

# Taking fair and just decisions based on findings leading to an incomplete or uncertain state of evidence

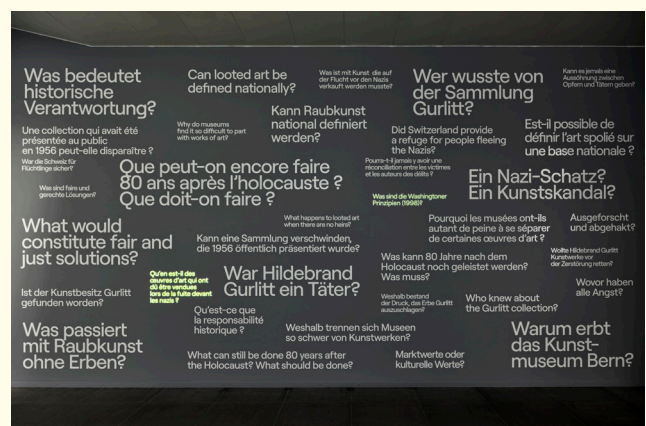
## The decision of the Kunstmuseum Bern in the restitution claim asserted by the heirs of Dr. Ismar Littmann

In December 2021, after several years of research on the bequest of Cornelius Gurlitt comprising some 1,600 works, the Stiftung Kunstmuseum Bern [Museum of Fine Arts Bern Foundation, hereinafter also: Foundation] made a decision regarding the definitive acceptance of artworks of incomplete provenance (1), as well as in the case of the restitution claim asserted by the heirs of Dr. Ismar Littmann for the Otto Dix watercolours *Dompteuse* (1922) and *Dame in der Loge* (1922).

These decisions were the result of deliberations and investigations carried out by the Stiftung Kunstmuseum Bern following the acceptance of Cornelius Gurlitt's estate in May 2014, which were made in consideration of internationally recognised principles of museum ethics such as the ICOM – Code of Ethics for Museums, the 1998 Washington Principles on Nazi-confiscated Art and the 2009 Terezín Declaration on Holocaust Era Assets and Related Issues. One key aspect here was to adopt a responsible approach despite the findings being incomplete, patchy and uncertain. Since such a situation is a regular occurrence in provenance research when it comes to establishing the historical facts of a case, this aspect is also reflected in the revised provenance categories which the Kunstmuseum Bern [Museum of Fine Arts Berne] has developed in a critical examination of the evaluation systems which are in use in Germany and Switzerland: the aim here is to enable decisions to be made in this type of essentially ambivalent situation where the state of evidence is fragmentary. After all, with reference to principle number four of the Washington Principles, arriving at a categorisation always implies the question of what the consequence might be where there is no conclusive evidence or reconstruction is not possible with a high degree of probability.

### The bequest of Cornelius Gurlitt 2014

Rolf Nikolaus Cornelius Gurlitt died on 6 May 2014, having previously designated the Stiftung Kunstmuseum Bern as his sole heir by will. On 22 November 2014, after careful consideration, the Foundation decided to accept the Gurlitt bequest. In the six months between the opening of the will and the end of the period to disclaim the inheritance, it was possible to arrive at an agreement with the Federal Republic of Germany and the Free State of Bavaria [2014 Agreement].(2)



KUNSTMUSEUM BERN, RAUBKUNST? [LOOTED ART?], INSTALLATION IN THE EXHIBITION GURLITT. TAKING STOCK, KUNSTMUSEUM BERN, 16.09.2022-15.01.2023 (COPYRIGHT: KUNSTMUSEUM BERN, PHOTOGRAPHER: ROLF SIEGENTHALER)

In signing this agreement, the Foundation accepted the interpretation of the term “Nazi-confiscated art” in accordance with the “Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property” [Joint Declaration](3) of December 1999, thereby becoming the first institution in Switzerland to align itself with the German interpretation of Nazi-confiscated art as having been withdrawn as a result of persecution [“NS-verfolgungsbedingter Entzug”].





In the 2014 Agreement, the contracting parties also agreed on a procedure that draws a distinction between works the provenance of which is clearly established and works, the provenance of which is unresolved. This procedure was reflected in the so-called *Provenienzampel* [provenance traffic light system, 2014]. As a result, the Kunstmuseum Bern relinquished ownership of artworks which it was possible to identify as Nazi-looted art (“red”). These works were to remain in the fiduciary possession of the Federal Republic of Germany until they could be returned to their (former) rightful owners or the latter’s descendants. Works of art for which, based provenance research, it was possible to rule out any suspicion of Nazi-looted art with a probability bordering on certainty (“green”) were to remain the property of the Foundation. In the case of works with unclear changes of ownership during the period of National Socialist rule (1933-1945) without clear exclusion or clear confirmation of an act of looting (“yellow”), the Foundation had the right to relinquish ownership and hand the works over to the Federal Republic of Germany (the so-called right of choice).

### Provenance research 2013-2021

The approximately 1,600 works in the bequest of Cornelius Gurlitt were initially subject of provenance research by the task force “Schwabinger Kunstfund” (2013-2015) as well as the projects “Gurlitt Provenance Research” (2016-2017) and “Reviews, documentation and claims related research for the Gurlitt art trove” (2018), which were carried out in Germany from 2015 onwards under the auspices of the Stiftung Deutsches Zentrum Kulturgutverluste [German Lost Art Foundation]. In 2017, Kunstmuseum Bern itself set up a Provenance Research Department which initially set out to clarify the provenance of works belonging to the group of so-called “degenerate art” in collaboration with the Forschungsstelle “Entartete Kunst” [“Degenerate Art” Research Centre] at the University of Hamburg. After handing over the research documentation compiled in the course of these German Lost Art Foundation projects to the Kunstmuseum Bern in March 2019, the museum’s provenance researchers conducted an evaluation up until June 2021 and established additional research strategies.

### Assessing findings: the provenance categories used by the Kunstmuseum Bern

In the course of its evaluation and research, the Kunstmuseum Bern decided to introduce additional differentiations to the category for objects of unresolved provenance (“yellow” category, *Provenienzampel* 2014), namely the categories “yellow-green” and “yellow-red”.

Provenance Categories	
 not looted art	The provenance for the period from 1933 to 1945 could be reconstructed. This is not a case of looted art.
 no indications of being looted art	The provenance from 1933 to 1945 has not been unambiguously clarified; gaps in the ownership history remain. According to current research, there is no evidence of looted art. There are no implications of looted art and / or conspicuous circumstances.
 indications of being looted art	The provenance from 1933 to 1945 has not been conclusively clarified; gaps in the ownership history remain. According to current research, there is no evidence of looted art. There are, however, implications of looted art and / or conspicuous circumstances.
 looted art	The provenance for the period from 1933 to 1945 could be reconstructed. This is a case of looted art.

KUNSTMUSEUM BERN, CATEGORIES FOR ASSESSING THE FINDINGS OF PROVENANCE RESEARCH, 2021.

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The categories “Nazi-looted art” (“red”) and “not looted art” (“green”) were supplemented with the addition of the categories “yellow-green” and “yellow-red”: these reflect an incomplete state of evidence and, unlike the evaluation systems used by the Swiss Federal Office of Culture (BAK) and the German Lost Art Foundation, allow for a more qualified and verifiable assessment that can form the basis for decisions regarding transfer of ownership.<sup>(4)</sup>

According to the matrix used by the Kunstmuseum Bern, the categories “Nazi-looted art” (“red”) and “not looted art” (“green”) presuppose a verifiable and documented reconstruction of the ownership situation in the period 1933 to 1945; this is comparable to the definitions published by the German Lost Art Foundation in October 2019. The categories “yellow-green” and “yellow-red” are applied to cases where there are provenance gaps or the ownership status

cannot be clearly established. “Yellow-green” denotes that the provenance from 1933 to 1945 has not been unambiguously clarified; gaps in the ownership history remain. According to current research, there is no evidence of looted art. There are no implications of looted art and / or conspicuous circumstances. “Yellow-red” denotes that the provenance from 1933 to 1945 has not been conclusively clarified; gaps in the ownership history remain. According to current research, there is no evidence of looted art. There are, however, implications of looted art and / or conspicuous circumstances. These definitions allow for a differentiation also in cases in which the state of knowledge or the strength of evidence is below a justifiable level required at court.



OTTO DIX, DAME IN DER LOGE, 1922, WATERCOLOUR, PRIVATE COLLECTION (COPYRIGHT: KUNSTMUSEUM BERN, PHOTOGRAPHER: MICK VINCENZ)

According to the preliminary conclusion of the research as of 30 June 2021, it was possible to assign 1,091 works of art from the bequest of Cornelius Gurlitt the provenance of which in the period from 1933 to 1945 is incomplete to the category “yellow-green“, while the provenance of 29 works was assessed as “yellow-red“. In the case of works in the “yellow-

red” category, the Kunstmuseum Bern relinquished ownership by resolution of the Foundation Council passed on 5 November 2021 and handed over these works to the Federal Republic of Germany – provided research had been completed, no claims had been made and no potential beneficiaries were apparent. As a result, five works were handed over to the Federal Republic of Germany in December 2021. These are now the responsibility of the so called “Kunstverwaltung des Bundes” [Federal Art Administration, see pp. 14-16]. For 22 works of art in the “yellow-red” category, the Kunstmuseum Bern has since conducted further research in response to existing restitution claims, using research strategies that involve a substantially fresh approach.

In the event that a work of art permanently taken over by the Stiftung Kunstmuseum Bern (“green” or “yellow-green“), should reveal indications of Nazi-looted art and/or conspicuous circumstances based on further provenance research (“yellow-red“) or if evidence emerges of an actual case of Nazi-looted art (“red“), the institution will work on a “fair and just solution” with the (former) rightful owner(s) or their descendants according to the Washington Principles and the Terezín Declaration.

#### Handling uncertain states of evidence

The framework for the decision of the Stiftung Kunstmuseum Bern is based on internationally recognised principles of museum ethics, including the ICOM – Code of Ethics for Museums as well as the Washington Principles and the Terezín Declaration. One central importance, however, is the responsible handling of situations of an uncertain state of evidence – in accordance with principle number four of the Washington Principles:

“In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.”

What this means in practice will be illustrated by the surrender of property in the case of the claim for restitution of the heirs of Dr. Ismar Littmann.

In December 2021, the Foundation handed over two Otto Dix watercolours, transferring ownership jointly to the heirs of Dr. Ismar Littmann and descendants of Dr. Paul Schaefer. For these two works it was not pos-



sible to establish the provenance in the period from 1933 to 1945 without gaps, and no evidence of Nazi-looted art emerged from the research presented. Nonetheless, there were certain indications of Nazi-looted art and conspicuous circumstances (“yellow-red”).



OTTO DIX, DOMPTEUSE, 1922, WATERCOLOUR, PRIVATE COLLECTION (COPYRIGHT: KUNSTMUSEUM BERN, PHOTOGRAPHER: MICK VINCENZ)

Following the publication of artworks from Cornelius Gurlitt’s estate in the Lost Art database, the heirs of Dr. Ismar Littmann submitted a restitution claim to the “Schwabinger Kunstfund” task force, which was the responsible agency at that time. This claim initially applied to two watercolours by Otto Dix, *Dame in der Loge* (1922) (<https://gurlitt.kunstmuseumbern.ch/de/collection/item/154337/>, last accessed: 11.12.2022) and *Dompteuse* (1922) (<https://gurlitt.kunstmuseumbern.ch/de/collection/item/154336/>, last accessed: 11.12.2022). In October 2014, the community of heirs extended their submission to include a further 23 works. For these 25 works in total, the Federal Re-

public of Germany had refused restitution based on provenance research carried out by the “Schwabinger Kunstfund” task force (2013-2015) and investigations pursued under the project “Gurlitt Provenance Research” (2016-2017).

From 2019 onwards, the Kunstmuseum Bern continued to pursue its research while maintaining dialogue with the representatives of Dr. Ismar Littmann’s heirs: the aim here was to arrive at a joint assessment of the ownership status and circumstances of the loss. As a result of this dialogue, the heirs of Dr. Ismar Littmann and his wife Käthe Littmann abandoned their claim for restitution of 23 works of art from the bequest of Cornelius Gurlitt, while at the same time maintaining their claim for restitution of the Otto Dix watercolours *Dompteuse* (1922) and *Dame in der Loge* (1922). The research carried out from 2013 to 2017 did not lead to any conclusive findings for the watercolours *Dompteuse* (1922) and *Dame in der Loge* (1922) by Otto Dix: it was not possible to find any clear evidence that either of the works had been the property of Dr. Ismar Littmann (1887-1934) or his descendants or that the works had been confiscated due to persecution in the period between 30 January 1933 and 8 May 1945.

After a review by external experts, the project “Gurlitt Provenance Research” assessed the provenance of both works as being “unresolved” (“yellow”, *Provenienzampel* 2014).

After further investigations by the Kunstmuseum Bern, the situation as of June 2021 was as follows: The provenance of both works is highly ambiguous and incomplete with regard to work identity, ownership and withdrawal due to persecution for the period from 1933 to 1945. The research did not establish evidence of ownership status or evidence of changes of ownership during the period of National Socialist rule. Likewise, it was not possible to clearly prove a confiscation of the works carried out by the Prussian Secret State Police (Gestapo) in February 1935. Nonetheless, the findings did reveal a body of circumstantial evidence of sufficient substance and strength to enable a decision to be made as to the most likely potential scenario: according to this, both Dr. Ismar Littmann and Dr. Paul Schaefer (1881-1946) or their respective descendants may potentially have been ag-

grieved parties or legitimate claimants.

### Taking a decision despite an incomplete state of evidence

In the case of the two watercolours by Otto Dix, the conclusions regarding the identity of the work, its ownership and persecution-related withdrawal are largely based on meticulously developed circumstantial evidence. Although coherent, this remains outside the realm of certainty or high probability. There appears to be evidence of a persecution-related confiscation by the Gestapo on the premises of the auction house Max Perl, Berlin, prior to an auction. However, the ownership status of the works at the time of this confiscation remains unresolved. It was not possible to determine the time and nature of a transfer of ownership from Dr. Ismar Littmann to Dr. Paul Schaefer, both of whom were persecuted by the National Socialist regime. Accordingly, withdrawal due to persecution cannot be ruled out for either Dr. Ismar Littmann or Dr. Paul Schaefer; the works may even have been withdrawn twice. At the same time, there is no indication as to any other potentially aggrieved party.

From a legal point of view, the findings in both cases did not come close to a degree of clarity that could

be used as evidence. Accordingly, for both works an assessment was made in order to establish the most likely potential scenario outside categories of proof that presuppose certainty or strong probability. As a consequence, it was clear that the works could neither be classified Nazi-looted art (“red“) or not looted art (“green“). Due to the existing indications of Nazi-looted art based on circumstantial evidence, the works were assigned to the “yellow-red” category.

Any enforcement of restitution claims before a civil court would most likely have been futile due to the incomplete state of evidence based on the findings in the present case. Given the extent of the gaps in the evidence, the Foundation acted in the spirit of Washington and Terezín as well as in the spirit of the fundamental values of the legal system by following the maxim of a “fair and just solution”, which can be aptly applied in all situations in life. Accordingly, the Museum relinquished ownership of the watercolours *Dompteuse* (1922) and *Dame in der Loge* (1922) by Otto Dix to the benefit of the heirs of Dr. Ismar Littmann and the descendants of Dr. Paul Schaefer. The works were transferred to them jointly after the conclusion of a transfer agreement.



KUNSTMUSEUM BERN, WALL GRAPHIC ON THE PROVENANCE OF THE WORKS OTTO DIX, DAME IN DER LOGE (1922) AND DOMPTEUSE (1922), IN THE SECTION ENTITLED LEGITIMATE? AS PART OF THE EXHIBITION GURLITT. TAKING STOCK, KUNSTMUSEUM BERN, 16.09.2022-15.01.2023 (COPYRIGHT: KUNSTMUSEUM BERN, PHOTOGRAPHER: ROLF SIEGENTHALER)

The two families accepted this Solomonic solution as “fair and just”. As such, this solution constitutes one further option for dealing with incomplete provenances in the interest of a “fair and just solution”.

### Conclusion and further perspectives

Since 2013, the process of dealing with the Gurlitt collection has led to fundamental reflections as to how museums should handle Nazi-looted art. In accepting the bequest, the Kunstmuseum Bern has also initiated a process of reassessing questions of provenance and restitution. This is demonstrated not least by the decisions taken by the Nationalrat [Swiss National Council] and the Ständerat [Council of States] in the summer and autumn of 2022, which adopted both the motion to set up an independent commission for cultural property seized as a result of Nazi persecution and the motion to establish a central, digital platform to publish the results of provenance research. By accepting the Gurlitt bequest, the Stiftung Kunstmuseum Bern has committed itself to searching for and restituting cultural objects expropriated as a result of Nazi persecution. In dealing with this bequest in recent years, it has become clear that even in cases of very incomplete evidence, are possible that adequately take account of the interests of the current proprietors and (former) rightful owners. Aside from any discussion of terminology, a central element of each individual case is the fact that individuals lost

their possessions and their lives due to persecution by National Socialist Germany. It follows on from this that fair and responsible handling of cultural assets seized as a result of Nazi persecution is imperative. By being prepared to accept to make plausible decisions on the basis of findings leading to an incomplete or uncertain state of evidence below a justiciable level, museums can live up to the principles signed by more than 40 states in Washington in 1998 and in Terezín in 2009. In doing so, they can also show their willingness to engage in serious, respectful dialogue with the victims’ families.

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(1) <https://www.kunstmuseumbern.ch/de/service/medien/archiv-medienmitteilungen/medienmitteilungen-2021/10-12-2021-legal-cornelius-gurlitt-2592.html> (last accessed: 11.12.2022)

(2) Vereinbarung zwischen der Bundesrepublik Deutschland, dem Freistaat Bayern und der Stiftung Kunstmuseum Bern, 24.11.2014, [https://www.kunstmuseumbern.ch/admin/data/hosts/kmb/files/page\\_editorial\\_paragraph\\_file/file\\_en/1016/vereinbarung\\_kmb\\_endfassung.pdf?lm=1416827765](https://www.kunstmuseumbern.ch/admin/data/hosts/kmb/files/page_editorial_paragraph_file/file_en/1016/vereinbarung_kmb_endfassung.pdf?lm=1416827765) (last accessed: 11.12.2022).

(3) <https://www.kulturgutverluste.de/Webs/EN/Foundation/Basic-principles/Common-Statement/Index.html;jsessionid=FD962C7F78DE68BE19DBD835F843DB9A.m1> (last accessed: 11.12.2022)

(4) The evaluation systems used by the German Lost Art Foundation and the Swiss Federal Office of Culture (BAK) only stipulate a need for further research for the category “orange” or “C”. Cf. Leitfaden Provenienzforschung zur Identifizierung von Kulturgut, das während der nationalsozialistischen Herrschaft verfolgungsbe-

dingt entzogen wurde, ed. Stiftung Deutsches Zentrum Kulturgutverluste mit Arbeitskreis Provenienzforschung e. V., Arbeitskreis Provenienzforschung und Restitution – Bibliotheken, Deutscher Bibliotheksverband e. V., Deutscher Museumsbund e. V. and ICOM Deutschland e. V., Magdeburg 2019, pp. 89-90, <https://www.kulturgutverluste.de/Webs/DE/Recherche/Leitfaden/Index.html>, accessed: 08.05.2020; Bundesamt für Kultur (BAK), Wegleitung für die Erstellung des Schlussberichts für Projekte zur Erforschung der Provenienzen von Kunstwerken im Bereich NS-Raubkunst und zur Publikation der Resultate, status September 2020, <https://www.bak.admin.ch/raubkunst/merkblatt-hinweis>, last accessed: 08.05.2020; Verband der Museen der Schweiz / Association des musées suisses / Associazione die musei svizzeri, Provenienzforschung im Museum I. NS-Raubgut. Grundlagen und Einführung in die Praxis, series: Normen und Standards – Empfehlungen des VMS 2021, Zurich 2021, p. 6, [https://www.museums.ch/assets/files/dossiers\\_d/Standards/VMS\\_Standard\\_Provenienz\\_NS-Raubgut\\_D\\_Web\\_neu.pdf](https://www.museums.ch/assets/files/dossiers_d/Standards/VMS_Standard_Provenienz_NS-Raubgut_D_Web_neu.pdf) (last accessed: 11.12.2022)





# Newsletter

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## FOCUS ON SWITZERLAND

When it became publicly known in November 2013 that artworks from the possession of Cornelius Gurlitt had been seized, this triggered ongoing developments in the field of provenance research.

While the discussion surrounding the restitution of Ernst Ludwig Kirchner's *Berlin Street Scene* in 2006 had already led Germany's political leaders to declare that there would be a significant increase in the support provided for provenance research in future (Presse- und Informationsamt der Bundesregierung, Pressemitteilung 436, 14 November 2007), the so-called "Gurlitt Art Trove" further boosted the sense of determination to enhance the structures in this field of research and set about pooling resources. As a result, the Federal Government, the Länder and the national associations of local authorities passed the resolution to establish the German Lost Art Foundation as a public-law institution in Magdeburg on 1 January 2015. The "Gurlitt Art Trove" is also described as something of a milestone in terms of raising global awareness surrounding the complex of topics of National Socialist art looting, provenance research and restitution. By accepting the Gurlitt bequest in 2014, the Museum of Fine Arts Bern finally took on the exceptional responsibility of engaging with Hildebrand Gurlitt and his legacy, going on to establish Switzerland's first ever museum department dedicated to provenance research. After completion of the research in Germany, conducted through the *Schwabinger Kunstfund* Taskforce (2013-2015), the Gurlitt Provenance Research Project (2016-2017), and "Reviews, Dokumentation und anlassbezogene Forschungsarbeiten zum Kunstfund Gurlitt" (2018), the Kunstmuseum Bern assessed the results, according to its provenance

categories (see Brühlhart/Doll/Garbers-von Boehm/Raschér pp. IX-XIV). The museum's exhibition *Taking stock. Gurlitt in Review* (16.9.2022-15.01.2023) recently provided an in-depth insight into the Gurlitt legacy and its scholarly analysis. In addition, collaborative work was carried out with the Forschungsstelle "Entartete Kunst" at the University of Hamburg (2019-2022) to clarify the origin of the items of "degenerate art" in this collection, resulting in a supplementary publication entitled *Kunst, Konflikt, Kollaboration. Hildebrand Gurlitt und die Moderne*: The volume addresses the position of the museum director and curator Gurlitt with respect to German Modernism and his role as an art dealer during the National Socialist era and in the post-war period.

The long-standing research links between Germany and Switzerland have prompted us to change the structure of this newsletter: A Focus Switzerland in this issue specifically features topics relating to Switzerland (see pp. I-XIV). In view of the current debate and the agreement to set up an independent commission on Nazi-looted art, the special feature in this issue is not likely to be the last, and we look forward to engaging in close ongoing dialogue.

### GESA VIETZEN

Office of the Advisory Commission



Beratende Kommission  
im Zusammenhang mit der Rückgabe  
NS-verfolgungsbedingt entzogenen Kulturguts,  
insbesondere aus jüdischem Besitz

 Bundesministerium  
Kunst, Kultur,  
öffentlicher Dienst und Sport  
Kommission für Provenienzforschung

 CIVS



Beratende Kommission  
im Zusammenhang mit der Rückgabe  
NS-verfolgungsbedingt entzogenen Kulturguts,  
insbesondere aus jüdischem Besitz

 Spoliation  
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Panel

 Restitutions Committee

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