains open.

V. Public Controllers

Federal bodies, by contrast, rarely face this question. Since they must rely on a legal basis for their processing (Art. 34 ff. FADP), the assessment of any overriding public interest has, in principle, already been made by the legislature itself. Zysset, however, points to an important qualification : absent such a legal basis, justifying processing by an overriding public interest remains narrowly constrained, given that data protection stems from a fundamental right. This constraint is consistent with the principle of legality because, as Zysset highlights, data protection enjoys the status of a fundamental right. Therefore, exceptions allowing federal bodies to process personal data without a legal basis are few and narrowly circumscribed. This is all the truer given that, as we have argued, provenance research is likely to involve the processing of sensitive personal data, which requires a more detailed legal basis.

VI. Conclusion

Zysset's article provides a valuable contribution to the relatively underexplored issue of data protection in the context of provenance research. As we have argued, sensitive personal data are more likely to arise in this context than her analysis suggests, in particular where the history of a work of art is linked to persecution or unlawful appropriation. For private actors, legal uncertainty remains despite the Federal Office of Culture's Recommendations. For federal bodies, the existing statutory bases may not cover all situations requiring the processing of personal data. Addressing these gaps is essential to ensure that provenance research can fulfil its purpose in compliance with data protection law.

Proposition de citation : Lucile Pasche, Literature Review : Esther Zysset, Data Protection and Provenance Research, 23 septembre 2026 *in* www.swissprivacy.law/419

Les articles de swissprivacy.law sont publiés sous licence creative commons CC BY 4.0.