

# the artist as philanthropist

strengthening  
the next  
generation of  
artist-endowed  
foundations

a study of the emerging artist-endowed  
foundation field in the U.S.

  
THE ASPEN INSTITUTE  
PROGRAM ON PHILANTHROPY  
& SOCIAL INNOVATION

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### **VOLUME II**

#### **PART B.**

#### **CONSIDERATIONS IN FOUNDATION PRACTICE**

#### **PART C.**

#### **COLLECTED BRIEFING PAPERS**



THE ASPEN INSTITUTE  
PROGRAM ON PHILANTHROPY  
& SOCIAL INNOVATION

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## strengthening the next generation of artist-endowed foundations

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## **December 2010 Update to Text**

These substantive updates were made to the Study report following publication November 2010.

### **VOLUME TWO**

#### **ADDITIONAL CITATIONS**

##### **8.2.4 Oeuvres: Catalogues Raisonnés and Authentication**

Citation: Catalogue Raisonné Scholars Association. "A Summary of the Seminar." *CRSA Forum* 14 (2004): 12. Page 202, note 30.

Citation: Catalogue Raisonné Scholars Association. "CRSA Guidelines for Issuing Scholarly Opinions about Authenticity." *CRSA Forum* 23 (2010): 3. Page 209.

##### **Appendix B. Foundation Practice, A. References**

Citation: Catalogue Raisonné Scholars Association. "CRSA Guidelines for Issuing Scholarly Opinions about Authenticity." *CRSA Forum* 23 (2010): 3. Page 245.

##### **Appendix B. Foundation Practice, B. Sources of Practical Information**

Citation: Catalogue Raisonné Scholars Association. Page 249.

# PART B.

## CONSIDERATIONS IN FOUNDATION PRACTICE

# INTRODUCTION:

## Considerations in Foundation Practice

**Part B. Considerations in Foundation Practice** looks at the forming, operating, and terminating of foundations themselves, as well as the planning and conducting of their charitable programs. These observations about considerations in practice both build on the findings of factors in the Aspen Institute's National Study of Artist-Endowed Foundations (Study) that influence the ability of foundations to realize their donors' charitable intentions and also respond to particular trends in foundation formation, governance, exempt purpose, and charitable programs. This links directly to the briefing papers featured in **Part C. Collected Briefing Papers**, which have been commissioned to address critical issues identified during the Study's research. Each chapter on practice references technical resources and cites particular briefing papers that address subjects in greater detail.

The artist-endowed foundation field draws on a number of separate, professional realms within art, law, and philanthropy, each of these having its own terminology. **6. Glossary of Terms in Practice** lists terms from relevant fields used in these chapters on practice. **7. Forming, Sustaining, and Terminating Foundations** focuses on considerations in institutional practice in creating and operating foundations and also comments on foundation termination as a possible choice in some cases. **8. Planning and Conducting Charitable Programs** reviews considerations in programmatic practice in planning and conducting foundations' grantmaking and direct charitable activities.

In all likelihood, this section of the Study report will be read chapter by chapter by persons with specific interests in the particular topic. For that reason, each chapter separately discusses the ways in which private foundation law potentially influences considerations in planning and conducting the respective charitable activities. These should be read in combination with the briefing papers and references as cited. As for the Study report as a whole, this discussion of practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

Appendices closing **Part B. Considerations in Foundation Practice** include a comprehensive listing of the references cited in each individual chapter and a list of organizations that serve as sources of practical information broadly in the various professional areas across which the artist-endowed foundation field operates. The choice of references reflects the varied needs of audiences for this report, which includes those who are expert in some of the respective professional areas and those who are not.

## 6. GLOSSARY OF TERMS IN PRACTICE

The discussion of artist-endowed foundation practice necessarily draws on the terminology of a number of separate, professional realms with respect to the field's institutional and programmatic activities. These include philanthropy, private foundation law, and trust and estate law, as well as art history and contemporary art practice. In addition, several terms have been framed specifically for the purposes of the descriptions of artists' philanthropies found in the Aspen Institute's National Study of Artist-Endowed Foundations (Study).

The following terms are used in **Part B. Considerations in Foundation Practice** based on the definitions given here, which are drawn from sources cited and, in some cases, elaborated for relevancy to artist-endowed foundations.

*Artist-Endowed Foundation*—A private foundation created or endowed by a visual artist, the artist's surviving spouse, or other heirs or beneficiaries to own the artist's assets for use in furthering tax-exempt charitable and educational activities serving a public benefit.<sup>1</sup>

*Artist's Assets*—Artists' assets conveyed to artist-endowed foundations derive from art-related activities, as well as other sources unrelated to art, and include financial and investment assets, art assets (such as art collections, archives, libraries, and copyrights and intellectual property), real property (such as land, residences, studios, exhibition facilities, and nature preserves), and other types of personal property.<sup>2</sup>

*Attribution*—The ascribing of something to someone or something (for example, authorship of a work of art to a specific artist).<sup>3</sup>

*Authentication*—The determination or judgment that an artwork is by the artist to whom it has been attributed.<sup>4</sup> Attribution and authentication are an aspect of scholarly research undertaken to produce a catalogue raisonné, defined below.

*Beneficiary*—(1) An individual or entity that is the recipient of a bequest.<sup>5</sup> (2) An individual or entity that is the recipient of a foundation's grant.<sup>6</sup> (3) An individual assisted by a foundation's direct charitable activity, such as one chosen to participate in a residency program.

*Bequest*—A sum of money, or other property, made available upon the donor's death.<sup>7</sup>

*Blockage Discount*—A reduction to the fair market valuation of similar assets held in bulk, such as an artist's collected works, to reflect the extent to which the selling price would be depressed were the assets to be sold at one time.<sup>8</sup> This might be with respect to an estate, for estate valuation purposes, or a private foundation, for asset valuation purposes.

*Board of Directors*—(1) The governing body of a corporation. (2) The group of persons responsible for the administration of a nonprofit, charitable corporation.<sup>9</sup>

*Catalogue Raisonné*—A thorough, reasoned, and systematic documentation of all works by an artist known at the time when the catalogue is prepared.<sup>10</sup> The artist's oeuvre—the body of artworks constituting the lifework of the artist—is the subject of the catalogue.

*Charity*—Used narrowly, it means provision of aid to the poor. In its traditional legal meaning, the word *charity* encompasses religion, education, assistance to the government, promotion of health, relief of poverty or distress, and other purposes that benefit the community.<sup>11</sup>

*Charitable Class*—To qualify as a charitable organization, an entity's activities must benefit the general public or a segment of the general public large enough, and sufficiently open ended in definition, to constitute a charitable class and not a specific individual or limited group.<sup>12</sup>

*Charitable Organization*—Charitable trusts or nonprofit corporations created for a broad range of purposes considered of benefit to the public, below.<sup>13</sup>

*Charitable Purpose*—The activity of benefit to the public to which a tax-exempt charitable organization is committed, most commonly those listed in the Internal Revenue Code—religious, charitable (relief of the poor and needy), scientific, testing for public safety, literary or educational, for the prevention of cruelty to children or animals, as well as medical research organizations and amateur athletic associations. Regulations add to this list advancing education or science, lessening the burdens of government, and promoting social welfare. Museums and other institutions promoting the arts are entitled to exemption because they are considered to be advancing education.<sup>14</sup>

*Charitable Trust*—A legal entity established by a deed or declaration of trust under which persons or corporations, acting as trustees, administer assets for charitable purposes and not for the benefit of specified individuals.<sup>15</sup>

*Charitable-Use Asset*—An asset owned by a foundation that is used or held for use directly in the conduct of activities fulfilling its exempt purpose.<sup>16</sup> Such activities are known as *direct charitable activities*. Charitable-use assets, also known as exempt purpose assets, that are used or held for use in direct charitable activities are excluded when calculating the annual payout requirement based on a percentage of net noncharitable-use assets.<sup>17</sup>

*Conflict of Interest*—A conflict of interest arises when fiduciaries, as well as certain parties related to them, have a direct or indirect financial interest in a decision or transaction by the charitable organization. Fiduciaries are prohibited from participating in decisions in which they have a conflict of interest.<sup>18</sup>

*Conflict of Interest Policy*—A conflict of interest policy consists of a set of procedures to follow to avoid the possibility that those in positions of authority over a charitable organization might receive an inappropriate benefit.<sup>19</sup>

*Direct Charitable Activity*—An activity undertaken by a private foundation itself as a direct expenditure in furtherance of its charitable purpose, as opposed to making a grant to another organization.<sup>20</sup>

*Disqualified Person*—Foundation managers, defined as officers, directors, and trustees or employees with such powers; persons or entities that are substantial contributors; owners of more than 20 percent of a corporation or other entity that is a substantial contributor; family members of disqualified persons; business entities in which disqualified persons have more than a 35 percent interest; and government officials. The law bars most transactions between a foundation and its disqualified persons.<sup>21</sup>

*Estate*—(1) A legal entity comprising a deceased person's aggregate property.<sup>22</sup> An estate is permitted to exist for a limited period and terminates under court supervision when all obligations have been met and all property has been distributed as directed by the individual's will.<sup>23</sup> (2) In art circles, common parlance for the aggregate body of artworks, rights, and other property owned privately by an individual or group of individuals who are heirs or beneficiaries of a deceased artist. There is no time limit on use of this descriptive term employed to protect the privacy of owners.

*Estate Distribution Foundation*—A private foundation established to accomplish the posthumous, charitable distribution of an artist's assets, including artworks owned at the artist's death and not bequeathed to other beneficiaries. This type of foundation is not intended to exist in perpetuity, though it might not have a defined term.<sup>24</sup>

*Estate Plan*—The arrangement for the disposition and management of one's estate at death through the use of wills, trusts, insurance policies, and other devices.<sup>25</sup> An estate plan



might include provisions to establish a private foundation or fund an existing foundation.

*Excess Business Holdings*—The holdings in a specific business of a foundation and all of its disqualified persons that exceed the level of holdings permitted a private foundation, generally 20 percent.<sup>26</sup>

*Excise Tax on Earnings*—An annual tax on net investment income that must be paid to the Internal Revenue Service (IRS) by a private foundation.<sup>27</sup>

*Expenditure Responsibility*—Special procedures that foundations are required to use to make a grant to an organization that is not a public charity.<sup>28</sup> Expenditure responsibility is often necessary for grants made to non-US organizations.

*Family Foundation*—Common parlance for a private foundation of which the majority of the board comprises members of a family and their employees.<sup>29</sup> Family foundations typically derive funds from members of a single family.

*Fiduciary*—A person who has legal responsibility for the administration of a nonprofit corporation or charitable trust and, as such, has an affirmative duty to carry out the charitable purposes of the organization. Fiduciaries of charitable organizations include all trustees, directors, and officers, or other persons in positions to influence the organization.<sup>30</sup>

*Fiduciary Duties*—With respect to charitable organizations, under the *duty of loyalty* a fiduciary will not profit at the expense of the organization, and under the *duty of care* a fiduciary will not be reckless in its administration.<sup>31</sup>

*Form 990-PF, Annual Information Return*—The form filed annually by private foundations with the IRS. The IRS uses the form to assess compliance with the Internal Revenue Code.<sup>32</sup> Private foundations are required by law to file this form, as well as to make it available to the public upon request. Forms filed since 1998 can be viewed online at GuideStar (<http://www.guidestar.org/>) and National Center for Charitable Statistics (<http://nccs.urban.org/>).

*Functionally-Related Business*—A regularly conducted business enterprise substantially related to a charitable organization's purpose apart from its need for income.<sup>33</sup>

*Grant*—An award of funds or property to an organization or individual enabling the entity or person to undertake charitable activities.<sup>34</sup> Also, an award of opportunity to an individual to participate in a direct charitable activity, such as a residency program.

*Grantee*—The individual or organization that receives a grant or award.<sup>35</sup>

*Guidelines*—A statement of a foundation's goals, priorities, criteria, and application procedures for distributing its grant funds.<sup>36</sup> Likewise, criteria and procedures for awarding opportunities to participate in direct charitable activities, such as a residency program.

*Heir*—Someone entitled by law, as a relation, to inherit a person's property.<sup>37</sup>

*Insider*—A person in a position of power, or one who has access to confidential information.<sup>38</sup> Common parlance for a foundation's trustees, directors, officers, and substantial contributors. In some cases, the term also includes the families of these persons.

*Intellectual Property*—Rights in artists' creative works generally, affirmed in the legal form of copyrights, patents, and trademarks. These rights can be transferred by testamentary bequest, including to an artist-endowed foundation.<sup>39</sup> Also, rights in works produced by a foundation, such as publications, media productions, websites, and the like.

*Internal Revenue Service (IRS)*—The federal agency responsible for regulating private foundations and their activities (<http://www.irs.gov/>).<sup>40</sup>

*Jeopardizing Investment*—An investment that risks the ability of a private foundation to carry out its exempt purpose.<sup>41</sup>

*Lifetime Foundation*—A private foundation created and supported by an artist during the artist's lifetime. It might not be intended to exist following the artist's death.<sup>42</sup>

*Limited Edition*—Editions of fine art multiples, limited to a specifically stated number of copies that are usually numbered consecutively and sometimes signed by the artist.<sup>43</sup> While production of a print edition typically is completed at one time, photographers and sculptors often produce the works comprising an edition individually over time as exhibition or sale opportunities arise or as available resources make production possible.

*Multiples*—Works of fine art that are designed to be produced so that there is more than one original. The most common examples are works produced from plates or negatives, including engravings, etchings, lithographs, photographs, and other prints.<sup>44</sup> Sculptures cast from the same model or mold are multiples as well.

*Nonoperating Foundation*—One of the two primary types of private foundations, as defined below, the other type being the private operating foundation. Nonoperating

foundations generally make grants to individuals and organizations that further charitable purposes or carry on other exempt activities or functions.<sup>45</sup> Nonoperating foundations must meet specific financial benchmarks annually, detailed in *Payout Requirement*.

*Nonprofit Corporation*—A legal entity created under a charter or articles of organization granted by a state agency under laws requiring that it does not have shareholders entitled to any distribution of profits. Nonprofit charitable corporations are those organized for one or more charitable purpose.<sup>46</sup>

*Partial Grant/Partial Sale of Art*—A form of grant in which an artwork is sold for its program-related use to a public charity, typically a museum, at a price below fair market value.<sup>47</sup> The difference between sale price and market value is recorded by the foundation as a grant. Museums refer to such transactions as *gift-purchases*, and individual donors making such sales use the term *bargain sale*.

*Payout Requirement*—The amount that a private foundation is required to expend for charitable purposes annually. A nonoperating foundation must expend annually approximately five percent of the fair market value of its net noncharitable-use assets.<sup>48</sup> A private operating foundation must expend annually at least 85 percent of its adjusted net income or minimum investment return, whichever is less, on the active conduct of programs constituting its exempt purpose and, in addition, must meet one of three other tests: (1) devoting substantially more than half of its assets directly to the active conduct of its exempt purpose; (2) expending directly for its exempt purpose an amount not less than two-thirds of its minimum investment return, which equates to approximately 3.3 percent of its net noncharitable-use assets; or (3) meeting a public support test similar to that for public charities, but less stringent.<sup>49</sup>

*Philanthropy*—Voluntary giving by an individual or group to promote the common good. Also commonly refers to grants of money given by a foundation, individual, or group to nonprofit organizations.<sup>50</sup> Used broadly, the term describes the field of organizations and individuals involved in conducting philanthropic activities.

*Posthumous Prints or Casts*—An artist can authorize the printing or casting of an edition of his or her work (such as a print, photograph, or sculpture) to take place after the artist's death. Such works must be marked clearly as having been produced posthumously so as not to be considered a forgery. Legislation in some states requires disclosure of a work's posthumous production and, in some cases, evidence of authorization by the artist or by the artist's legal representative.<sup>51</sup> Presumably, this would be the entity that owns the artist's copyright, such as the artist-endowed foundation.

*Private Benefit*—To qualify for exemption, an organization must establish that it is not organized or operated for the private benefit of any persons. This includes persons who have a direct interest in the organization (such as the creator, his or her family, and persons controlled directly or indirectly by such private interests) and also persons who do not have a direct interest in the organization, such as any private individual.<sup>52</sup>

*Private Foundation*—A nongovernmental, nonprofit organization—typically formed as a charitable trust or nonprofit corporation, with funds generally from a single source and programs managed by its own trustees or directors—established to maintain or aid social, educational, religious, or other charitable activities serving the common welfare through grants or through direct charitable activities. US private foundations are tax-exempt under Section 501(c)(3) of the Internal Revenue Code and are classified by the IRS as a private foundation as defined in the Code.<sup>53</sup> Private foundations are either nonoperating foundations or private operating foundations.

*Private Inurement*—Section 501(c)(3) of the Internal Revenue Code states in part that to qualify for exemption, “no part of the net earnings of the organization inures to the benefit of any private...individual....” The prohibition applies only to persons who have an interest in the organization, such as directors, officers, or employees.<sup>54</sup>

*Private Operating Foundation*—A subcategory of private foundations that conducts a substantial amount of its charitable activities directly, rather than through making grants to other charitable organizations, and that generally holds endowments or substantial assets, such as art collections, devoted to its charitable purposes.<sup>55</sup> Private operating foundations must meet specific financial benchmarks annually, detailed in *Payout Requirement*.

*Program-Related Investment*—A loan or other investment made by a private foundation for a project related to the foundation's charitable purpose and interests. The foundation generally expects to receive its money back with limited or below-market interest.<sup>56</sup>

*Public Charity*—A nonprofit organization that is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code and that receives its financial support from a broad segment of the public, in contrast to private foundations that receive financial support typically from one source.<sup>57</sup> Public charities must continue to meet an annual public support test. Those not able to do so could be reclassified as private foundations.

*Public Inspection and Disclosure*—Private foundations are required to make available for public inspection and copying their exemption applications and their annual information returns (Forms 990-PF).<sup>58</sup> Private foundations are required to report the identity of their donors and the amounts received on their annual information returns.

*Qualifying Distribution*—Expenditures of a private foundation made to satisfy its annual payout requirement.<sup>59</sup> These can include grants, charitable administrative expenses, loans and program-related investments, and amounts paid to acquire assets used directly in carrying out tax-exempt purposes, as well as costs to conduct direct charitable activities.

*Section 501(c)(3)*—The section of the Internal Revenue Code that defines the terms by which an organization will qualify to be designated as charitable and tax-exempt.<sup>60</sup>

*Self-Dealing*—Self-dealing is specifically defined in the Internal Revenue Code as any transaction between a private foundation and a disqualified person in which the person has a direct or indirect financial interest; such transactions are prohibited, with few exceptions.<sup>61</sup>

*Supporting Organization*—A public charity that is not required to meet the public support test because it supports another public charity. A supporting organization must meet one of three legal tests that ensure the organization being supported has some influence over the actions of the supporting organization.<sup>62</sup>

*Tax-Exempt Organization*—An organization that does not have to pay federal or state income taxes. Organizations, other than churches, that seek recognition of their tax-exempt status under Section 501(c)(3) of the Internal Revenue Code must apply to the IRS.<sup>63</sup>

*Trust*—A legal device used to set aside money or property of one person for the benefit of one or more persons or organizations.<sup>64</sup>

*Trustee*—The persons or institutions responsible for the administration of a trust.<sup>65</sup>

*Unrelated Business Income Tax*—A tax on income derived from a regularly conducted trade or business that is not substantially related to a charitable organization's exempt purpose, other than its need for income.<sup>66</sup>

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<sup>1</sup> A term defined and used for the purposes of the Study.

<sup>2</sup> A term defined and used for the purposes of the Study.

<sup>3</sup> Art Law Glossary, International Foundation for Art Research, <http://www.ifar.org/glossary.php>.

<sup>4</sup> Ibid.

<sup>5</sup> Glossary of Terms in Philanthropy, Donors Forum of Chicago, last modified March 23, 2010, <http://www.donorsforum.org/>

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ralph E. Lerner and Judith Bresler, *Art Law, The Guide for Collectors, Investors, Dealers, & Artists*. 3rd ed. (New York: Practising Law Institute, 2005), 1747–1748.

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- <sup>9</sup> Marion R. Fremont-Smith, *Governing Nonprofit Organizations, Federal and State Law and Regulation* (Cambridge, MA: Belknap Press of Harvard University, 2004), 158–168.
- <sup>10</sup> Catalogues Raisonnés: Frequently Asked Questions, International Foundation for Art Research, [http://www.ifar.org/cat\\_rais.php](http://www.ifar.org/cat_rais.php).
- <sup>11</sup> Council on Foundations, “Glossary of Philanthropic Terms” (Washington, DC: Council on Foundations, 2003).
- <sup>12</sup> Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* (Valhalla, NY: Thomson/RIA, 2002–2008), 3–5.
- <sup>13</sup> Marion R. Fremont-Smith, “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>14</sup> Ibid..
- <sup>15</sup> Ibid.
- <sup>16</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 11-9–11-14.
- <sup>17</sup> Ibid.
- <sup>18</sup> Ibid.
- <sup>19</sup> Ibid.
- <sup>20</sup> Ibid., 11-28–11-30.
- <sup>21</sup> Fremont-Smith, “Federal and State Laws.”
- <sup>22</sup> Linda Picard Wood, ed., *Merriam-Webster's Dictionary of Law* (New York: Merriam-Webster, 1996), 169.
- <sup>23</sup> Fremont-Smith, “Federal and State Laws.”
- <sup>24</sup> A term defined and used for the purposes of the Study.
- <sup>25</sup> Wood, *Merriam-Webster*, 169.
- <sup>26</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 12–37.
- <sup>27</sup> Donors Forum, Glossary of Terms.
- <sup>28</sup> Ibid.
- <sup>29</sup> Fremont-Smith, “Federal and State Laws.”
- <sup>30</sup> Ibid.
- <sup>31</sup> Ibid.
- <sup>32</sup> Donors Forum, Glossary of Terms.
- <sup>33</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 21-1–21-23.
- <sup>34</sup> Donors Forum, Glossary of Terms.
- <sup>35</sup> Ibid.
- <sup>36</sup> Ibid.
- <sup>37</sup> Bryan A. Garner, *A Dictionary of Modern Legal Usage* (New York: Oxford University Press, 1995), 400.
- <sup>38</sup> Wood, *Merriam-Webster*, 249.
- <sup>39</sup> United States Copyright Office, <http://www.copyright.gov/>.
- <sup>40</sup> Donors Forum, Glossary of Terms.
- <sup>41</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 12–47.
- <sup>42</sup> A term defined and used for the purposes of the Study.
- <sup>43</sup> Art and Architecture Thesaurus Online, Getty Research institute, <http://www.getty.edu/>.
- <sup>44</sup> Ibid.
- <sup>45</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 9-4
- <sup>46</sup> Fremont-Smith, “Federal and State Laws.”
- <sup>47</sup> Marie C. Malaro, *A Legal Primer on Managing Museum Collections* (Washington, DC: Smithsonian Books, 1998), 377–378.
- <sup>48</sup> Ibid.
- <sup>49</sup> Ibid.
- <sup>50</sup> Donors Forum, Glossary of Terms.



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- <sup>51</sup> Lerner and Bresler, *Art Law*, 451–492.
- <sup>52</sup> Fremont-Smith, “Federal and State Laws.”
- <sup>53</sup> Donors Forum, Glossary of Terms.
- <sup>54</sup> Fremont-Smith, “Federal and State Laws.”
- <sup>55</sup> *Ibid.*
- <sup>56</sup> Donors Forum, Glossary of Terms.
- <sup>57</sup> *Ibid.*
- <sup>58</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 33–37.
- <sup>59</sup> Donors Forum, Glossary of Terms.
- <sup>60</sup> *Ibid.*
- <sup>61</sup> Fremont-Smith, “Federal and State Laws.”
- <sup>62</sup> Donors Forum, Glossary of Terms.
- <sup>63</sup> *Ibid.*
- <sup>64</sup> *Ibid.*
- <sup>65</sup> *Ibid.*
- <sup>66</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 21-1–21-23.

## 7. FORMING, SUSTAINING, AND TERMINATING FOUNDATIONS

The ability of artist-endowed foundations to realize their donors' charitable intentions is determined to a great extent by institutional practice, specifically the choices made in the process of forming and sustaining foundations and, in some cases, terminating foundations. Second-generation artist-endowed foundations—those created in the 1970s and later—have been active for a number of decades, and it is possible now to make observations about the key considerations in institutional practice that influence the realization of a foundation's potential.

This discussion of considerations in institutional practice among artist-endowed foundations addresses practice in forming, sustaining, and terminating artist-endowed foundations. The first part of this section focuses on practice in foundation formation, including: (1) motivations and challenges in formation, and (2) factors and considerations in planning foundations. The second part focuses on sustaining foundations: (1) economic models used by artist-endowed foundations, (2) professional advisors to foundations, and (3) conflict of interest policies and practice. The final section addresses practice in terminating artist-endowed foundations.

The ways in which institutional practice and program practice intersect are considered in **8. Planning and Conducting Charitable Programs**, including with respect to grantmaking, as well as direct charitable activities involving archives, art collections, copyrights and intellectual property, catalogues raisonnés and authentication, and real property.

### 7.1 CONSIDERATIONS IN FORMING ARTIST-ENDOWED FOUNDATIONS

This discussion of considerations in institutional practice in forming artist-endowed foundations provides a broad overview of the topic, pulling together a number of interrelated choices that together influence, and in some cases determine, a foundation's potential to realize its donor's charitable intentions.

The section's first chapter draws on experiences of artist-endowed foundations over the past decades to explore motivations in forming artist-endowed foundations and review

challenges in foundation formation, all with the aim of identifying patterns that can help inform improvements in the practice of foundation formation.

The second chapter examines factors and considerations in planning artist-endowed foundations. It looks first at common foundation models, describes their characteristics, and discusses their potential attributes and possible limitations for certain purposes. The chapter then turns to four areas in which individuals creating foundations and their advisors are required to weigh options and make important choices: (1) donor intentions with respect to charitable purpose, beneficiaries, foundation function, lifetime or posthumous creation, and existence in perpetuity or for a limited term; (2) technical matters, such as jurisdiction of formation, asset characteristics, and legal status as it combines with asset classification; (3) people and expertise, focused on governance structure, administrative competencies, and roles of artists' heirs and beneficiaries; and (4) economic capacity, with respect to a foundation's economic model, its scale and asset mix, and the valuation, blockage discount, and role of artworks.

The chapters of **8. Planning and Conducting Charitable Programs** detail considerations involved in planning and conducting grantmaking and direct charitable activities and note how institutional practice and program practice intersect.

In all likelihood, persons with specific interests will read the chapter that addresses their topic of interest and not the section as a whole. For that reason, each chapter separately summarizes the ways in which private foundation law potentially influences considerations in planning and conducting the respective charitable activities. These summaries should be read in combination with briefing papers and references as cited. As for the Aspen Institute's National Study of Artist-Endowed Foundations (Study) report as a whole, this discussion of practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

## 7.1.1 Motivations and Challenges in Foundation Formation

Artist-endowed foundations are created by artists, by artists' surviving spouses, and by other heirs or beneficiaries who commit an artist's assets to the ownership of a private foundation for use in furthering exempt charitable and educational activities serving a public benefit. Of foundations with assets of \$1 million and above with data examined during the Aspen Institute's National Study of Artist-Endowed Foundations (Study), 80 percent were created by artists (30 percent during artists' lifetimes, and 50 percent under artists' estate plans) and 20 percent were created by artists' heirs or beneficiaries. This latter group includes surviving spouses, children, grandchildren, great grandchildren, nieces and nephews, non-marital life partners, and personal or professional associates.

This chapter offers general observations about practice in foundation formation, focusing broadly on motivations and challenges in the formation process. The information reviewed here sets the stage for a subsequent discussion of factors and considerations in foundation planning presented in the following chapter. General resources on foundation formation are featured at the close of this chapter, including briefing papers prepared for the Study that pertain to this topic, along with references documenting specific examples of formation motivations and challenges.

### **Motivations in Foundation Formation**

Many human and practical motivations combine to inform creation of an artist-endowed foundation. These include personal, professional, familial, financial, and philanthropic circumstances and interests. An effort to ascertain motivations in foundation formation for the field broadly, whether this is by the artist or by the artist's heirs or beneficiaries, can draw on two types of information available publicly. The first of these is demographic data, including obituaries, in combination with foundation data and related industry data. The second is anecdotal information, including foundations' public narratives featured in their reports and on their websites, as well as perspectives offered in artists' biographies, interviews, exhibition catalogues, and the like.

### **Demographic Data Illuminating Motivation**

Of foundations associated with deceased artists that hold assets of \$1 million and above with data available to the Study, 60 percent of the artists were survived at their death by no immediate heirs, either a spouse or a child, or were survived solely by a spouse or a non-marital life partner. In some cases, artists were survived by immediate heirs, but those heirs took no role in the foundation, presumably as determined by the artist or at their own choice. If nonparticipation in a foundation is taken to indicate that the heirs were likely to be unavailable, for whatever reason, to take up an inherited role with respect to the artists'

works, then 70 percent of the artists were individuals for whom immediate heirs would not be available in the longer-term, in fact or by choice, to fulfill a role overseeing exhibition, sales, or licensing of the artist's lifework. Presumably, creation of a foundation addressed this problem and served other important concerns, chief among these being the fulfillment of philanthropic intentions.

The types of artists associated with artist-endowed foundations are discussed in **3. Field History and Influences**, which explores artists' demographic data in combination with two other factors—artists' market standing and foundation function. Two broad patterns were identified that cast a light to some extent on motivations, both of artists themselves and, in some cases, artists' heirs or beneficiaries.

Those artists whose works garner strong market interest,<sup>1</sup> or who had access to other sources of private support, such as family wealth, and who had no immediate heirs or were survived only by a spouse or life partner are more often associated with a grantmaking foundation or with a comprehensive foundation that incorporates grantmaking among other activities.<sup>2</sup>

Those artists whose works garner strong market interest and who were survived by immediate heirs, including children, are more often associated with foundations functioning as study centers and exhibition programs.<sup>3</sup> Artists' heirs or beneficiaries in many cases play a role in such foundations.

### **Anecdotal Information Addressing Motivation**

Anecdotal information about the motivation of artists or their heirs or beneficiaries in creating foundations cannot be quantified. However, a few general observations can be made. Discussions of motivations often reference cultural themes—advancing a newer art form, such as photography;<sup>4</sup> furthering an aesthetic philosophy;<sup>5</sup> increasing art education opportunities;<sup>6</sup> supporting a much-loved cultural or educational institution;<sup>7</sup> facilitating artists' creative practices;<sup>8</sup> and assisting artists with financial need.<sup>9</sup> Humanitarian and social concerns are mentioned as well—HIV/AIDS research and services,<sup>10</sup> social justice,<sup>11</sup> opportunities for disadvantaged children,<sup>12</sup> and animal welfare,<sup>13</sup> among others.

For foundations endowed with artists' works, motivations often include the desire to realize a particular role for the artworks. These typically concern the foundation's function in assuring maintenance and public presentation of the artists' works, in some cases under specific conditions or arrangements.<sup>14</sup> Another typical concern is implementing broad distribution of the artist's works to public collections consistent with the artist's vision.<sup>15</sup> A foundation also might be the vehicle to formalize participation, or not, in supervision of the artist's works. In some cases, this means organizing the involvement of heirs and beneficiaries in overseeing charitable use and disposition of an artist's works.<sup>16</sup> Conversely, a foundation might be used to protect the artist's works from family members ill-equipped to

oversee art exhibition, sale, and licensing activities, or who are inappropriate in the artist's view to supervise these activities.<sup>17</sup> Finally, a foundation might be described broadly as the means to manage the posthumous disposition of an artist's artistic output.<sup>18</sup>

Consistent with the role of private foundations in American philanthropy, a foundation can play an important role in estate planning for a visual artist. As such, the motivations behind the creation of and the purposes defined for artist-endowed foundations are discussed in practical, instrumental terms. Some foundations are described as a means to minimize estate taxes,<sup>19</sup> dispose of lesser artworks,<sup>20</sup> or isolate unproven works from the art market where they might undermine the artist's standing.<sup>21</sup> In the end, multiple motivations are served and must be weighed and integrated during the formation of an artist-endowed foundation.<sup>22</sup>

## **Perspectives on Choices in Formation**

A number of the briefing papers prepared for the Study address the formation process as the critical point at which a foundation's prospects are determined. Stephen K. Urice outlines the process of foundation formation—detailing choices that flow from the decision to realize a public benefit, as distinct from a private benefit—and considerations to be weighed by artists and their advisors.<sup>23</sup> Stephen Gillers offers practical guidance on the topic of selecting and working with a legal advisor to establish an artist-endowed foundation.<sup>24</sup>

Frances R. Hill discusses the public benefit requirement of exempt entities as a practical aid in planning, organizing, and operating artist-endowed foundations.<sup>25</sup> She considers the choices to be made by artists and their heirs and beneficiaries in determining a foundation's overarching charitable purpose, planning program activities that will realize a public benefit, and identifying appropriate, broad categories of individuals who are to benefit from the programs. Marion R. Fremont-Smith reviews federal and state laws regulating conflict of interest and how these apply to artist-endowed foundations, many aspects of which are determined by choices made during a foundation's formation.<sup>26</sup>

Robert Storr discusses the human context in which artist-endowed foundations are formed.<sup>27</sup> He focuses particularly on choices about disposition of archives and artworks during foundation formation, how these bear on the efficacy of foundations in the long-term, and the professional expertise necessary to support the process appropriately. He also notes the importance of a clear articulation of intentions for their foundations by artists in order to provide guidance for decisions that must be made after their deaths. Charles C. Bergman provides a concrete example of the choices encountered in foundation formation by reviewing the history of the Pollock-Krasner Foundation and the process of its establishment.<sup>28</sup>



## Observations on Challenges in Formation

The total number of artist-endowed foundations identified to date is quite small relative to the overall scale of the greater foundation universe. However, a sufficient number has been established to enable some observations about effective practice in foundation formation and, conversely, to identify patterns in challenges associated with the formation process. A foundation that is unable to realize its donor's intention for public benefit fully, or is delayed in that full realization, often has been hampered by decisions made during formation.

The following observations about challenges in forming artist-endowed foundations are based on briefing papers prepared for the Study as well as information available publicly. This includes foundations' annual information returns (Forms 990-PF),<sup>29</sup> rulings and determinations by regulators,<sup>30</sup> foundation publications, artists' biographies, archival records,<sup>31</sup> and professional literature generally. This broad summary of challenges is not comprehensive; for example, it excludes discussion of problems associated with valuation of artists' estates and how such problems impact foundation formation.<sup>32</sup> Nonetheless, it offers a general picture of concerns that result from choices made intentionally during foundation formation. Challenges include difficulties associated with preparation of governing instruments, preparation of wills and estate plans, assumptions about economic models, and provisions for governance, as follows.

### ***Tax Exemption Delayed or Denied***

Foundation formation can be delayed or derailed at the get-go. The application for recognition of exemption will be denied if a foundation's trust instrument or articles of incorporation fails to include specific language required by law.<sup>33</sup> Exemption will be denied if a foundation is not committed to a charitable purpose—one or a combination of the charitable purpose categories that are specified as eligible for exemption—or if it is not operated exclusively for public benefit.<sup>34</sup>

### ***Flawed Wills and Estate Plans***

A flawed will can create challenges by inadvertently disallowing the creation or funding of a foundation.<sup>35</sup> The language of a will can cast confusion about the division of property between a foundation and other beneficiaries, leading to litigation that consumes resources that otherwise would have been available to support the foundation's charitable purpose.<sup>36</sup> A will that is vague as to an artist's intentions for a foundation, or fails entirely to address that topic, contributes to confusion and conflict among those responsible for establishing the foundation, and in some cases provides an opportunity for malfeasance.<sup>37</sup>

A flawed estate plan also can frustrate an artist's intentions to create a foundation. This includes an estate plan that makes provisions for a foundation that conflict with a spouse's rights under state law.<sup>38</sup> Related to this is an estate plan that assigns inappropriate assets to a foundation (for example, interest in an artist's corporation whose necessary liquidation

triggers tax payments that consume resources intended to support the foundation's charitable purpose).<sup>39</sup> Likewise, an estate plan that forms a foundation whose activities include publishing an artist's works, but bequeaths copyrights in those works to a foundation insider, sets up the potential for conflicts of interest, self-dealing, and even inurement.<sup>40</sup>

### ***Unfeasible Economics***

A foundation's inability to fully realize an intended public benefit can be traced in some cases to economic choices made during formation. These fall into several categories: creation of a foundation with an ambitious charitable purpose that an artist's estate plan cannot fund sufficiently;<sup>41</sup> lack of necessary resources, such as a foundation that is funded predominantly with art assets of unproven economic value;<sup>42</sup> and mismatch between charitable purpose and assets, such as funding a grantmaking program that requires dollars in the short-term with a body of artworks of the type that necessitates a longer-term strategy for sales,<sup>43</sup> or endowing a foundation with real property whose maintenance and operation consumes available resources, leaving its charitable programs underfunded.<sup>44</sup>

Although an artist might underfund a foundation financially because of limited personal means, it is not unknown for artists with means to underfund their foundations financially.<sup>45</sup> Typically this involves decisions by artists to direct their financial assets to private beneficiaries and to place their art in a foundation with minimal financial resources under the assumption that art sales or rights licensing fees will support the care and charitable use of the artworks. However, this might not prove to be the case.

### ***Hampered Governance***

A foundation can be constrained by governance choices made during formation. For foundations endowed with artworks, placing the foundation's art dealer or other individuals who privately own and sell the artist's works on the foundation's board can create a heightened risk for conflict of interest.<sup>46</sup> Foundations created with governing bodies comprising only related directors can have difficulty implementing required conflict of interest procedures when related directors must be excluded from decisions in which they have a conflict of interest.<sup>47</sup> In some states, foundations with boards comprising exclusively or primarily related members will be unable to compensate related persons or to indemnify directors and officers.<sup>48</sup> Foundations established with trustees, directors, or officers lacking knowledge of private foundation regulations can inadvertently run afoul of these rules.<sup>49</sup> This can be the case even when a foundation's legal advisor is a member of the governing board.<sup>50</sup>

## Optimal Circumstances for Foundation Formation

The types of challenges in foundation formation discussed above—those involving technical errors in organizational documents and applications for exemption, unclear or improperly written wills and flawed estate plans, unfeasible economics, unrealistic assumptions about art sales, and hampered governance—to a great extent are challenges that might be minimized or avoided. That would be possible were there the necessary legal expertise, broader information about effective planning and formation processes available to support different choices by donors, realistic expectations about art sales, and greater knowledge about private foundation law among persons responsible for forming and governing artist-endowed foundations.

Beyond minimizing and avoiding challenges in forming artist-endowed foundations is the question of what circumstances might better support the foundation formation process broadly.

The Study's findings indicate artists typically form lifetime foundations when in their mid-70s. This suggests foundation formation by artists takes place to a great extent in the context of estate planning with a focus on preparing for posthumous philanthropy. That would be consistent with research findings about the impact of tax incentives that since 1969 have favored posthumous bequests to private foundations, compared to lifetime gifts.<sup>51</sup> It also would be consistent with published estate planning advice that a foundation intended to play a role in an artist's estate plan be created during the artist's lifetime so that it stands ready for its role following the artist's death.<sup>52</sup> This suggests several important questions.

Would a greater range of estate planning strategies be available to artists were they to address the process earlier in their lives, particularly with respect to optimal provisions for heirs and beneficiaries, as well as methods to maximize estate liquidity and minimize estate tax liability?

Might it be the case that artists forgo gratifying opportunities to engage in organized personal philanthropy during their lifetimes on the assumption that foundations are merely estate planning mechanisms?<sup>53</sup>

Would formation and operation of foundations during artists' lifetimes help to ensure better communication about artists' intentions for their foundations to the trustees, directors, officers, and professional advisors who will carry forward that mission in the long-term?

To the extent that the answer to these questions is affirmative, two alternatives—engaging estate planning at least a decade earlier than current practice, and increasing the focus on artist-endowed foundations' role in organized personal philanthropy during artists' lifetimes—merit consideration by artists and their advisors.

## **Resources: Foundation Formation—Motivations and Challenges**

### **Best Practice Perspectives: Formation of Artist-Endowed Foundations**

Bergman, Charles C. "A Commitment to Support Individual Artists Worldwide: Reflections on the Experience of One Artist-Endowed Foundation." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Fremont-Smith, Marion R. "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

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Gillers, Stephen. "Enter the Lawyers: Choosing and Working with Estate and Foundation Counsel to Secure an Artistic and Philanthropic Legacy." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Storr, Robert. "Toward a Public Library of American Culture: Reflections on the Centrality of Art and Importance of Access in Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Urice, Stephen K. "Creativity and Generosity: Considerations in Establishing an Artist-Endowed Foundation." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

### **Documentation: Challenges in Foundation Formation**

MILTON AND SALLY AVERY ARTS FOUNDATION INC.

Ruling Year 1983. Created by Sally Michel Avery during her lifetime.

Milton Avery Papers, 1926–1982; Financial and Legal Records, 1943–1982. Archives of American Art, Smithsonian Institution. <http://www.aaa.si.edu/collectionsonline/avermilt/>

## THE JOSEPH AND ROBERT CORNELL MEMORIAL FOUNDATION

Ruling Year 1984. Created by Joseph Cornell by his will.

Joseph Cornell Papers. Joseph Cornell Estate Papers, 1944–1986. Archives of American Art, Smithsonian Institution.

<http://www.aaa.si.edu/collectionsonline/cornjose/series10.htm>.

## C & B FOUNDATION TRUST (Cornell and Benton)

Ruling Year 1976; created by Joseph Cornell's sister as his residuary legatee.

Joseph Cornell Papers. Joseph Cornell Estate Papers, 1944–1986. Archives of American Art, Smithsonian Institution.

<http://www.aaa.si.edu/collectionsonline/cornjose/series10.htm>.

## DOROTHY DEHNER FOUNDATION FOR THE VISUAL ARTS INC.

Ruling Year 1995. Created by Dorothy Dehner by her will.

Marter, Joan. "Joan Marter on the Dorothy Dehner Foundation." In *Artists' Estates, Reputations in Trust*. Edited by Magda Salvesen and Diane Cousineau, 294–302. New Brunswick, NJ: Rutgers University Press, 2005.

## SAM FRANCIS FOUNDATION (fka Samuel L. Francis Art Museum Inc.)

Ruling Year 1995 (precursor entity 1990). Precursor entity created by Sam Francis during his lifetime.

Nicholas, Frederick M. "Afterword: Artist Beware." In *Foundation Management: Innovation and Responsibility at Home and Abroad*. Edited by Frank L. Ellsworth and Jose Lumarda, 295–298. Hoboken, NJ: John Wiley and Sons, 2003.

## GRAHAM FOUNDATION FOR ADVANCED STUDIES IN THE FINE ARTS (fka American School of Fine Arts)

Ruling Year 1959. Created by Ernest R. Graham by his will.

Manny, Carter H. "Oral History of Carter Manny." By Franz Schulze. Compiled under the auspices of the Chicago Architects Oral History Project, the Art Institute of Chicago. Chicago: Art Institute of Chicago, 1995 and 2001.

## OSSORIO FOUNDATION

Ruling Year 1996. Created by the beneficiary of Alfonso Ossorio's estate plan.

Solomon, Michael. "Michael Solomon on the Ossorio Foundation." In *Artists' Estates, Reputations in Trust*. Edited by Magda Salvesen and Diane Cousineau, 204–218. New Brunswick, NJ: Rutgers University Press, 2005.

## THE MARK ROTHKO FOUNDATION INC.

Ruling Year 1971. Created by Mark Rothko during his lifetime.

Breslin, James E. B. *Mark Rothko: A Biography*. Chicago: University of Chicago Press, 1993.

Seldes, Lee. *The Legacy of Mark Rothko*. Rev. ed. New York: Da Capo Press, 1996.

## LOUIS COMFORT TIFFANY FOUNDATION

Ruling Year 1938 (precursor entity 1918. Created by Louis Comfort Tiffany during his lifetime.

Kemeny, George A., and Donald Miller. "Louis Comfort Tiffany: The Artist as Business Man." In *Tiffany Desk Treasures: A Collector's Guide*, 16–18. New York: Hudson Hills Press, 2002.

### Private Foundation Law

Fremont-Smith, Marion R. *Governing Nonprofit Organizations, Federal and State Law and Regulation*. Cambridge, MA: Belknap Press of Harvard University Press, 2002.

Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008.

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<sup>1</sup> See discussion of methodology with respect to identifying artists' market standing. Helicon Collaborative, "Quantitative Profile of the Artist-Endowed Foundation Field," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).

<sup>2</sup> See foundations of Herb Block, Richard Florsheim, Adolph Gottlieb, Jerome Hill, Joan Mitchell, Robert Mapplethorpe, Andy Warhol, etc.

<sup>3</sup> See foundations of Richard Avedon, Alexander Calder, Donald Judd, Roy Lichtenstein, Norman Rockwell, Willem de Kooning, etc.

<sup>4</sup> Herb Ritts Jr. Foundation, <http://www.herbritts.com/foundation/>

<sup>5</sup> Donna Roberts, "Gordon Onslow Ford, Last Survivor of the Paris Surrealists of the 1930s," *Independent*, November 20, 2003, Obituaries section.

<sup>6</sup> The Anne and Gordon Samstag International Visual Arts Scholarships, <http://www.unisa.edu.au/samstag>.

<sup>7</sup> Donald M Anderson Foundation, <http://www.donaldandersonfoundation.org>.

<sup>8</sup> Heliker-La Hotan Foundation, <http://www.heliker-lahotan.org/>.

<sup>9</sup> The Adolph and Esther Gottlieb Foundation, <http://www.gottliebfoundation.org/>.

<sup>10</sup> The Robert Mapplethorpe Foundation, <http://www.mapplethorpe.org/>.

<sup>11</sup> The Herb Block Foundation, <http://www.herblockfoundation.org/>.

<sup>12</sup> The Keith Haring Foundation, <http://www.haring.com/foundation/about/index.html>.

<sup>13</sup> Edward Gorey and Kevin McDermott, *Elephant House: Or, The Home of Edward Gorey* (Petaluma, CA: Pomegranate Communications, 2003).

<sup>14</sup> See discussion of Isamu Noguchi's intentions. Masayo Duus, *The Life of Isamu Noguchi, Journey Without Borders*, trans. Peter Duus (Princeton, NJ: Princeton University Press, 2000), 349–351.

<sup>15</sup> See comments on Robert Motherwell's intentions. Carol Vogel, "Inside Art: Motherwells in Texas," *New York Times*, October 22, 1993, Arts section, New York edition.

<sup>16</sup> See description of the foundation's formation. Georgia O'Keeffe Foundation, "A History of the Georgia O'Keeffe Foundation," in *The Georgia O'Keeffe Foundation, 2001–2006* (Abiquiú, NM: Georgia O'Keeffe Foundation, 2008), 22–29.

<sup>17</sup> See comments on Robert Mapplethorpe's intentions. Peter Conrad, "Robert Mapplethorpe, Such Dirty Pretty Things," *Guardian*, July 23, 2006, Observer Review section.



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- <sup>18</sup> See comment on Charles Burchfield's intention. C. Arthur Burchfield, "Preface," in *Charles Burchfield's Journals, The Poetry of Place*, ed. Benjamin Townsend (Albany: State University of New York Press, 1993), xv.
- <sup>19</sup> Ralph E. Lerner, "Ralph Lerner on Art Law," in *Artists' Estates, Reputations in Trust*, ed. Magda Salvesen and Diane Cousineau (New Brunswick, NJ: Rutgers University Press, 2005), 333.
- <sup>20</sup> Ibid.
- <sup>21</sup> See discussion of Willem de Kooning's estate. Kelly Devine Thomas, "De Kooning's Hidden Legacy," *ARTnews*, March 2006, 114–119.
- <sup>22</sup> See discussion of Henry Moore's various considerations for his foundation. Roger Berthoud, *The Life of Henry Moore*, 2nd ed. (London: Giles de la Mare Publishers, 2003), 428–429.
- <sup>23</sup> Stephen K. Urice, "Creativity and Generosity: Considerations in Establishing an Artist-Endowed Foundation," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>24</sup> Stephen Gillers, "Enter the Lawyers: Choosing and Working with Estate and Foundation Counsel to Secure an Artistic and Philanthropic Legacy," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>25</sup> Frances R. Hill, "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>26</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>27</sup> Robert Storr, "Toward a Public Library of American Culture: Reflections on the Centrality of Art and Importance of Access in Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>28</sup> Charles C. Bergman, "A Commitment to Support Individual Artists Worldwide: Reflections on the Experience of One Artist-Endowed Foundation," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>29</sup> Internal Revenue Service annual information returns (Forms 990-PF), GuideStar, <http://www.guidestar.org/>.
- <sup>30</sup> Revenue Rulings and Private Letter Rulings, Legalbitstream, <http://www.legalbitstream.com/>.
- <sup>31</sup> Archival records for some artists, Collections Online, Archives of American Art, Smithsonian Institution, <http://www.aaa.si.edu/collectionsonline/>.
- <sup>32</sup> For example, foundations associated with Robert Mapplethorpe, Georgia O'Keeffe, Andy Warhol, etc.
- <sup>33</sup> See Hill, "Public Benefit and Exemption," for a discussion of required language.
- <sup>34</sup> See Fremont-Smith, "Federal and State Laws," for a discussion of various rulings denying exemption due to private benefit.
- <sup>35</sup> See discussion of Milton Avery's will. Milton Avery Papers, Financial and Legal Records, 1943–1982. Archives of American Art, Smithsonian Institution, <http://www.aaa.si.edu/collectionsonline/avermilt/series5.htm>.
- <sup>36</sup> See discussion of Joseph Cornell's will. Joseph Cornell Estate Papers, 1944–1986. Archives of American Art, Smithsonian Institution, <http://www.aaa.si.edu/collectionsonline/cornjose/>.
- <sup>37</sup> See discussion of Mark Rothko's will. Lee Seldes, *The Legacy of Mark Rothko*, rev. ed. (New York: Da Capo Press, 1996), 72.
- <sup>38</sup> See discussion of Sam Francis's estate plan. Frederick M. Nicholas, Afterword: Artist Beware, in *Foundation Management: Innovation and Responsibility at Home and Abroad*, ed. Frank L. Ellsworth and Joe Lumarda (Hoboken, NJ: John Wiley and Sons, 2003), 295–298.
- <sup>39</sup> Ibid.

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- <sup>40</sup> Fremont-Smith, "Federal and State Laws."
- <sup>41</sup> See discussion of Ernest R. Graham's plans to create a school of fine arts. Carter H. Manny, interview by Franz Schulze, "Oral History of Carter Manny," the Chicago Architects Oral History Project, (Chicago: Art Institute of Chicago, 1995 and 2001).
- <sup>42</sup> See discussion of Alfonso Ossorio's estate plan. Michael Solomon, "Michael Solomon on the Ossorio Foundation," in *Artists' Estates, Reputations in Trust*, ed. Magda Salvesen and Diane Cousineau (New Brunswick, NJ: Rutgers University Press, 2005), 204–218.
- <sup>43</sup> See periodic suspensions of grant program. Aaron Siskind Foundation, <http://www.aaronsiskind.org/recipient.html>. See notice concluding grants program. The George Sugarman Foundation, <http://www.georgesugarman.com/>.
- <sup>44</sup> See discussion of Louis Comfort Tiffany's intentions for his foundation. George A. Kemeny and Donald Miller, "Louis Comfort Tiffany: The Artist as Business Man," in *Tiffany Desk Treasures: A Collector's Guide* (New York: Hudson Hills Press, 2002), 16–18.
- <sup>45</sup> See discussion of Dorothy Dehner's estate plan. "Joan Marter on the Dorothy Dehner Foundation," in *Artists' Estates, Reputations in Trust*, ed. Magda Salvesen and Diane Cousineau (New Brunswick, NJ: Rutgers University Press, 2005), 294–302.
- <sup>46</sup> See discussion of the Mark Rothko Foundation formation. James E. Breslin, *Mark Rothko: A Biography* (Chicago: University of Chicago Press, 1993), 540–542.
- <sup>47</sup> Fremont-Smith, "Federal and State Laws."
- <sup>48</sup> *Ibid.*
- <sup>49</sup> See Hon Chew Hee Estate Foundation. Rob Perez, "Insider Purchase of Artwork Challenged," *Honolulu Star Bulletin*, March 6, 2005, <http://archives.starbulletin.com/2005/03/06/news/story3.html>.
- <sup>50</sup> See Textile Arts Foundation. Reynolds Cafferata, "IRS Pulls Rug Out From Under Private Operating Foundation," Mitchell Silberberg & Knupp, [http://www.msk.com/images/ps\\_attachment/attachment993.PDF](http://www.msk.com/images/ps_attachment/attachment993.PDF).
- <sup>51</sup> Elizabeth T. Boris, "Creation and Growth: A Survey of Private Foundations," in *America's Wealthy and the Future of Foundations*, ed. Teresa Odendahl (New York: Foundation Center, 1987) 65–126.
- <sup>52</sup> Ralph E. Lerner and Judith Bresler, "Tax and Estate Planning for Artists," in *Art Law, The Guide for Collectors, Investors, Dealers and Artists*, 3d ed. (New York: Practising Law Institute, 2005), 1777.
- <sup>53</sup> Storr, "Toward a Public Library."



## 7.1.2 CONSIDERATIONS IN FOUNDATION PLANNING

Much has been learned about planning artist-endowed foundations as their numbers have increased; those established early on have matured, and new approaches have been developed in response to the particular characteristics of the assets held and used by these foundations. Among other examples discussed in **8. Planning and Conducting Charitable Programs**, the use of partial grants/partial sales to accomplish charitable distribution of artworks and generate funds to support charitable programs has demonstrated that a foundation's art assets received as bequests or contributions can play important multiple roles. Likewise, use of artworks as exempt-purpose resources in scholarly and educational programs has increased the ways to deploy assets viewed previously as economic resources exclusively.

Even as these developments are incorporated, however, planning artist-endowed foundations continues to increase in complexity. Where earlier foundations were created primarily by painters and sculptors, the current generation of artists whose members are now entering their seventh decade (the typical point at which artists form or plan foundations) has produced a wider range of art forms and greater variety of intellectual property. Beyond artistic production, a significant trend affecting foundation planning is the practice of incorporating artists' creative businesses, a choice found frequently among artists of the generation now creating foundations. As discussed below, private foundations face specific limits in business holdings, and certain corporate forms have particular tax ramifications as well. Finally, evolving laws in some states can complicate choices in forming foundations in particular jurisdictions.

This chapter offers a general orientation to considerations in planning artist-endowed foundations as an aspect of institutional practice. Subsequent chapters deal with sustaining and terminating artist-endowed foundations. The chapters of **8. Planning and Conducting Charitable Programs** detail considerations involved in planning and conducting grantmaking and direct charitable activities, with specific discussions of program activities involving archives, art collections, copyrights and intellectual property, catalogues raisonnés and authentication, and real property.

Based on a review of foundations' annual information returns (Forms 990-PF), the first portion of this chapter discusses the three most common foundation models found among artist-endowed foundations and offers observations on their potential attributes and possible limitations for certain purposes. The second portion reviews key factors and practical considerations to be weighed in planning an artist-endowed foundation. Resources on foundation planning are featured at the close of this chapter, including briefing papers

prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study) that pertain to this topic.

The information presented here is intended as a general orientation to matters addressed in planning an artist-endowed foundation, based on observations about current practice as evidenced by foundations' reported activities. Choices in practice, and related ramifications, can vary significantly based on a foundation's particular circumstance. Persons planning and establishing artist-endowed foundations should do so with the guidance of legal counsel expert in private foundation law, in addition to legal advisors who are knowledgeable about important related areas, such as estate planning and intellectual property. As for the Study report as a whole, this discussion of observations about practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

## Common Foundation Models

**2. Field Dimensions and Taxonomy** discusses the various functions foundations play to fulfill their charitable purposes. To recap, these include grantmaking foundations, direct charitable activity foundations (such as those operating study centers and exhibition collections, house museums, or residency programs), comprehensive foundations that combine multiple functions, and estate distribution foundations—those charged to accomplish the posthumous, charitable distribution of an artist's assets not bequeathed to other beneficiaries.

Despite a common assumption that a foundation's activities can be predicted based on its legal status (for example, that nonoperating foundations are grantmakers and operating foundations conduct direct charitable activities), the Study's findings confirm that this does not hold true for many artist-endowed foundations. Foundations similar in their functions can differ as to legal status. A foundation functioning as a residency program might be an operating foundation, or it might be a nonoperating foundation with its real property used and classified as an exempt purpose asset.<sup>1</sup>

Likewise, a foundation that conducts an exhibition program in combination with a grantmaking program might be a nonoperating foundation with its art collection used and classified as an exempt purpose asset, or it might be an operating foundation that makes grants as an integral part of a program conducted directly by the foundation.<sup>2</sup> A foundation that houses an archive and art collection might be an operating foundation, or it might be a nonoperating foundation with its nonfinancial assets used and classified as exempt purpose assets.<sup>3</sup> Clearly, a broader range of factors can be involved in planning an artist-endowed foundation than the usual correlation between legal status and function.

The multiple factors to be considered in foundation planning, and how these can come together in different ways, are evidenced in three foundation models commonly found among those artist-endowed foundations that have been funded with artworks and other nonfinancial assets in addition to financial assets. These models, which can be found among foundations established more than three decades ago, as well as those created more recently, include the nonoperating foundation with its assets (including artworks and intellectual property) held for income purposes;<sup>4</sup> the nonoperating foundation with nonfinancial assets used and therefore classified in whole or in part as exempt purpose assets;<sup>5</sup> and the private operating foundation, with expenditures and assets devoted to the active conduct of charitable activities.<sup>6</sup> Each model appears to have its potential advantages for particular purposes and in certain circumstances.

### **Nonoperating Foundation with Noncharitable-Use Assets**

The most common foundation model found among artist-endowed foundations is that of a nonoperating foundation that uses its assets for income purposes and conducts grantmaking that, together with charitable administrative expenditures, fulfills an annual charitable distribution requirement based on five percent of the net value of noncharitable-use assets.<sup>7</sup> As is the case in the greater foundation universe, this model appears to work well for artist-endowed foundations that have been funded primarily with financial assets.<sup>8</sup> It also has been employed in those cases where a grantmaking foundation has been endowed with artworks for which there is an established market, the artworks are intended to be sold, and the foundation will not be involved in conducting direct charitable activities with its art inventory, this function being accomplished more effectively by other institutions, such as museums and universities.<sup>9</sup> When this type of foundation is funded with art assets, intellectual property, and real property, these assets are used for income purposes, and are sold and licensed to fund grantmaking and associated administrative costs.

The appeal of this type of foundation appears to be its simplicity. For example, making periodic sales from an art inventory held solely for income purposes is likely to be simpler than maintaining an art collection dedicated to charitable use alongside an inventory of works available to be consigned for sale. Another likely advantage is freedom from the expenses and administrative activities involved in conducting direct charitable activities using the artworks, since typically this is accomplished by other institutions, such as museums, that maintain expert staff and are able to garner funds from a variety of sources to support exhibitions, scholarship, publications, and the like.

One potential limitation of this model for an artist-endowed foundation appears to be the possible difficulty of meeting the annual payout requirement when a foundation's assets are predominantly artworks salable only over the longer term and not on a predictable basis in the short term.

Investments in artists' business entities that produce passive income, such as that from royalties, can be found among nonoperating foundations with noncharitable-use assets. Depending on the form of an artist's business entity and the nature of the activity, it can generate taxable unrelated business income.<sup>10</sup> It also can fall afoul of business holding limits that apply to private foundations.<sup>11</sup> However, investments in some types of business entities that derive income primarily from passive sources, such as royalties, in certain circumstances potentially do not produce taxable income<sup>12</sup> and are not subject to business holding limits applicable to private foundations.<sup>13</sup> Nonetheless, interest in an artist's business entity organized as an S corporation—a common corporate form that in the past has been popular as the legal form for some artists' businesses—generates income subject to the unrelated business tax in all cases.

Likely to be an important consideration for some is that the charitable contribution income tax deduction for donors making lifetime financial gifts to nonoperating foundations is less than what is allowed for donors making lifetime gifts to private operating foundations or to public charities.<sup>14</sup> Further, lifetime gifts of some types of nonfinancial property to a nonoperating foundation, such as artworks and real property, are afforded an income tax charitable contribution deduction limited to the donor's basis in the property, not its appreciated value.<sup>15</sup>

Regardless of the type of foundation or public charity, when contributing their own artworks during their lifetimes, artists' charitable contribution income tax deductions are limited to the cost of materials in the contributed work.<sup>16</sup>

### **Nonoperating Foundation with Exempt Purpose Assets**

This model has been used for artist-endowed foundations that engage in grantmaking and also have been funded with artworks or real property intended to be used wholly or in part as resources in direct charitable activities.<sup>17</sup> A direct charitable activity is one undertaken by a foundation itself as a direct expenditure in furtherance of its charitable purpose, as opposed to making a grant to another organization. Generally assumed to be the purview of operating foundations, recent research in the greater foundation universe has identified a trend toward involvement in direct charitable activities among nonoperating foundations.<sup>18</sup> Artist-endowed foundations appear to be part of this pattern.

One possible advantage to this model is that foundations structured in this way are not subject to the constraints on grantmaking that apply to private operating foundations, discussed below. At the same time, artworks and real property assets are used wholly or in part as resources in conducting direct charitable activities. To the extent that assets are used for exempt purposes, foundations exclude these assets when calculating their annual payout requirement.<sup>19</sup> In addition, expenditures to conduct direct charitable activities in which the assets are used are reported by foundations as qualifying distributions toward

fulfillment of the payout requirement.<sup>20</sup> Designation of an asset as one used for exempt purposes is made annually and based on actual use.<sup>21</sup>

This model is used by foundations that make grants on multiple, diverse topics, not all of which relate closely to a direct charitable activity conducted using exempt purpose assets, such as artworks or real property. Given the diversity of charitable interests among artists (for example, combining an artistic concern and a humanitarian concern), a form that accommodates both grantmaking on diverse topics as well as the conduct of direct charitable activities utilizing exempt purpose assets is likely to be of increasing interest.

Estate distribution foundations often are planned as this type of foundation.<sup>22</sup> In such cases, artworks are used as resources for an exhibition or education program until they are distributed by grant or partial grant/partial sale to cultural and educational institutions, or they might be sold to fund cash grants for charitable purposes that might or might not be art-related. This model also has been used for foundations primarily conducting direct charitable activities, absent programmatic grantmaking.<sup>23</sup>

As above, investments in artists' business entities that derive income from passive sources can be found among nonoperating foundations with exempt purpose assets. Depending on the form of an artist's business entity and the nature of the activity, it can generate taxable unrelated business income. It also can fall afoul of business holding limits that apply to private foundations. However, investments in some types of business entities that derive income primarily from passive sources, such as royalties, in certain circumstances potentially do not produce taxable income and are not subject to business holding limits applicable to private foundations. Nonetheless, interest in an artist's business entity organized as an S corporation generates income subject to the unrelated business tax in any case.

The limitation of this model for an artist-endowed foundation appears to be the expense involved in fulfilling the requirement that assets classified as exempt purpose assets be used, or held for use, in direct charitable activities.<sup>24</sup> This represents a program expense and also might involve a staff expense in order to provide the expertise necessary to conduct direct charitable activities. Failure to conduct direct charitable activities using the assets would alter their treatment with respect to calculating the annual charitable distribution requirement.<sup>25</sup> In addition, another limitation for some would be the less advantageous treatment of lifetime contributions to a nonoperating foundation, as noted above.

### **Private Operating Foundation**

The legal status of *private operating foundation* is commonly found among artist-endowed foundations focused primarily on conducting direct charitable activities involving artworks or real property assets.<sup>26</sup> In broad terms, an operating foundation must meet certain financial benchmarks intended to ensure that it is expending its income primarily on the



direct conduct of activities that constitute its exempt purpose and, as one among three other additional measures of choice, its assets are devoted substantially to its exempt activities.<sup>27</sup> As a general rule, these benchmarks can translate to a lower charitable distribution requirement than might be the case for a nonoperating foundation with respect to a required payout calculated based on noncharitable-use assets. The difference narrows, however, when the comparison is made to a nonoperating foundation with nonfinancial assets used and therefore classified as exempt purpose assets.

Operating foundation status can be found among some artists' lifetime foundations, including those that receive artists' lifetime gifts comprising real property or artworks created by other artists that have been purchased by the artist-donor (for example, when developing a residency facility, assembling an art collection, or making grants of artworks by other artists to museums).<sup>28</sup> The model also is found among foundations that receive lifetime gifts of artworks from artist's heirs and beneficiaries.<sup>29</sup> Donors making lifetime gifts of artworks or real property to an operating foundation for use related to its programs are eligible for an income tax charitable contribution deduction based on fair market value, in contrast to donors of such property to nonoperating foundations.<sup>30</sup> Further, donors making such gifts, as well as those making financial contributions, are eligible for the optimal income tax charitable contribution deduction, comparable to that for donors to public charities.<sup>31</sup> As above, the charitable contribution income tax deduction for artists who contribute their own works during their lifetimes is limited to the cost of materials in the artworks.<sup>32</sup>

Investments in artists' business entities that generate nonpassive revenue can be found among artist-endowed foundations with private operating status. This suggests that, in certain circumstances, and depending on its legal form and its relationship to a foundation's charitable purpose and function, an artist's business entity that generates revenue of a nonpassive character and is bequeathed to an operating foundation potentially might be operable as a functionally related business. As a general rule, a functionally related business is defined as a regularly conducted business substantially related to an organization's charitable purpose apart from the foundation's need for income.<sup>33</sup>

This is of interest because liquidation of an artist's corporation bequeathed to a foundation potentially can disrupt or eliminate activities that are central to realizing a foundation's charitable purpose. It is likely this concern will be a planning consideration for an increasing number of artist-endowed foundations.<sup>34</sup> As has been noted, interest in an artist's business entity organized as an S corporation would generate income subject to the unrelated business income tax.

One limitation of the operating foundation model appears to be the expense involved in fulfilling the requirement to directly conduct charitable activities, which equates to a program cost and most likely a compensation expense. Another potential drawback in some

circumstances appears to be the restrictions that apply to grantmaking by operating foundations. An operating foundation's grants will not be qualifying distributions, meaning applicable to fulfilling the annual charitable distribution requirement, unless the grants are an integral part of a program that the foundation operates directly and in which it maintains a significant involvement.<sup>35</sup> Such an involvement is signified in one respect by a qualified staff or board that administers the direct charitable activities and supervises the grants.<sup>36</sup> In theory, an operating foundation making grants in two unrelated fields (for example, to address a humanitarian concern and to advance a cultural purpose) necessarily would be one that conducts direct charitable activities in each field under the supervision of a board or staff qualified in each area, a potentially costly proposition.

### **Multiple Entities and Evolution**

In some cases, more than one foundation has been created to accommodate various charitable purposes, or various aspects of a charitable purpose, intended by an artist or by an artist's heirs or beneficiaries. A common pairing is a nonoperating grantmaking foundation in combination with an operating foundation that conducts direct charitable activities using artworks or real property assets.<sup>37</sup> Also common is a nonoperating grantmaking foundation in combination with a public charity that uses real property assets and artworks as resources for public programs.<sup>38</sup> In some cases, there is a financial relationship among the entities, whether formal and regular or unspecified but periodic, although a financial relationship is not always present. There also might be a governance link (for example, with a shared director), although again, this is not always the case.

Presumably, multiple entities provide the optimal arrangement for ownership and charitable use of a particular type of asset and, as one consideration, segregate these assets and their uses, which for some purposes might be preferable. For example, a grantmaking foundation might use its art inventory and intellectual property assets for income purposes while the separate, associated entity might use its art collection and real property as exempt purpose resources for direct charitable activities. In addition, provided that the artist generates sufficient public interest, an associated entity in the form of an operating foundation or a public charity has the potential to attract contributions and develop a base of public support, in contrast to a nonoperating foundation.

Also, as noted elsewhere in the Study, private foundations can change their legal status as well as the use and classification of their assets, and artist-endowed foundations appear to be a fairly dynamic lot. Foundations established as nonoperating grantmaking foundations can change legal status after receiving bequests and contributions of nonfinancial assets intended for use in direct charitable activities, as discussed above. Conversely, operating foundations can complete a planned project, distribute the related exempt purpose asset to a public charity, and revert to nonoperating status as grantmakers holding assets for income purposes.<sup>39</sup>

## Key Factors in Planning

A variety of factors are weighed in planning an artist-endowed foundation and, in the end, these must align appropriately in order for a foundation to have the capacity necessary to realize the charitable purpose intended by its donor. The following section offers a general orientation to key factors in foundation planning, highlighting those pertaining to four broad areas: donor intentions, technical matters, people and expertise, and economic capacity.

### Donor Intentions

#### ***Charitable Purpose, Beneficiaries, and Function***

Foundations are organized under state law, typically as trusts or nonprofit corporations. To qualify for federal tax exemption, a private foundation must be formed to accomplish an exempt purpose—one of the categories of charitable purposes designated under the tax law as eligible for tax exemption—and it must benefit a broad segment of the general public.<sup>40</sup> In contrast to this are entities created by persons who wish to provide a benefit to specific private individuals, such as family members or personal associates, or who do not require a philanthropic organization to manage their assets posthumously for educational or charitable purposes. These individuals establish a non-tax-exempt entity (such as a private trust, noncharitable corporation, or limited liability company) that distributes financial benefits to designated individuals.<sup>41</sup>

In defining a foundation's exempt purpose, several concerns are central to a foundation's subsequent success. One is to articulate a specific purpose beyond broad standard language in order to provide sufficient guidance to foundation trustees, directors, and officers when the artist no longer is involved. The challenge is to do this while avoiding an overly narrow directive that becomes outdated or limits the flexibility needed to adapt to changes in the external environment.<sup>42</sup> Another concern is to identify the segment of the general public that would benefit from the charitable purpose and define clearly how this category of individual would benefit from the foundation's activities.<sup>43</sup> A third concern is to specify a function or combination of functions that not only fulfill the charitable purpose, but can be supported by the artist with sufficient financial resources and with assets that are appropriate to the task.

A foundation's charitable purpose can be fulfilled by a number of functions. As one example, a charitable purpose to assist the creative development of individual artists might be fulfilled by a function as a residency foundation that operates a work-study center for artists or as a program foundation that conducts training workshops and professional development classes for artists. Alternatively, the same charitable purpose might be fulfilled as a grantmaking foundation that provides financial project support to individual artists, or one that makes cash grants to organizations whose programs assist artists' creative initiatives.

Some artists have provided for the creation of a foundation with a charitable purpose articulated broadly in the expectation that a specific function will be determined by the foundation's trustees, officers, and directors. An example would be a foundation with a charitable purpose to support animal welfare or to advance the visual arts. In contrast to that approach, other artists have provided for the creation of a foundation with a designated charitable purpose and a function specified to fulfill that purpose. An example would be a foundation established with a charitable purpose to advance artists' education that is to do so specifically by functioning as a grantmaking foundation providing scholarship support for art students.

Foundations can be formed with a charitable purpose and function focused exclusively on an artist's oeuvre. An example would be a foundation educating the public about the artist's works and creative principles with a function as a study center or an exhibition program. In contrast, some legal advisors guiding artists in the creation of their foundations recommend that a foundation which is to have such a focus be formed with a broader charitable purpose so that a combination of functions can be developed to make optimal use of the various resources that will be available to the foundation. A classic example is the Henry Moore Foundation, a British philanthropy which is dedicated to advancing the public's engagement with the visual arts and sculpture broadly and with the sculptor's work specifically, a purpose supported by a variety of functions, among which is a study center and exhibition program committed to the artist's oeuvre.<sup>44</sup>

### ***Lifetime or Posthumous Creation***

There are contrasting opinions among legal advisors on advice to artists who will be creating foundations intended to receive bequests under an estate plan. One opinion is that such foundations should be created during an artist's lifetime.<sup>45</sup> In this view, it is preferable for a foundation to be established and ready for its role following an artist's death. As such, during the artist's lifetime the foundation can function with the artist's participation as a grantmaking foundation, funded periodically or on a pass-through basis. This ensures that the artist will have an opportunity to work with the chosen trustees, directors, officers, and professional advisors and, within that context, to communicate intentions for the foundation's long-term activities. It also enables the artist to experience the gratification of organized personal philanthropy.

In contrast, another opinion is that foundations should be created under an artist's estate plan, and artists should use other means to accomplish personal philanthropy during their lifetimes, such as simple checkbook charity. In this view, the activities of an artist-endowed foundation with respect to the artist's works are significantly different after an artist's death from what is permitted during an artist's lifetime. Artists who fail to understand this difference, and so involve their lifetime foundations in activities with their artworks, can run afoul unintentionally of private foundation laws that prohibit private benefit and self-

dealing.<sup>46</sup> In addition, converting an active lifetime grantmaking foundation following an artist's death to accommodate a bequest of nonfinancial assets and initiate direct charitable activities—to shift gears, so to speak—can be complicated in some cases. Starting the foundation from the outset with the necessary legal status and administrative structure for such activities, which would be possible after the artist's death, could be simpler in some cases.

For artists who are married, particularly those who are residents of community property states, some legal advisors believe that an artist-endowed foundation is best established by the surviving spouse, formed either under the spouse's estate plan or as a financially funded lifetime foundation prepared to receive the spouse's bequest. Because the unlimited federal estate tax marital deduction enables a surviving spouse to inherit the artist's artworks free of the federal estate tax, a foundation's role in minimizing the estate tax is not pertinent.<sup>47</sup> Nor is a foundation necessary to distribute artworks charitably. In contrast to the artist with respect to his or her own works, artworks contributed by the surviving spouse to public charities, such as museums or universities, for use in their programs, are valued at fair market value and are eligible for an optimal charitable contribution income tax deduction.<sup>48</sup>

Finally, a contrasting opinion is that the foundation's long-term role should be confirmed prior to the artist's death, rather than deferring the decision to the surviving spouse. In this view, a foundation should be founded either during the artist's lifetime or at death, but as part of an irrevocable estate plan.<sup>49</sup> If the artist is survived by his or her spouse, the foundation can receive a financial bequest to support grantmaking activities or can be allowed to remain dormant until the spouse's death. Typically, the spouse will be the beneficiary of one or two trusts that qualify for the marital deduction and that name the foundation as the beneficiary at the spouse's death.<sup>50</sup> Alternatively, the foundation can receive the artist's art collection in its entirety following the artist's death. The spouse will be the beneficiary of trusts funded with other assets that name the foundation as the beneficiary at the spouse's death. In both scenarios, a goal is to avoid dividing an art collection between a foundation and a surviving spouse, potentially creating conflict of interest risks given the spouse's role as a foundation insider.<sup>51</sup>

### ***Existence in Perpetuity or for a Limited Term***

Many artist-endowed foundations are formed to exist in perpetuity. Others are not, including those created as estate distribution foundations and those established specifically to conduct a defined project, either during the artist's lifetime or posthumously. Some non-perpetual foundations have no specified term but are expected to exist only as long as is required to complete a particular task or so long as a specific individual is available to provide leadership. A few do have defined periods, often two decades.

The central consideration with respect to perpetuity is the ability to provide sufficient financial resources, or assets that will produce these, in order to sustain the foundation and its charitable program. A key consideration pertaining to a limited term is the appropriate relationship among charitable purpose, assets, and time frame. A foundation set to terminate prior to expiration of the copyrights it owns will need to dispose of these appropriately to a charitable recipient. One that is given 10 years to liquidate a collection of artworks for which there is not an established market is likely to conclude its term with an inventory on hand, particularly if it is restricted to selling artworks to fund cash grants, rather than making grants of art.

## **Technical Matters**

### ***Legal Form and Jurisdiction***

A private foundation may be organized using different legal forms, primarily as a charitable trust or a nonprofit corporation, with a range of considerations to be weighed as to what choice is most useful for particular purposes.<sup>52</sup> For a variety of reasons, the foundation universe broadly favors the corporate form over that of the trust.<sup>53</sup> Nonetheless, either the trust or corporate form may have benefits or drawbacks in particular circumstances, including with respect to considerations presented by specific jurisdictions, as follows.

Forming as a Delaware corporation is a frequent choice when establishing an artist-endowed foundation. Of those created since 1995, one-quarter made this choice as compared to fewer than 10 percent of those created in prior years. Presumably this reflects the appeal of Delaware's laws, which historically have afforded greater protection against the liability of a corporation's directors.<sup>54</sup> As a general rule, wherever it chooses to operate, a foundation's internal administration will be subject to the rules of the state in which it was incorporated.<sup>55</sup> Related to this, laws in California and New York, among other states, place constraints on foundations incorporated in those states whose boards have a majority of directors defined as related under these laws—California by prohibiting compensation of related persons, and New York by prohibiting indemnification of directors and officers.<sup>56</sup> Such limitations are not applicable to foundations formed in those states as trusts or to foundations doing business in those states that were incorporated elsewhere.

Apart from this, New York State has emerged as a complicated jurisdiction for artist-endowed foundations generally. As one example, proposed legislation aiming to limit deaccessioning by New York museums and collecting institutions employs broad language that in its current form potentially applies to private foundations endowed by artists with artworks intended for sale to fund the foundations and their charitable programs.<sup>57</sup> As it stands, this proposed legislation would not be limited by jurisdiction of formation or by legal form.

In addition, the next generation of artist-endowed foundations—whose members are increasingly likely to use their art assets wholly or in part as resources in conducting direct charitable activities of an educational and scholarly nature rather than holding them exclusively for income purposes—may experience difficulties due to existing New York State education law and regulations. When seeking to incorporate in New York, nonprofit entities with educational purposes as part of their missions are required to secure the consent of the state's commissioner of education and, if deemed to be educational institutions—as are museums, archives, and other entities that hold collections used for aesthetic and educational purposes and for exhibition to the public—must organize under the rules of the New York State Board of Regents.<sup>58</sup>

The requirement to organize under these rules could be of consequence as this would subject artist-endowed foundations to deaccessioning restrictions designed for museums, which potentially would prohibit sales of artworks to fund operation of foundations and their charitable programs. Foundations with educational purposes as part of their missions that are incorporated in other states and seek permission to do business in New York State, which is required in order to employ staff and lease or own property, must have the consent of the state's education commissioner to do so.<sup>59</sup> Presumably, foundations potentially could encounter similar concerns during this process.

California and other community property states present a different type of challenge, in this case to artists married and seeking to fund their foundations posthumously. A private foundation bequeathed an interest in community property (such as an artist's corporation, collected artworks, or intellectual property) is in a potentially complex situation. Activities to exhibit and sell or to promote and educate about artworks whose ownership is shared with a foundation insider, such as an artist's surviving spouse, present potential risks with respect to conflict of interest and laws prohibiting private benefit and self-dealing.<sup>60</sup>

### ***Asset Characteristics, Classification, and Legal Status***

An asset's characteristics can be a defining factor in choices for charitable purpose, legal status, or foundation term. For example, intellectual property generating passive income potentially might be a productive asset for all types of foundations, whether or not it is related to charitable purpose. At the same time, alignment of the foundation's term, if it is limited, and expiration of the rights is a consideration. As noted, depending on its form, the nature of its activity, and whether or not it relates directly to a foundation's charitable purpose, an artist's business enterprise could generate taxable or nontaxable income, could fall afoul of business holding limits, or potentially might be operated appropriately as a functionally related business by an operating foundation.

In the same vein, artworks for which there is not an established market would not be a likely asset with which to fund a charitable purpose realized through cash grantmaking.

However, if the artworks are supported by sufficient financial assets, they could be resources for a charitable purpose realized through grants of artworks. Real property might be used by a foundation to conduct direct charitable activities, such as a residency or exhibition program. In contrast, real property would not be useful for such purposes if renovation costs required to meet standards for the intended use (for example, to house an art collection or to provide access to the public) were likely to consume funds needed to operate the program.

A foundation's charitable purpose and function, combined with the character of its assets and the way these are utilized by the foundation, will inform its election of status as a nonoperating or operating foundation, as well as the classification of its artworks as noncharitable-use or exempt purpose assets. The three common foundation models discussed at the beginning of this chapter demonstrate the various ways that legal status can combine with asset classification to provide the optimal capacity in support of a foundation's charitable purpose. Legal status and asset classification also combine to determine a key aspect of a foundation's economic model—how a foundation's annual charitable distribution requirement is calculated, which assets are included in the calculation, and what types of expenses are necessary with respect to the assets.

### **Limits to Assets by Law**

State laws set standards for the prudent investment of charitable endowments and trusts. In the same vein, private foundation law prohibits *jeopardizing investments*—defined generally as investments that potentially jeopardize the ability of a foundation to carry on its exempt purpose.<sup>61</sup> Also prohibited are *excess business holdings*—defined generally as the amount of a foundation's holdings in a business enterprise that, combined with its insiders' holdings, exceed a level set by law.<sup>62</sup> As noted earlier, an exception to this for some types of foundations is a *functionally related business*—defined generally as a regularly conducted business substantially related to a foundation's charitable purpose apart from the foundation's need for income.<sup>63</sup> Whether or not functionally related, interest in an S corporation generates unrelated business income.<sup>64</sup>

### **People and Expertise**

#### **Governance Structure**

Many artist-endowed foundations are organized with the governance structure most familiar in the wider nonprofit universe, that of a volunteer board of directors that sets policy and supervises a professional staff responsible for administering the foundation and its programs. Among small foundations without staff, a volunteer board typically administers the foundation and its programs. Other artist-endowed foundations are organized with a governance structure found primarily among private foundations—that of a single individual or a small group of individuals who are compensated to administer the foundation and operate its programs, sometimes supported by a staff. This structure combines governance



and administrative functions and, in the view of some, can raise questions of accountability in certain circumstances. This is particularly the case, for example, if governance and administration of a foundation resides in one individual exclusively, such as a sole trustee.

Appropriately qualified trustees, directors, and officers, as well as staff, may be compensated reasonably for services that are necessary to carry out a foundation's exempt purpose. Reasonable compensation is what is paid by similar organizations for the same services in comparable circumstances.<sup>65</sup> Neither prior compensation paid privately by the artist during his or her lifetime nor compensation specified by the artist-donor's testamentary documents can be a basis for compensation by a foundation that is not reasonable. Related to this, an artist-donor may request but cannot obligate a foundation to employ a specific individual after the artist's death, and such a request does not alter the fiduciary duty of trustees, directors, and officers to conduct a foundation's affairs prudently and in its best interests.

Less than 20 percent of private foundations with data examined in recent national research compensate members of their governing body, and only 30 percent employ staff.<sup>66</sup> Both of these factors are associated primarily with larger foundations; compensation of governing bodies and trustees is more frequently associated with operating foundations and with foundations having institutional trustees, such as banks.

The boards of many incorporated foundations are empowered to nominate and elect new board members. Alternatively, some foundations are formed as membership corporations, of which members of the corporation determine successor board members and otherwise approve significant institutional changes. Likewise, individuals forming charitable trusts sometimes have assigned independent institutions, such as universities, the authority to appoint successor trustees. For both corporate and trust foundations, these types of arrangements either enhance accountability or limit flexibility, depending on one's perspective and purpose. At the other end of the spectrum, some artists have specified that foundation trustees or foundation officers and directors have the exclusive personal right to appoint their individual successors, not subject to other approvals. This isn't a widely recommended practice as again, it can raise questions of accountability.

In the end, examples can be found of both successful and less successful foundation governance utilizing each of these structures and practices. This suggests that individuals themselves as much as any particular governance structure are the defining factor in effective governance.

### **Administrative Competencies**

The presence of administratively competent individuals in governance and staff roles is as important as effective governance. In broad terms, whatever an artist-endowed foundation's

function, it requires administrative competency in four core areas: program expertise (effective implementation of direct charitable activities and grantmaking programs that merit tax-exempt status); curatorial expertise (knowledgeable care and appropriate disposition of art collections, archives, and intellectual property, whether intended for income purposes or for use in direct charitable activities); business management expertise (capable transformation of the diverse resources contributed under an artist's estate plan into a sustainable economic enterprise); and foundation administration expertise (basic knowledge of how to operate for public benefit consistent with private foundation law).

These administrative competencies typically are provided by a foundation's governing body and staff and are, in some cases, bolstered by expert advisory committees. It is reasonable to question whether a foundation created with a governing body and staff drawn exclusively from the artist's inner circle, or comprising only family members, will provide the full complement of necessary administrative competencies.

Artist-endowed foundations also require specialized expertise in four critical areas: the art market, legal aspects of foundation administration, investment management, and foundation accounting. As a general rule, specialized expertise in these areas is best provided by professional advisors—art dealers, attorneys, investment advisors, and accountants—who are not members of a foundation's governing body.<sup>67</sup> Although there are exceptions to this, typically involving attorney trustees and institutional trustees, foundation managers must be free to change professional advisors as required by a foundation's evolving needs and circumstances. This can be difficult if advisors serve in governance roles.<sup>68</sup> Professional advisors also should be able to serve the foundation without potential conflicts of interest rising from dual roles in advising and governance. This is particularly true of a foundation's art dealer.

Finally, in some cases, foundation administration—back-office operations, grants management, financial administration, record keeping, annual reporting, and the like—is provided by an external source. This includes professional firms that specialize in philanthropic administration and advising, law firms specializing in trust and estate management, and institutional trustees, such as banks and trust companies.

### ***Roles of Heirs and Beneficiaries***

Of foundations that hold assets of \$1 million and above with data examined during the Study, 20 percent were created by artists' heirs or beneficiaries, such as surviving spouses, children, grandchildren, great grandchildren, nieces and nephews, non-marital life partners, and personal or professional associates. Artists whose works garner market interest, indicated by market standing, and who were survived by immediate heirs, are more often associated with foundations functioning as study centers and exhibition programs, as

opposed to those functioning as grantmaking foundations. Artists' heirs and beneficiaries in many cases play a role in such foundations as trustees, directors, or officers.

As noted throughout the Study report, private foundation law prohibits transactions between a foundation and its insiders and penalizes activities that provide a benefit directly or indirectly to insiders that is more than incidental or tenuous.<sup>69</sup> The growing popularity of the family foundation in American philanthropy generally—one in which members of a family and their employees represent a majority of the governing body—can present potential complications when utilized for artist-endowed foundations. This is the case when a foundation's insiders, including the artist's heirs and beneficiaries, personally own, sell, and license the artist's works while the foundation's activities educate about and promote the artist's works, potentially benefiting its insiders economically. With respect to this, the following general parameters can be a useful starting point in planning a foundation's charitable purpose and function and identifying appropriate roles for artist's heirs and beneficiaries.

If it is determined that a foundation is to function as a study center and exhibition program educating about and promoting the artist's works, as a general rule its trustees, directors, and officers should be persons who do not benefit economically from sales and licensing of the artist's works.<sup>70</sup> This means, for example, that artist's heirs and beneficiaries who own, sell, and license the artist's works generally would not take these roles, which instead would be filled by heirs and beneficiaries who received bequests unrelated to the artist's works or by persons entirely independent of these individuals and their interests.

It also might be the case that an artist's artworks and rights have been committed in their entirety to the foundation and not distributed in part to private individuals. In that situation, the artist's heir or beneficiary, if qualified for the role, potentially could be compensated reasonably to serve a governance or executive role (for example, as the foundation's trustee, president, chairperson, or executive director).

Conversely, if it is determined that an artist's heirs or beneficiaries must play roles as trustees, directors, or officers of a foundation associated with the artist, and these individuals benefit economically from sales and licensing of the artist's works, as a general rule the foundation's activities should not involve educating about and promoting the artist's works. This means, for example, that the foundation might function as a grantmaking foundation in support of purposes not tied to the artist's works, or might operate an unrelated program, such as an artists' work-study residency center. It also might be the case that the foundation and the artist's heirs and beneficiaries benefit mutually from sales and licensing of the artist's works under the auspices of a separate legal entity that neither control. Even so, as a general rule a foundation in this situation should not be involved in promoting the artist's works.

An artist's estate plan should avoid inadvertently creating potential conflicts of interests and risks of self-dealing and inurement (for example, by bequeathing copyrights to persons who will be insiders of a foundation that is intended to undertake publications, exhibitions, and media projects involving use of the copyrights).<sup>71</sup> Similarly, donors creating a foundation should provide for a governing body with the proportion of independent directors necessary to implement a conflict of interest policy.<sup>72</sup>

As discussed in **7.2.3 Conflict of Interest Policies and Practice**, foundation trustees, directors, and officers are responsible for knowing the laws under which private foundations operate, although they also should consult with legal counsel expert in private foundation law on the details of their particular circumstance. Where a possible exception might apply (for example, with respect to activities that potentially confer a benefit to foundation insiders that is no more than incidental or tenuous), foundation trustees, directors, and officers can confirm that exception, and protect themselves and the foundation, by obtaining a reasoned opinion letter from legal counsel expert in private foundation law or requesting a private letter ruling from the Internal Revenue Service (IRS).<sup>73</sup>

## **Economic Capacity**

### ***Economic Model***

Private foundations are economic entities. If not economically viable, artist-endowed foundations will be unable to realize their charitable purposes, however generous or culturally significant these might be potentially. As discussed in greater detail in **7.2.1 Economic Models**, foundations created and endowed by artists, or their heirs or beneficiaries, are established typically using one of several economic models—foundations supported by living donors, foundations supported by earnings on investments, foundations actively converting art inventories to endowments, foundations supported by investment earnings combined with art-related income, and foundations supported exclusively or primarily by art-related income.

The first two economic models assume that funds from sources other than art sales and rights licensing will provide the primary financial support for the foundation and its programs. The latter three models assume there is an established market for the artist's works and intellectual property and that these will be the productive basis of the foundation's economic model.

With respect to sales of artworks, whatever a foundation's legal status and however it uses and classifies its assets, it is subject to an excise tax on net investment income.<sup>74</sup> By legislation approved in 2006, gains from sales of exempt purpose assets are subject to the excise tax unless used promptly to acquire comparable property.<sup>75</sup> Unless substantially related to a foundation's charitable purpose aside from its need for funds, income from a

regularly conducted business activity is unrelated business income and subject to a tax for that purpose.<sup>76</sup>

### **Scale and Asset Mix**

There are no guidelines as to the scale needed to ensure that an artist-endowed foundation can be viable economically. Lifetime foundations supported by their donors and those endowed exclusively with financial assets can be small, \$1 million or less, as is commonly the case in the greater foundation universe.

In contrast, foundations that own artworks and other types of nonfinancial assets will need to be larger, as determined by an array of specific factors that influence expense. To start, setting up a foundation funded with artworks or art-related property involves expenditures beyond those for a foundation funded financially (for example, costs to inventory, appraise, or relocate an art collection, and in some cases legal fees to secure control of artworks; or costs to upgrade a facility for use as a residency site or study center). Beyond this, costs will increase, and assets to fund costs therefore will need to be greater, for those foundations that are located in urban centers with higher rent and property costs; employ professional staff or compensate their trustees, directors and officers; own an archive; own an art collection comprising large-scale artworks, numerous artworks, or artworks requiring conservation and specialized storage; own copyrights whose administration involves legal expense; lease administrative offices; own property; operate a facility; or conduct direct charitable activities and public programs.

The average value of assets held by all foundations with data available to the Study was \$11 million in 2005, and total annual expenditures for all purposes averaged \$475,000. Reflecting the large number of new foundations and lifetime foundations—both typically smaller in scale—the median asset value was \$1 million, and median total annual expenditures for all purposes were \$100,000. As a general analysis, if resources to fund these expenses were derived exclusively from proceeds of art sales, sales of \$1 million would be necessary to fund expenditures at the greater scale and \$200,000 would be required at the lower scale, assuming an art dealer's commission of 50 percent. Many variables are possible, but this might be one starting point in weighing the extent to which an art collection or intellectual property could be the productive basis of a foundation's economic model.

Further in this vein, among foundations reporting financial assets and art assets in combination, art assets represented 60 percent of aggregate assets. Of all foundations reporting assets comprising financial, art, and land and building assets, nonfinancial assets represented about 70 percent of aggregate assets. Taking these aggregate figures broadly, this equates to a range of one dollar of financial assets for every one and one-half dollar of nonfinancial assets, on the one hand, to one dollar of financial assets for every two and one-third dollar of nonfinancial assets. Again, many variables are possible, but these broad ratios

of financial to nonfinancial assets might be one starting point in considering the mix of assets to be provided when creating an artist-endowed foundation.

### ***Valuation, Blockage Discount, and Role of Artworks***

Many foundations funded with artists' rights and artworks are intended to license and sell these, wholly or in part, in support of the charitable purpose specified by their donors. As a general rule, foundation trustees, directors, and officers are responsible for optimizing the value of these assets. Some individuals who create foundations assume the posthumous market for the works of an artist can match levels achieved during the artist's lifetime and even surpass these if the foundation stimulates interest through scholarly efforts, publications, and exhibition activities that offer new perspectives on the artist's oeuvre. Where this has proven to be true, it has involved primarily artists who had achieved an established market during their lifetimes.<sup>77</sup>

Other persons who are forming foundations hope that a market for an artist's works can be created posthumously. This is a more difficult proposition. Art historical examples can be found of under-recognized artists—those who were not supported by art sales during their lifetimes—whose works became prized posthumously, but there is little evidence to date that an artist-endowed foundation can facilitate this phenomenon with any certainty. To the extent that it might be possible to do so, advancing the reappraisal of an artist's oeuvre is a long-term effort over a period of years, involving a sustained program of scholarship, publications, exhibitions, placement of select works in prominent collections, and perhaps even representation by a new art dealer.

All of this entails an annual expense, even as artworks must be cared for with provisions that fulfill the duty of trustees, directors, and officers responsible for care of a foundation's assets. The unavoidable conclusion is that artworks with an uncertain market are best understood not as financial assets, but as financial obligations that will need to be funded, and sufficiently so.

Artworks distributed to a foundation under an estate plan are valued initially as they were appraised at the artist's death for estate tax purposes. An updated valuation of its assets is reported each year by a foundation on its annual information return (990-PF). Securing a blockage discount of the value of an estate's art assets is important in some cases. A blockage discount is a reduction to the fair market value of similar assets held in bulk to reflect the extent to which the selling price would be depressed were the assets to be sold at one time.<sup>78</sup> As discussed in the chapter on economic models, an appropriate blockage discount is critical for those artist-endowed foundations whose art inventory is held for income purposes and, as such, is incorporated when calculating the annual charitable distribution requirement based on five percent of the net value of all noncharitable-use assets.

This is less a concern for foundations that hold their art collections as charitable-use assets, in which case these are not subject to the five percent payout requirement. Nonetheless, an appropriate blockage discount of the value of an estate's artworks is important for any type of foundation that is the residuary beneficiary of an estate plan under which noncharitable beneficiaries will receive bequests of artworks, estate taxes will be paid, and the foundation will receive the remaining interest. In contrast, a foundation that is the exclusive beneficiary of an artist's estate plan, and also will hold its assets wholly for charitable use, would be less likely to need a blockage discount applied to the value of the art assets it receives.

For artists who achieve an established market during their lifetime, their intentions as donors can define the economic potential of nonfinancial assets planned to fund a foundation. For example, beyond disposition of an extant body of works, a sculptor might affirm that a foundation owns the intellectual property and has the authority to complete editions incomplete at the artist's death for the purpose of contributing posthumous works to museums, as well as periodically offering works for sale to fund operation of the foundation and its charitable programs.

Alternatively, a sculptor might specify that no casts can be made posthumously and that molds and models must be destroyed or contributed to museums with strict prohibitions on resale. The same range of choices can be made by photographers, designers, illustrators, and other artists creating editioned works and multiples. A chief consideration in these choices is to confirm an alignment between the foundation's charitable purpose and function, its economic requirements, and the intended role for the artist's works and rights.

### **Foundation Viability: Individuals and Their Motivations**

A foundation might be planned effectively in light of all of the factors and considerations highlighted above and yet its viability depends at heart on the motivations and types of individuals that are involved in its governance and programs. A foundation's viability depends, for example, on whether the individuals involved in a foundation understand and are dedicated to its charitable purpose; whether such persons have a commitment to the foundation's independent efficacy and do not see it as a vehicle for personal influence or private agendas; whether they provide a diversity of capabilities and perspectives beyond a closed inner circle to inform institutional choices and program decisions; whether persons advising on legal matters counsel prudence and do not facilitate legal-minimum choices that might potentially put a foundation at risk; and whether there are appropriately defined roles for experts, such as a foundation's art dealer, so that they can serve the foundation's best interests free of potential conflicts of interest. In all these respects, a foundation's ability to function in fulfillment of its charitable purpose as defined by its donor's intentions depends on the individuals that lead its governance and guide its programs.

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<sup>1</sup> See Camargo Foundation as an example of the former and Heliker-LaHotan Foundation as an example of the latter.

<sup>2</sup> See the Adolph and Esther Gottlieb Foundation as an example of the former and the Dedalus Foundation as an example of the latter.

<sup>3</sup> See Emilio Sanchez Foundation as an example of the former and Mandelman-Ribak Foundation as an example of the latter.

<sup>4</sup> See the Charles E. Burchfield Foundation (Ruling Year 1967), among other examples.

<sup>5</sup> See the Adolph and Esther Gottlieb Foundation (Ruling Year 1976), among other examples.

<sup>6</sup> See the Josef and Anni Albers Foundation (Ruling Year 1972), among other examples.

<sup>7</sup> Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008, 11-3—11-28.

<sup>8</sup> See the foundations of Milton and Sally Avery, Jerome Hill, Gordon Samstag, Walter Lantz, etc.

<sup>9</sup> See the foundations of Charles Burchfield, William Glackens, Hans Hofmann, Jackson Pollock, Esteban Vicente, Andy Warhol, etc.

<sup>10</sup> *Ibid.*, 21–20.

<sup>11</sup> *Ibid.*, 12-32–12-46.

<sup>12</sup> *Ibid.*, 23-16–23-22.

<sup>13</sup> *Ibid.*, 12-32–12-36.

<sup>14</sup> *Ibid.*, 9-3.

<sup>15</sup> Bruce R. Hopkins and Jody Blazek, *Private Foundations: Tax Law and Compliance*, 2nd ed. (Hoboken, NJ: John Wiley & Sons, 2003–2010), 507–512.

<sup>16</sup> Ralph E. Lerner and Judith Bresler, *Art Law, The Guide for Collectors, Investors, Dealers, and Artists*, 3rd ed. (New York: Practising Law Institute, 2005), 1767–1768.

<sup>17</sup> See the foundations of Viola Frey, Adolph Gottlieb, Al Hirschfeld, Robert Mapplethorpe, Herb Ritts, etc.

<sup>18</sup> Loren Renz and Rachel Elias, *More than Grantmaking: A First Look at Foundations' Direct Charitable Activities* (New York: Foundation Center, 2007).

<sup>19</sup> Hill and Mancino, *Taxation of Exempt Organization*, 11-9–11-14.

<sup>20</sup> *Ibid.*, 11-19–11-24.

<sup>21</sup> *Ibid.*, 11-11.

<sup>22</sup> See foundations of Lily Harmon, Reuben Kadish, Italo Scanga, Stella Waitzkin, etc.

<sup>23</sup> See foundations of Claire Falkenstein, Lorser Feitelson and Helen Lundeberg, Sam Francis, Beatrice Mandelman and Louis Ribak, etc.

<sup>24</sup> Hill and Mancino, *Taxation of Exempt Organization*, 11-10.

<sup>25</sup> *Ibid.*

<sup>26</sup> See foundations of Gordon Onslow Ford, Suzy Frelinghuysen and George L. K. Morris, Donald Judd, Georgia O'Keeffe, etc.

<sup>27</sup> Hill and Mancino, *Taxation of Exempt Organization*, 9-6–9-10.

<sup>28</sup> See foundations of Alexander Girard, J. Seward Johnson Jr., Alex Katz, Neltje, etc.

<sup>29</sup> See foundations of Jasper Cropsey, Alfonso Ossorio, Guy Rose, Harold Weston, etc.

<sup>30</sup> Hopkins and Blazek, *Private Foundations*, 507–512.

<sup>31</sup> Hill and Mancino, *Taxation of Exempt Organization*, 9-3.

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- <sup>32</sup> Lerner and Bresler, *Art Law*, 1767–1768.
- <sup>33</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 21-1–21-23.
- <sup>34</sup> Hopkins and Blazek, *Private Foundations*, 396–397.
- <sup>35</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 11-28–11-33.
- <sup>36</sup> *Ibid.*
- <sup>37</sup> See Alden and Vada Dow Fund and Alden B. and Vada B. Dow Creativity Foundation, a house museum and archive; Jerome Foundation and Camargo Foundation, a residency program; Barnett and Annalee Newman Foundation Trust and the Barnett Newman Foundation, a study center with archive; Gloria F. Ross Foundation and Gloria F. Ross Center for Tapestry Studies, a research and education program, etc.
- <sup>38</sup> See Edward Gorey Charitable Trust and Strawberry Lane Foundation, a public charity house museum; the Pollock-Krasner Foundation and the Pollock-Krasner House and Study Center, Stony Brook Foundation, a public charity house museum and archive; the Andy Warhol Foundation for the Visual Arts, and the Andy Warhol Museum, Carnegie Museums of Pittsburgh, a public charity single-artist museum; etc.
- <sup>39</sup> See the Eric and Barbara Carle Foundation, Girard Foundation, etc.
- <sup>40</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>41</sup> Stephen K. Urice, "Creativity and Generosity: Considerations in Establishing an Artist-Endowed Foundation," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>42</sup> *Ibid.*
- <sup>43</sup> Frances R. Hill, "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>44</sup> The Henry Moore Foundation, <http://www.henry-moore.org/>.
- <sup>45</sup> Lerner and Bresler, *Art Law*, 1777.
- <sup>46</sup> Fremont-Smith, "Federal and State Laws."
- <sup>47</sup> Lerner and Bresler, *Art Law*, 1782.
- <sup>48</sup> *Ibid.*
- <sup>49</sup> Fremont-Smith, "Federal and State Laws."
- <sup>50</sup> For a discussion of estate planning principles pertaining to the types of charitable goals discussed here, see Jeffrey N. Pennell and Alan Newman, *Estate and Trust Planning* (Chicago: American Bar Association, 2005).
- <sup>51</sup> *Ibid.*
- <sup>52</sup> Don R. Weigandt and Janine Racanelli, "What Form Should Your Private Foundation Take?" in *Trusts & Estates*, May 2009. <http://trustsandestates.com/>.
- <sup>53</sup> Urice, "Creativity and Generosity."
- <sup>54</sup> *Ibid.*
- <sup>55</sup> Fremont-Smith, "Federal and State Laws."
- <sup>56</sup> *Ibid.*
- <sup>57</sup> Robin Pogrebin, "Museums and Lawmakers Mull Sales of Art," *New York Times*, January 14, 2010, C31, New York edition.
- <sup>58</sup> Victoria B. Bjorklund, James J. Fishman, and Daniel L. Kurtz, *New York Nonprofit Law and Practice: With Tax Analysis*, 2nd ed. (New York: Matthew Bender & Company, 2009), 3-13–3-29.
- <sup>59</sup> *Ibid.*
- <sup>60</sup> Fremont-Smith, "Federal and State Laws."
- <sup>61</sup> Hill and Mancino, *Taxation of Exempt Organization*, 12-46–12-64.
- <sup>62</sup> *Ibid.*, 12-32–12-41.

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<sup>63</sup> Ibid., 23-1-21-23.

<sup>64</sup> Ibid., 22-100.

<sup>65</sup> Fremont-Smith, "Federal and State Laws."

<sup>66</sup> Elizabeth T. Boris, Loren Renz, et al, *What Drives Foundation Expenses and Compensation? Results of a Three-Year Study* (Washington, DC: Urban Institute; New York: Foundation Center, 2008).

<sup>67</sup> Council on Foundations, *Determining Reasonable Compensation for Foundation Directors and Trustees, A Guidance Memorandum from the Board of Directors of the Council on Foundations* (Washington, DC: Council on Foundations, 2002).

<sup>68</sup> Stephen Gillers, "Enter the Lawyers: Choosing and Working with Estate and Foundation Counsel to Secure an Artistic and Philanthropic Legacy," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).

<sup>69</sup> Fremont-Smith, "Federal and State Laws."

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Hill and Mancino, *Taxation of Exempt Organization*, 12-3-12-23.

<sup>75</sup> Ibid., S12-3-S12-5.

<sup>76</sup> Ibid., 21-1-21-23.

<sup>77</sup> See foundations of Josef and Anni Albers, Charles Burchfield, Adolph Gottlieb, Robert Mapplethorpe, and Robert Motherwell, among others.

<sup>78</sup> Lerner and Bresler, *Art Law*, 1747-1748.



## 7.2 CONSIDERATIONS IN SUSTAINING ARTIST-ENDOWED FOUNDATIONS

This discussion of institutional practice in sustaining artist-endowed foundations extends elements introduced in **6.1.2 Considerations in Foundation Planning** and focuses on three key factors—resources, expertise, and knowledge of the special regulatory framework in which private foundations operate—that are essential in developing and maintaining the capacity of artist-endowed foundations and their charitable programs. The first chapter outlines economic models used by artist-endowed foundations and notes considerations in their implementation; the second discusses professional advisors that provide expert guidance to artist-endowed foundations with respect to four critical concerns—the art market, legal aspects of foundation administration, foundation accounting, and investment management; and the third chapter discusses conflict of interest policies and their preparation and implementation.

In all likelihood, persons with specific interests will read the chapter that addresses their topic of interest and not the section as a whole. For that reason, each chapter separately summarizes the ways in which private foundation law potentially influences considerations in planning and conducting the respective charitable activities. These summaries should be read in combination with briefing papers and references as cited. As for the Study report as a whole, this discussion of practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.



## 7.2.1 Economic Models

The economic model of any particular foundation will be distinctive, based on its specific charitable purpose, function, assets, and the role its assets are intended to play in furthering its charitable purpose. It is also likely a foundation's economic model will evolve. Perpetuity for a foundation may or may not be a goal, although foundations not intended for perpetuity require a viable economic model during their lifetime in order to fulfill their charitable purpose. Foundations funded with a variety of assets—including artworks, intellectual property, and real property—often undertake an initial process of reorganizing their assets. This might involve distributing assets not useful to the foundation's purposes, selling some assets in order to fund startup of foundation administration and programs, and making initial investments to establish a source of ongoing income, if that is a priority.

In some cases, artists have contemplated this process and made specific provisions concerning use and disposition of their artworks, rights in works, real property, and other components of a bequest. In other cases, foundation trustees, directors, and officers are empowered to use their discretion and judgment in these matters as is necessary to achieve the donor's intended charitable purpose.<sup>1</sup> How foundations utilize their assets for public benefit purposes is regulated by the Internal Revenue Service (IRS) and state attorneys general, and in some cases by local courts supervising administration of estates.<sup>2</sup> Foundation trustees, directors, and officers preparing plans to develop their organization's economic model should do so with the guidance of legal advisors expert in these rules.

This chapter discusses the variety of economic models found among artist-endowed foundations. It reviews the different sources of foundation income, notes how the various economic models function generally, points to laws and regulations relevant to art sales income, and concludes with comments on starting up a foundation's economic model. A number of elements that bear on a foundation's economic model are discussed in **7.1.2 Considerations in Foundation Planning**, including a foundation's legal status as a nonoperating or private operating foundation and the classification of its assets as exempt purpose assets or noncharitable-use assets. Resources on the subject of foundation economic models are featured at the close of the chapter, including briefing papers prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study) that pertain to the topic.

### Sources of Income

Of artist-endowed foundations with data available to the Study, one-half hold financial assets exclusively. This includes fully funded foundations—those that have received all intended bequests, as well as lifetime foundations—those that typically receive periodic support from their living donors in order to undertake charitable activities. Another 45 percent of



foundations hold assets that include artworks or a combination of artworks and real property—facilities and land. Only five percent hold assets that include real property but no artworks. The average value of assets held by all artist-endowed foundations with data available to the Study was \$11 million in 2005 and the median was \$1 million, reflecting the large number of new foundations and lifetime foundations (ones whose artist-donors are living), both types typically being smaller in scale than established foundations.

Artist-endowed foundations are sustained by revenue from a variety of sources. Gifts and contributions from donors is the greatest of these, representing more than half of all revenue to foundations with data for the 15-year period (1990–2005) reviewed by the Study's quantitative analysis. Apart from gifts and contributions, the most common sources of revenue are earnings on investments and art-related income, typically proceeds from periodic sales of artworks and, to a lesser extent, royalties and licensing fees.<sup>3</sup> A diversity of other program-related sources also provide modest revenue—sales of educational materials (such as publications, reproductions, films, and the like), art loan fees, and admission income, facility rentals, and memberships, these last typically being for house museums. A few private operating foundations solicit grants from other foundations and donors. Overall, an artist-endowed foundation's revenues from these various sources will differ based on the charitable purpose and function of the foundation, the scale and composition of the donor's bequest, and the use intended for the assets.

## **Common Economic Models**

As noted previously, private foundations are economic entities. If not economically viable, artist-endowed foundations are unable to realize their charitable purposes, however generous or culturally significant these might be potentially. In broad terms, private foundations created and endowed by artists, or their heirs or beneficiaries, are set up based on one of five models: foundations supported by living donors, foundations supported by earnings on investments, foundations converting art inventories to financial endowments, foundations supported by investment earnings combined with art-related income, and foundations supported by art-related income.

The first two economic models assume that funds from sources other than art sales and rights licensing will provide the primary financial support for the foundation and its programs. The latter three models assume there is an established market for the artist's works and intellectual property and that these will be the productive basis of the foundation's economic model. More detailed discussion of these five economic models follows.

### **Foundations Supported by Living Donors**

Foundations established and led by artists during their lifetimes typically receive financial contributions periodically to support grantmaking<sup>4</sup> or to fund direct charitable activities,

exclusively or in combination with grants.<sup>5</sup> The same is true of foundations established by artists' heirs or beneficiaries during their lifetimes. In a few cases, lifetime foundations might receive sufficient contributions to develop an endowment so that periodic contributions are supplemented by earnings on investments. Building a financial base during the donor's lifetime allows more flexibility when a significant bequest is received by the foundation following the donor's death. Assuming the bequest includes artworks and other nonfinancial assets—which typically involve expenses to organize, secure, and prepare for programmatic use—funds on hand can ease cash flow during the period a foundation is managing this process.

Beyond financial donations, artists' contributions to their lifetime foundations sometimes include artwork by other artists as well as real property (for example, a facility for use in operating a residency program). Several considerations bear on such contributions. The amount of a charitable income tax deduction that might be received by an artist for such a gift is a technical question related to the foundation's legal status as a nonoperating or operating foundation, the relationship of the gift to the foundation's charitable purpose, and how the property was acquired by the artist originally. Artists in some cases also consider a strategy to capitalize their foundation by contributing their own artworks for subsequent sale by the foundation. This affords only a nominal income tax deduction to an artist.<sup>6</sup> It also involves potential risks, chief among these being the possibility that a foundation's activities with the artist's own works might inadvertently breach laws prohibiting private benefit and self-dealing by promoting the artist's career, thereby benefiting the artist economically.<sup>7</sup>

Similar concerns apply to foundations created during their lifetimes by artists' heirs and beneficiaries. Whether a foundation is funded strictly financially or has received gifts of the artist's works, in cases where foundation insiders own, sell, and license the artist's works, there is a risk of inadvertently breaching laws that prohibit private benefit and self-dealing if the foundation's activities promote the artist's works or rights, potentially benefiting the insiders economically.<sup>8</sup>

### **Foundations Supported by Earnings on Investments**

Bequests to some artist-endowed foundations comprise primarily financial assets, and to the extent that the artist's works are included in the bequest, these do not contribute importantly to the foundation's economic resources.<sup>9</sup> As noted below, a foundation receiving an artist's investment portfolio may be required to revamp it in order to comply with rules applicable to private foundation investments specifically and to those of charitable organizations generally. Financially endowed foundations formed by artists or their heirs or beneficiaries are involved in managing investments prudently with the aim of achieving a return that can sustain the foundation and its programs and continue to develop the endowment. As with financially endowed foundations generally, this has been a challenging task in recent years and is expected to continue to be so for a while.<sup>10</sup>

## **Foundations Converting Art Inventories to Financial Endowments**

In contrast to those that receive primarily financial assets, some artist-endowed foundations receive art assets for income purposes, with the expectation that an art inventory will be sold to endow the foundation and its programs financially.<sup>11</sup> Although a few foundations have sold collections of artworks at auction in recent years for the purpose of establishing an endowment, liquidating an art inventory to develop endowed funds more commonly takes place as a long-term initiative. In this mode, the pace of art sales cannot be such that it drives down the value of the remaining inventory, and achieving optimal value often requires a careful, multiyear process to develop a market for the works since not all aspects of an artist's oeuvre are known and appreciated equally. This effort to develop a market can involve new scholarship, publications, and exhibitions of artworks, in many cases attending to different aspects of an artist's oeuvre with different strategies over time. At the same time, the cost to store, secure, insure, conserve, and document artworks intended for sale represents a fixed cost that can be substantial.

In addition, charitable expenditures—those for grants and charitable administrative expenses—must be sufficient to meet the annual payout requirement based on five percent of the fair market value of noncharitable-use assets, which for this type of foundation includes its art inventory. A sufficient blockage discount of the value of an estate's artworks bequeathed to this type of foundation is critical so that the payout requirement does not force sales of art at an excessive pace, depressing the selling price and resulting in wasted assets. A blockage discount is defined as a reduction to the fair market value of similar assets held in bulk to reflect the extent to which the selling price would be depressed were the assets to be sold at one time.<sup>12</sup>

Fluctuations in the art market and in the stock market concurrently, as has been the case in recent years, can present a challenge in meeting the required payout. Making grants of artworks as well as cash grants is one response to diminished liquidity; whether that is possible depends on a variety of factors, including the foundation's charitable purpose and the ways in which its artworks are intended to be used. In the end, financial endowments developed through periodic art sales will only grow if there is a net surplus of income over disbursements and the foundation's investment and spending policy supports endowment growth.

## **Foundations Supported by Investment Earnings Combined with Art-Related Income**

Some artist-endowed foundations receive a combination of assets, including artworks and real property, with the intention that some will be sold over time and the proceeds will be invested to sustain the foundation and its programs, while other holdings will be retained and used in direct charitable activities, such as study centers and exhibition programs.<sup>13</sup> In this model, artworks that are sold are used until then as resources in direct charitable

activities. Such foundations are supported by a combination of earnings on investments and revenue from a variety of other sources, such as periodic art sales or royalties and licensing fees. Periodic sales of artworks take place in some cases as a dimension of charitable activities, such as grants of artworks by partial grant/partial sale, or in other cases as an aspect of a mission to educate the public about the artist's works and creative principles. In these instances, exhibition and sales of unique artworks and limited edition originals are an important means of exposing the public to the artist's oeuvre and aesthetic development, as are sales of publications, reproductions, films, and other educational products.

### **Foundations Supported by Art-Related Income**

In some cases, foundations' economic models are based primarily on art-related income with minimal investment income in the mix and the development of a financial endowment not an activity.<sup>14</sup> For some, proceeds from periodic sales of artworks might be the main source of income, while for others royalties and licensing fees might represent the bulk of income.

### **Term-Limited and Non-Perpetual Foundations**

As noted, some foundations are not intended to exist in perpetuity, being created either with a defined term or a finite task.<sup>15</sup> The latter two economic models, above, are used most commonly by estate distribution foundations—those that are charged to accomplish the posthumous, charitable distribution of an artist's assets, including artworks, owned at the artist's death and not bequeathed to other beneficiaries. These foundations sell or make grants of their artworks, spend down any financial assets on cash grants and charitable administrative expenses, and upon termination, distribute their remaining assets to a qualified public charity.

### **Assumptions about Art-Related Income**

Art-related income—including proceeds from periodic art sales, royalties, and licensing fees—is an important component of the economic model for some artist-endowed foundations. As discussed in **7.1.2 Considerations in Foundation Planning**, realistic assumptions about the extent to which an artist's works or rights might be the productive basis of a foundation's economic model are essential. Evidence suggests it is more likely this will be the case where there was an established market for the artist's works and rights during the artist's lifetime, signified in one respect by the ability of the artist to support him or herself through art sales or royalties. When this is not the case, a foundation's economic model will need to incorporate other sources of revenue to supplement art-related income. The chapter on foundation planning also discusses data on foundations' total expenses and the level of periodic art sales that might be necessary to support those costs, as well as the mix of financial and nonfinancial assets found among a sample of established foundations.

## **Laws and Regulations Relevant to Income from Periodic Art Sales**

To the extent that sales of artworks and licensing of rights and intellectual property are to play a role in an artist-endowed foundation's economic model, federal tax law potentially pertaining to such activities undertaken by private foundations should be considered from the outset. Foundations should plan and conduct their art sales activities with the guidance of legal advisors expert in these laws and regulations, as well as knowledgeable about applicable state and local laws and sales taxes.

### ***Excise Tax on Net Investment Income***

Private foundations are subject to an excise tax on net investment income, which includes interest, dividends, rents, royalties, and net capital gain income.<sup>16</sup> By legislation approved in 2006, gains from the sale of exempt purpose assets generally are subject to this excise tax unless they are used promptly to acquire comparable property.<sup>17</sup>

### ***Tax on Unrelated Business Income***

The income of tax-exempt organizations generally is not subject to federal income tax. As an exception, unless substantially related to a foundation's charitable purpose aside from its need for funds, income from a regularly conducted business activity is unrelated business income and subject to a tax for that purpose.<sup>18</sup> As a general rule, income from passive sources (such as rent, royalties, interest, and dividends) is excluded from unrelated business income.<sup>19</sup> In contrast, income of any type from an S corporation is unrelated business income in all cases.<sup>20</sup>

### ***Rulings Related to Periodic Art Sales***

Apart from sales to liquidate an art inventory received as a bequest, art sales by charitable organizations have been the focus of various rulings by the IRS over the years.<sup>21</sup> Among negative rulings concerning art sales are those in which an organization's activities involved little else than selling artworks and any educational and charitable activities conducted by the organization were nominal; art sales were not substantially related to the organization's educational purpose beyond its need for funds and so produced unrelated business income; sales of artworks depleted an organization's ability to fulfill its educational purpose of exhibiting original artworks to the public; and most commonly, art sales provided a benefit to private individuals.<sup>22</sup>

Alternatively, affirmative rulings concerning art sales have discussed the appropriate relationship between an organization's charitable purpose and the related sales of artworks and art-related materials.<sup>23</sup> These have included sales of donated limited edition artworks and unique artworks received as gifts, as well as sales of reproductions and other art-related products with a substantial relationship to an organization's educational purpose, such as publications, videos, note cards, and the like. Affirmative rulings also have discussed art sales undertaken to endow art-related programs, both scholarly and charitable in nature.<sup>24</sup>

The appropriate relationship between a foundation's charitable purpose and function and its activities generating art-related income should be defined carefully. As discussed in the briefing paper by Frances R. Hill concerning the public benefit obligations of artist-endowed foundations, the relationship between exempt status and sales of art by artist-endowed foundations depends on the presence of the required public benefit, the absence of impermissible private benefit, and the role of the art in relationship to the purposes and activities of the foundation. Application of these principles will depend on the facts and circumstances of each particular case.<sup>25</sup> Finally, as discussed in the prior chapter on foundation planning, legislation proposed to regulate museum deaccessions in some jurisdictions might have an impact on sales of art by some artist-endowed foundations.

## **Starting Up an Economic Model**

In addition to seeking tax exemption from the IRS, new foundations also may be involved necessarily in securing additional rulings about their programs and assets. Artists' lifetime foundations subsequently formalizing new charitable programs following receipt of an artist's bequest also might need to secure rulings from the IRS. Approvals might be sought for guidelines of programs making grants to individuals and those awarding residencies at work-study centers, and for changing from nonoperating status to private operating status, if that is the preferred legal status and the foundation's legal advisor considers such a ruling advisable. Rulings, or opinions from legal advisors expert in private foundation law, also might be sought on the appropriate role for an artist's assets or business enterprise functionally related to the foundation's charitable purpose.

Initiating a foundation's economic model, and the program activities it supports, might include organizing and caring for artworks; upgrading real property to meet standards for use in direct charitable activities; distributing some artworks charitably, including by grants and by partial grant/partial sale; beginning periodic art sales and initiating rights licensing to fund charitable programs and seed an endowment; and initiating programs using artworks and real property intended as resources for direct charitable activities. In some cases, it also includes establishing a separate entity to own and conduct public programs with a collection of the artist's works or the artist's former studio and residence.

Initial financing for many artist-endowed foundations is drawn typically from three sources: the artist's investment portfolio; sales of nonfinancial assets not intended for the foundation's use, such as unrelated collections, real estate, and the like; and initial sales of works from the foundation's art inventory or art collection. In some cases, foundations seek financing against future periodic art sales or royalty income in order to fund their initial organizing process and proceed with charitable and scholarly programs in a timely manner. Moving forward expeditiously with periodic art sales can hinge on a foundation's representation by an art dealer. Considerations in a foundation's arrangements with its art

dealer, or art dealers, are discussed in the following chapter on foundation professional advisors.

An investment portfolio received from an artist might require restructuring to comply with private foundation laws prohibiting excess business holdings or jeopardy investments, as well as to meet standards legislated by states for the prudent investment of charitable endowments and trusts. Beyond revising an investment portfolio, foundations in some cases are involved in re-acquiring intellectual property or other art-related interests dispersed during the artist's lifetime.

Finally, a review of compensation that will be paid to trustees, directors, officers, and staff is necessary at the start-up of a foundation's economic model to ensure compliance with private foundation law requiring that compensation be reasonable. *Reasonable compensation* is what is paid by similar organizations for the same services in comparable circumstances; compensation is inclusive, incorporating all economic benefits paid and provided by the foundation.<sup>26</sup> Neither prior compensation paid privately by the artist during his or her lifetime nor compensation specified by the artist-donor's testamentary documents can be a basis for compensation by a foundation that is not reasonable.

### **Necessary Expertise**

Planning, preparing for, initiating, and operating a successful economic model depends to a great extent on the presence of the necessary administrative capacities among a foundation's governing body and staff. In particular, business management expertise is critical for a foundation's economic viability. With sufficient business management expertise among its trustees, directors, and officers, a foundation hampered by inadequate planning, minimal liquidity, excessive organizing and startup costs, or problematic assets has a chance to overcome these drawbacks and advance the charitable purpose intended by its donor. Conversely, even when generously endowed and prepared in all other respects, a foundation lacking this expertise can see its resources dissipate and fall short of what it requires to realize its donor's vision. Thus, one of the key steps in starting up a foundation's economic model is an assessment of board and staff capabilities to ensure that the necessary expertise will be available.

## Resources: Foundation Economic Models

### Foundation Economic Models and Sources of Income Generally

Beggs, Sarah. 2009–2011 *Foundation Operation and Management Report*. Washington, DC: Association of Small Foundations, 2008.

Belmonte, Cynthia. “Domestic Private Foundations and Charitable Trusts: Tax Years 2005 and 2006.” *Statistics of Income Bulletin* (Internal Revenue Service) 29, no. 2 (Fall 2009).

### Economic Models of Artist-Endowed Foundations

Hill, Frances R. “Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations.” In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Urice, Stephen K., and Valerie Prochazka. “Art Sales by Charitable Organizations: A Summary of Rulings and Determinations.” In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Urice, Stephen K. “Creativity and Generosity: Considerations in Establishing an Artist-Endowed Foundation.” In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

### Private Foundation Rules and Artist-Endowed Foundation

Fremont-Smith, Marion R. “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations.” In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

### Private Foundation Law

Fremont-Smith, Marion R. *Governing Nonprofit Organizations, Federal and State Law and Regulation*. Cambridge, MA: Belknap Press of Harvard University Press, 2004.

Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008.

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<sup>1</sup> Stephen K. Urice, “Creativity and Generosity: Considerations in Establishing an Artist-Endowed Foundation” in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).

<sup>2</sup> Marion Fremont-Smith, *Governing Nonprofit Organizations, Federal and State Law and Regulation* (Cambridge, MA: Belknap Press of Harvard University Press, 2004).

<sup>3</sup> Foundations report art-related income, principally art sales and royalties, in a variety of categories on the annual information return (Form 990-PF), and the data cannot be isolated mechanically, as is possible for gifts and contributions, for example. However, data collected manually confirm that



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- of foundations with assets of \$10 million and above, one-half reported art-related income in 2005, and art-related income represented 30 percent of all revenues for all foundations of that scale.
- <sup>4</sup> See foundations associated with Helen Frankenthaler, Wolf Kahn and Emily Mason, Alex Katz, Ellsworth Kelly, Peter Laird, LeRoy Neiman, and Beverly Willis, among others.
- <sup>5</sup> See foundations associated during their artists' lifetimes with William N. Copley, Alexander Girard, and Madge Tennent, among others.
- <sup>6</sup> Ralph E. Lerner and Judith Bresler, *Art Law, The Guide for Collectors, Investors, Dealers, and Artists*. 3rd ed. (New York: Practising Law Institute, 2005), 1767–1768.
- <sup>7</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>8</sup> *Ibid.*
- <sup>9</sup> See foundations associated with Richard Florsheim, Jerome Hill, Walter Lantz, Albert K. Murray, Leslie Powell, and Gordon Samstag, among others.
- <sup>10</sup> Foundation Center, *Highlights of Foundation Yearbook, 2009 Edition* (New York: Foundation Center, 2009).
- <sup>11</sup> See foundations associated with William Glackens, Hans Hofmann, Jackson Pollock and Lee Krasner, and Andy Warhol, among others.
- <sup>12</sup> Lerner and Bresler, *Art Law*, 1747–1748.
- <sup>13</sup> See foundations associated with Josef and Anni Albers, Adolph Gottlieb, Gaston Lachaise, and Robert Motherwell, among others.
- <sup>14</sup> See foundations associated with Charles Addams, Al Hirschfeld, Robert Mapplethorpe, and Judith Rothschild, among others.
- <sup>15</sup> See foundations associated with Alexander Girard, Milton Horn, and Georgia O'Keeffe, among others.
- <sup>16</sup> Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations*, 12-3–12-23 (Valhalla, NY: Thomson/RIA, 2002–2008).
- <sup>17</sup> *Ibid.*, S12-3–S12-5.
- <sup>18</sup> *Ibid.*, 21-1–21-23.
- <sup>19</sup> *Ibid.*, 23-16–23-23.
- <sup>20</sup> *Ibid.*, 22–100.
- <sup>21</sup> Stephen K. Urice and Valerie Prochazka, "Art Sales by Charitable Organizations: A Summary of Rulings and Determinations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>22</sup> *Ibid.*
- <sup>23</sup> *Ibid.*
- <sup>24</sup> *Ibid.*
- <sup>25</sup> Frances R. Hill, "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>26</sup> Fremont-Smith, "Federal and State Laws."

## 7.2.2 Professional Advisors

Artist-endowed foundations are created by artists and by artists' heirs or beneficiaries. They require a mix of administrative competencies in four core areas: program expertise, curatorial expertise, business management expertise, and foundation administration expertise. These competencies are provided typically by the members of a foundation's governing body and staff and, in some cases, by expert advisory committees. Beyond this, artist-endowed foundations look to professional advisors to provide expert guidance with respect to four critical concerns: the art market, legal aspects of foundation administration, foundation accounting, and investment management. In some cases, foundations also use professional philanthropic administration services. Identifying and working with appropriate professional advisors can be a defining factor in an artist-endowed foundation's ability to fulfill its charitable purpose.

This chapter reviews the key areas in which artist-endowed foundations use professional advisors, noting considerations in selecting and working with advisors based on the experiences of foundations identified during the Study. Resources on foundation professional advisors are featured at the close of the chapter, including briefing papers prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study) that pertain to the topic. The information presented here is intended as a general orientation to the subject of professional advisors as an aspect of foundation practice. As for the Study report as a whole, this discussion of practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

### Art Dealers

Artist-endowed foundations sell artworks and license intellectual property in service to a variety of charitable purposes. Some of these purposes value artworks and rights as financial resources exclusively; some value them as charitable-use assets with cultural, scholarly, and educational significance; and some combine economic and exempt purpose values. For an artist-endowed foundation funded with an artist's artworks and rights, the art dealer or licensing agent who serves the foundation by accomplishing the exhibition and periodic sale of these artworks or the licensing of these rights is a central element in the successful realization of its charitable purpose. This is the case whether the aim is to educate the public about an artist's works and creative principles or to achieve a successful economic model that can sustain a charitable program, or a combination of both intentions.

### Types of Relationships

Whether or not the agreement with an art dealer established during the artist's lifetime terminates at the artist's death depends on the specifications of that agreement under local law.<sup>1</sup> The decision of a foundation's trustees, directors, and officers to re-engage exclusively

with the artist's lifetime art dealer, enter an exclusive agreement with a new art dealer, or work non-exclusively with one or several art dealers for a period of time depends on a foundation's purposes.

There is no single format by which artist-endowed foundations organize their representation by art dealers. In the most common arrangement, foundations are represented exclusively by a single art dealer, typically when the market for an artist's works is primarily regional or national.<sup>2</sup> However, in some cases artist-endowed foundations are represented by multiple art dealers. This might involve different art dealers for different artists, if a foundation is endowed with works by more than one artist.<sup>3</sup> It might involve different dealers representing artworks in different media.<sup>4</sup> It also might involve different representation in distinct geographic regions, with art dealers active separately in various cities in the US or in countries abroad.<sup>5</sup> Apart from their art dealers, foundations that license reproduction rights are represented in the US by rights clearance organizations or cooperatives, and by related organizations with geographic purviews in different countries or regions internationally.<sup>6</sup> Those licensing intellectual property more broadly tend to be represented by brokers active in a variety of industries, such as fashion and furnishings, rather than a single industry.<sup>7</sup>

Trustees, directors, and officers of artist-endowed foundations seek representation by an art dealer and gallery based on factors that indicate a gallery's capacity to educate and develop the public's appreciation of the artist's works and creative principals and its ability to stimulate interest in acquiring the artist's works among art collectors and museums and their patrons. A variety of concerns relate to these goals: the aesthetic context afforded the foundation's artist by other artists represented by a gallery; the scholarly caliber of a gallery's exhibitions and catalogues; public interest in and attendance at a gallery's exhibitions; the network of art collectors, museum patrons, and museums who are clients of a gallery; a record of facilitating collectors' gifts to museums; and a gallery's general prestige and reputation for sound business practices. Commissions paid to art dealers can range by region and might vary based on the established market for an artist's works and the services to be provided by a gallery, among other factors.<sup>8</sup>

Selection of a rights clearance organization or broker to manage licensing of reproduction rights or other intellectual property can depend on factors specific to an artist's works and the nature of the services required. Some brokers or rights clearance organizations specialize in particular media—photography often differing from painting and sculpture, for example. A broker might license reproduction rights as a single activity or within a combination of services, and some focus in particular regions or work through networks internationally.

## Private Foundations are Different

Unlike an artist or an artist's heirs or beneficiaries, a private foundation does not have the option of doing business on an informal, handshake basis. Foundation trustees, directors, and officers have a defined duty to assure the proper care and security of artworks owned by a foundation, wherever these are located and controlled.<sup>9</sup> Artworks lost in a gallery bankruptcy, or mislaid or damaged due to informal inventory procedures or storage arrangements, might expose a foundation's trustees, directors, and officers to potential liability if these events take place absent prudent business procedures. An art dealer selected to represent a private foundation should be engaged with provisions for policies and procedures that reflect these requirements. If the art dealer who represented the artist during his or her lifetime is selected to represent the foundation, a review of policies and procedures should confirm that these meet the new standards.

Whereas an artist's heir or beneficiary has the option to maintain a relationship with the artist's art dealer based primarily on friendship or long personal history, foundation trustees, directors, and officers have a duty to determine on a business basis the representation that best serves the foundation's interests. To the extent that a foundation's artworks have been committed wholly or in part to support the foundation and its programs, its trustees, directors, and officers have a responsibility to see that art sales realize the appropriate value of those assets and that they are not wasted.<sup>10</sup>

As an additional distinction, a foundation endowed with a finite body of works by a deceased artist requires a different approach to representation than does a living artist producing new works on an ongoing basis. A key aspect of that approach is a business plan outlining a considered strategy with respect to the role art exhibitions and periodic sales from a finite inventory will play in the foundation's charitable program and in its economic model. As a final distinction, artist-endowed foundations conduct a variety of activities potentially involving art sales. A foundation that intends to implement a program of partial grants/partial sales to distribute the artist's works to museums and educational institutions might choose to accomplish that charitable activity apart from its regular representation agreement with an art dealer or under a special representation arrangement specifically for that purpose.

## Appropriate Roles for Art Dealers

Private foundation law makes a distinction between persons serving as *brokers*—agents managing transactions for a client and compensated on a commission basis—and persons serving as *dealers*—principals who buy property on their own account and sell to third parties.<sup>11</sup> This distinction is significant in that *brokers*, but not *dealers*, are included in the category of persons providing personal services necessary to carry out a foundation's exempt purpose who, if serving as a member of a foundation's governing body, are permitted to receive reasonable compensation for their services.<sup>12</sup> *Reasonable* is defined as

compensation consistent with that paid by similar organizations for the same services in comparable circumstances. Persons serving in governance roles and compensated for a personal service cannot participate in votes that influence their own compensation.<sup>13</sup>

In contrast to the clear distinctions assigned the terms of *dealer* and *broker* under private foundation law, art dealers in practice can play a number of roles for their artist-endowed foundation clients. While for the most part foundations' art dealers act as brokers and sell foundations' artworks on consignment, and as such are compensated on a commission basis, in some instances they do purchase works from their foundation clients, acting as principals. In contrast, representatives who manage the licensing of foundations' intellectual property function as brokers and not as principals.

Artists in some cases would like to place their art dealer on the governing body of a foundation that they intend will play a role in their estate plan. This is a choice that merits careful consideration. From the perspective of the foundation's best interests and the future responsibilities of its trustees, directors, and officers, there might be good reason in the future to change gallery representation in response to evolving needs and circumstances. This is difficult if the foundation's art dealer also serves on its board.

Apart from this, it is reasonable to question whether a foundation's art dealer could provide optimum service to the foundation if also playing a governance role. As noted throughout the Study, private foundation law prohibits transactions between foundations and their insiders and persons related to these individuals and their private interests.<sup>14</sup> Among other constraints, a foundation's art dealer also serving as a trustee, director, or officer would not be able, directly or indirectly, to purchase artworks from the foundation, sell artworks to the foundation, or exchange artworks with the foundation. Other sales facilitation activities common in managing the secondary market for an artist's works potentially might be curtailed as well.

Most art dealers adhere to the ethical standards of their profession.<sup>15</sup> Nonetheless, the field's most high profile case involving prosecution and findings of breach of fiduciary duty and of self-dealing involved an art dealer who served as a foundation trustee, among other roles.<sup>16</sup> An art dealer's dual role in representation and in governance does heighten the potential for conflict of interest. In addition, arrangements that meet the letter of the law—the legal minimum—nonetheless can convey an image publicly that undermines a foundation's credibility and distracts from its good works; as such, something may be legal but not advisable. In the end, an art dealer with special loyalty to an artist and distinctive expertise in an artist's works is likely to serve the artist-endowed foundation most effectively by playing a governance role exclusively or by playing the representation role exclusively, unconstrained in conducting the full range of activities needed to serve a foundation's best interests.

Finally, trustees, directors, and officers are responsible for using the foundation's art dealer appropriately. Artist-endowed foundations require business management expertise to transform an artist's bequest into a sustainable economic enterprise. Periodic art sales are central to a foundation's economic model in many cases, but a foundation's art dealer should not be assumed to be the source of business management expertise.

## **Attorneys**

Artist-endowed foundations are not possible without lawyers.<sup>17</sup> Attorneys are required for the creation of foundations, preparation of estate plans that include formation of foundations, and administration and settlement of estates that fund foundations. Once they are organized, artist-endowed foundations require legal services for a wide range of program and business activities, as well as for the fundamental task of operating for public benefit consistent with state and federal law applicable to private foundations. Among all the specialists that provide a foundation with professional advice, its legal counsel has the greatest impact on the critical choices made in the formation process and during foundation operation that influence the successful realization of a charitable purpose.

### **Private Foundation Law is Different**

Private foundations are tax-exempt, charitable organizations. Exempt organization law is a defined practice area, one in which attorneys can pursue the continuing legal education credits required to comply with state licensing standards.<sup>18</sup> Within exempt organization law, private foundation law is a distinct area of expertise concerning the laws and regulations that apply specifically to private foundations. These laws differ from those that apply to public charities, which is the status of many art museums.<sup>19</sup> Although some attorneys specialize exclusively in exempt organization law, most come to the topic in combination with trust and estate practices or tax practices. Attorneys active in advising exempt organizations generally and private foundations specifically often attend annual convenings to stay abreast of the latest developments and new regulations in this specialized field.<sup>20</sup> Practitioners active in the field often speak at these conferences.

By their nature, artist-endowed foundations engage in activities requiring a diversity of legal expertise, including: intellectual property law; commercial law; employment law; and laws pertaining to specialized topics, such as art authentication. These areas of expertise are separate from expertise in private foundation law. However, a foundation's activities in these areas can be influenced importantly by its legal status as a private foundation.<sup>21</sup>

As an aspect of their duties administering a foundation's affairs, its trustees, directors, and officers have a responsibility to retain the appropriate professional services necessary for a foundation to accomplish its charitable purpose.<sup>22</sup> Along with other important criteria, an attorney who is to represent a private foundation on an ongoing basis should be engaged based on evidence of knowledge about private foundation law.

## **Types of Attorneys Advising Artist-Endowed Foundations**

Artist-endowed foundations are created and advised by attorneys from a variety of practice areas. As in the broader foundation universe, many foundations are created by trust and estate counsel in the context of estate plans. Trust and estate attorneys have expertise in forming foundations consistent with trust and estate law; beyond creation and funding of a foundation under an estate plan, some also have expertise in operating foundations under private foundation law, which is a different body of law. Sometimes, artist-endowed foundations are created by attorneys who manage artists' ongoing business and tax concerns, the view being that forming and managing a foundation is part of full-service representation for a client. In some cases, such attorneys develop knowledge about private foundation law. However, in many cases such attorneys seek outside counsel on specialized topics, such as preparing an estate plan and forming and operating a private foundation.

In discussing formation of artist-endowed foundations, **7.1.1 Motivations and Challenges in Formation** notes a variety of difficulties identified in prior decades, including those associated with legal advising. In broad terms, the challenges identified were those that involved creation of foundations by legal advisors unfamiliar with private foundation law, estate plans prepared by attorneys lacking estate planning expertise or unaware of how aspects of private foundation law intersect with estate planning concerns, and operation of foundations with the advice of counsel unfamiliar with private foundation law.

Artist-endowed foundations must be viable in the context of an estate plan and also be operable over the longer term consistent with private foundation law. As a practical matter, a private foundation planned by estate counsel for estate planning purposes should be reviewed by counsel expert in private foundation law to confirm it will be operable consistent with private foundation law after the estate is settled as planned. Likewise, a private foundation created as a lifetime foundation to serve as the vehicle for an artist's personal philanthropy should be reviewed by estate planning counsel and counsel expert in private foundation law before provisions for its funding and directions for its long-term role are incorporated into the artist's estate plan.

More broadly, in planning a foundation, alignment of donor and counsel is an important consideration. Some attorneys view foundations exclusively as transitional vehicles to accomplish the orderly, posthumous distribution of the artist's artworks and archive; creation of a sustained, charitable corpus to accomplish a larger philanthropic purpose is not a goal. Persons creating foundations and their counsel should be of the same mind, just as trustees, directors, and officers should be in accord with the foundation's legal advisor concerning the foundation's role.

## **Appropriate Roles for Legal Advisors**

An attorney with multiple client relationships, for example, one who serves as executor of an artist's estate or represents the estate during estate administration, and also advises the private foundation created by the estate plan, serves on the foundation's governing body, and represents the artist's heir or beneficiary with interests in the estate plan, can develop a conflict of interest with respect to decisions that bear on the potentially divergent interests of these multiple clients. By best practice standards, clients involved in multiple-client arrangements should consider seeking a second opinion before signing a conflict of interest waiver with an attorney.<sup>23</sup> In the event of an actual conflict of interest, the foundation should be represented by independent counsel.<sup>24</sup> Attorneys practicing in the same firm are not independent of one another.<sup>25</sup>

As above, attorneys are permitted to serve as members of a foundation's governing body and receive reasonable compensation for personal service necessary to conduct a foundation's exempt activities. Persons serving in governance roles and compensated for personal service cannot participate in votes that influence their own compensation.<sup>26</sup> Although there are exceptions (for example, with respect to attorney trustees for foundations organized as trusts) a foundation's trustees, directors, and officers should be free to change representation in response to a foundation's evolving needs and circumstances. This can be difficult if the foundation's attorney is a member of its governing body.<sup>27</sup> A legal advisor should be available to the foundation as required whether or not serving in a governance role. Appointing an attorney to a foundation board as a strategy to secure discounted, pro-bono services is a questionable choice.

Finally, foundation trustees, directors, and officers are responsible for using their legal advisors appropriately. Legal considerations bear on the development of a sustainable economic model, but a foundation's counsel should not be assumed to provide it with business management expertise. Attorneys will advise on legal considerations in the disposition of an artist's archive or collected artworks. However, many other considerations bear on such choices and legal counsel should not be the single source of expertise in such matters. Likewise, attorneys will advise on legal considerations in planning grantmaking programs and direct charitable activities, but legal counsel should not be the sole perspective in defining a foundation's activities in support of its charitable purpose. Finally, a legal advisor will assess potential conflict of interests and may conclude that a transaction is permissible in narrow legal terms. However, a range of perspectives in addition to a legal analysis is necessary to determine what choice serves a foundation's best interests.



## **Certified Public Accountants**

Accounting and auditing not-for-profit entities is an area of specialization in which certified public accountants can pursue the continuing professional education credits necessary to comply with state licensing standards.<sup>28</sup> Within that area, accounting for private foundations is a distinct body of knowledge about the laws and regulations that pertain specifically to these entities, which differ in many cases from those for public charities, the type of organization that comprises the majority of entities referred to as *nonprofits*. Some local accounting firms develop expertise in accounting and auditing for tax-exempt organizations, although many local firms include exempt organizations among a wide range of clients. National accounting firms in some cases have specialized practice groups in this area, often based in a particular regional office and led by partners that specialize in nonprofit clients.

### **Private Foundations are Different**

Financial accounting for nonprofits generally and private foundations specifically differs from business accounting, such as that for sole proprietorships, partnerships, and corporations, any of which might be the legal form used for an artist's creative practice during his or her lifetime. Foundation trustees, directors, and officers are responsible for retaining the professional services necessary for a foundation to accomplish its charitable purpose. Along with other important criteria, a certified public accountant selected to serve a private foundation should be engaged based on evidence of expertise in financial accounting for exempt organizations and, more specifically, for private foundations.

Private foundations differ from public charities with respect to statutory requirements for annual audits. With a few exceptions, many states' annual audit requirements for nonprofits apply to charitable organizations that raise funds from members of the public; for the most part these are public charities.<sup>29</sup> As such, most private foundations have not been subject to an audit requirement by law. Despite this, recent research found that more than 80 percent of independent foundations surveyed nationally obtain an annual financial audit.<sup>30</sup> About the same percentage uses an accounting firm to prepare or review their annual information return (Form 990-PF), and more than 60 percent have accountants review their financial and internal controls regularly.<sup>31</sup>

### **Specialized Needs of Artist-Endowed Foundations**

Of foundations with data available to the Study, 45 percent reported art assets with an aggregate value of \$1.1 billion. For artist-endowed foundations funded with collections of artworks, regular review of internal controls is important to protect the foundation and the persons who govern and lead it. As above, foundation trustees, directors, and officers have legal responsibilities for administering foundation property, with a duty to ensure the proper care and security of a foundation's artworks, wherever these are located.<sup>32</sup> An audit tests an organization's internal controls in order to ascertain the credibility of its records

for its assets.<sup>33</sup> This cannot guarantee against fraud, but can identify weaknesses in policies and procedures that represent liabilities.<sup>34</sup>

Foundations annually report the fair market value of all assets on the annual information return (Form 990-PF), which is prepared typically by a foundation's accountant for submission to the Internal Revenue Service (IRS). For many artist-endowed foundations, this includes artworks and intellectual property, the values of which are reported whether they are used for income purposes or as exempt purpose assets. With appropriate procedures, a professional appraisal of such assets can be updated in subsequent years by knowledgeable staff or advisors.

### **Appropriate Roles for Accountants**

As above, an accountant who serves as a member of a foundation's governing body can be compensated reasonably for personal service necessary to conduct a foundation's exempt activities, but cannot participate in votes on that compensation.<sup>35</sup> A foundation's trustees, directors, and officers should be free to change accountants in response to a foundation's evolving needs and circumstances. This can be difficult if the foundation's accountant is a member of its board. By virtue of auditor independence standards, an accountant providing bookkeeping or other management services would not conduct the foundation's audit.<sup>36</sup> Likewise, an accountant serving as a member of a foundation's governing body would not conduct its audit.<sup>37</sup>

Foundation trustees, directors, and officers are responsible for using their accountants appropriately. Artist-endowed foundations require business management expertise. Although financial accounting bears on this, a foundation's accountant cannot be expected to provide business management expertise.

### **Investment Advisors**

The defined duties of foundation trustees, directors, and officers with respect to their roles administering foundation property are discussed most commonly in terms of their responsibilities as stewards of foundations' investments. Reflecting this, a great deal of literature is available on the topic of private foundations and their investment policies and practices, including selection, compensation, and evaluation of investment advisors and managers.<sup>38</sup> Along with charitable and educational institutions broadly, foundation investment practices and performance are surveyed annually.<sup>39</sup> Investment practices of different types and sizes of foundations are surveyed as well.<sup>40</sup>

### **Private Foundations are Different**

Investment advising for charitable organizations is different from advising wealthy individuals, and advising an artist-endowed foundation is different from advising a wealthy artist. Most states have legislated standards for the prudent investment of charitable endowments and

trusts.<sup>41</sup> Beyond this, private foundation law specifically prohibits *jeopardizing investments*, defined generally as investments involving a level of risk not consistent with the prudent business judgment that is a duty of foundation trustees, directors, and officers.<sup>42</sup> Investments made appropriately during an artist's lifetime may not meet the standards that apply to a private foundation. An investment portfolio received under an artist's estate plan may need to be restructured in light of this. Alongside other important criteria, an investment advisor or manager selected to serve a private foundation should be engaged based on evidence of knowledge about these laws.

### **Appropriate Roles for Investment Advisors**

As noted above, an investment advisor who serves as a member of a foundation's governing body can be compensated reasonably for personal service necessary in carrying out a foundation's exempt purpose, but cannot participate in votes that influence his or her own compensation. Again, a foundation's trustees, directors, and officers should be free to change investment advisors in response to evolving needs and circumstances. This can be difficult if the investment advisor serves on the foundation's board.

Foundation trustees, directors, and officers are responsible for using their investment managers appropriately. Artist-endowed foundations require business management expertise. Although investment acumen bears on this, a foundation's investment advisor cannot be assumed to provide business management expertise.

### **Philanthropic Administration Services**

During the past two decades, the use of professional firms to provide back-office, philanthropic administration has grown rapidly in the greater foundation universe, particularly among family foundations.<sup>43</sup> Such firms offer specialized expertise in foundation administration on a pro-rata basis, providing access to a level of professional competency most smaller foundations are unable to acquire by employing staff directly. Some firms began as family offices serving the investment and philanthropy needs of wealthy families and have extended their capacities to a broader client base. Others have emerged from consulting firms specializing in advising donors on their personal philanthropy. Most recently, use of technology and online formats have increased efficiency and access to a variety of services, including support for record keeping, grantmaking, grant management, compliance monitoring, and annual reporting activities.

Professional philanthropic administration services typically work with financially endowed grantmaking foundations, a category that includes most artists' lifetime foundations and those artist-endowed foundations funded exclusively with financial assets. For other types of artist-endowed foundations, a central consideration in a decision to use an administrative service or advisor is the ability to tailor services in light of nontraditional assets, direct charitable activities, and an economic model involving periodic art sales and rights licensing.

## **Professional Advisors Overall**

Several themes are consistent across the areas in which artist-endowed foundations require professional advising in order to realize their charitable purposes—the art market, legal aspects of foundation administration, foundation accounting, investment management, and in some cases, philanthropic administration generally. Chief among these is the duty of foundation trustees, directors, and officers to retain and work with the appropriate professional advisors as a central aspect of their responsibilities in administering a foundation's affairs. Additional related themes include selecting professional advisors who have the necessary qualifications and expertise; defining roles for professional advisors based on a foundation's best interests and independent efficacy; using professional advisors appropriately; and compensating professional advisors reasonably, both those that might serve in a governance role and those that do not.<sup>44</sup>

As with the persons leading a foundation's governance and guiding its programs, a foundation's professional advisors should understand and be committed to its charitable purpose. This commitment should be a central element in the professional advising relationship.

## **Resources: Professional Advisors**

### **Professional Advisors Overview**

#### **Art Dealers**

Lerner, Ralph E., and Judith Bresler. "Artwork Transactions: Private Sales." In *Art Law, The Guide for Collectors, Investors, Dealers and Artists*, 76–244. New York: Practising Law Institute, 2005.

#### **Attorneys**

Cafferata, Reynolds. "The Role of Counsel in Foundations: Choices, Beginnings, and Service." In *Foundation Management, Innovation and Responsibility at Home and Abroad*, Edited by Frank L. Ellsworth and Joe Lumarda, 205–246. Hoboken, NJ: John Wiley and Sons, 2008.

#### **Certified Public Accountants**

Audit Committee Effectiveness Center. *The AICPA Audit Committee Toolkit: Not-for-Profit Organizations*. 2nd ed. New York: American Institute of Certified Public Accountants, 2010.

Kosaras, Andras. "Thinking About an Audit? Read This First." *Foundation News and Commentary* 46, no. 4 (July/August 2005).

#### **Investment Advisors**

Griswold, John S. Jr. *Principals of Foundation Investment Management*. Washington, DC: Association of Small Foundations, 2006.

#### **Philanthropic Administration**

Professional Directory of Foundation Advisors, Association of Small Foundations.  
<http://www.smallfoundations.org/forms/Directory/search>.

#### **Foundation Accounting and Legal Expenses: Comparative Data**

Association of Small Foundations. *2009–2011 Foundation Operations and Management Report*. Washington, DC: Association of Small Foundations, 2010.

#### **Professional Advisors and Artist-Endowed Foundations**

Gillers, Stephen. "Enter the Lawyers: Choosing and Working with Estate and Foundation Counsel to Secure an Artistic and Philanthropic Legacy." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

#### **Private Foundation Rules and Artist-Endowed Foundations**

Fremont-Smith, Marion R. "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

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## **Private Foundation Law**

Fremont-Smith, Marion R. *Governing Nonprofit Organizations, Federal and State Law and Regulation*. Cambridge, MA: Belknap Press of Harvard University Press, 2004.

Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008.

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<sup>1</sup> Ralph E. Lerner and Judith Bresler, *Art Law, The Guide for Collectors, Investors, Dealers, and Artists*. 3rd ed. (New York: Practising Law Institute, 2005), 26.

<sup>2</sup> See foundations associated with Charles Burchfield, Lorser Feitelson and Helen Lundeberg, Gordon Onslow Ford, George Segal, etc.

<sup>3</sup> See foundations associated with Jackson Pollock and Lee Krasner, etc.

<sup>4</sup> See foundations associated with Josef and Anni Albers, Andy Warhol, etc.

<sup>5</sup> See foundations associated with Josef and Anni Albers, Adolph Gottlieb, Robert Mapplethorpe, Robert Motherwell, Andy Warhol, etc.

<sup>6</sup> Among others, Artists Rights Society, Visual Artists and Galleries Association, Art+Commerce, Magnum Photos, etc.

<sup>7</sup> See foundations associated with Keith Haring, Robert Mapplethorpe, Andy Warhol, etc.

<sup>8</sup> Guidelines for the Professional Practice of Studio Art, Contracts with Art Dealers, College Art Association, <http://www.collegeart.org/guidelines/practices.html>.

<sup>9</sup> Marion R. Fremont-Smith, "Fiduciary Duties: Duty of Care." In *Governing Nonprofit Organizations, Federal and State Law and Regulation* (Cambridge, MA: Belknap Press of Harvard University Press, 2004), 199–215.

<sup>10</sup> *Ibid.*

<sup>11</sup> Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* (Valhalla, NY: Thomson/RIA, 2002–2008), 10–42.

<sup>12</sup> John A. Edie, *Self-Dealing, A Concise Guide for Foundation Board and Staff* (Washington, DC: Forum of Regional Associations of Grantmakers, 2008).

<sup>13</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*, Washington, DC: Aspen Institute, 2010).

<sup>14</sup> *Ibid.*

<sup>15</sup> ADAA Code of Ethics and Professional Practice, Art Dealers Association of America, [http://www.ifar.org/professional\\_guideline\\_item.php?docid=1245166504](http://www.ifar.org/professional_guideline_item.php?docid=1245166504).

<sup>16</sup> See discussion of the Mark Rothko estate and foundation. Fremont-Smith, "Federal and State Laws."

<sup>17</sup> Stephen Gillers, "Enter the Lawyers: Choosing and Working with Estate and Foundation Counsel to Secure an Artistic and Philanthropic Legacy," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).

<sup>18</sup> American Bar Association, <http://www.abanet.org/>.

<sup>19</sup> Fremont-Smith, "Federal and State Laws."

<sup>20</sup> The annual Representing and Managing Tax-Exempt Organizations Conference, held by the Georgetown University Law Center, Washington, DC, is an example.

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- <sup>21</sup> Reynolds Cafferata, "The Role of Counsel in Foundations: Choices, Beginnings, and Service," in *Foundation Management, Innovation and Responsibility at Home and Abroad*. Edited by Frank L. Ellsworth and Joe Lumarda (Hoboken, NJ: John Wiley and Sons, 2008), 205–246.
- <sup>22</sup> Ibid.
- <sup>23</sup> Gillers. "Enter the Lawyers."
- <sup>24</sup> Cafferata. "Role of Counsel."
- <sup>25</sup> Gillers. "Enter the Lawyers."
- <sup>26</sup> Fremont-Smith. "Federal and State Laws."
- <sup>27</sup> Gillers. "Enter the Lawyers."
- <sup>28</sup> American Institute of Certified Public Accountants, <http://www.aicpa.org/>.
- <sup>29</sup> Marion R. Fremont-Smith, Appendices, in *Working Paper No. 33.8: The Search for Greater Accountability of Nonprofit Organizations* (Cambridge, MA: Hauser Center for Nonprofit Organizations, Harvard University, 2006).
- <sup>30</sup> Andras Kosaras, "Thinking About an Audit? Read This First." in *Foundation News & Commentary* 46, no.4 (July/August 2005).
- <sup>31</sup> Ibid.
- <sup>32</sup> Fremont-Smith. "Fiduciary Duties."
- <sup>33</sup> New York State Attorney General, *Internal Controls and Financial Accountability for Not-for-Profit Boards* (New York: New York Charities Bureau, Office of the Attorney General, State of New York, 2007).
- <sup>34</sup> Kosaras, "Thinking About an Audit?"
- <sup>35</sup> Fremont-Smith. "Federal and State Laws."
- <sup>36</sup> American Institute of Certified Public Accountants, Independence and Related Topics. *The AICPA Audit Committee Tool Kit* (New York: American Institute of Certified Public Accountants, 2005).
- <sup>37</sup> Ibid.
- <sup>38</sup> John S. Griswold Jr., *Principals of Foundation Investment Management* (Washington, DC: Association of Small Foundations, 2006).
- <sup>39</sup> Commonfund Benchmark Studies, Commonfund Institute, <http://www.commonfund.org/>.
- <sup>40</sup> See Association of Small Foundations, Council on Foundations, and National Center for Family Philanthropy.
- <sup>41</sup> Uniform Law Commission, *Uniform Prudent Management of Institutional Funds Act*, <http://www.upmifa.org>.
- <sup>42</sup> Hill and Mancino. *Taxation of Exempt Organizations*, 12-46–12-64.
- <sup>43</sup> Professional Directory of Foundation Advisors, Association of Small Foundations, <http://www.smallfoundations.org/>.
- <sup>44</sup> Comparative data on accounting, investment, and legal expenses are available from professional foundation associations, including Council on Foundations and the Association of Small Foundations.

## 7.2.3 Conflict of Interest Policies and Practice

Alongside recognition of the important role private foundations play in philanthropy, there always has been a concern about the use of private foundations by insiders for personal, noncharitable purposes.<sup>1</sup> A variety of problems have been highlighted in the press and addressed by Congress over the years. Foundations have paid excessive compensation to insiders. They have been used to maintain control of businesses and as a means to dispose advantageously of undesirable assets. Foundation assets have been invested to enhance the value of stocks and properties owned by insiders, and their business activities have been conducted to create advantages for insiders. These types of activities have spurred successive reforms, making private foundations a highly regulated industry requiring compliance with a body of law that prohibits most transactions between a foundation and its insiders.<sup>2</sup>

This chapter summarizes the subject of conflict of interest for private foundations, provides an overview of effective practice in preparing and implementing conflict of interest policies, and highlights typical conflict of interest considerations for artist-endowed foundations generally. Resources on the topic of conflict of interest are cited at the close of the chapter, including briefing papers prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study) that pertain to this topic. Chief among these is the paper by Marion R. Fremont-Smith that reviews the history and current status of federal and state laws regulating conflict of interest and discusses how these laws apply to artist-endowed foundations and their activities.<sup>3</sup>

Each of the chapters in the following **8. Planning and Conducting Charitable Programs** highlights considerations informed by a basic understanding of private foundation law and regulations as these relate generally to the various charitable activities conducted by artist-endowed foundations. In addition, planning for the roles of artists' heirs and beneficiaries in order to avoid and minimize potential conflicts of interest is discussed in **7.1.2 Considerations in Foundation Planning**. The discussion here is intended as a general orientation to conflict of interest policies and their implementation as a matter of foundation practice. Foundation trustees, directors, and officers preparing their organization's conflict of interest policies and practices should do so with the guidance of legal counsel expert in private foundation law. As for the Study report as a whole, this discussion of practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.



## Private Foundations: Conflict of Interest and Self-Dealing Generally

Both state law and the Internal Revenue Code deal with situations in which persons in positions of authority over a charitable organization might receive an inappropriate benefit. The federal laws on these matters for private foundations are stricter than those for public charities; where public charities are given some leeway, most transactions between a private foundation and its insiders—generally trustees, directors, officers, substantial contributors, and individuals related to these persons and to their interests—are prohibited.

*Conflict of interest* is a state law term that describes a situation in which a charitable organization's insider has a personal economic interest in, and therefore could benefit from, a decision or action to be taken by the organization. Conflict of interest is regulated by state law, which requires that specified procedures must be used when a conflict of interest arises. In contrast to federal law for private foundations, with appropriate procedures state law allows a few types of transactions involving conflict of interest. Insiders cannot participate in votes to approve transactions in which they have a conflict of interest.<sup>4</sup>

*Self-dealing* is defined in the Internal Revenue Code as any transaction between a private foundation and its *disqualified persons*, generally insiders, in which a person has a direct or indirect financial interest. Such transactions are prohibited, with few exceptions.<sup>5</sup> Flagrant or repeated self-dealing can lead to the loss of tax-exempt status for the foundation. As noted in the Fremont-Smith paper, even though both state and federal law come to bear in these matters, for private foundations federal law is definitive in that to be eligible for tax exemption, a private foundation's governing instrument must include provisions that require it to comply with the federal private foundation law, whatever the state in which it is formed.<sup>6</sup>

As a practical matter, a conflict of interest exists in all self-dealing transactions. For this reason, the Internal Revenue Service (IRS) inquires of all organizations applying for tax exemption if they have adopted a conflict of interest policy detailing procedures to follow to avoid the possibility that those in authority over the organization might benefit inappropriately. Thus, federal authorities use a state law term, *conflict of interest*, in their discussion of governance efficacy as it pertains to the federally prohibited activity of self-dealing.

### Prohibited Transactions

Transactions between a foundation and its insiders that are prohibited in the Internal Revenue Code as acts of self-dealing include buying, selling, or exchanging property; renting and leasing property, except if an insider leases property to the foundation at no cost for a charitable use; lending money or extending credit, except if an insider makes an interest-free loan to the foundation to be used for a charitable purpose; providing goods, services,

or facilities to an insider, except if provided on the same terms to members of the general public; compensating an insider, except for *personal service* necessary to carry out a foundation's exempt purpose; use of a foundation's assets or income by or for the benefit of a foundation insider, directly or indirectly, unless the benefit is of the type defined as no more than *incidental or tenuous*; and payments to government officials.<sup>7</sup> A transaction will violate these rules if it takes place directly or if it takes place between the foundation and a third party but provides an indirect financial or economic benefit to an insider.<sup>8</sup>

### **Compensation**

As an exception to the prohibition on self-dealing, with certain provisions, a private foundation may pay reasonable compensation to an appropriately qualified insider for necessary *personal service*. Insiders cannot participate in votes to approve their own compensation or to compensate persons related to them, these being transactions in which they have a conflict of interest.<sup>9</sup>

*Necessary services* are those that directly further the foundation's exempt purpose. *Reasonable compensation* is what is paid by similar organizations for the same services in comparable circumstances; compensation is inclusive, incorporating all economic benefits paid financially or otherwise provided by the foundation. *Personal service* includes service as a trustee, director, officer, or staff, and a set of services identified in regulations and rulings as financial services, legal services, accounting services, investment services, and the services of a broker acting as an agent for the foundation, but not a dealer buying from and selling to the foundation. Such services as information technology management, web design, interior design, graphic design, photography, and the like have not been identified as personal services.<sup>10</sup>

### **Incidental or Tenuous Benefits**

Examples cited commonly where only incidental or tenuous benefits to a foundation insider are derived from the use of a foundation's income or assets include public goodwill and recognition received by a foundation's substantial donor as the result of its grant to a public television station whose broadcast acknowledgement featured the donor's name, naming of a facility in honor of an insider as a result of a foundation's grant, and a foundation grant to assist improvement of a public park in a neighborhood where an insider owns a property.<sup>11</sup> As a general rule, insiders cannot participate in votes to approve transactions from which they derive only an incidental or tenuous benefit, these being transactions in which they have a conflict of interest.

### **Common Acts of Self-Dealing**

Self-dealing transactions are distinct from transactions that can be permitted if appropriate procedures are used to deal with a conflict of interest, such as those involving reasonable and necessary compensation of insiders for personal service or benefits to insiders that are no more than incidental or tenuous.

Examples of self-dealing transactions commonly cited in guides published for boards and staff of private foundations include payment of travel expenses for insiders' relatives; use by insiders' relatives of tickets purchased by the foundation, such as to fundraising events; foundation grants made to satisfy an insider's personal pledge; payment of excessive compensation or reimbursement to insiders; loans to insiders; payments to rent office space from an insider and to reimburse the insider for occupancy-related costs; payments to insiders and their relatives for services that are not among the identified personal services;<sup>12</sup> and personal use of foundation property by insiders, such as displaying foundation-owned artworks in an insider's home. Such transactions are prohibited as self-dealing, regardless of the procedure used to approve them.

### **Responsibilities of Trustees, Directors, and Officers**

Persons governing and leading private foundations have significant responsibilities by virtue of their positions—commonly referred to as *fiduciary duties*—and are held accountable under state and federal laws to fulfill these obligations.<sup>13</sup> As such, accepting a foundation governance or executive role is accepting a responsibility to be informed about these laws. As a concrete example, a foundation's annual information return (Form 990-PF) requires that foundations report any prohibited transactions with insiders. The person who signs the form—typically the foundation trustee, president, or executive director—is signing under oath that the return is true, correct, and complete.<sup>14</sup> With respect to allegations of self-dealing that might be raised by regulators, foundation insiders who can demonstrate that they acted with the advice of legal counsel can make a defense on that basis.<sup>15</sup>

### **Preparing and Implementing Conflict of Interest Policies**

During the past decade, a major initiative in the philanthropic sector nationally raised awareness of best practice in governance and accountability, particularly for conflict of interest and self-dealing.<sup>16</sup> This effort paralleled increased scrutiny by regulators and Congress, including new, stricter laws adopted in 2006. Many artist-endowed foundations formed in prior decades that had not adopted conflict of interest policies are now doing so. The application for tax exemption submitted to the IRS by new entities now asks if the applicant has adopted a conflict of interest policy, and if not, asks how the organization manages conflict of interest absent a policy.<sup>17</sup> In light of this, the question for artist-endowed foundations is not whether to adopt a conflict of interest policy, but how to adopt and implement a policy that is relevant and useful in guiding accountable foundation governance and administration.

Laws regulating conflict of interest for private foundations differ from those for public charities. As such, sample conflict of interest policies prepared for public charities, which is the legal status of most museums, are not useful as models to private foundations. Unfortunately, this includes the sample policy provided by the IRS itself in its materials for applicants seeking exemption. However, sample policies specific to private foundations are

available from professional foundation associations.<sup>18</sup> Likewise, foundations increasingly publish their conflict of interest policies on their websites.<sup>19</sup> Samples are helpful in some respects, but a foundation's own policy should address the particular areas in which it is likely to experience conflicts of interest so that the policy is a useful tool. The areas in which conflicts of interest are likely to occur derive from the particular characteristics of a foundation's charitable activities, its governance, and assets.

In the same vein, codes of ethics are not relevant samples for conflict of interest policies. There is a significant distinction between regulation of conflict of interest and prohibition of self-dealing by law, as opposed to proscriptions against conflict of interest by non-legally binding ethical conduct standards promulgated in many professional fields. The former is mandatory while the latter is aspirational.

### **Purpose of a Policy**

The purpose of a conflict of interest policy is to safeguard the foundation's tax-exempt status, protect its insiders from violating the law and incurring fines, and ensure the foundation's reputation for integrity, by fact and by appearance.<sup>20</sup> The policy addresses how a foundation will conduct its activities to guarantee that it complies with laws regulating conflict of interest and prohibiting self-dealing. A foundation's governing body has the right to adopt a higher standard than the minimum set by law. The policy's relevant provisions are reiterated in the foundation's board handbook, personnel policies, and other governance and administrative documents.

### **Components of a Policy**

A foundation's conflict of interest policy is a comprehensive written statement adopted and followed by its governing body. A conflict of interest policy defines conflict of interest, notes relevant state and federal laws, and identifies potential areas in which conflicts are most likely to arise for the foundation. A policy lists specific categories of persons covered by the policy, requires these individuals affirm in writing annually that they understand and agree to the policy, requires these individuals to disclose conflicts of interest annually and immediately as they arise, and requires contemporaneous documentation of all governance discussions and votes involving conflict of interest.<sup>21</sup> Additionally, many policies specify that use of the foundation's confidential information for personal gain is prohibited.<sup>22</sup> Likewise, many policies identify a channel through which suspected or potential conflicts of interest or other ethical lapses can be reported confidentially.<sup>23</sup>

With respect to a potential conflict of interest, a policy outlines the procedure by which the governing body of a foundation determines if a conflict of interest exists and whether or not it involves a transaction prohibited by law or by foundation policy. In cases where a transaction is not prohibited, the policy details how the transaction will be reviewed and, if appropriate, how it will be approved by a sufficient number of disinterested directors.

Finally, the policy specifies corrective steps to be taken with respect to individuals found to have violated the policy.<sup>24</sup>

### **Implementing a Policy**

Once adopted, effective implementation of a conflict of interest policy involves ongoing activities. In addition to annual and immediate notification by foundation insiders of conflicts as they arise, these include maintenance of a regularly updated list of disqualified persons, these being foundation insiders and persons related to them and to these individuals' interests with whom a possible transaction represents a potential conflict of interest or is prohibited by law; regular training for foundation insiders and staff; and annual review and revisions to update the conflict of interest policy and maintain its relevance.<sup>25</sup> On this last point, for instance, an artist's lifetime foundation involved primarily in grantmaking will, once it receives the artist's bequest, need to update its conflict of interest policy entailing new assets and new activities (for example, an art collection or real property intended for use in direct charitable activities).

As a practical matter, the makeup of a foundation's governing body should be such that it is able to implement its conflict of interest policy. For example, if it will engage in transactions involving conflicts of interest, such as compensating insiders, a foundation needs a sufficient number of independent directors to vote in circumstances where interested and related directors are disqualified from voting.<sup>26</sup>

### **Artist-Endowed Foundations: Conflict of Interest Policies and Practice**

Historically, artist-endowed foundations have been a focus of two known cases involving findings of self-dealing. The Mark Rothko Foundation maintained its tax-exempt status, but its insiders—including the artist's art dealer and other executors of the artist's estate who were also the foundation's directors—were prosecuted during the 1970s and 1980s for actions found to involve self-dealing, among a variety of other significant transgressions.<sup>27</sup> In contrast, the tax-exempt status of the Textile Arts Foundation was revoked by the Internal Revenue Service during the 1990s.<sup>28</sup> A privately published ruling made prior to that by the IRS discussed a finding of self-dealing by the foundation of a textile artist and its insiders, which included the artist who was a founder, substantial contributor, and member of the board on which the foundation's attorney also served.<sup>29</sup>

The current growth in the number of artist-endowed foundations is taking place at the same time the press and Congress are focusing on governance and accountability in the philanthropic sector, including among private foundations. It also parallels the increasing popularity of family foundations—those foundations whose boards comprise a majority of family members and their employees—and of foundations created by wealthy art collectors to own and exhibit their art collections. With respect to arrangements that heighten the

potential for conflict of interest risks, these latter two trends have particular ramifications in the context of foundations created, endowed, and governed by artists or their heirs and beneficiaries.

### **Factors That Heighten Potential Risks**

As noted in subsequent chapters on planning and conducting charitable programs, including grantmaking and direct charitable activities, certain arrangements and activities by artist-endowed foundations and their insiders will increase the potential for conflict of interest. Depending on their nature, these arrangements and activities, noted below, should be avoided entirely or managed prudently under a conflict of interest policy.

An artist-endowed foundation whose board comprises related individuals and their employees exclusively will be exposed to heightened conflict of interest risks if it undertakes transactions requiring approval by an unrelated director. For state law purposes, special approval for such transactions may be sought from the state attorney general.<sup>30</sup>

An artist's lifetime foundation whose activities involve the artist's artworks risks breaching the prohibitions on private benefit and self-dealing by promoting the artist's career and benefiting the artist economically, whether directly or indirectly. This includes such foundation activities as owning, exhibiting, lending, and selling the artist's works; researching and publishing about the artist's oeuvre; making cash grants to support activities involving the artist's works; and making grants of the artist's works.<sup>31</sup>

An artist-endowed foundation that undertakes activities educating about and promoting the artist's works, or makes grants to support such activities, heightens the risk for conflict of interest if its insiders include persons who personally own, sell, and license the artist's works and rights, and as such, potentially benefit economically from the foundation's activities, directly or indirectly.<sup>32</sup>

An artist-endowed foundation that owns, exhibits, and sells the artist's works heightens the risk for conflict of interest if the foundation's art dealer serves as a member of its governing body. Exchanging with, buying from, and selling to the foundation directly or indirectly is prohibited as self-dealing. Facilitating favorable terms for a third party's transaction with the foundation as an aspect of an insider's business dealings with the third party potentially is self-dealing.<sup>33</sup>

An artist-endowed foundation that makes grants to individual artists is exposed to conflict of interest risks if its insiders or staff members buy, sell, or accept gifts of artworks from the foundation's grantees or potential grantees, directly or indirectly.

## Practical Points

The Fremont-Smith briefing paper considers the practical application of laws regulating conflict of interest and prohibiting self-dealing on activities typical of artist-endowed foundations. Highlights of practical considerations follow.

Foundations cannot make grants to foundation insiders or persons related to them. Foundations may make grants to organizations where insiders or persons related to them serve as board members or as staff, but the grants cannot be designated to compensate or otherwise benefit these individuals economically, and the insiders generally should not participate in votes to approve the grants.

An artist-endowed foundation cannot buy, sell, exchange, or license artworks and intellectual property to or from its insiders, directly or indirectly through its broker or by arrangement with third parties. Foundations cannot make grants to organizations designated to support acquisition or licensing of artworks or rights owned by insiders.

As a general rule, a foundation should not store, insure, care for, or manage artworks and intellectual property owned by insiders, unless these works and rights have been pledged irrevocably to the foundation.

A foundation's artworks cannot be displayed privately in the residence or on property owned by an insider. A foundation may occupy property owned by an insider on a rent-free basis, but must pay occupancy-related costs directly to vendors and cannot improve the property unless it has been pledged irrevocably to the foundation.

As a general rule, an artist-endowed foundation should not conduct activities that potentially provide an economic benefit to its insiders, directly or indirectly. As such, a foundation generally should not exhibit artworks for sale by insiders, share an art dealer with insiders, promote sales of artworks owned by insiders, link from its website to sites featuring artworks for sale by insiders, or prepare material for publications featuring artworks for sale by insiders. Nor should a foundation undertake activities that generate royalties benefiting insiders or sell products licensed by insiders.

Similarly, to the extent that it potentially increases the economic value of artworks, a foundation generally should not authenticate works owned by its insiders or make grants to organizations designated for activities to authenticate works owned by insiders. Likewise, where it potentially increases economic value, a foundation generally should not exhibit or publish about works owned by its insiders or make grants to organizations designated to support such activities.

## Confirming Potential Exceptions

Foundation trustees, directors, and officers are responsible for knowing the laws under which private foundations operate, although they also should consult with legal counsel expert in private foundation law on the details of their particular circumstance. Where a possible exception might apply (for example, with respect to activities that potentially confer a benefit to foundation insiders that is no more than incidental or tenuous), foundation trustees, directors, and officers can confirm and document that exception, and protect the foundation, as well as themselves, by obtaining a reasoned opinion letter from legal counsel expert in private foundation law or requesting a private letter ruling from the IRS.<sup>34</sup> A reasoned opinion letter is a formal legal analysis for which the law firm will be liable if not correct.<sup>35</sup> A private letter ruling interprets and applies the laws to a specific set of facts.<sup>36</sup>

Foundation insiders cannot assume that another foundation and the rulings or opinions it may have secured will suffice as a precedent with respect to a possible exception for their own foundation or relieve them of the responsibility to confirm their own exception. Foundations and their circumstances differ substantially in ways that might not be evident publicly, but can be significant in regulatory terms. An opinion letter addresses exclusively the foundation to which it was issued and will not assist others. A private letter ruling applies only to the foundation to which the ruling was issued and cannot be used as precedent by others.<sup>37</sup> Although acquiring an opinion letter or private letter ruling addressing a foundation's specific circumstance might be costly, it could be a prudent investment, particularly in planning a new foundation that will undertake activities benefiting insiders in ways that are assumed to be only incidental or tenuous.<sup>38</sup>

Finally, it is important to remember that a conflict of interest may not exist when analyzed on narrow legal terms, but the appearance of a conflict of interest may exist and in itself could be detrimental to the foundation. To the extent that the appearance of conflict of interest could be detrimental, foundation insiders have an obligation as fiduciaries to act in the foundation's best interest by assessing that potential detriment and acting to avoid it if that is the prudent course.



## **Resources: Conflict of Interest Policies and Practice**

### **Conflict of Interest Basics**

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### **Conflict of Interest Policies and Practice**

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### **Private Foundation Law**

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Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008.

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<sup>1</sup> Thomas A. Troyer, "The 1969 Private Foundation Law: Historical Perspective on Its Origins and Underpinnings," *The Exempt Organization Tax Review* 27, no. 1 (January 2000): 52–65.

<sup>2</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> John A. Edie, *Self-Dealing, A Concise Guide for Foundation Board and Staff* (Washington, DC: Forum of Regional Association of Grantmakers, 2006).

<sup>9</sup> Fremont-Smith, "Federal and State Laws."

<sup>10</sup> Edie, *Self-Dealing*.

<sup>11</sup> Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* (Valhalla, NY: Thomson/RIA, 2002–2008), 10–34.

<sup>12</sup> Edie, *Self-Dealing*.

<sup>13</sup> Marion R. Fremont-Smith, *Governing Nonprofit Organizations, Federal and State Law and Regulation* (Cambridge, MA: Belknap Press of Harvard University Press, 2004), 187.

<sup>14</sup> Forum of Regional Associations of Grantmakers, *What You Should Know Before Signing Your Organization's Form 990-PF: A Guide for Foundation Officers* (Washington, DC: Forum of Regional Associations of Grantmakers, 2007).

<sup>15</sup> Fremont-Smith, "Federal and State Laws."

<sup>16</sup> Panel on the Nonprofit Sector, *Report to Congress and the Nonprofit Sector on Governance, Transparency, and Accountability* (Washington, DC: Independent Sector, 2005).

<sup>17</sup> Internal Revenue Service, *Form 1023 Application for Recognition of Exemption*, rev. ed. (Washington, DC: Internal Revenue Service, 2006).

<sup>18</sup> See Association of Small Foundations, Council on Foundations, and National Center for Family Philanthropy, among other sources.

<sup>19</sup> See Ford Foundation, the J. Paul Getty Trust, and the William and Flora Hewlett Foundation, among others.

<sup>20</sup> Legal Services and Ethical Standards Group, *Drafting a Conflict of Interest Policy: A Guide to Key Provisions* (Washington, DC: Council on Foundations, 2006).

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

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- <sup>23</sup> Forum of Regional Association of Grantmakers, *Developing a Whistleblower Policy* (Washington, DC: Forum of Regional Association of Grantmakers, 2007).
- <sup>24</sup> Legal Services, *Drafting a Conflict of Interest Policy*.
- <sup>25</sup> Sarah Beggs, *How to Avoid Self-Dealing* (Washington, DC: Association of Small Foundations, 2008).
- <sup>26</sup> Fremont-Smith, "Federal and State Laws."
- <sup>27</sup> *Ibid.*
- <sup>28</sup> Internal Revenue Service, *Internal Revenue Bulletin 1994-26*, 1994-I.R.B. 15, Deletions from the Cumulative List of Organizations Contributions to Which are Deductible under Section 170 of the Code," (Washington, DC: Internal Revenue Service, 1994).
- <sup>29</sup> Internal Revenue Service, "National Office Technical Memorandum, Private Letter Ruling 9408006, December 4, 1992" (Washington, DC: Internal Revenue Service, 1992).
- <sup>30</sup> Fremont-Smith, "Federal and State Laws."
- <sup>31</sup> *Ibid.*
- <sup>32</sup> *Ibid.*
- <sup>33</sup> *Ibid.*
- <sup>34</sup> *Ibid.*
- <sup>35</sup> Reynolds T. Cafferata, "The Role of Counsel in Foundations: Choices, Beginnings, and Service," in. *Foundation Management, Innovation and Responsibility*, ed. Frank L. Ellsworth and Joe Lumarda (Hoboken, NJ: John Wiley and Sons, 2008), 239–240.
- <sup>36</sup> *Ibid.*
- <sup>37</sup> Fremont-Smith, "Federal and State Laws."
- <sup>38</sup> *Ibid.*

## 7.3 CONSIDERATIONS IN TERMINATING ARTIST-ENDOWED FOUNDATIONS

Not all artist-endowed foundations exist in perpetuity. Some foundations have been planned specifically for a limited term or finite purpose. Some have been terminated by their founders or by a decision of trustees, directors, and officers. Others have converted to public charity status to improve prospects for economic viability. In at least one instance, a foundation was terminated involuntarily by the Internal Revenue Service (IRS). Of almost 300 artist-endowed foundations identified during the Study, at least two dozen have terminated over the past three decades. In the greater foundation universe, termination is a consistent practice.<sup>1</sup> Among private foundations nationally, the most recent annual rate of termination was 1.5 percent.<sup>2</sup>

Private foundations terminate in a variety of ways.<sup>3</sup> These including spending down assets on ongoing charitable activities, distributing assets to qualified public charities, or converting to public charity status. Termination also might involve transferring assets to or merging with another private foundation. Termination of private foundations is regulated at the state and federal level, as discussed below.<sup>4</sup> This chapter reviews examples of artist-endowed foundation that have terminated, as identified during the Aspen Institute's National Study of Artist-Endowed Foundations (Study), and then discusses special considerations in terminating an artist-endowed foundation.<sup>5</sup> Resources on foundation termination are listed at the close of the chapter, including briefing papers prepared for the Study that pertain to this topic.

Foundation trustees, directors, and officers preparing plans to terminate an artist-endowed foundation will do so with the guidance of legal advisors expert in the laws and regulations that apply to private foundation termination. As for the Study report as a whole, this discussion of practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

### Perspectives on Termination

While many persons create artist-endowed foundations with the intention that they exist in perpetuity, others do not. Artists themselves may have varied views on the topic of perpetuity, which is true of donors creating private foundations generally. Recent research confirmed that almost one-quarter of family foundation surveyed are currently undecided about the issue of perpetuity, with this view particularly evident among foundations with living donors.<sup>6</sup>

The views of other influential individuals also come to bear on the question of perpetuity for an artist-endowed foundation. An artist's heirs or beneficiaries may not believe the foundation, and in particular its activities that relate to the artist's artworks, should be directed by anyone who did not know the artist personally. More concretely, aspects of the foundation's activities may depend on the presence of specific individuals. In some cases, this might be the artist's long-time studio assistant who is the sole person able to oversee technical processes to complete an incomplete edition, if that is planned. It also might be a dedicated professional associate or long-time employee willing to manage the foundation for nominal or no compensation. When such persons can no longer serve, it is unlikely anyone else can or will take up the role.

Separately from these influences, some attorneys advising artist clients on estate planning matters hold an instrumental view of artist-endowed foundations primarily as the vehicle to accomplish the orderly distribution of an artist's estate. That transitional function might take place quickly or over several decades. From this perspective, once a checklist of necessary activities is accomplished—preparation of the catalogue raisonné, organization of the archive, mounting of a definitive retrospective, identification of an appropriate public charity to receive the archive and art collection—a foundation should terminate. The creation of a sustained, charitable corpus to accomplish a larger philanthropic purpose is not a goal.

Finally, views on termination may evolve over time. Artist-endowed foundations established with a mission to address immediate concerns, and therefore operating with an assumption of a limited term, may evolve to address an ongoing need that requires a sustained presence. The Adolph and Esther Gottlieb Foundation, established under the artist's will, is one such case. Initially without a defined time frame for its grantmaking program assisting established artists with financial need and providing emergency grants to artists, the foundation committed to perpetuity when the ongoing nature of its key concerns became apparent.<sup>7</sup>

## **Termination Scenarios**

### **Termination as Planned and Intended**

Although in the minority, some artist-endowed foundations have been established to operate with a limited term. This might be defined by a specific time-frame or by some other condition (for example, completing the posthumous, charitable distribution of an artist's estate, meaning those assets, including artworks, owned at the artist's death and not bequeathed to other beneficiaries). The C & B Foundation Trust (Cornell and Benton) was formed in 1975 by Joseph Cornell's sister, a residuary legatee of his estate, as a condition of resolving litigation with the artist's executors. Funded with a selection of works by Joseph Cornell, the Foundation operated until 1980, spending down its assets by making grants of artworks to museums and awarding cash grants primarily to organizations with educational and social welfare missions.<sup>8</sup> The Georgia O'Keeffe Foundation, formed by an agreement

settling litigation among the artist's executors, was created with a term of 20 years from the artist's death and tasked to complete the charitable distribution of her estate.<sup>9</sup> Having completed its assignment and term, the Foundation's 2006 information return (Form 990-PF) details the transfer of its assets, including an archive and remaining artworks, under a contribution agreement with the Georgia O'Keeffe Museum.<sup>10</sup>

Similarly, the Milton Horn Trust filed a final information return for 2005, 10 years after the artist's death. The return noted activities pursuant to the terms of the Trust, which included distributing artworks and cash to charitable organizations.<sup>11</sup> The Judith Rothschild Foundation was established to operate for 25 years following the artist's death in 1993. As detailed regularly in its annual information returns (Forms 990-PF), the Foundation's specified term concludes in 2018.<sup>12</sup>

Some foundations function for a short time, serving as conduits to receive and distribute a donor's lifetime gifts. In existence for four years, the Agnes Martin Foundation received funds and made grants with those funds addressing needs in the artist's local New Mexico community before filing a final information return in 2004, the year of the artist's death.<sup>13</sup> The Noah's Art Foundation, established by Niki de Saint Phalle a year prior to her death, received and then granted artworks to a museum holding a collection of her works. The Foundation's final information return was filed three years later, for 2004.<sup>14</sup> The Niki Charitable Art Foundation, a separate foundation created under the artist's will, continues to operate.

A foundation's singular purpose might be as a vehicle for its donor's lifetime philanthropy. The designer Alexander Girard established the Girard Foundation and directed it for three decades, with his spouse assembling and exhibiting an extensive collection of world folk art subsequently contributed to the Museum of International Folk Art in Santa Fe, New Mexico. The Foundation filed its final information return five years after his death in 1993.<sup>15</sup> Active for 15 years, the Chen Chi Foundation used the bulk of its funds to make grants establishing a university art museum in Shanghai, China, to which the artist subsequently contributed a collection of his artworks as a personal gift. The Foundation became inactive prior to the artist's death in 2005.<sup>16</sup>

### **Termination by Donor Choice**

Donors—artists or their heirs or beneficiaries—sometimes choose to terminate a foundation. In some cases, foundations have been replaced by those of a different type or with a different focus. The Harriet G. and Esteban Vicente Charitable Trust, created by the artist's spouse, filed a final information return in 2004.<sup>17</sup> The Harriet and Esteban Vicente Foundation, a separate foundation established in 2001, the year of the artist's death, continues to operate. The Wyeth Endowment for American Art, active for four decades, filed a final information return in 2008 after spending down its assets.<sup>18</sup> The Andrew and

Betsy Wyeth Foundation for American Art, a separate foundation established in 2003, maintains an active grantmaking program.

In some instances, artist's heirs or beneficiaries have revised their own estate plans in ways that do not involve funding a foundation, as was reported in the final information return for the Tony and Jane Smith Foundation, filed for 2007.<sup>19</sup>

As they consider a foundation's longer-term prospects, donors—the artist or the artist's heirs or beneficiaries—as well as a foundation's trustees, directors, and officers, may determine that the most appropriate path to realize its exempt purpose is to place the foundation's assets with an established public charity, often a museum or educational institution. The John Sloan Memorial Foundation was established by artist Helen Farr Sloan, the painter's surviving spouse, during her lifetime and operated for 15 years. Nine years prior to her death in 2005, the Foundation transferred its assets, including its archive and art collection, to the Delaware Art Museum.<sup>20</sup> Similarly, the Jan Stussy Foundation, created under the artist's estate plan in 1990 and endowed with his works and archive, filed its final information return for tax year 2008, reporting the distribution off its assets to Woodbury University, where art sales are intended to fund a faculty chair in the school's architecture program.<sup>21</sup>

In the same vein, the Mark Rothko Foundation, created prior to the artist's death in 1970, was reorganized with a new governing board following litigation involving the artist's estate. After reorganization, it operated until 1986 when it distributed artworks to a number of museums and placed its archives and a significant art collection at the National Gallery of Art.<sup>22</sup> The Paul Strand Foundation, formed under the artist's estate plan, was active for five years prior to merging with another entity in 1982 to form a new public charity, the Aperture Foundation, with the artist's archive and collected works committed as a resource for a broad mission to advance photography.<sup>23</sup>

In some cases, smaller-scale foundations might not be created with a defined term, but will operate as long as assets can support meaningful activities. The Alice Baber Art Fund, created under the artist's estate plan and funded with financial and art assets, was active for 16 years. The Fund filed a final information return for 2005 outlining liquidation of the organization's assets, including its remaining artworks, by public auction and distribution of proceeds to public charities, including creation of a named fund to support visiting artists at Marlboro College.<sup>24</sup>

Similarly, the Richard Florsheim Art Fund, created under the artist's estate plan and endowed with artworks and financial assets, filed a final information return 28 years after his death. The Fund spent down the bulk of its financial assets, then committed its residual assets to assist another private foundation—Marie Walsh Sharpe Art Foundation—that shared its mission of support to artists. This culminated a process that included grants of

artworks to regional museums, placement of a core art collection at the Leepa-Rattner Museum of Art at St. Petersburg College, Florida, and donation of the Fund's records to the Archives of American Art, Smithsonian Institution, which also holds the artist's papers.<sup>25</sup>

### **Public Charity Status—Conversion or Successor Organization**

Several artist-endowed foundations have terminated private foundation status by converting to public charity status or by transferring assets to a successor public charity established specifically to carry forward the same mission. A central motivation in this process is to broaden economic prospects by developing a broad base of public support using the charitable contribution incentives afforded donors to public charities. Foundations operating museums and education programs are most likely to choose this option.

The Arthur Griffin Center for Photographic Art operated with the artist's leadership for 10 years prior to his death in 2001, after which it transferred its assets to a successor public charity, the Griffin Museum of Photography.<sup>26</sup> After functioning for 15 years, the Romare Bearden Foundation filed a final information return in 2003 reporting transfer of its assets to a like-named public charity.<sup>27</sup> The Isamu Noguchi Foundation, known initially as the Akari Foundation, functioned for 36 years. In 2004, it transferred its assets to the Isamu Noguchi Foundation and Garden Museum, a successor public charity. The Foundation's final information return included a discussion of mission considerations and state regulations for educational entities leading to the change.<sup>28</sup> Other foundations—such as the Albin Polasek Foundation, Judd Foundation, and Ryman-Carroll Foundation—undertake conversion to public charity status without creating a separate, successor entity. This involves operating for a defined period as a public charity, thus demonstrating the ability to attract and sustain a substantial level of public support as required to maintain public charity status.

### **Transfer to Public Charity Grantmakers**

In recent years, there has been a trend in the greater foundation universe of private foundations terminating by establishing funds at community foundations, which are public charities. Several artist-endowed foundations have made that choice. After four decades of activity, the Naramore Foundation, created by architect Floyd Naramore, distributed its remaining assets to the Seattle Foundation in 2006.<sup>29</sup> In 2007, the Boschen Fund for Artists at Berkshire Taconic Community Foundation was established by the Martha Boschen Porter Fund to assume that private foundation's activities of support to artists. The initial foundation had been funded annually for two decades by the artist, now in her ninth decade.<sup>30</sup> The Brother Thomas Fund, established by ceramist Thomas Bezanson, transferred its assets to the Boston Foundation in 2007 upon its establishment following the artist's death.<sup>31</sup>



## Involuntary Termination

Not all terminations of private foundation status are by choice. A foundation's exempt status can be terminated by the IRS if it is found to have engaged repeatedly in activities prohibited for private foundations. Among these are transactions with foundation insiders categorized as self-dealing.<sup>32</sup> In the many decades since the first artist-endowed foundation was created, only one is known to have been terminated involuntarily. Revocation of the Textile Arts Foundation's exemption was published by the IRS in 1994.<sup>33</sup> A privately published ruling by the IRS made prior to the revocation discussed a finding of self-dealing by the foundation of a textile artist and its insiders.<sup>34</sup>

## Factors in Termination

As noted, termination of a private foundation is regulated at both the state and federal levels. Attorneys general in most states enforce termination procedures, often detailed on their websites, and these requirements differ from state to state. Local courts supervising administration of estates also might play a role. The IRS regulates termination of private foundations.<sup>35</sup> The gist of these regulations is to ensure that assets committed to serve a public benefit, and whose donors as a result have enjoyed favorable tax treatment, are distributed or transferred to other qualified tax-exempt entities for charitable use, or are expended on charitable activities, and do not revert to private use upon a foundation's termination.

As in the examples above, artist-endowed foundations may terminate by expending all assets on their exempt activities, by distributing assets to qualified public charities, by converting to public charity status, or by transferring assets to or merging with another private foundation. Beyond laws and regulations at the state and federal level, there could be special considerations in the termination process for artist-endowed foundations related to the nature of their assets.

This is particularly true for intellectual property, since many foundations hold the copyrights to their artists' works. In some cases, as above, foundations' final information returns (Forms 990-PF) specifically note the disposition of copyrights upon termination. These might be distributed to public charities, such as museums that own a particular artwork and receive the rights to that work, or they might be transferred in whole with other assets to a successor organization. In contrast, by lack of specific provisions otherwise, copyrights might be abandoned as a result of a foundation's termination. A few foundations have reported intellectual property rights on their annual information returns since their inception, but many others have not, in which case the matter of disposition goes unremarked.<sup>36</sup>

Another challenge for some foundations that own artist's archives is disposition of art matter and materials, such as studies, models, and unfinished works. These types of materials usually are not included in artists' papers and documentary materials committed to archival repositories, nor are they typically sold, as are finished works. In some cases, foundations terminate by placing a core collection that includes such art matter in combination with selections of related finished works. These distributions might be made to a university museum, library, or historical museum where such materials have value as educational or historical resources in a broader context.

As with some bequests of entire estates to museums by artists or their heirs or beneficiaries,<sup>37</sup> foundations that terminate by distributing large collections to a museum might do so with the general understanding that the museum will exercise its discretion in what works to accession and what works to sell. This approach could be central to funding the care and charitable use of the accessioned works. As noted in the examples above, foundations might liquidate a remaining art collection at public auction. This choice could seem problematic to some concerned with an auction's impact on an artist's market, but might be appropriate and necessary in some instances. Again, disposition of a foundation's assets should be accomplished with the guidance of legal advisors familiar with the relevant laws and regulations.

## **Institutional Documentation**

Finally, termination of a private foundation raises the question of disposition of the organization's own records. Some artist-endowed foundations have published periodic or summary reports on their activities, but most have not. Websites represent the primary publication effort for a growing number of foundations, but these disappear if a foundation terminates. A few foundation managers have recorded oral histories. A few foundation archives have been placed with an institutional repository.<sup>38</sup> Some trustees, directors, and officers point to the charitable activities accomplished or supported by a foundation as the preferred historical record. However, this atomized record fades quickly and is not helpful to leaders of new foundations seeking to learn from the experience of predecessors. As the artist-endowed foundation field continues to evolve, its prospects merit more focused attention on the question of what constitutes effective practice in documenting the experiences of its component institutions.

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<sup>1</sup> Gabriel Rundy, *Creation of Foundations and Their Wealth*, ed. Teresa Odendahl (New York: Foundation Center, 1987), 189.

<sup>2</sup> Steven Lawrence and Reina Mukai, *Foundation Growth and Giving Estimates*, 2008, rev. ed. (New York: Foundation Center, 2008).

<sup>3</sup> Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* (Valhalla, NY: Thomson/RIA, 2002–2008), S8-4–S8-12.

<sup>4</sup> Jane C. Nober, "Legal Brief: Choreographing a Foundation Disappearing Act," *Foundation News and Commentary* (May/June 2003).

<sup>5</sup> Annual information returns (Forms 990-PF) for many of the foundations whose terminations are cited can be viewed at GuideStar, <http://www.guidestar.org/>.

<sup>6</sup> Loren Renz and David Wolcheck, *Perpetuity or Limited Life Span, How Do Family Foundations Decide?* (New York: Foundation Center, 2009).

<sup>7</sup> Sanford Hirsch, "Sanford Hirsch on the Adolph and Esther Gottlieb Foundation," in *Artists' Estates: Reputations in Trust*, ed. Magda Salvesen and Diane Cousineau (New Brunswick, NJ: Rutgers University Press, 2005), 191–203.

<sup>8</sup> Joseph Cornell Estate Papers, 1944–1986. Archives of American Art, Smithsonian Institution. <http://www.aaa.si.edu/collectionsonline/cornjose/>.

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<sup>10</sup> Georgia O'Keeffe Foundation, Annual Information Return (Form 990-PF), 2006.

<sup>11</sup> Milton Horn Trust, Annual Information Return (Form 990-PF), 2005.

<sup>12</sup> The Judith Rothschild Foundation, Annual Information Return (Form 990-PF), 2006.

<sup>13</sup> Agnes Martin Foundation, Annual Information Return (Form 990-PF), 2004.

<sup>14</sup> Noah's Art Foundation, Annual Information Return (Form 990-PF), 2004.

<sup>15</sup> Girard Foundation, Annual Information Return (Form 990-PF), 1998.

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<sup>18</sup> Wyeth Endowment for American Art, Annual Information Return (Form 990-PF), 2008.

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- <sup>23</sup> R. H. Cravens, "The Indispensable Art: Survival," in *Aperture*, no. 169 (Winter 2002): 2–13.
- <sup>24</sup> Alice Baber Art Fund, Annual Information Return (Form 990-PF), 2005.
- <sup>25</sup> Richard Florsheim Art Fund Records, 1990–2003, Archives of American Art, Smithsonian Institution, 2004.
- <sup>26</sup> Arthur Griffin Center for Photographic Art, Annual Information Return (Form 990-PF), 2002.
- <sup>27</sup> The Romare Bearden Foundation, Annual Information Return (Form 990-PF), 2003.
- <sup>28</sup> Isamu Noguchi Foundation, Annual Information Return (Form 990-PF), 2004.
- <sup>29</sup> Naramore Foundation, Annual Information Return (Form 990-PF), 2006.
- <sup>30</sup> Berkshire Taconic Community Foundation, *Boschen Fund for Artists Guidelines* (Sheffield, MA: Berkshire Taconic Community Foundation, 2007).
- <sup>31</sup> Brother Thomas Fund, Annual Information Return (Form 990-PF), 2007.
- <sup>32</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>33</sup> Internal Revenue Service, *Internal Revenue Bulletin 1994-26*, 1994-I.R.B. 15, Deletions from the Cumulative List of Organizations Contributions to Which are Deductible under Section 170 of the Code," (Washington, DC: Internal Revenue Service, 1994).
- <sup>34</sup> Internal Revenue Service, "National Office Technical Memorandum, Private Letter Ruling 9408006, December 4, 1992" (Washington, DC: Internal Revenue Service, 1992).
- <sup>35</sup> Internal Revenue Service, Voluntary Termination of Private Foundation Status, <http://www.irs.gov/charities/foundations/article/0,,id=137168,00.html>.
- <sup>36</sup> IRS Form 1023, Application for Recognition of Exemption, now asks specifically about ownership of copyrights and intellectual property.
- <sup>37</sup> See bequests by Roger Brown to the School of the Art Institute of Chicago, and by the surviving spouse of Gene Davis to the Smithsonian American Art Museum, among others.
- <sup>38</sup> See *The Georgia O'Keeffe Foundation Records, 1986-2006*. Yale Collection of American Literature, Beinecke Rare Book and Manuscript Library, Yale University, and *Richard Florsheim Art Fund Records, 1990-2003*, Archives of American Art, Smithsonian Institution.

## 8. PLANNING AND CONDUCTING CHARITABLE PROGRAMS

Artist-endowed foundations fulfill their charitable purposes by making grants to charitable organizations and individuals or by implementing direct charitable activities, such as operating study centers, exhibition programs, historic house museums, residency programs, and the like. Many foundations fall between these two modes, undertaking a combination of grantmaking and direct charitable activities. In some cases, a foundation might have two equal foci. More often, foundations give weight to one mode, functioning primarily as a grantmaking entity with ancillary direct charitable activities, or primarily implementing direct charitable activities with an associated grantmaking program.

Foundations can evolve, focusing on grantmaking at one point and at other points implementing direct charitable activities exclusively or in combination with grantmaking. For example, an artist's lifetime foundation funded with financial resources and conducting grantmaking might subsequently initiate direct charitable activities by virtue of receiving a bequest that includes artworks or a residential property. Conversely, a foundation formed to conduct direct charitable activities (such as assembling an art collection or operating a residency program) might have reason to distribute its nonfinancial assets, either as the culmination of a planned project or by virtue of necessity, after which it might conduct grantmaking exclusively.

For these reasons, this discussion of charitable program practice among artist-endowed foundations necessarily addresses practice in conducting grantmaking as well as in implementing direct charitable activities. The first part of this section focuses on grantmaking practice: (1) making grants to individuals, (2) making grants to organizations, and (3) making grants with artworks. The second part focuses on practice in implementing direct charitable activities, considered in light of the type of assets involved: (1) archives; (2) art collections; (3) copyrights and intellectual properties; (4) artists' oeuvres, as they are engaged in catalogues raisonnés and authentication; and (5) real property, meaning facilities and land. How the characteristics of these charitable activities inform foundation planning is discussed in **7. Forming, Sustaining, and Terminating Foundations**.

## 8.1 CONSIDERATIONS IN PLANNING AND CONDUCTING GRANTMAKING

Although modest in scale, the artist-endowed foundation field as a whole evidences a variety of grantmaking activities. In addition to grants to organizations, which comprise the bulk of the sector's grantmaking, artist-endowed foundations make grants to individuals, primarily artists and scholars, and distribute artworks charitably by grants and by charitable sales in the form of bargain sales or partial grants/partial sales. Numerous examples of artist-endowed foundations conducting grantmaking are highlighted in **4. Field Charitable Activity**.

This section of the study addresses foundation practice in grantmaking with chapters focused on (1) making grants to individuals, (2) making grants to organizations, and (3) making grants with artworks. Each chapter discusses the considerations, particularly for new artist-endowed foundations, in planning and undertaking these charitable activities.

In all likelihood, persons with specific interests will read the chapter that addresses their topic of interest and not the section as a whole. For that reason, each chapter separately summarizes the ways in which private foundation law potentially influences considerations in planning and conducting the respective charitable activities. These summaries should be read in combination with briefing papers and references as cited. As for the Study report as a whole, this discussion of considerations in practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

## 8.1.1 Making Grants to Individuals

Artist-endowed foundations that provide grants and awards to individual artists and scholars make a variety of practical choices in designing their grantmaking programs and operations. At the program level, these choices involve decisions about the category of individuals to be assisted and the desired result of the assistance, the kind of support that will be provided to achieve that aim, the selection process appropriate to these goals, and the grant monitoring provisions required to ensure the integrity of the program. More broadly, however, foundations first must determine institutionally whether grants to individuals are permitted by their bylaws and are consistent with the foundation's charitable purpose. They also must decide what scope of effort makes sense in light of available financial resources, as well as the organization's capacity to conduct a program. Finally, grants to individuals by private foundations are strictly regulated under the Internal Revenue Code, entailing specific legal and administrative requirements. Prior to implementing grantmaking to individuals, foundations must secure approval from the Internal Revenue Service (IRS) for their procedures.

This chapter reviews practice in grantmaking to individuals by artist-endowed foundations, with a focus on issues pertinent to new foundations. Specific examples of artist-endowed foundations making grants to individuals are detailed in **4. Field Charitable Activity**. This discussion is relevant to artist-endowed foundations planning to make cash grants and awards to individuals, awards of residencies to individuals at work-study centers, and grants to charitable organizations for payment to individuals selected and earmarked by the foundation. A variety of resources are available on the subject of foundation grants to individuals. A selection offering information on regulations, technical matters, and best practices is listed at the close of this chapter, along with briefing papers prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study) that are pertinent to this topic.

### Rules for Private Foundation Grants to Individuals

As fiduciaries, foundation trustees, directors, and officers are responsible for knowing the rules that pertain to grants to individuals, although they also will consult with legal counsel expert in private foundation law on the details of their particular circumstance. Familiarity with the rules enables a foundation's leaders to think creatively about how to accomplish their charitable purpose. Once the program concept is envisioned, foundation trustees, directors, and officers planning programs of grants to individuals should confirm that their plans can be implemented appropriately by conferring with legal advisors who have expertise in the laws and regulations that apply to private foundations active in this area. The following summary information highlights key aspects of the rules generally as an orientation to practical considerations. As for the Study report as a whole, this discussion



of practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

### **Pre-Approval Requirement**

In broad strokes, the Internal Revenue Code stipulates that a foundation's procedures to make grants to individuals must be approved in advance by the IRS before grants are made.<sup>1</sup> Grants made without pre-approval of procedures will subject the foundation to tax penalties. Pre-approval of grant procedures can be part of a new foundation's application for exemption or made separately if an established foundation initiates grantmaking to individuals as a new program activity. Unless otherwise specified, approval of a foundation's grantmaking procedures generally applies to subsequent grant programs if the same procedures are used.<sup>2</sup>

To secure pre-approval, a foundation will demonstrate that its proposed grant procedures support its charitable purpose; grants will be made on an objective, nondiscriminatory basis; the pool of potential grantees is sufficiently broad and open-ended so that grants will not benefit private interests or pre-selected individuals; selection criteria are related to the purpose of the grant; the grant procedure can be expected to result in grantees performing the activities intended; persons making grant selections have relevant qualifications and will not benefit privately from their decisions; grants will be supervised to ensure they are used as intended; provisions are in place to recover jeopardized or diverted grants; and thorough grant selection and reporting records will be maintained.<sup>3</sup>

The pre-approval requirement applies to procedures for scholarship and fellowship grants and loans to individuals for study at degree-granting educational institutions and to grants and loans to individuals for travel, study, or other similar purposes; to enhance a particular skill; or to produce a specific product.<sup>4</sup>

The definition of a grant to an individual includes not only direct financial payments, but also expenditures, such as for services and accommodations, to support his or her participation in a program of study or research. This would pertain, for example, to residency programs to which artists or scholars apply, are selected, and then are awarded access to accommodations and use of facilities and other resources to facilitate their art making or research activities. In addition, the definition includes grants and payments to other charitable organizations on behalf of individuals who have been selected by the foundation to receive the earmarked grants.<sup>5</sup>

Procedures that do not require prior approval are those for grants that do not entail future actions or services to fulfill the grant's terms and are not restricted to specified purposes. Examples of *no-strings* grants are achievement awards and prizes recognizing prior accomplishments, made to recipients selected from the general public, and disaster relief or emergency hardship assistance to indigent individuals. Nonetheless, such grants must meet the same requirements as those of pre-approved programs: they support a foundation's

charitable purpose, are made under procedures that are objective and nondiscriminatory, are not used for political and noncharitable purposes, and are properly documented and monitored.<sup>6</sup>

Whether in the form of a cash payment, loan, or residency, or as an achievement award or hardship assistance, the Internal Revenue Code prohibits a foundation from making a grant or award to its trustees, directors, officers, substantial contributors, or persons related to these individuals. Likewise, persons selecting or approving grants or awards cannot be in a position where they would derive a private benefit, either directly or indirectly, if certain potential grantees or awardees are selected over others.<sup>7</sup>

With respect to foundations that operate residency programs, meals and lodging may be provided to a foundation manager if these are reasonable compensation for services necessary to carry out the foundation's exempt purpose.<sup>8</sup> However, a residency—comparable to a grant—cannot be awarded to a foundation insider.<sup>9</sup>

### **Grants to Individuals by Operating Foundations**

Operating foundations have an additional consideration in framing grantmaking programs of all types, including those to individuals. An operating foundation's grants will not be qualified distributions, meaning applicable to charitable distribution requirements, unless the grants are an integral part of a program operated directly by the foundation and the foundation maintains a significant involvement in the grants. Simply selecting, awarding, and receiving reports on grants does not fulfill this requirement.<sup>10</sup>

### **Varieties of Approved Procedures**

Although rules for foundation grants to individuals are strict, the requirement for advance approval does not stipulate a specific grantmaking procedure: different types of foundations addressing different grant purposes can devise approaches appropriate to their particular circumstances. Shown below are representative examples of this flexibility and range of purposes in grantmaking procedures that have been approved for programs operated by private foundations, including artist-endowed foundations.

- Emergency grants or loans to indigent, mature, creative artists,<sup>11</sup> and grants to individuals with desperate financial needs, including impoverished artists.<sup>12</sup>
- Grants to artists with financial need to support completion of works already scheduled for exhibition, performance, or publication.<sup>13</sup>
- Grants to working painters, sculptors, and printmakers who have shown great promise, but are not sufficiently known.<sup>14</sup>
- Grants to artists with established track records in one discipline who want to work in a new medium.<sup>15</sup>

- Grants to composers, artists, and writers to produce new works, as well as to humanities scholars and visual and performing artists for formal or individual study to enhance their skills.<sup>16</sup>
- Grants to artists, scholars, curators, and writers to present, interpret, conserve, and preserve artists' works.<sup>17</sup>
- Grants to emerging artists working in visual and craft media,<sup>18</sup> and grants to independent, emerging filmmakers striving toward professional status.<sup>19</sup>
- Achievement awards to leading artists, scholarships and fellowships to assist students pursuing an advanced degree in the arts, and project grants to individuals in the US and abroad,<sup>20</sup>
- Awards to master artists recognizing their contributions to the cultural heritage of a particular state and the country,<sup>21</sup> and fellowships to master artists to sustain their craft and work as mentors with apprentices.<sup>22</sup>
- Grants to young artists so they may spend creative time in France,<sup>23</sup> and traveling fellowships to graduate architectural students for research abroad.<sup>24</sup>
- Scholarships to college art students selected in art competitions sponsored by the foundation,<sup>25</sup> and scholarships to graduates of high schools in a specific locality to support college study of art.<sup>26</sup>
- Fellowships at a center for advanced studies in Europe for scholars pursuing projects in the humanities and social sciences, and for visual artists, photographers, composers and writers pursuing creative projects.<sup>27</sup>
- Residency grants to artists, musicians, and writers to complete work in progress, start on new works, or develop a new line of creative endeavor.<sup>28</sup>
- Residency awards providing artists with the opportunity to work for an extended period without distractions in order to complete works or develop new directions in their work.<sup>29</sup>
- Residency grants enabling creative artists in the fields of painting, photography, sculpture, new media, new genre art, and multidisciplinary art to meet and exchange new ideas and improve and enhance their artistic capacity, skills, and talents.<sup>30</sup>

In contrast, the IRS ruled that procedures to award grants recognizing individuals who have made creative contributions in the visual and related arts—through such activities as creating, teaching, researching, or writing—did not require advance approval because grants would be made in recognition of past achievement with no obligations as to use.<sup>31</sup>

## Grant Focus and Criteria

Financial support to individual artists and scholars by artist-endowed foundations typically is awarded using career-stage criteria or criteria based on particular categories, such as geographic location, art form, or a defined community or creative philosophy.

### Career Stage Criteria

Informed by their artists' life experiences, artist-endowed foundations that operate programs making grants to individual artists often target support to particular points of need or opportunity in the arc of an artist's career. Such programs tend to focus on artists at three points: mature artists or those with sustained careers; early or mid-career artists, frequently referred to as *emerging artists* or *accomplished yet under-recognized artists*; and artists at the inception of their careers, including those completing graduate study or pursuing higher education.

Most foundations concerned with assisting mature artists target grants to financial need or emergency assistance. These grants are made by first vetting for artistic achievement and career commitment, then defining a scale of support to address general financial need or a specific emergency. However, some foundations focusing on this category of beneficiaries do not use financial need as a criterion, believing there are many committed and accomplished artists who would benefit from assistance to advance their careers even if they are not in financial straits. These foundations vet for artistic achievement and career commitment, as well as an indication of creative potential or career juncture, then provide support designed to bring recognition (such as an achievement award or prize), furnish working capital for creative explorations, or assist practical needs, such as documentation of an artist's oeuvre.

Foundations concerned with assisting early or mid-career artists, including those considered promising and emerging or accomplished yet under-recognized critically or commercially, typically provide support for career development broadly or more specifically to realize proposed creative projects. These foundations vet for artistic achievement or potential, assess financial need, then frame awards to assist career initiatives generally or support project realization specifically, sometimes in combination with an exhibition or presentation opportunity.

Fewer artist-endowed foundations target artists at the inception of their professional careers. Of those that do, some assist artists on costs pertaining to completion of graduate study—recognizing critical undertakings, such as the master of fine arts thesis exhibition or degree-related travel or research—or assist the move into professional studio practice. Foundations assisting art students with their education expense are more likely to make their grants to higher education institutions, although a few make scholarship and fellowship awards directly to individuals.

## **Criteria Based on Categories**

Apart from using the career stage model as a basis for grantmaking criteria, other foundations develop criteria based on the needs of specific types of artists or scholars. This includes individuals working in a particular art form or addressing a particular issue, those located in specific geographic areas, or those of a defined community or creative philosophy. In this mode, some foundations combine financial and technical assistance for artists working in a particular medium, or support professional development and travel for artists in more isolated geographic areas. Others recognize achievement among artists and scholars of cultures, communities, or philosophies that are less acknowledged by the artistic mainstream.

## **Criteria for Residencies and Other Direct Charitable Activities**

In contrast to making cash grants, some artist-endowed foundations conduct direct charitable activities to assist individual artists and scholars. Chief among these are foundations operating residency programs that provide artists and scholars with accommodations, access to facilities, and the opportunity to create and research in a work-study setting. Selection of participants using appropriate, pre-approved procedures remains a key aspect of these activities. It should be noted that residency programs operated by private foundations differ from those operated by public charities, including with respect to the requirement for pre-approval of private foundation procedures for grants to individuals.

Supporting creative productivity is a theme of residency programs. As with grants, residency programs often focus their awards to specific points in creative careers or on particular categories of artists and scholars. In some cases, selection criteria include the caliber, significance, or critical juncture of applicants' specific creative or scholarly projects proposed to be undertaken during a residency. In other cases, criteria are not project-specific but focus on broader indicators of applicants' ability to make optimal creative use of a residency opportunity.

## **Application Processes**

Many artist-endowed foundations—particularly those operating larger programs—that make grants to individual artists and scholars use an open application process in which any individual may apply and be evaluated for selection if they meet the program's published eligibility criteria. In theory, this approach ensures broad access to the program and satisfies concerns that individuals living or working outside established centers of influence will not be marginalized from an important opportunity.

The volume of response to an open application process, however, can be a burden for understaffed or smaller foundations, particularly those using very broad criteria. Some foundations with concerns about volume use a nomination process to identify potential grant applicants who are then invited to apply. This approach provides a manageably scaled

applicant pool, but must be designed and implemented to meet requirements for objective and nondiscriminatory procedures. As with selection committees, nominators must have qualifications and expertise relevant to the grant and not be in a position to benefit privately from their decisions. Some artist-endowed foundations awarding grants or fellowships to graduate students ask university faculties to nominate a candidate from their respective programs. Book awards often are made using nominations by publishers. More broadly, foundations invite experts in their fields—former grantees, prominent educators, and the like—to serve as nominators.

A nomination procedure can be effective for reasons beyond managing the volume of applicants. For example, if a program has not drawn applicants from a desired category of artist, qualified nominators knowledgeable about that category can help stimulate applications or provide feedback to the foundation about perceived barriers to access.

Foundations committed to using an open application process employ other strategies to manage applicant volume. Some have devised a two-step procedure, requiring a brief initial letter of inquiry to determine eligibility and then extending an invitation to submit a full application where letters indicate a fit with the foundation's focus. Still other foundations that use an open application process adjust their criteria to moderate volume (for example, by focusing on a particular art form or medium within a specific geographic area or in combination with other defining criteria relevant to the charitable purpose). Some foundations rotate criteria (for example, focusing on a particular art form in alternate years).

A few foundations charge application fees to help defray administrative costs of a large-scale selection process. Although there is no legal prohibition, some view application fees from individual artists as potentially unethical because it requires those members of the charitable class intended to benefit from the program to incur a financial cost in their effort to participate.

Artist-endowed foundations making awards for achievement or presenting prizes with no obligation to render future services typically use a nomination process that does not require the recipient to apply to the program, although a few do use an open application or self-nomination process.

## **Selection Processes**

By and large, artist-endowed foundations that make grants to individuals utilize selection committees comprising artists, scholars, and other types of art professionals with expertise relevant to the grant purpose. The selection committee submits grant recommendations to a foundation's trustees, officers, or directors, who in turn make the decision to award grants. Some foundations organize selection committees comprising completely

independent members, while others include board members along with independent members. Foundations that make awards annually often constitute selection committees annually, valuing a diversity of perspectives. Foundations that make grants several times each year typically maintain a standing selection committee.

Selection processes for emergency grants generally accommodate a shorter time frame and employ a simpler review procedure that doesn't involve a large committee. Whichever way grant selection is handled, the process must meet the rule that foundation grants to individuals are made on an objective and nondiscriminatory basis and that persons selecting grantees are not in a position to benefit directly or indirectly from their choices.

With a desire to minimize advocacy on behalf of potential grantees, many artist-endowed foundations do not publish the identity of nominators and selection committee members until the selection process is complete or, in the case of standing committees, a committee member steps down.

## **Structuring Individual Grant Programs to Match Foundation Capacity**

A common view in organized philanthropy is that programs making grants to individuals are expensive to operate. This is because such grants, which typically are modestly scaled, nonetheless involve the same amount of time and administrative activity to award and supervise as do grants, often larger in scale, made to institutions. Consistent with this, foundations making grants exclusively to individuals generally report that charitable administrative expenses make up a greater percentage of disbursements for charitable purposes than those of foundations that make grants exclusively to organizations.<sup>32</sup> For these reasons, larger artist-endowed foundations that must meet greater payout requirements—and those of any scale that are keen to minimize charitable administrative expenses—are less likely to utilize grantmaking to individuals as an exclusive mode to assist artists and scholars and more likely to make grants to organizations for programs supporting that purpose.

## **Minimizing Charitable Administrative Costs**

Despite this view, some foundations have developed strategies to minimize charitable administrative costs associated with making grants to individuals. A few foundations have chosen to make a smaller number of grants at a substantially larger scale. This is possible if a foundation's charitable purpose is consistent with criteria appropriate for a larger grant scale. Examples of this would be awards of unrestricted grants to advanced artists who have made sustained contributions to their field, or lifetime achievement awards—by definition unrestricted—to recognize an exceptional body of work.

Alternatively, some artist-endowed foundations make awards to individual artists biennially, distributing an amount equal to two years' of a grant budget in one year while consolidating costs to process applications and select grantees. Another approach is for foundations with more limited liquidity to alternate grant activities (for example, making modestly scaled cash grants to individuals one year and making grants of artworks to institutions the next year).

Whatever its capacity, a foundation is required to document its grantmaking process, monitor and maintain reports and records confirming its grants have been used for the intended charitable purpose, and adopt and implement procedures for recovery of jeopardized or diverted grants.

### **Online Formats for Application and Selection Processes**

As is the case for the greater foundation universe, the Internet has transformed the process of grantmaking to individual artists and scholars. It once was prohibitively expensive and logistically burdensome for small or unstaffed foundations to broadly advertise an individual grant program with an open application process, thus ensuring a sufficient pool of potential grantees. Broad promotion for open application now can be achieved expeditiously at minimal cost through announcements on foundations' websites, postings at the sites of relevant professional organizations, and distribution of announcements via professional and cultural online networks. Most foundations publish their program guidelines and application forms on their websites and post information about prior grant recipients. Even some foundations using a nomination or invitation process post program guidelines on their websites to inform about their process.

The Internet also is transforming the application and review processes for grants to individuals, although not without an attendant expense and learning curve. Increasingly, artist-endowed foundations are accepting online applications, including digital images of artworks, relieving applicants of the cost to prepare and mail slide packages. In some cases, foundations conduct grantee selection by convening review committees with members located nationwide through online processes, giving foundations access to expertise without the barrier of travel cost.



## **Other Administrative Considerations**

### **Enhancing Grants to Individuals**

Some artist-endowed foundations making grants to individuals provide technical assistance to complement the grant support, offering assistance directly or arranging support by another organization or a consultant. In some cases, foundations conduct the grant selection process and then provide a master grant to a separate charitable organization that in turn makes the awards to the foundation's selected grantees and provides the necessary technical assistance to support the grants. This approach is useful in cases where grant funds are released incrementally based on grantees' progress (for example, with film production or publication grants to individuals).

Beyond technical support optimizing grantees' success, some artist-endowed foundations also undertake direct charitable activities that complement the grants to individuals. This includes conducting conferences, showcases, exhibitions, publications, and websites. It also includes dissemination of relevant scholarship and research that advance the charitable purpose addressed by the program of individual grants, (for example, by educating about or increasing public understanding of a particular art form or cultural tradition).

### **Potential Tax Ramifications to Grantees**

In some cases, foundations are concerned about the income tax ramifications to the individuals receiving their grants and awards. A few arrange for technical assistance to grantees on tax planning matters. Most grants and awards are not tax-free to recipients. With appropriate procedures, however, support for qualified education expense<sup>33</sup> or disaster assistance grants made in certain circumstances can be tax-free to recipients.<sup>34</sup> Certain types of achievement awards can be transferred tax-free by the individual recipient to a charitable organization.<sup>35</sup> The procedures and terms of grants and awards for these types of purposes should be devised with guidance by knowledgeable legal advisors.

### **Grants to Non-US Artists**

Most artist-endowed foundations making grants to individuals limit their grants to US artists; however, a few make individual grants internationally. This includes the two foundations that operate the largest such program—the Pollock-Krasner Foundation—and the longest-running program—the Adolph and Esther Gottlieb Foundation. Whether a foundation's bylaws permit international grants is a point to be clarified at the outset of the program planning process. Among foundations making grants to individual artists internationally, the application, selection, and monitoring processes do not differ for grants to US and non-US artists, although grant payments outside the US are made in compliance with the respective country's laws and regulations.

For grants made to artists outside the US, tax-withholding requirements can apply if the grant supports activities within the US. Withholding is not required if funds are used

exclusively for activities outside the US. Foundations making such grants generally specify this geographic restriction on use in their grant agreements.<sup>36</sup> Procedures and terms of grants and awards to non-US artists should be devised with the guidance of knowledgeable legal advisors.

### **Working Through Intermediary Public Charities**

Some artist-endowed foundations find they are not in a position to operate a program making grants directly to individual artists or scholars. Such foundations still can assist individuals by providing support to a public charity that operates a program making grants or other types of awards to individual artists or scholars. A foundation in this circumstance cannot select the grant recipients, unless by pre-approved procedure, but nonetheless can accomplish the broader aim of assisting individual artists or scholars by sponsoring grants and awards. Examples of intermediary public charities making grants to artists and scholars are listed at the close of this chapter.

### **Program Review**

Program review and evaluation increasingly are viewed as best practice in the foundation universe broadly.<sup>37</sup> At this point, few artist-endowed foundations making grants to individuals have conducted reviews of their programs. This might be due to a conviction that all available funds should support grants, hesitancy to burden individual grantees with participation in a review, or a view that ongoing program refinement based on immediate feedback from grantees is sufficient. In any case, absent program reviews, there is limited information available currently to new artist-endowed foundations considering involvement in this important area of philanthropy that are eager to learn from the experiences of foundations operating established programs. Published reviews of artist-endowed foundations' programs making grants and awards to individuals would be a welcome contribution to the field.

## **Resources: Grants to Individuals**

### **Grantmaking to Individuals Fundamentals**

Beggs, Sara. "Awarding Grants to Individuals." *Primer Series*. Washington, DC: Association of Small Foundations, 2005.

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Rutnik, Tracey A., and Marty Campbell. *When and How to Use External Evaluators*. Baltimore, MD: Association of Baltimore Grantmakers, 2002.

"Tax Code Section 1441 Withholding Requirements." *International Grantmaking Basics*. United States International Grantmaking. <http://www.usig.org/>.

VanDecarr, Paul. *Grants to Individuals: Investing in People and Their Communities*. GrantCraft, 2008. <http://www.grantcraft.org/>.

### **Grantmaking and Residencies to Support Individual Artists**

"Arts Funding Topics." Support for Individual Artists. Grantmakers in the Arts. <http://www.giarts.org/support-individual-artists>.

Gehrig, Cynthia A. "Supporting Individual Artists, A Tool Box." *Grantmakers in the Arts Reader* 16, no. 3 (Fall 2005).

Obalil, Deborah, ed. *Ultimate Residency Resource Guide*. Providence, RI: Alliance of Artists Communities, 2005.

### **Documentation: Grantmaking to Individuals by Artist-Endowed Foundations**

Bergman, Charles C. "A Commitment to Support Individual Artists Worldwide: Reflections on the Experience of One Artist-Endowed Foundation." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Hirsch, Sanford. "Sanford Hirsch on the Adolph and Esther Gottlieb Foundation." In *Artists' Estates, Reputations in Trust*. Edited by Magda Salvesen and Diane Cousineau. New Brunswick, NJ: Rutgers University Press, 2005.

## **Private Foundation Rules and Artist-Endowed Foundations**

Fremont-Smith, Marion R. "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

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## **Private Foundation Law**

Fremont-Smith, Marion R. *Governing Nonprofit Organizations, Federal and State Law and Regulation*. Cambridge, MA: Belknap Press of Harvard University Press, 2004.

Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008.

## **A Limited Selection of Intermediary Public Charities Awarding Grants to Individual Artists and Scholars**

### **For Individual Artists**

Artist Trust. <http://www.artisttrust.org/>  
For artists in Washington State.

Center for Cultural Innovation. <http://www.cciarts.org/>  
For artists in California.

Cintas Foundation. <http://www.cintasfoundation.org/>  
For artists of Cuban descent residing outside Cuba.

College Art Association. <http://www.collegeart.org/>  
For artists nationally.

CERF+ (Craft Emergency Fund/Artists Emergency Resources).  
<http://www.craftemergency.org>  
For artists nationally

Creative Capital Foundation. <http://creative-capital.org/>  
For artists nationally.

Foundation for Contemporary Arts. <http://www.foundationforcontemporaryarts.org/>  
For artists nationally.

National Association of Latino Arts and Culture/NALAC Fund for the Arts.

<http://www.nalac.org/>

For Latino artists nationally.

Native Arts and Cultures Foundation. <http://www.nativeartsandcultures.org/>

For Native artists nationally.

New York Foundation for the Arts. <http://www.nyfa.org/>

For artists in New York State.

United States Artists. <http://www.unitedstatesartists.org/Public2/Home/index.cfm>

For artists nationally.

### **For Individual Scholars**

American Council of Learned Societies—for scholars nationally. <http://www.acls.org/>

For scholars nationally.

Asian Cultural Council. <http://www.accnny.org/>

For scholars nationally.

College Art Association. <http://www.collegeart.org/>

For scholars nationally

Council of American Overseas Research Centers. <http://www.caorc.org/>

For scholars nationally.

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<sup>1</sup> Paul VanDeCarr, "The Fine Print: Grants to Individuals and the Law," in *Grants to Individuals: Investing in People and Their Communities* (New York: GrantCraft, 2008).

<sup>2</sup> Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* (Valhalla, NY: Thomson/RIA, 2002–2008), 11-56–11-69.

<sup>3</sup> Sarah Beggs, *Awarding Grants to Individuals* (Washington, DC: Association of Small Foundations, 2005).

<sup>4</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 11-56–11-69.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid., 10-21–10-22.

<sup>9</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*, (Washington, DC: Aspen Institute, 2010).

<sup>10</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 11-28–11-31.

<sup>11</sup> Internal Revenue Service, *Private Letter Ruling* (PLR) 8426066, March 28, 1984

<sup>12</sup> PLR 200634016, June 1, 2006

<sup>13</sup> PLR 200102057, October 17, 2000

<sup>14</sup> PLR 8723072, March 12, 1987

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- <sup>15</sup> PLR 199926051, April 6, 1999
- <sup>16</sup> PLR 8120110, February 20, 1981
- <sup>17</sup> PLR 9652027, October 1, 1996
- <sup>18</sup> PLR 9312034, December 30, 1992
- <sup>19</sup> PLR 7933082 May 21, 1979
- <sup>20</sup> PLR 9728039, April 14, 1997
- <sup>21</sup> PLR 9840052, July 8, 1998
- <sup>22</sup> PLR 9821057, February 25, 1998
- <sup>23</sup> PLR 8141048, July 15, 1981
- <sup>24</sup> PLR 8218058, February 5, 1982
- <sup>25</sup> PLR 9539007, June 28, 1995
- <sup>26</sup> PLR 7909087, November 30, 1978
- <sup>27</sup> PLR 200134030, May 29, 2001
- <sup>28</sup> PLR 9541037, July 19, 1995
- <sup>29</sup> PLR 8337088, June 16, 1983
- <sup>30</sup> PLR 201021044, March 5, 2010
- <sup>31</sup> PLR 200419035, February 9, 2004
- <sup>32</sup> Elizabeth T. Boris, Loren Renz, et al., *What Drives Foundation Expenses and Compensation?* (Washington, DC: Urban Institute; New York: Foundation Center, 2008).
- <sup>33</sup> Internal Revenue Service, *Publication 525: Taxable and Nontaxable Income* (Washington, DC: Department of the Treasury, Internal Revenue Service, 2009).
- <sup>34</sup> *Ibid.*
- <sup>35</sup> *Ibid.*
- <sup>36</sup> "Tax Code Section 1441 Withholding Requirements," United States International Grantmaking, <http://www.usig.org/legal/1441.asp>.
- <sup>37</sup> Tracey A. Rutnik and Marty Campbell. *When and How to Use External Evaluators*. (Baltimore, MD: Association of Baltimore Area Grantmakers, 2002.)



## 8.1.2 Making Grants to Organizations

Artist-endowed foundations can be planned and designed to focus primarily on grantmaking, to combine grantmaking with direct charitable activities, or to function exclusively by operating direct charitable activities. Even in this last mode, however, foundations often make discretionary contributions in their local community. In all cases, foundations involved in grantmaking make programmatic choices about the charitable purposes their grantmaking activities will address, the types of grantees they will fund and how these will be selected, and how their grants will be framed to achieve their goals. Likewise, they will decide on how to implement and conduct oversight of their grants to ensure these are properly documented, used for the intended charitable purposes and not for any noncharitable purpose, and are recovered if diverted or misused. Informing all of these choices are institutional considerations about the level of funding that will be committed to grants, the scope and scale of grantmaking that makes sense in light of available resources, and how a grantmaking program will be operated consistent with a foundation's capacities.

This chapter reviews practice in grantmaking to organizations by artist-endowed foundations, paying particular attention to considerations and choices pertinent to new foundations. Specific examples of artist-endowed foundations and their grantmaking activities are detailed in **4. Field Charitable Activity**. Making cash grants to organizations is distinct from making grants to individuals, discussed in the prior chapter, and differs also from making grants of artworks to organizations, discussed in the following chapter. Numerous publications address the nuts and bolts, legal requirements, and best practices of grantmaking by private foundations generally; a selection of these is listed at the close of this chapter, along with briefing papers prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study) that relate to this topic.

Foundation trustees, directors, and officers planning grantmaking operations should do so with the guidance of legal advisors who have expertise in the laws and regulations that apply to private foundations active in this area. The following summary information highlights key aspects of the rules generally as an orientation to practical considerations. As for the Study report as a whole, this discussion of considerations in practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

### **Programmatic or Discretionary Grantmaking**

Many artist-endowed foundations conduct grantmaking programmatically—with published guidelines, a specified application procedure, proposal review schedules, and in some cases, selection processes that incorporate advisory input by professionals with relevant expertise. For other foundations, grantmaking reflects the personal philanthropy of an artist-donor or



the individual perspectives of trustees, directors, and officers and is conducted on a discretionary or opportunity basis, consistent with the foundation's charitable purpose. The choices between these two modes can hinge on the scale of resources, volume of grantmaking, role of grantmaking as a primary or ancillary focus, and presence of professional staff, as well as a foundation's charitable purpose and the phase of its institutional evolution—from donor-supported to fully funded by a bequest.

### **Defining Grantmaking Interests**

Grantmaking activities of artists' lifetime foundations—those established during artists' lifetimes and with their founders living—typically reflect the artists' charitable interests, which often are in the nature of personal philanthropy, but in some cases involve a defined program strategy. Those foundations intended to have a grantmaking function that are created after an artist's death, or artists' lifetime foundations that subsequently must formalize grantmaking activities after receipt of the artist's bequest, typically are one of two types. The first type is a foundation whose task is to implement its donor's specifically focused brief (for example, to fund college scholarship programs or support the initiatives of an identified institution). The second type is a foundation that must interpret its donor's broad, charitable mandate, such as to advance the visual arts, support creative opportunities for artists, assist animal welfare, or encourage opportunities for underprivileged children.

Foundations given broad mandates have used different types of planning activities to define the focus of their grantmaking. Some have conducted retreats with trustees, directors, and officers to consider how grantmaking should be informed by the artist-donor's concerns and life experiences. Others have convened leading practitioners, professionals, and educators for conferences and discussions about a particular field's needs and how these might translate to grantmaking opportunities. Still others have looked to their own newly appointed professional leaders to make recommendations about grantmaking focus. In many cases, grantmaking has evolved in practice. In a few instances, foundations have commissioned program reviews (for example, at a 10-year benchmark) and revised their initial grantmaking focus in light of what was learned.

### **Changes for Artists' Lifetime Foundations**

An important consideration for artists' lifetime foundations is the way a foundation inevitably changes when it receives its donor's bequest and is fully funded. At the least, this might mean grantmaking of a more programmatic nature where grants previously were made on a discretionary basis. However, if the bequest encompasses nonfinancial assets intended for charitable use, a foundation's programs will evolve substantially to include not only grantmaking, but also direct charitable activities involving the art collection or other real property held as an exempt purpose asset. In some instances, foundations in this position will change legal status (for example, from nonoperating to operating status). If this is the case, grantmaking activities initiated during the artist's lifetime will need to be

reviewed and revised in order to comply with any rules and requirements that might be associated with the new legal status; substantial modifications in such cases are not uncommon.

## **Programmatic Grantmaking: A Thematic or Strategic Focus**

Some artist-endowed foundations define a broad theme supporting their charitable purpose and make grants responding to a wide variety of activities within that general theme. Examples include foundations that fund on themes such as art education, children's literacy, or animal welfare by making grants to worthy organizations active in these areas in order to provide unrestricted support for the grantees' exempt purposes or project support as prioritized by the grantee. Foundations assisting community betterment efforts in a particular geographic locality generally take a comparable approach.

Other foundations have determined a particular strategy within a broad theme by identifying a critical function for which their funds can make a significant difference to support their charitable purpose. For example, some foundations whose charitable purpose is to support artists' creativity do so by making grants to art organizations specifically to fund artists' commissions for new work or to finance residencies for artists to develop new work. Some foundations whose charitable purpose is to make works of accomplished but less-recognized living artists more broadly accessible to the public have done so by making grants specifically to support museums in purchasing and exhibiting works by artists who fit this definition.

Still other foundations have defined their grantmaking around theories of change toward a goal that supports their charitable purpose, such as advancing knowledge about a less-recognized category of artist, art form, or cultural tradition. For example, foundations whose charitable purpose is to increase public understanding about the contributions of women architects or the arts of the African diaspora have made grants to support scholarly research, publications, and classroom projects using new scholarship. Those with a charitable purpose to advance a less-institutionalized art form (such as photography, editorial cartooning, and animation) have made grants to support development of new programs dedicated to the form by prominent institutions and to assist creation of new organizations dedicated to the form.

Many artist-endowed foundations develop two-part grantmaking programs. This might include grantmaking nationally using a specific strategy in combination with grantmaking locally around a broad theme or on a discretionary basis. An example of this would be a national program of grants to art museums specifically to support development of art conservation capacities in combination with community betterment grants in a particular locality giving preference to projects of organizations assisting art education and wildlife conservation.

## **Foundation-Initiated Projects and Collaborations with Intermediaries**

In some cases, foundations with an established grant program will specify interests outside the program for which they will fund foundation-initiated projects. This might be the case when a foundation plans a highly targeted effort to address a newer medium with few established institutions (for example, to advance editorial cartooning). Likewise, a special initiative alongside an ongoing grant program might be conducted exclusively through a foundation-selected intermediary organization, chosen because it has the necessary technical expertise to support grantees' success. This might be the case for using an intermediary to make regrants to assist film and video productions or support specialized medical research.

## **Grantmaking by Private Operating Foundations**

Artist-endowed foundations that are private operating foundations must weigh particular considerations in planning grantmaking. Expenditures for grants generally will not be qualified distributions, meaning applicable to charitable distribution requirements, unless the grants are an integral part of a program operated directly by the foundation and it maintains a significant involvement in the grants. Selecting and awarding grants and receiving reports on grants are not sufficient in themselves to fulfill this requirement.<sup>1</sup>

## **Application Procedures**

### **Open Application or Application by Invitation**

Many artist-endowed foundations make grants to organizations using an open application process in which any organization may submit a proposal if the organization and its request meet the foundation's published guidelines for eligibility and grant selection criteria. These foundations typically specify one or two application deadlines per year timed well in advance of board meetings to allow for preliminary review by advisors, grant committees, or staff specialists. Foundations using an open application process sometimes employ a two-step procedure in which a letter of inquiry is reviewed to confirm eligibility before an invitation to submit a full proposal is extended. Foundations use their websites to publish grant guidelines, application procedures and forms, and related information, often including lists of prior grantees. Some prefer to accept applications online.

Other foundations, typically those without professional staff, state that they make grants only to preselected organizations invited to submit applications. This might be the case for foundations focused primarily on the personal philanthropic interests of a living donor or those with no staff that are concerned about managing a high volume of applications. It isn't clear, however, whether the invitation-only approach actually minimizes application volume because it often results in a high level of fundraising appeals made individually to foundation trustees, directors, and officers. Likewise, foundations functioning as vehicles for artists' personal philanthropy and working only by invited application are more likely to make numerous, small grants. Of greater concern is that foundations using an invitation-only

process tend to make grants exclusively to organizations with personal access to their trustees and directors. This can lock a foundation into a narrow set of interests, isolating it from potential grantees with fresh ideas and diverse perspectives.

### **Online Formats for Application and Selection**

Most foundations conducting grantmaking programmatically publish their guidelines and application forms on their websites and post information about prior grant recipients. Many foundations accept applications online, and some now require that applications be submitted online. In some cases, foundations conduct application review and grant selection meetings online, enabling foundations to access expertise nationally without the barrier of travel cost.

### **Structuring Grantmaking to Match Foundation Capacity**

Artist-endowed foundations that are designed to have substantial grantmaking operations typically hire staff experienced in grantmaking or set up grantmaking operations with the guidance of advisors experienced in grantmaking administration. Artist-endowed foundations that have no staff, those with modest grant budgets, or those making grants as an ancillary function can be challenged to devise grantmaking programs that match a foundation's capacity and also make productive use of charitable resources. Including an experienced grantmaker among trustees or directors makes sense in these cases.

Several observations can be made about the challenge of matching grantmaking to foundation capacity. At the most basic level, the greater the number of grants that are made, the greater the capacity and expense required in order to administer grant activity appropriately. Making a smaller number of larger grants often makes more sense, assuming that approach would be consistent with a foundation's charitable purpose.

Similarly, processing hundreds of proposals and fielding numerous fundraising appeals made individually to trustees, directors, and officers in order to distribute a small grant budget can be unnecessarily burdensome. Sufficiently focused guidelines can help moderate the volume of applications and make the selection process more effective. A two-step process using an initial letter of inquiry to identify potential grantees that best match a foundation's interest, who then are invited to submit applications, also can help.

Making grants nationally or internationally can be more costly to implement and monitor appropriately than funding locally. Identifying a unique purpose that requires a national or international approach might merit the additional cost. Alternatively, working through an intermediary public charity whose national or international administrative capacity is subsidized by other donors can lower the expense and direct a greater portion of a foundation's funds to the actual grant purpose.

Finally, there is a long-standing practice of using external, professional services to administer foundation grant programs, such as those provided by bank trust departments, trust companies, law firms specializing in trust and estate management, and professional philanthropic administration services. Most recently, the increase in foundation formation in the greater philanthropic field, particularly among family foundations, has spurred creation of a greater number and variety of external resources offering support for foundation administration. These services, in some cases using online formats, make professional administration of grantmaking operations accessible to foundations on a pro-rata basis, enabling smaller foundations to conduct grantmaking supported by appropriate administration and technical expertise.

Whichever way foundations choose to organize and operate their grant programs, they are responsible for making grants that comply with the relevant private foundation laws and regulations.<sup>2</sup>

## **Funding Organizations to Assist Individual Artists or Scholars**

Many artist-endowed foundations have as their charitable purpose the education and development of artists or the support of artists' creative activities as a benefit to the public. While some foundations make grants to individual artists directly, the majority of foundations address this purpose by making grants to organizations whose programs assist artists. For example, foundations make grants to organizations that educate artists formally in degree programs; train and develop artists in community settings; operate programs providing the infrastructure for individual artists' creative development and activities (such as residencies, fellowships, exhibitions, and the like), and make regrants or awards to artists individually for project purposes. Similarly, artist-endowed foundations concerned with advancing art history scholarship in many cases do not make grants to individual scholars directly, but pursue this charitable purpose by making grants to organizations that provide fellowships and other types of awards to support scholars' research and publication activities.

As in grantmaking generally, foundations supporting individual artists or scholars by making grants to organizations do so by funding thematically or strategically. For example, some foundations working thematically assist worthy organizations in a specific art discipline or scholarly field by providing grants for general support or for projects that are prioritized by the grantee organizations. Others working strategically make grants targeted to a particular function (for example, specifically assisting organizations that operate artist commissioning or residency programs, or those that provide scholar fellowships or publishing grants).

Some foundations work closely with organizational grantees to develop a tailored program for individual artists or scholars that is administered by the organization and funded by the foundation. Pre-approval of grantmaking procedures is not required if a foundation makes a

grant to an organization for its program assisting individual students, artists, or scholars. However, if a foundation itself selects the individuals to be funded or assisted by its grant to an organization, it is considered to be making a grant to an individual and pre-approval of its grantmaking procedure is required.<sup>3</sup>

## **Other Types of Grants and Charitable Disbursements**

### **International Grants**

The visual arts and design universe is international in scope and, not surprisingly, some artist-endowed foundations make grants to non-US entities—those that are not organized in the US and do not have US tax exemption. Much of this involves grants of artworks to museums in countries abroad, discussed in the following chapter, but in some cases it is in the form of cash grants (for example, to support cultural organizations or educational institutions). Special rules apply to private foundation grants made to non-US organizations.<sup>4</sup> The purpose of a grant must be charitable exclusively, and the non-US organization selected as a grantee must be the equivalent of a US public charity. On this second point, foundations either must ascertain an organization's equivalency to a US public charity, based on documentation submitted by the potential grantee, or exercise *expenditure responsibility* in making the grant, a defined procedure which involves a higher level of documentation and reporting as well as segregation of funds by the grantee.<sup>5</sup>

The 2001 terrorist attacks heightened concerns about private foundation grants to non-US organizations, resulting in stricter requirements. As one response, an increasing number of US public charities are being established under the banner of *friends of* organizations, including for international museums and cultural organizations.<sup>6</sup> As US public charities, *friends of* organizations are permitted to solicit and accept grants to support their projects intended to develop the non-US institution and its programs. If appropriate procedures are followed, grants to *friends of* organizations generally can be made without the heightened documentation and reporting requirements applicable to direct cross-border grants.<sup>7</sup> Procedures and terms for grants to international organizations and to *friends of* organizations should be devised by legal advisors familiar with these rules.

### **Charitable Loans and Program-Related Investments**

A few artist-endowed foundations have made *program-related investments* (PRIs), defined as a loan or investment that significantly furthers a foundation's charitable purposes and would not have been made except for a direct relationship to the exempt purpose. An example would be a no-interest bridge loan made by a private foundation with an interest in historic preservation in order to finance emergency acquisition of an endangered historic property by an historic preservation public charity. The primary purpose of a PRI cannot be to generate revenue or to enhance the value of property. In fact, charitable loans typically are made at zero interest or below market interest rates. In some cases, a grant might be combined with a loan to a grantee. If it meets the requirements of the Internal Revenue

code, a PRI generally can be a qualifying distribution toward a foundation's annual distribution requirement.<sup>8</sup>

Among the key considerations in charitable lending or investing are whether a foundation's bylaws permit making a PRI, on what basis it would be consistent with the foundation's charitable purpose, and by what evidence it would be defined as charitable in purpose. PRIs cannot be made for political purposes and, as with all other activities, private foundations cannot make loans that benefit their substantial contributors, trustees, directors, officers, staff, or persons related to these individuals. Terms for PRIs should be devised by knowledgeable legal advisors. How PRIs, as well as repayments of such loans and investments, are reported on a foundation's annual information return (Form 990-PF) with respect to qualifying distributions should be determined by accountants who are expert in private foundation taxation.

### **Grants to Entities Other Than Public Charities**

Some artist-endowed foundations have made grants to other private foundations, which by definition are not public charities. An example would be a grant made to support a direct charitable activity conducted by another private foundation, such as a symposium on current practice in art research and a publication based on the convening's proceedings. Grants by private foundations to other private foundations must be made exclusively for charitable purposes and require use of expenditure responsibility grantmaking procedures.<sup>9</sup> In addition, compliance with other rules that bear on this specific topic can determine whether or not a grant will be a qualifying distribution for the purpose of fulfilling charitable distribution requirements.<sup>10</sup> Terms for such grants should be devised by legal advisors familiar with these rules.

A few artist-endowed foundations have made grants to US entities that are not tax-exempt. An example would be a grant made to a private trust that owns an artist's archive in order to support preparation of a scholarly publication drawing on research into the archive's holdings. In broad terms, private foundations generally are permitted to make grants to entities that are not public charities if the purpose of the grant is charitable, the grant is used exclusively for charitable purposes and not for noncharitable purposes (including general support of the non-exempt entity), and the foundation uses expenditure responsibility procedures to make the grant.<sup>11</sup> Guidance by legal advisors familiar with these rules is important.

## Summary of Rules for Grants to Organizations

Private foundations and their activities are regulated under the Internal Revenue Code, and the rules for private foundations generally are more stringent than those that apply to public charities, which is the status of most art museums and other types cultural and educational organizations.<sup>12</sup> As fiduciaries, foundation trustees, directors, and officers are responsible for knowing these rules, although they also should consult with legal counsel expert in private foundation law on the details of their particular circumstance.

### Grantmaking Basics

A foundation's grantmaking activities must be conducted so that they further the foundation's charitable purpose, benefit a charitable class that is broadly public, and do not provide a private benefit to particular individuals or limited groups.<sup>13</sup>

Foundations cannot make grants or loans for noncharitable purposes generally and specifically cannot make grants to influence legislation or political campaigns or for any political purpose.<sup>14</sup>

Grants and loans made to organizations that are not public charities (such as other private foundations, US entities that are not tax-exempt, or foreign organizations that do not have US tax-exemption) are subject to specific rules and procedures, typically as expenditure responsibility transactions.<sup>15</sup>

A grant to a public charity earmarked for an individual that has been selected by the foundation is considered a grant to that individual and must be made in compliance with rules for foundation grants to individuals, including pre-approval of grantmaking procedures, discussed in the prior chapter.<sup>16</sup>

### Grantmaking and Insiders

A foundation cannot make a grant or loan to a substantial contributor or its insiders, including trustees, directors, and officers, or persons related to these individuals. Likewise, its grants and loans cannot be designated to benefit, directly or indirectly, any of these persons.<sup>17</sup>

A grant or loan cannot be made to fulfill a personal pledge by a foundation insider.<sup>18</sup>

Although not required by federal law, it is viewed as a matter of best practice that foundation insiders not participate in votes to approve grants or loans to organizations for which they serve as a board member or have similar influence.<sup>19</sup>



## Program Review

Program review and evaluation are a growing interest in the foundation field at large.<sup>20</sup> A few artist-endowed foundations have commissioned reviews of their grant programs at key junctures and refined their grantmaking based on what they learned. Most established artist-endowed foundations involved in grantmaking, however, have not reviewed their programs or published program reviews. As a result, those new artist-endowed foundations that have been created with the intention to undertake grantmaking, and so have an interest in learning from the experience of established foundations, find there is little information available to them. With an increasing number of established artist-endowed foundations reaching 20 and 30-year anniversaries, there is a timely opportunity to learn from their grantmaking experiences through program reviews to the benefit of the field as a whole.

## **Resources: Grants to Organizations**

### **Advance Planning for Grantmaking**

Arthurs, Alberta. "Artist-Endowed Foundations: Meaningful Philanthropic Opportunities in the Arts and Culture." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

*Scanning the Landscape, Finding Out What's Going on in Your Field*. GrantGraft.  
<http://www.grantcraft.org/>.

*Strategic Philanthropy: Five Approaches for Making a Difference*. Foundation Source.  
<http://www.foundationsource.com/>.

### **Grantmaking Fundamentals**

Gast, Elaine C. *The Guide to Small Foundation Management: From Groundwork to Grantmaking*. Washington, DC: Council on Foundations, 2002.

Hollahan, Jennifer. *The Complete Guide to Grantmaking Basics: A Field Guide for Funders*. Washington, DC: Council on Foundations, 2008.

### **Grantmaking Review and Evaluation**

Grantmakers for Effective Organizations. *Evaluation in Philanthropy: Perspectives from the Field*. Washington, DC: Grantmakers for Effective Organizations, 2009.

*Making a Difference: Evaluating Your Philanthropy*. The Philanthropic Initiative.  
<http://www.tpi.org/>.

Rutnik, Tracey A., and Marty Campbell. *When and How to Use External Evaluators*. Baltimore, MD: Association of Baltimore Grantmakers, 2002.

### **Grantmaking Using Expenditure Responsibility Procedures**

Edie, John A. *Expenditure Responsibility Step by Step*, 3rd ed. Washington, DC: Council on Foundations, 2002.

### **Grantmaking with Intermediaries**

Szanton, Peter L. *Toward More Effective Use of Intermediaries*. New York: Foundation Center, 2006.

### **International Grantmaking**

Edie, John A. and Jane C. Nober. *Beyond our Borders: A Guide to Making Grants Outside the U.S.*, 3rd ed. Washington, DC: Council on Foundations, 2002.

*International Grantmaking Basics*. United States International Grantmaking.  
<http://www.usig.org/>.

### **Program-Related Investments and Loans**

Carlson, Neil. *Program-Related Investments: Skills & Strategies for New PRI Funders*. GrantCraft.  
<http://www.grantcraft.org/>.

Shaw, Janice Simsohn. "Leveraging Your Assets with Loans and Other Program Related Investments." *Primer Series*. Washington, DC: Association of Small Foundations, 2006.

### **Private Foundation Rules and Artist-Endowed Foundations**

Fremont-Smith, Marion R. "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Hill, Frances R. "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

### **Private Foundation Law**

Fremont-Smith, Marion R. *Governing Nonprofit Organizations, Federal and State Law and Regulation*. Cambridge, MA: Belknap Press of Harvard University Press, 2004.

Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008.

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<sup>1</sup> Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations*, (Valhalla, NY: Thomson/RIA, 2002–2008), 11-28–11-31.

<sup>2</sup> *Ibid.*, 11-78–11-93.

<sup>3</sup> *Ibid.*, 11-56–11-69.

<sup>4</sup> United States International Grantmaking, <http://www.usig.org/>.

<sup>5</sup> John A. Edie and Jane C. Nober, *Beyond our Borders: A Guide to Making Grants Outside the U.S.*, 3rd ed. (Washington, DC: Council on Foundations, 2002).

<sup>6</sup> Victoria B. Bjorklund and Jennifer I. Reynoso, *How Private Foundations Can Use "Friends of" Organizations* (Arlington, VA: Council on Foundations, n.d.), <http://www.usig.org/>.

<sup>7</sup> *Ibid.*

<sup>8</sup> Neil Carlson, "Legal Definitions and Requirements," in *Program-Related Investing, Skills & Strategies for New PRI Funders* (New York: GrantCraft, 2006).

<sup>9</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 11-1–11-23.

<sup>10</sup> John A. Edie, *Expenditure Responsibility Step by Step*, 3rd ed. (Washington, DC: Council on Foundations, 2002).

<sup>11</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 11-92–11-93.

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- <sup>12</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropy: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>13</sup> Frances R. Hill, "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>14</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 11-41–11-55.
- <sup>15</sup> *Ibid.*, 11-78–11-93.
- <sup>16</sup> *Ibid.*, 11-56–11-69.
- <sup>17</sup> Fremont-Smith, "Federal and State Laws."
- <sup>18</sup> *Ibid.*
- <sup>19</sup> Jane C. Nober, *Legal Basics: What Every Foundation Leader Should Know*, (Washington, DC: Council on Foundations, 2007).
- <sup>20</sup> Tracey A. Rutnik and Marty Campbell. *When and How to Use External Evaluators*. (Baltimore, MD: Association of Baltimore Area Grantmakers, 2002.)



## 8.1.3 Making Grants with Artworks

Many artist-endowed foundations distribute artworks charitably and do so for a variety of reasons and in a range of circumstances. Some foundations occasionally distribute artwork charitably while others design large-scale initiatives or even focus on grantmaking with artworks as a central aspect of an ongoing charitable program. Foundations that choose to distribute artworks charitably weigh a number of considerations in preparing and implementing these grants. Chief among these considerations is how such grants relate to the foundation's charitable purpose generally. Within this, the foundation must consider what particular role its arts assets are intended to play in supporting its charitable purpose—whether as noncharitable or exempt purpose assets, and how that role aligns with the charitable purpose to be accomplished by the grants of art.

This chapter reviews practice in making grants of artworks by artist-endowed foundations with a focus on questions pertinent to new artist-endowed foundations. Specific examples of foundations distributing artworks charitably are detailed in **4. Field Charitable Activity**. The previous discussion of grantmaking to organizations notes considerations in international grantmaking. **7. Forming, Sustaining, and Terminating Foundations** discusses charitable distribution of artworks in the context of an artist-endowed foundation's termination. Resources relevant to charitable distribution of artworks are listed at the close of this chapter, along with briefing papers prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study) that are relevant to this topic.

Foundation trustees, directors, and officers planning programs to distribute artworks charitably should do so with the guidance of legal advisors expert in the laws and regulations that apply to private foundations active in this area. The following summary information highlights key aspects of the rules generally as an orientation to practical considerations. As for the Study report as a whole, this discussion of considerations in practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

### Considerations in Charitable Distributions of Artworks

Charitable distribution of art by artist-endowed foundations generally takes place in three modes. Most frequently, grants and partial grants/partial sales of artworks—referred to variously as bargain sales or gift-purchases—are implemented early in a foundation's lifecycle following receipt of a bequest that includes an art collection, with distribution one aspect of activities needed to set up the foundation and its programs. In other cases, grantmaking with artworks takes place later in the course of a foundation's development as appropriate opportunities are identified, or as institutional transitions require, or even in

preparation for termination. In fewer instances, granting artworks is an ongoing activity, either as the singular program or a primary focus of the foundation.

### **Intentions and Motivations**

A foundation's charitable purpose and the intentions of its donor inform the choice and capacity to make grants and partial grants/partial sales of artworks. If a foundation's activities after an artist's death are to include charitable distribution of artworks, artists or artists' heirs or beneficiaries forming foundations often express a preference for how this should be accomplished. Some prefer that the collected works be presented comprehensively in a single location, enabling in-depth study of the collection in all its dimensions. Others see a risk of marginalization in a single site and instead prefer that the works be represented in multiple public collections where they can be exhibited in varied context and made accessible to a wide array of audiences. Alternatively, some artists or artists' heirs or beneficiaries indicate no preference and instead confirm that a foundation's trustees, directors, and officers have discretion in such matters.

Practical factors also motivate charitable distribution of art. Foundations that are terminating or have experienced a substantial reduction in institutional capacity and cannot maintain a collection will have to distribute their art collections or art inventories, in some cases by grants. Foundations that receive bequests of associated collections (such as study collections assembled by artists during their lifetimes) often sell these, but in some cases choose to distribute them charitably. Similarly, foundations that fund grantmaking with art sales but hold substantial inventories of non-salable works, such as unfinished works or study works not meant for sale, sometimes choose to distribute these inventories of non-salable works charitably so they can be located for optimal educational and scholarly use.

There also can be significant expense in caring for a large art collection. A new artist-endowed foundation might choose to mount a targeted program over several years to distribute a portion of its collection, particularly larger works, by grant or by partial grant/partial sale, after which the scale of its art holdings will be more in line with its ongoing institutional capacity to care for them. Finally, some foundations that hold primarily art assets are designed to make grants of artworks on an ongoing basis, either as a single focus or alternating with cash grants. This latter, dual approach is one that helps foundations with minimal liquidity lessen the pressure to sell assets quickly in order to meet their payout requirement.<sup>1</sup>

### **Practical Limitations**

An artist's standing and whether or not museums or other types of charitable institutions are interested in receiving grants of art or participating in partial grants/partial sales are the deciding factors in a foundation's ability to work in this way. Much like the challenge of developing a market for the works of an artist who is lesser known, opportunities for

charitable distribution of artworks can require long-term efforts (such as scholarship, publications, and exhibitions) to develop appreciation and interest.

An artist's lifetime foundation—one whose artist-donor is living—would not be involved in making grants or partial grants/partial sales of the artist's artworks. Distributing the artist's works to museums, universities, and other types of collecting institutions during the artist's lifetime might inadvertently breach laws prohibiting private benefit and self-dealing if a foundation's activities of this nature serve to promote the artist's career, thereby benefiting the artist economically.<sup>2</sup>

### **Charitable Distribution of Art as It Relates to Charitable Purpose and Asset Classification**

Beyond a donor's preference, there are important considerations about charitable disposition of foundation assets held for public benefit. A foundation's charitable purpose and the role intended for its art holdings combine to define the considerations that must be weighed when a foundation plans grants of artworks or when it plans to make partial grants/partial sales of art.

As discussed elsewhere in this report, artworks classified as noncharitable-use assets typically are intended to be sold to generate revenue in support of a foundation's charitable activities, often grantmaking. Foundations in such cases generally are obligated to optimize the value of the art inventory in serving this purpose.

Giving away, by grant or by partial grant/partial sale at less than fair market value, assets intended for sale to support a foundation's programs might be justified to the extent that such a gift ultimately would enhance the overall value of the foundation's remaining art inventory as a resource to fund its programs. In practical terms, that can be the outcome of a grant that places select artworks in prestigious public collections or establishes a definitive collection to support exhibition, scholarly research, and educational programs that foster wider appreciation of the artist's oeuvre. A central question in this choice is whether charitable distribution of artworks would deplete an art inventory, either by quantity or by value, so that its intended purpose of creating an endowment or providing operating and grantmaking funds was compromised, and if so, to what extent.

It might also be the case that a foundation grants an artwork in lieu of making a cash grant to a charitable organization, stipulating that proceeds from the artwork's sale be used to further the grantee's exempt purpose. Assuming the artwork is intended as a resource for sale to fund the foundation's grantmaking activities, the question that pertains in this choice is whether the grant, whatever its material form, supports activities consistent with the foundation's grantmaking criteria and charitable purpose.



Conversely, artworks classified as charitable-use assets typically are intended for use as resources for study, exhibition, and educational programs, with this educational and scholarly use conducted by the foundation itself or by loan to other appropriate institutions. Granting these artworks wholly or partially might be justified in terms of advancing a foundation's scholarly or educational mission. This can be the result of grants or partial grants/partial sales that place artworks with academic institutions and in museum collections where they will be utilized most effectively and with the greatest access as resources for public exhibitions, scholarly research, and educational programs. A key consideration in this choice is whether a collection's diminishment, in scale or by type or breadth of holdings, would have an impact on a foundation's ability to fulfill its educational and scholarly purpose, and if so, to what extent.

In some instances, a foundation's charitable purpose, exclusively or in part, is to accomplish the charitable distribution of artworks individually or of an art collection in its entirety, whether these have been received as a gift or bequest or otherwise assembled by the foundation. Assuming the artworks are intended to be used as an educational and scholarly resource, the consideration in this choice is whether the grant or partial grant/partial sale of the artworks places them with grantees whose capacities and purposes will enable their optimal use in realizing that goal.

How private foundations utilize their assets for public benefit purposes is regulated by the Internal Revenue Service (IRS) and state attorneys general, and in some cases by local courts supervising administration of estates.<sup>3</sup> Foundations planning charitable distribution of artworks—by grant or by partial grant/partial sale—will develop their plans with the guidance of legal advisors expert in these matters. Likewise, how grants and partial grants/partial sales of artworks should be reflected when preparing a foundation's annual information return (990-PF) should be determined by an accountant knowledgeable about private foundation taxation.

## **Strategies for Charitable Distributions**

By and large, foundations' charitable distribution of artworks is accomplished using one of two strategies: wide distribution to enhance collections of numerous museums in a variety of locales; or distribution focused on a primary location to develop a definitive collection, new curatorial department, or new institution. Some foundations have used both strategies, either in combination or sequentially, in undertaking charitable distribution of artworks at different points in a foundation's evolution.

### **Enhancing Public Collections Broadly**

In making grants or charitable sales of artworks to enhance the collection of numerous museums, foundation managers use a variety of criteria. Grants often are made to museums with which an artist was associated during his or her lifetime. Other types of considerations

might inform a programmatic approach to distribution. In some cases, the goal is to ensure access to the artist's works by the broadest possible audiences. This suggests an emphasis on museums that have not had the opportunity to acquire the artist's works or are located where audiences are less likely to have had opportunities to experience the artist's works.

In other cases, an emphasis is placed on making grants to particular types of institutions, such as university museums that will use the artworks as study resources. Another approach is to determine where artworks, individually or in groups, can complete or amplify museums' existing holdings in ways that will enrich scholarship and exhibition opportunities. In this approach, grants of artworks often are made as opportunities arise (for example, to augment a collection where a museum is planning a retrospective or definitive exhibition or important scholarly publication).

### **Establishing Definitive Collections or New Programs or Institutions**

In contrast to wide distribution, some foundations focus charitable distribution of artworks on one site. The goal in this case might be to concentrate a collection spanning the arc of a career together with archives, creating a study resource achieving greater depth than that distributed across multiple collections. In addition, some artists' oeuvres have a profound resonance with the particular locality or terrain that shaped the creative vision. In such cases, a priority might be placed on situating a definitive collection in that locale to fully realize its interpretive and scholarly potential. In other cases, simple opportunity and human relationships transpire in ways that focus efforts on one institution, a museum's capital campaign often creating the occasion.

As a broad observation, artist-endowed foundations focusing their distribution of artworks in one site are more likely to work with an existing institution than to create an entirely new organization, although several have facilitated development of new museums under the auspices of larger entities, such as universities or museum consortia. As another pattern, regional museums are more likely than urban museums to be the site of substantial gifts from artist-endowed foundations intended to establish a definitive collection or dedicated program. In the cases where urban museums are the site of a substantial gift, it is most often associated with development of a new curatorial department or collection initiative.

Whatever the factors, foundation trustees, directors, and officers often become involved in facilitating the larger institutional development processes of museums or university departments. This might include stimulating new directions or priorities in collecting at an established museum, which in turn could necessitate assisting a larger capital project to house contributed artworks, all of which can unfold over longer periods of time. Not surprisingly, grants of collected artworks to one site often are augmented with financial support (for example, to develop a facility for optimal exhibition and scholarly use, or to assist related public programs featuring the contributed artworks).

## Implementing Partial Grants/Partial Sales

As noted, aside from grants of art, some foundations choose to distribute artworks as a partial grant/partial sale. Such transactions are known among individual donors as *bargain sales* and among museums as *gift-purchases*, and when undertaken as a foundation initiative sometimes are referred to as *museum sales programs*. A partial grant/partial sale is a form of grant in which an artwork is sold for program-related use to a tax-exempt organization—typically a museum, library, university, or other institution housing a public art collection—for a price that is below fair market value. The difference between sale price and market value is recorded by the foundation as a grant.

A partial grant/partial sale is useful in fulfilling the double goals of charitable distribution and conversion of art assets to financial assets necessary to fund and endow charitable programs. Also important for some foundation trustees, directors, and officers is the goal of involving a museum's trustees in purchasing an artwork as opposed to simply accepting a grant. The view here is that a partial grant/partial sale in which the purchase component is accomplished by a museum with contributions from trustees or significant donors, much like a challenge grant, will increase the likelihood that the artworks remain a priority for the museum's exhibition and educational purposes.

The practice of acquiring artworks by partial grant/partial sale is familiar to most art museums in the form of a gift-purchase, although typically as transactions with individual donors.<sup>4</sup> For private foundations, a partial grant/partial sale is undertaken with a programmatic rationale in order to further a foundation's charitable purpose. A partial grant/partial sale program might be a means, for example, to place an artist's works in museum collections broadly, increasing public access in furtherance of a charitable purpose to educate the public about the artist's creative principles. At the same time, the partial grant/partial sale program would generate funds to endow a study center that maintains a core art collection as an educational and scholarly resource, consistent with the foundation's charitable purpose. As for any grant, the grant portion of a gift-purchase transaction will support the foundation's charitable purpose and be consistent with criteria developed for the grant program. Grant agreements for partial grants/partial sales should be devised by legal counsel knowledgeable about private foundation rules that bear on these matters.

In addition to confirming the relationship to charitable purpose and defining appropriate criteria for grant selection, foundations planning a partial grant/partial sale program should consider how the sale aspect of that activity would relate to their non-programmatic, periodic art sales accomplished through representation agreements with commercial art dealers. If partial grants/partial sales are to be made apart from a representation agreement, foundations should determine the requirements of laws regulating art sales and taxes potentially applicable to art sales. How the grant and income components of bargain sales

and gift-purchases, as well as potential capital gains, should be reflected when preparing a foundation's annual information return (Form 990-PF) should be determined by accountants who are knowledgeable about private foundation taxation.

As noted, how private foundations utilize their assets for public benefit purposes is regulated by the IRS and by state attorneys general, and also in some cases by local courts. Foundations planning charitable distribution of artworks by partial grant/partial sale will develop their plans with the guidance of legal advisors expert in these rules.

## **Grant Terms and Agreements**

While the terms for a grant or partial grant/partial sale of art by an artist-endowed foundation must fulfill the responsibilities of a foundation's trustees with respect to ensuring that the artworks granted will be used for the intended exempt purpose, the terms also must be realistic for the grantee institution. Few established museums have gift acceptance policies that permit them to receive grants or donations of individual works with unusual or highly limiting restrictions.<sup>5</sup> Some artist-endowed foundations, however, do make art grants stating that the works are a permanent gift and cannot be sold. It is more likely that grants of collected works, particularly large collections, will be made with specifications. These might stipulate expectations about the frequency of exhibition over a period of time or availability of works for later sale.

Other approaches are used when substantial grants of artworks are being made to new institutions or to established institutions that are developing new facilities or whose capacities are not proven for the grant's specific purpose. In such cases, an artist-endowed foundation might commit to grant a substantial collection contingent on the accomplishment of specific institutional benchmarks that confirm a sufficient capacity to steward the grant as intended. This is not unlike a challenge grant in which a foundation commits to releasing funds or making other resources available as a grantee meets certain fundraising goals or program benchmarks. The terms of commitment agreements and grant contracts for these purposes should be carefully devised with guidance by knowledgeable legal advisors.

## **International Grants of Artworks**

Among artist-endowed foundations making grants of artworks, the majority of recipients are US tax-exempt institutions. However, given the international scope of the visual arts and design universe, it is not surprising that grants also are made to non-US museums. As discussed in the prior chapter, special rules apply to foundation grants made to organizations outside the US.<sup>6</sup> Procedures and terms for grants to international museums, or to the *friends of* organizations established as tax-exempt entities in the US to garner support for projects that will benefit international museums, should be devised by legal advisors familiar with these rules.

## Summary of Rules for Granting Artworks

Private foundations and their activities are regulated under the Internal Revenue Code, and the rules for private foundations generally are stricter than those that apply to public charities, which is the status of many art museums and other types of cultural and educational organizations.<sup>7</sup> As fiduciaries, foundation trustees, directors, and officers are responsible for knowing these rules, although they also should consult with legal counsel expert in private foundation law on the details of their particular circumstance.

### Granting Artworks Basics

A foundation's grantmaking with artworks must be conducted so that this activity furthers the foundation's charitable purpose, benefits a charitable class that is broadly public, and does not provide a private benefit to particular individuals or limited groups.<sup>8</sup>

Grants and partial grants/partial sales made to non-US organizations are subject to specific rules and procedures, often as expenditure responsibility transactions.<sup>9</sup>

### Granting Artworks and Insiders

A foundation cannot grant or sell an artwork to a substantial contributor, to its insiders (including trustees, directors, officers), or to persons related to these individuals. Likewise, its grants and charitable sales of artworks cannot be designated to benefit, directly or indirectly, any of these persons.<sup>10</sup>

A grant of art or partial grant/partial sale of art cannot be made to fulfill a personal pledge made by a foundation insider.<sup>11</sup>

Although not required by law, it is viewed widely as a matter of best practice that foundation insiders not participate in votes to approve grants to organizations for which they serve as board members or have similar influence.<sup>12</sup>

## Program Review

Program review and evaluation are an increasing practice in the foundation universe broadly.<sup>13</sup> To date, none of the artist-endowed foundation that have made grants or partial grants/partial sales of art have conducted reviews of these programs. Some foundations no longer exist, others have completed their initiatives and do not expect to take up this type of activity again, and still others are not inclined to draw attention to programs they administer by invitation. Whatever the reason, absent program reviews, a substantial body of knowledge that would benefit new artist-endowed foundations considering this important philanthropic practice—which is likely to increase in use as more foundations of prominent artists receive their bequests—remains untapped.

## **Resources: Grants with Artworks**

### **Acceptance Policies for Gifts of Art to Museums**

Association of Art Museum Directors. *Professional Practices in Art Museums*. New York: Association of Art Museum Directors, 2001.

Malaro, Marie C. "Bargain Sales." In *A Legal Primer on Managing Museum Collections*. 2nd ed., 377–378. Washington, DC: Smithsonian Books, 1998.

### **Art Sales by Charitable Organizations**

Urice, Stephen K., and Valerie Prochazka. "Art Sales by Charitable Organizations: A Summary of Rulings and Determinations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

### **Documentation: Charitable Distribution of Art by Artist-Endowed Foundations**

Berman, Avis. "The Right Place: The Founding of the Andy Warhol Museum," In *The Andy Warhol Museum*. Edited by Tom Armstrong, 17–37. New York: Distributed Art Publishers, 1994.

Georgia O'Keeffe Foundation. "Distribution of Georgia O'Keeffe Art 1994–2000" and "Distribution of Georgia O'Keeffe Art by Gift-Purchase 2001–2006." In *The Georgia O'Keeffe Foundation, 1994–2000 and 2000–2006*. Abiquiu, NM: Georgia O'Keeffe Foundation, 2001 and 2008.

Girard, Alexander H., and James Pahl. "Introduction: The Girard Foundation Collection." In *The Girard Collection at the Museum of International Folk Art*. Edited by Mary Wachs, 8–11. Santa Fe: Museum of New Mexico Press, 1995.

### **Grants of Property by Private Foundations**

Blazek, Jody. "Qualifying Distributions, Noncash and In-Kind Grants." In *Tax Planning and Compliance for Tax-Exempt Organizations*, 331. Hoboken, NJ: John Wiley & Sons, 2004.

Hopkins, Bruce R., and Jody Blazek, "Distributing, Rather than Selling, Property." In *Private Foundations, Tax Law and Compliance*, 2nd ed., 359–361. Hoboken, NJ: John Wiley & Sons, 2003-2008.

### **International Grantmaking**

Bjorklund, Victoria B., and Jennifer I. Reynoso. *How a Private Foundation Can Use 'Friends of Organizations*. United States International Grantmaking. <http://www.usig.org/>.

*International Grantmaking Basics*. United States International Grantmaking.  
<http://www.usig.org/>.

## **Program Review and Evaluation**

Rutnik, Tracey A., and Marty Campbell. *When and How to Use External Evaluators*. Baltimore, MD: Association of Baltimore Grantmakers, 2002.

## **Private Foundation Rules and Artist-Endowed Foundations**

Fremont-Smith, Marion R. "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Hill, Frances R. "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

## **Private Foundation Law**

Fremont-Smith, Marion R. *Governing Nonprofit Organizations, Federal and State Law and Regulation*. Cambridge, MA: Belknap Press of Harvard University Press, 2004.

Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008.

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<sup>1</sup> Bruce R. Hopkins and Jody Blazek, "Distributing, Rather than Selling, Property," in *Private Foundations, Tax Law and Compliance*, 2nd ed. (Hoboken, NJ: John Wiley & Sons, 2003), 359–361.

<sup>2</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).

<sup>3</sup> Marion Fremont-Smith, *Governing Nonprofit Organizations, Federal and State Law and Regulation* (Cambridge, MA: Belknap Press of Harvard University Press, 2004).

<sup>4</sup> Marie C. Malaro, *A Legal Primer on Managing Museum Collections* (Washington, DC: Smithsonian Books, 1998), 377–378.

<sup>5</sup> Association of Art Museum Directors, "Procedures for Acquisition Made through Gift and Bequest," in *Professional Practices in Art Museums* (New York: Association of Art Museum Directors, 2001).

<sup>6</sup> *International Grantmaking Basics*, United States International Grantmaking, <http://www.usig.org/>.

<sup>7</sup> Fremont-Smith, "Federal and State Laws".

<sup>8</sup> Frances R. Hill, "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).

<sup>9</sup> Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* (Valhalla, NY: Thomson/RIA, 2002–2008), 11-78–11-93,

<sup>10</sup> Fremont-Smith, "Federal and State Laws".

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<sup>11</sup> Ibid.

<sup>12</sup> Jane C. Nober, *Legal Basics: What Every Foundation Leader Should Know* (Washington, DC: Council on Foundations, 2003).

<sup>13</sup> Tracey A. Rutnik and Marty Campbell. *When and How to Use External Evaluators*. (Baltimore, MD: Association of Baltimore Area Grantmakers, 2002.)





## 8.2 CONSIDERATIONS IN PLANNING AND CONDUCTING DIRECT CHARITABLE ACTIVITIES

A direct charitable activity is an activity undertaken by a foundation itself as a direct expenditure in furtherance of its charitable purpose, as opposed to making a grant to another organization.<sup>1</sup> Expenditures to conduct direct charitable activities generally are qualifying distributions for the purposes of fulfilling a foundation's required charitable disbursements. In contrast, neither investment activities nor acquisition and maintenance of assets held for income purposes are direct charitable activities, even though these generate funds to support charitable programs.<sup>2</sup> Numerous examples of artist-endowed foundations conducting direct charitable activities are highlighted in **4. Field Charitable Activity**.

Direct charitable activities have been associated primarily with private operating foundations. As noted in **7. Forming, Sustaining, and Terminating Foundations**, operating foundations are required to meet certain financial benchmarks intended to ensure that they expend their income primarily on the direct conduct of activities constituting their charitable purpose and, as one among three additional measures of choice, that they devote their assets substantially to use in their exempt activities.<sup>3</sup> More recently, however, research in the greater foundation universe has confirmed a strong trend toward conducting direct charitable activities among nonoperating foundations.<sup>4</sup>

Two of the findings of the Aspen Institute's National Study of Artist-Endowed Foundations (Study) point to an extensive involvement in direct charitable activities among artist-endowed foundations generally. The first finding is that artist-endowed foundations with legal status as operating foundations, although decidedly in the minority, are increasing in number at a greater pace than those whose legal status is that of a nonoperating foundation. The second finding is that nonoperating artist-endowed foundations in aggregate classify almost 40 percent of all assets as charitable-use assets.

Charitable-use assets, or exempt purpose assets, are defined as assets used or held for use in the direct active conduct of a foundation's charitable program. As such, these assets are not incorporated in calculating the foundation's annual payout or charitable distribution requirement.<sup>5</sup> Although there is not a requirement that assets used in direct charitable activities be classified as charitable-use assets, those foundations that do classify assets as charitable-use assets (by excluding them from net noncharitable-use assets on which payout is calculated) by definition will be engaged in conducting direct charitable activities in the utilization of those assets, or are obligated to do so.

Direct charitable activities are not limited to activities involving charitable-use assets. If these further a foundation's charitable purpose, such activities as conducting conferences and seminars, undertaking and disseminating research, presenting public exhibitions and programs, operating educational programs, and providing technical assistance can be direct charitable activities. However, among artist-endowed foundations, most direct charitable activities do pertain to charitable-use assets.

For the purposes of this section of the Study report, direct charitable activities conducted by artist-endowed foundations are considered in light of the type of asset that is involved in the activity: (1) archives; (2) art collections; (3) copyrights and intellectual property; (4) artists' oeuvres, as they are engaged in catalogues raisonnés and authentication; and (5) real property, meaning facilities and land. The following chapters discuss each type of asset, the kinds of direct charitable activities in which it is used, and considerations—particularly for new artist-endowed foundations—in undertaking these activities.

Finally, activities involving the types of assets discussed here are not always direct charitable activities (for example, if the assets are held for income purposes, as might be the case for an art inventory intended exclusively for sale or a facility used exclusively as a rental property). In that case, expenditures for the related activities would not count as qualifying distributions toward the foundation's charitable distribution requirement. Nonetheless, the discussion presented here of practical considerations involved in managing such assets will be useful in many respects.

In all likelihood, persons with specific interests will read the chapter that addresses their topic of interest and not the section as a whole. For that reason, each chapter separately summarizes the ways in which private foundation law potentially influences considerations in planning and conducting the respective direct charitable activities. These summaries should be read in combination with briefing papers and references as cited. As for the Study report as a whole, this discussion of considerations in practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

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<sup>1</sup> Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* (Valhalla, NY: Thomas/RIA, 2002–2008), 11-28–11-30.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., 9-6–9-10.

<sup>4</sup> Loren Renz and Rachel Elias, *More than Grantmaking, A First Look at Foundations' Direct Charitable Activities* (New York: Foundation Center, 2007).

<sup>5</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 11-10–11-11.

## 8.2.1 Archives

In the greater scheme of things, artist-endowed foundations appear to be minor players among all entities that own artists' archives. Many artists' archives can be found at institutional repositories, such as public archives, libraries, museums, research institutes, and university collections. Beyond this, it is reasonable to assume that the great majority of archives are owned privately by artists' heirs and beneficiaries. Among artist-endowed foundations overall, most do not own their artist-donors' archives. Nonetheless, as new artist-endowed foundations increasingly incorporate a study and education mission, the number involved in administration of their artist-donors' archives, whether over the long-term or only initially in preparation for further disposition, is likely to grow.

The decision for a foundation to own and administer an artist's archive involves a variety of choices. Considerations include the relationship of the archive to the foundation's charitable purpose, the optimal location for scholarly access to the archive, the nature of archival materials as these define special storage and maintenance requirements, and the type of professional expertise necessary to conduct direct charitable activities involving the archive. Most fundamental, however, are institutional considerations about the level of resources that will be available to a foundation to support administration of the archive consistent with professional standards and the duty of care to which its trustees, directors, and officers are obligated.

This chapter reviews foundation practice in owning artists' archives and conducting direct charitable activities involving archival collections, emphasizing considerations pertinent to new artist-endowed foundations. Examples of artist-endowed foundations conducting these types of activities are highlighted in **4. Field Charitable Activity**. A variety of publications and technical resources are available concerning the nuts and bolts and best practices of owning, organizing, and managing archives. A selection of these is featured at the close of this chapter, along with briefing papers prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study) that pertain to this topic.

Foundation trustees, directors, and officers preparing plans to own and operate an artist's archive should do so with the guidance of legal advisors expert in the laws and regulations that apply to private foundations active in this area. The following summary information highlights key aspects of the rules generally as an orientation to practical considerations. As for the Study report as a whole, this discussion of considerations in practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

## Artists' Archives: Perspectives

Among artists, scholars, and educators, a great deal of interest exists in the matter of artists' archives and their disposition—how they are to be owned, cared for, and made available appropriately for study, research, and presentation. Artists' papers and documentary materials are invaluable as primary sources that illuminate artists' oeuvres. Access to primary material documenting an artist's creative development and achievements is essential to scholarship by which cultural knowledge and artistic practice are disseminated.

Reflecting this importance, the artist's archive—and in particular, access to the artist's archive—is addressed by many of the briefing papers prepared for the Study; these are listed at the close of this chapter. Among the authors, Tom McNulty provides a general tutorial on artists' archives and libraries, including questions foundation managers should ask themselves to determine the most appropriate disposition for archival materials.<sup>1</sup> James T. Demettrion and Lowery Stokes Sims,<sup>2</sup> as well as Robert Storr, underscore the importance of artists' archives held by foundations as resources enriching presentation and reception of exhibited works. Joan Marter discusses the ways an artist's historic standing can be shaped by scholars' access to the artist's archives.<sup>3</sup>

Robert Storr also considers the need from a foundation's inception for professional expertise in handling archival materials and determining their disposition. More philosophically, he defines unfettered access to artists' archives and works as the single most important function to fulfill a foundation's public benefit obligation, in his opinion.<sup>4</sup> Joseph L. Sax asks whether interested parties' control of a foundation that owns an artist's archive leads to conflicts with its public benefit obligation.<sup>5</sup> Marion R. Fremont-Smith considers the legal framework for foundations' relationships to artists' heirs and beneficiaries in owning artists' archives and works.<sup>6</sup> Frances R. Hill notes that a foundation undermines its claim to public benefit if access to the artist's archive is conditioned on the private purposes of foundation insiders.<sup>7</sup>

## The Varieties of Archives

In some instances, the term *archive* is used to describe a representative body of work by an artist. In most cases, however, artist-endowed foundations describe the artist's finished works they own as an art collection or art inventory, distinct from the artist's archive, which holds documentary materials, sometimes including unfinished works. An artists' archive can comprise a wide range of materials, and the nature of these will determine the archive's potential role in scholarly and educational activities. What an archive holds depends on a variety of factors, a few of which include the nature of an artist's creative practice, the various media in which an artist worked, an artist's own documentation preferences, and the length of an artist's career.

At the most basic, an artist's archive encompasses an artist's documentary materials accumulated over a creative lifetime. Sometimes referred to as the artist's *papers*, these materials might include personal and professional correspondence; personal and professional financial, business, and tax records; legal documents; writings, texts, manuscripts, and proofs; diaries, notebooks, and scrapbooks; photographs, and audio and film recordings; bibliographic materials; exhibition publications, catalogs, reviews, and critical documentation; and the artist's library, particularly if annotated. In some cases, family memorabilia, as well as the detritus of daily life, are included.

Beyond an artist's papers, an archive also might encompass art matter—studies, sketchbooks, plans, renderings, maquettes, molds, unfinished works, artists' proofs, photographers' negatives, work prints, and such. Source materials, sometimes extensive, and associated collections assembled for study and inspiration might also be present. An archive might also incorporate the artist's *studio archive*—studio materials, supplies, equipment, and furnishings, as well as studio records.

Practice in categorizing materials varies. For example, some foundations separate art matter from the papers and documentary materials so that it can be assigned to the art collection. Archives are not static, and in many cases continue to be developed with the addition of new materials and collections that are acquired as well as contributed. Practice in valuing artists' archives also varies. Although there are exceptions, material held in an archive for the most part has worth for its historic and scholarly character, which for most artists is likely to be limited in contrast to fair market value that might be relevant to collections of finished artworks.

## **Options in Placement of Artists' Archives**

Of artist-endowed foundations with assets of \$1 million and above, more than one-third own artists' archives. The majority of these operates a study center or has provisions to make the archives available for research and study. By and large, however, artist-endowed foundations do not own their artists' archives. Among this greater number, several patterns are evident in placement of artists' archives. As one broad observation, the Archives of American Art, Smithsonian Institution, is the repository for archives of one-third of the deceased artists whose archives are not owned by their foundations. Other patterns in disposition of archives can be observed by foundation function.

In the cases of some artist-endowed foundations that focus primarily on grantmaking and do not conduct scholarly activities, artists' archives have been donated to institutional repositories where the materials are administered as scholarly and educational resources. For example, the archive of George Segal was donated to Princeton University and that of Herb Block to the Library of Congress. The papers of Martin Wong were donated to Fales Library and Special Collections of New York University and those of Hans Hofmann to the

Archives of American Art. Artists' archives also have been distributed to dedicated museums or to more broadly geared museums as components of special collections. For example, their respective foundations placed the artists' archives with the Andy Warhol Museum, and with the William Glackens Collection of the Museum of Art Fort Lauderdale, Nova Southeastern University.

Distribution of artists' archives is not exclusive to grantmaking foundations. For example, the papers of Saul Steinberg and Gaston Lachaise are owned by Yale University. Both foundations own and exhibit collections of their artists' works. The papers of Jacob and Gwendolyn Knight Lawrence and Leon Polk Smith are owned by the Archives of American Art. The former foundation maintains an online resource center about the two artists and their works, and the latter foundation exhibits a collection of the artist's works. The Sam Francis Papers are owned by the Getty Research Institute. The Sam Francis Foundation owns a collection of the artist's works and conducts scholarly research. The Frederick Sommer archive is owned by the Center for Creative Photography, University of Arizona. The Frederick and Frances Sommer Foundation exhibits a collection of the artist's works and operates his former home and studio as a study center and residency site.

In contrast, other foundations' missions incorporate functions as study centers or exhibition collections and, as a dimension of this, involve ownership and operation of the artists' archives. Among this type of foundation are the Willem de Kooning Foundation, Roy Lichtenstein Foundation, the Barnett Newman Foundation, and the Niki (de Saint Phalle) Charitable Art Foundation. Even among this type of foundation, however, an artist's archive might not be comprehensive. For example, artists might place collections of their papers at different institutions over the course of a career and only in later years decide to create a foundation and include documentary materials in the bequest to their foundation. Although the Josef and Anni Albers Foundation owns a substantial archive for both artists, some of Josef Albers' papers and related materials are held by Yale University, where he taught for a number of years prior to deciding to form a foundation.

Finally, although ownership of an artist's archive might be a central and ongoing aspect of a foundation's function, it also can be a finite project to organize a scholarly resource that will be housed in perpetuity by another entity. The Georgia O'Keeffe Foundation was created as a time-limited foundation and concluded its activities 20 years after the artist's death, having completed a set of tasks that included processing and cataloging her archive and library. These were distributed to the Georgia O'Keeffe Study Center of the Georgia O'Keeffe Museum.

An artist's lifetime foundation—one whose artist-donor is living—would not be involved in owning or managing the artist's archive. Owning or administering an artist's archive during the artist's lifetime might inadvertently breach laws prohibiting private benefit and self-

dealing if a foundation's activities of this sort served to promote the artist's career or relieved the artist of costs to maintain and administer the archive, in either case benefiting the artist economically.<sup>8</sup>

## **Varieties of Direct Charitable Activities Involving Artists' Archives**

The various types of direct charitable activities conducted by artist-endowed foundations, many of these involving artists' archives, are discussed in **4. Field Charitable Activity**. These include preparation, maintenance, and development of archives themselves; operation of study centers as resources for scholars, curators, educators, artists, and students with study purposes; development of content-rich websites featuring archival materials; curating touring exhibitions; preparation of scholarly monographs; publication of artists' texts and books; scholarly research initiatives, including oral histories, catalogues raisonnés, and art authentication; technical support for art conservation efforts; operation of internship programs involving students in archival research; and professional convenings and symposia informed by archival research on key issues in fields such as art history scholarship, education, and conservation.

## **Summary of Rules for Ownership of Artists' Archives**

Briefing papers prepared for the Study discuss many practical considerations, philosophic views, and regulatory matters concerning ownership of artists' archives by artist-endowed foundations. It is useful to summarize the key points about ownership and administration of an artist's archive by a private foundation as they are informed potentially by private foundation law. These rules differ significantly from ownership by private individuals and entities, and also are distinct in many cases from ownership by public charities, which is the status of many museums and libraries. The following points are applicable generally to private foundations administering artists' archives. As fiduciaries, foundation trustees, directors, and officers are responsible for knowing these rules, although they also should consult with legal counsel expert in private foundation law on the details of their particular circumstance.

### **Archive Basics**

An artist's archive owned by an artist-endowed foundation must be administered so that it furthers the foundation's charitable purpose, benefits a charitable class that is broadly public, and does not provide a private benefit to particular individuals or limited groups.<sup>9</sup>

An artist's archive owned by a foundation cannot be managed physically as it had been by the artist. An archive during the artist's lifetime often is not fully insured and typically is held in a physical space that is not fully secured or climate controlled. As fiduciaries, foundation trustees, directors, and officers are bound by the duty of care to protect a



foundation's assets; that duty sets a higher standard than what applies to the artist or to other private owners.<sup>10</sup>

An artist's archive classified as a charitable-use asset must be used or held for use in direct charitable activities supporting the foundation's charitable purpose.<sup>11</sup> Presumably this is as a scholarly resource, so the archive should be processed or prepared sufficiently so that scholars and others can use it for research purposes. Likewise, it should be accessible so that it is available for use.

A foundation cannot limit access to its archive based on the private purposes of its insiders.<sup>12</sup> Access policies should be institutional, based on objective guidelines, and applied equitably. As a matter of best practice, these should be published on the foundation's website.

Nonetheless, the artist or any other person donating archival materials may mandate closed or limited access for a specified period to particular materials (for example, those that involve the privacy or confidentiality of living persons during their lifetimes).<sup>13</sup> Such restrictions must be implemented equitably, consistent with the access policy.

In line with the private benefit prohibition that is a fundamental criterion for tax exemption, access to an archive owned by a private foundation cannot be made available to one individual exclusively or on terms more favorable than those that apply to other individuals.<sup>14</sup>

## **Archives and Insiders**

A private foundation cannot expend its resources to house, insure, maintain, and operate an artist's archive that is owned by a foundation insider unless the archive has been pledged irrevocably to the foundation.<sup>15</sup> Whether directly or indirectly through others, a private foundation cannot trade or purchase archival holdings from its insiders, nor can it trade, sell, or give archival holdings to its insiders.<sup>16</sup>

An archive owned by a foundation may be located in premises owned by a foundation insider as long as that location meets required standards and does not impede access. However, the foundation cannot pay rent or reimburse expenses to the insider, nor can it expend its funds to improve the facility unless the property has been pledged irrevocably to the foundation.<sup>17</sup>

In summary, to fulfill the duty of care and to meet the charitable purpose and charitable-use requirements, private foundation ownership of an artist's archive will involve expenses and procedures for which private individuals or entities are not obligated. Likewise, to comply with the prohibitions on private benefit and self-dealing, foundation ownership of an archive necessarily will eliminate the personal prerogative of foundation insiders in the operation of the archive.

Finally, it might be the case that over time a foundation is not able to meet these criteria in maintaining and operating an archive that it owns. If so, the fiduciary responsibility of its trustees, directors, and officers generally obligates them to place the archive with an appropriate organization where it will be operated in fulfillment of its intended role as a scholarly and cultural resource. How private foundations utilize their assets for public benefit purposes is regulated by the Internal Revenue Service (IRS) and state attorneys general, and in some cases by local courts supervising administration of estates. Foundations planning the charitable distribution of a major asset will develop their plans with the guidance of legal advisors expert in these rules.

## **Standards for Administration of Archives**

Beyond law and regulations applicable to private foundations as these inform ownership and administration of artists' archives, the archival field nationally operates based on a code of ethics and professional practice that informs the work of archivists and persons who steward archives.<sup>18</sup> By definition of the profession, many persons who fulfill the role of archivist work in organizations that own an archive, but are not archival institutions exclusively. Artist-endowed foundations that own archives generally are such entities, and the best practice standards of the field apply to them.

Among these standards is the responsibility to make available original research materials on equal terms of access, in accordance with a clearly defined and publicized institutional access policy, and to not deny access to materials or grant privileged or exclusive access to any researcher.<sup>19</sup> In accordance with this responsibility, professional standards for art historians cite as improper professional practice any request to reserve exclusive research or publication rights from an institution.<sup>20</sup> Scholars employed by the archive-owning institution are included in this standard.

Also cited among best practice standards for archives are the responsibilities to:

- protect confidentiality of private individuals consistent with lawful restrictions on access to materials;
- protect the physical security and integrity of collections;
- publish notice of an archive's existence and the status of its preparation;
- disseminate policies governing access and use of collections; and
- apply limitations on access to unprocessed materials consistently and equally to all users.

In line with private foundation rules and best practice standards of the field, an artist-endowed foundation may limit access to its archive according to an institutional policy, adopted by its board, which must be applied consistently to all researchers. Examples include:

- a policy might stipulate appropriately that the archive is accessible during specified hours;
- a defined procedure is used to request access;
- access to unprocessed materials is limited or closed;
- access to fragile materials or highly valuable materials is limited to a particular location or time period;
- access to materials bearing on the privacy of living persons is closed during the lifetimes of those individuals or for a specified period; and
- access will be closed temporarily in the event the foundation implements necessary administrative projects without disruption, such as re-cataloguing or digitization.

Likewise, a policy might stipulate that access will be denied to individuals who have not complied with the policy previously, whose use endangers the physical security of the collection, or whose activities disrupt other users. As above, these provisions must be applied consistently and equally to all users.

## Summary of Copyright Issues Related to Archives

**8.2.3 Copyrights and Intellectual Property** addresses the broad topic of practice among artist-endowed foundations owning and administering artists' copyrights and intellectual properties. Some aspects of copyright administration relate directly to administration of an artist's archive and merit comment here. A chief example is requests by researchers for permission to publish texts or visual materials held in an archive for which a foundation holds the rights, with publication intended for scholarly and academic purposes. Scholarly publication typically includes learned journals or educational or cultural books with limited press runs, in contrast to commercial publications.<sup>21</sup> It is useful to summarize the basics about administration of copyrights by private foundations as they pertain to this area and are informed potentially by private foundation law.

In brief, rules that apply to administration of archives owned by private foundations also bear on administration of copyrights for scholarly and academic purposes. These rules, again, differ significantly from ownership by private individuals and entities, as well as being distinct in many cases from ownership by public charities, which is the status of most art museums. The following points are applicable generally to private foundations administering copyrights for scholarly and academic purposes. As before, foundation trustees, directors, and officers are responsible as fiduciaries for knowing these rules, although they also should consult with legal counsel expert in private foundation law on the details of their particular circumstance.

## **Archive-Related Copyright Basics**

Copyrights owned by a private foundation must be administered to further the foundation's charitable purpose, benefit a charitable class that is broadly public, and not provide private benefit to particular individuals or limited groups.<sup>22</sup>

Copyright permissions by a foundation cannot be granted based on the private purposes of its insiders.<sup>23</sup> Permission to publish text and images should be determined according to an institutional policy, based on objective criteria, adopted by the foundation's board, and applied equitably to all scholars' requests. As a matter of best practice, these criteria should be published on the foundation's website. Appropriate criteria could include factual correctness for texts, compliance with guidelines for captions and attribution, and image integrity. An example of an appropriate procedure is a requirement for pre-publication review to confirm compliance with guidelines.

In line with the private benefit prohibition that is a fundamental criterion for tax exemption, a private foundation cannot authorize publication by one scholar exclusively or on terms more favorable than those applied to other scholars.<sup>24</sup>

As is the case for all copyright owners, a private foundation's exclusive rights are limited by the doctrine of fair use, described generally as pertaining to use for limited, noncommercial purposes, such as criticism, comment, news reporting, teaching, scholarship, or research.<sup>25</sup>

## **Copyrights and Insiders**

A private foundation cannot administer copyrights owned by a foundation insider unless the copyrights have been pledged irrevocably to the foundation.<sup>26</sup> In addition, payment of copyright fees by a foundation to its insiders, or for their benefit, constitutes self-dealing as well as inurement, this last being a basis for revocation of exemption.<sup>27</sup> Likewise, a foundation cannot license its intellectual property to insiders or for their benefit, or permit its intellectual property to be used at no cost by insiders or for their benefit.<sup>28</sup>

In formulating institutional guidelines to administer copyright permissions, foundations should confer with legal advisors who are expert in private foundation law, as well as those who are knowledgeable about intellectual property law.

## **Effective Practice Enhancing Foundations' Educational and Scholarly Purposes**

A variety of effective practices can be identified in the greater archival field and among artist-endowed foundations that contribute to the important goal of optimizing the scholarly and educational role of archival collections. A selection of these practices includes:

- guidance by a professional archivist when determining the disposition of an artist's archive and proper handling of archival materials;
- prompt website publication about an archive's existence, the status of its preparation, and how scholars are to submit inquiries about that status;
- adoption and annual review of an institutional access policy and an institutional rights and reproduction policy by the foundation's board, as well as website publication of both policies;
- planning and organization of archives by credentialed professionals to meet professional standards;
- appropriate facilities, procedures, and insurance to house, secure, and protect archival collections;
- review of archive-related internal controls during the foundation's annual audit;
- website publication of archival finding aids and lists of related, external collections;
- searchable access to archival databases;
- digital documentation of archival materials for website publication and dissemination to external platforms;
- appropriate physical provisions for use of archives, including dedicated work space for researchers separate from archival storage;
- stipends to assist researchers working with archives and fellowships to assist scholars with long-term research projects, awarded objectively by committee;
- internship programs educating students in archival research and archival management practice;
- facilitated exchange of curricula among educators who have developed teaching resources based on archival materials; and
- symposia and convenings addressing research opportunities and issues related to archival holdings.

## **Owning Artists' Archives: Observations on Practice**

While a wide variety of artist-endowed foundations—including those functioning as grantmakers, study centers and exhibition collections, museums, and residency sites—do not own an archival collection, some artist-endowed foundations have focused on owning and developing artists' archives as an aspect of their direct charitable activities. Two examples of these are the Josef and Anni Albers Foundation<sup>29</sup> and the Dedalus Foundation

(Robert Motherwell).<sup>30</sup> A few observations about these two foundations are useful in considering the range of capacities and scale of resources required to administer artist's archives and conduct related direct charitable activities.

The foundations differ in their institutional capacities, with total assets reported for 2005 of \$19 million (Albers) and \$52 million (Dedalus), and total charitable purpose disbursements for the same year of \$1.6 million and \$2.5 million, respectively.<sup>31</sup> Both the Albers Foundation (Ruling Year 1972) and the Dedalus Foundation (Ruling Year 1983) combine a study center, including an archive and library, and an exhibition collection. Each conducts grantmaking activities, the Albers Foundation on a small-scale, discretionary basis and the Dedalus Foundation on a programmatic basis. The Dedalus Foundation awards individual fellowships in art history, criticism, and fine arts. The Albers Foundation hosts visiting artists. Both foundations own archival materials in multiple formats and media, as well as the respective artists' studio archive. The foundations occupy purpose-built facilities outfitted for security, fire, and climate control and incorporating work areas for researchers. Development of the Albers Foundation's owned facility was funded by external sources; improvement of the Dedalus Foundation's leased facility was self-funded.

Professionals with art historical credentials staff both foundations. The Dedalus Foundation employs a staff archivist, while the Albers Foundation retains an archivist consultant on a project basis in combination with curatorial and collection management staff. The Albers Foundation financed the processing of its archive with grants from external sources, while the Dedalus Foundation drew on its operating budget to organize its archive. Both foundations have developed content-rich websites featuring archival finding aids, digitized images of archival materials, and information on related collections held by other repositories. The Albers Foundation is among the first artist-endowed foundations to contribute an image collection to ARTstor, the online digital library of art images used by scholars, curators, educators, and students for research and pedagogic purposes.

The archives are used in conducting the foundations' direct charitable activities, such as publications, exhibitions, and preparation of catalogues raisonnés. They also are consulted by curators and independent scholars for projects not affiliated with the foundations themselves. Each foundation's procedure to request access to the archive, along with rights and reproductions guidelines, is featured on its website. The Dedalus Foundation supports a fellowship in management of artists' archives at the Museum of Modern Art, which holds related collections in its archive. Both foundations host student interns who are involved in research projects using the foundations' archives.

Two publication initiatives highlight activities drawing on the foundations' archival collections. The first involves use of study materials produced by Josef Albers's students, along with the artist's own texts, color experiments, and studies, for a publication examining

the evolution of the artist's influential pedagogic practice over four decades.<sup>32</sup> The second involves use of the artist's notebooks, sketchbooks, letters, interviews, and essays for a new edition of Robert Motherwell's writings as an influential critic and theorist of modern art.<sup>33</sup>

### **Alternatives to Archive Ownership: Observations on Practice**

In contrast to the Albers and the Dedalus Foundations, some artist-endowed foundations, not structured to engage directly in scholarship, pursue development of the archive collaboratively with a separate organization, typically a museum or university. A number of examples exist, but among the longest-standing initiatives of this type is the Charles E. Burchfield Foundation (Ruling Year 1967).

The Charles E. Burchfield Foundation reported assets of \$2 million and charitable purpose disbursements of \$100,000 for 2005.<sup>34</sup> The Foundation operates a grantmaking program assisting arts, education, and community betterment purposes broadly, primarily in western New York State where the artist lived for many years. Over more than four decades, the Foundation has supported development of the artist's archive by the Burchfield Penney Art Center, Buffalo State College, which now holds an extensive collection of the artist's papers, journals, and art matter, as well as his studio archive. A variety of projects have received the foundation's occasional support and attracted funding from an array of other donors. These include publication and digitization of the artist's journals, use of the archive's holdings for scholarly publications and exhibitions prepared by a variety of institutions and scholars, and presentation of the artist's studio within an interpretive display exploring his studio practice.<sup>35</sup>

Another long-standing effort is that of Ezra Jack Keats Foundation (Ruling Year 1970), which reported assets of \$5 million and charitable disbursements of \$150,000 in 2005.<sup>36</sup> The Foundation operates a program of grants to support children's literacy projects at public schools and libraries nationwide. Over several decades, it has facilitated development of the extensive Ezra Jack Keats Collection held at the de Grummond Children's Literature Collection, the University of Southern Mississippi, including assistance to scholarly research, publication, and exhibition initiatives drawing on the archive's holdings.<sup>37</sup>

## **The Appropriate Role for an Artist-Endowed Foundation**

By all accounts, disposition of an artist's archive should aim to achieve the greatest possible accessibility, which may or may not involve an artist-endowed foundation as the owner of the archive. The duties of foundation fiduciaries and the public benefit obligations and private benefit prohibitions of private foundations together define the role of artist-endowed foundations as owners and administrators of archives. Likewise, operation of archives takes place within the framework of recognized professional standards for the archival field. For those artists or their heirs and beneficiaries who are eager to see an artist's archive developed as a resource to disseminate cultural knowledge and artistic practice, a private foundation might be one option, provided there are sufficient resources to properly care for and appropriately administer the archive.

Among the growing number of artist-endowed foundations, however, will be many that are modest in scale and limited in resources, and as such, not positioned to support costs involved in preparing and operating an archive according to professional standards. Given this, it is important to recognize that foundations can realize the potential of an artist's archive by working in partnership with an institution that has sufficient capacity and will bring specialized expertise to bear, preferably in combination with complementary holdings that enhance opportunities for scholarship. In all cases, a priority should be placed on optimal access to the artist's archive and to ensuring conditions that will stimulate robust, independent scholarship—a goal that serves the public benefit and is essential to illuminating an artist's position in art history.



## **Resources: Archives**

### **Archive Fundamentals**

Hunter, Gregory S. *Developing and Maintaining Practical Archives*, 2nd ed. New York: Neal-Schuman Publishers, 2003.

Mackay, Nancy. *Curating Oral Histories: From Interview to Archive*. Walnut Creek, CA: Left Coast Press, 2006.

McNulty, Tom. "Artist-Endowed Foundations Stewarding Artists' Archives and Libraries: The Importance of Standards and Access." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Nordström, Alison D. "Artists and Archives: Making the Match." In *A Visual Artist's Guide to Estate Planning: The 2008 Supplement Update*. Edited by Barbara Hofmann, 119–122. Colorado Springs, CO: Marie Walsh Sharpe Art Foundation, 2008.

### **Best Practice Guidelines**

#### **Access**

ACRL/SAA *Joint Statement on Access to Research Materials in Archives and Special Collection Libraries*. American Library Association: Association of College and Research Libraries and Society of American Archivists. <http://www.ala.org/>.

#### **Ethics**

*Code of Ethics for Archivists*. Society of American Archivists. <http://www.archivists.org/>.

"Code of Ethics for Art Historians and Guidelines for the Professional Practice of Art History." Standards and Guidelines. College Art Association. Last modified January 1995. <http://www.collegeart.org/guidelines/histethics.html>.

### **Internship Programs**

Dubberly, Sara. *Standards and Guidelines for Museum Internships*. Washington, DC: American Association of Museums, 1993.

### **Scholarly Permissions**

Bober, Phyllis Prayer. "Guidelines for Fair Use of Visual Materials in Scholarly Publication and Research." In *Copyrights and Permissions in Scholarly and Educational Publishing*. Standards and Guidelines. College Art Association. <http://www.collegeart.org/guidelines/reprorights.html>.

## **Security**

*Guidelines Regarding Security and Theft in Special Collections.* Rare Books and Manuscripts Section, American Library Association: Association of College and Research Libraries. <http://www.ala.org/>.

## **Best Practice Perspectives: Artist-Endowed Foundations and Archives**

Demettrion, James T., and Lowery Stokes Sims. "Artist-Endowed Foundations and Museums: Observations on the Relationship." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Marter, Joan. "Artist-Endowed Foundations: Archives, Access, and Scholarship." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Sax, Joseph L. "Public Benefit Obligations and Legacy Stewardship Activities of Artist-Endowed Foundations: Are They in Conflict?" In *Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Storr, Robert. "Toward a Public Library of American Culture: Reflections on the Centrality of Art and Importance of Access in Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

## **Private Foundation Rules and Artist-Endowed Foundations**

Fremont-Smith, Marion R. "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Hill, Frances R. "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

## **Private Foundation Law**

Fremont-Smith, Marion R. *Governing Nonprofit Organizations, Federal and State Law and Regulation*. Cambridge, MA: Belknap Press of Harvard University Press, 2004.

Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008.

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- <sup>1</sup> Tom McNulty, "Artist-Endowed Foundations, Artists' Archives, and Libraries: The Importance of Standards and Access," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>2</sup> James T. Demetrion and Lowery Stokes Sims, "Artist-Endowed Foundations and Museums: Observations on the Relationship," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>3</sup> Joan Marter, "Artist-Endowed Foundations: Archives, Access, and Scholarship," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>4</sup> Robert Storr, "Toward a Public Library of American Culture: Reflections on the Centrality of Art and Importance of Access in Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>5</sup> Joseph L. Sax, "Public Benefit Obligations and Legacy Stewardship of Artist-Endowed Foundations: Are They in Conflict?" in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>6</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>7</sup> Frances R. Hill, "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>8</sup> Fremont-Smith, "Federal and State Laws."
- <sup>9</sup> Hill, "Public Benefit."
- <sup>10</sup> Marion R. Fremont-Smith, "Fiduciary Duties: Duty of Care," in *Governing Nonprofit Organizations, Federal and State Law and Regulation* (Cambridge, MA: Belknap Press of Harvard University Press), 199–215.
- <sup>11</sup> Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* (Valhalla, NY: Thomson/RIA, 2002–2008), 11-9–11-10.
- <sup>12</sup> Hill, "Public Benefit."
- <sup>13</sup> Menzi L. Berndt-Klot, *Navigating Legal Issues in Archives* (Chicago: Society of American Archivists, 2008), 49–51.
- <sup>14</sup> Hill, "Public Benefit."
- <sup>15</sup> Fremont-Smith, "Federal and State Laws."
- <sup>16</sup> Ibid.
- <sup>17</sup> Ibid.
- <sup>18</sup> *Code of Ethics for Archivists*, Society of American Archivists, <http://www.archivists.org/>.
- <sup>19</sup> ACRL/SSA Joint Statement on Access to Research Materials in Archives and Special Collections Libraries, American Library Association: Association of College and Research Libraries and Society of American Archivists, <http://www.ala.org/>.
- <sup>20</sup> *Code of Ethics for Art Historians and Guidelines for the Professional Practice of Art History*, College Art Association, <http://www.collegeart.org/>.
- <sup>21</sup> *Guidelines for Fair Use of Visual Materials in Scholarly Publication and Research*, College Art Association, <http://www.collegeart.org/>.
- <sup>22</sup> Hill, "Public Benefit."
- <sup>23</sup> Ibid.
- <sup>24</sup> Ibid.
- <sup>25</sup> *Copyright: Fair Use*, United States Copyright Office, Library of Congress, <http://www.copyright.gov/>.
- <sup>26</sup> Fremont-Smith, "Federal and State Laws."
- <sup>27</sup> Ibid.

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<sup>28</sup> Ibid.

<sup>29</sup> The Josef and Anni Albers Foundation, <http://www.albersfoundation.org/>.

<sup>30</sup> The Dedalus Foundation, <http://www.dedalusfoundation.org/>.

<sup>31</sup> Summary financial data are cited broadly in order to indicate the general scale of activities; data are drawn from foundations' annual information returns (Forms 990-PF), available online at GuideStar, <http://www.guidestar.org/>.

<sup>32</sup> Frederick A. Horowitz and Brenda Danilowitz, *Josef Albers: To Open Eyes: The Bauhaus, Black Mountain College and Yale* (London: Phaidon Press, 2006).

<sup>33</sup> Robert Motherwell, *The Writings of Robert Motherwell*, ed. Dore Ashton and Joan Banach (Berkeley: University of California Press, 2007).

<sup>34</sup> Summary financial data are cited broadly in order to indicate the general scale of activities; data are drawn from annual information returns (Forms 990-PF), available online at GuideStar, <http://www.guidestar.org/>.

<sup>35</sup> Burchfield Penney Art Center, Buffalo State College, <http://www.burchfieldpenney.org/>.

<sup>36</sup> Summary financial data are cited broadly in order to indicate the general scale of activities; data are drawn from annual information returns (Forms 990-PF) available online at GuideStar, <http://www.guidestar.org/>.

<sup>37</sup> University of Southern Mississippi, de Grummond Children's Literature Collection, <http://www.lib.usm.edu/~degrum/>.



## 8.2.2 Art Collections

The body of artwork that remains in their possession is a significant focus for many artists as they prepare their estate plans. As discussed in **7. Forming, Sustaining, and Terminating Foundations**, there are a variety of options for disposition of art collections under artists' estate plans, including as noncharitable bequests to benefit private individuals and as charitable bequests to benefit tax-exempt, charitable organizations. This latter option might include bequests to established public charities (such as museums and universities) or for those artists with sufficient resources, it might include a bequest to a private foundation created by the artist during his or her lifetime or formed posthumously under the artist's estate plan.

The many considerations in establishing a private foundation that will be viable and able to realize an artist's charitable intentions are discussed in **7. Forming, Sustaining, and Terminating Foundations**. In practical terms, the first requirement in the formation of any private foundation, including one that will receive an art collection, is an exclusively charitable purpose; tax-exempt status is not possible in its absence. Another practical requirement is the availability of financial resources of the scale necessary to support the foundation and realize its charitable programs, including caring for and utilizing an art collection consistent with professional standards and the duty of care to which its trustees, directors, and officers are obligated. Either of these two requirements—an exclusively charitable purpose and adequate financial resources—absent the other is not sufficient, in which case an alternative approach will be necessary.

This chapter considers foundation practice in owning art collections and conducting direct charitable activities involving the artworks, noting in particular the considerations that are relevant to new artist-endowed foundations. Examples of artist-endowed foundations implementing direct charitable activities are highlighted in **4. Field Charitable Activity**, which also provides examples of foundations conducting charitable distribution of artworks through grants or charitable sales of art. Many aspects of the Aspen Institute's National Study of Artist-Endowed Foundations (Study) report address foundations' art collections and are noted in this chapter's text. A selection of publications and technical resources concerning practical aspects and best practices of owning and administering art collections is featured at the close of this chapter, along with briefing papers authored for the Study that relate to this topic.

Foundation trustees, directors, and officers preparing plans to own and operate an art collection should do so with the guidance of legal advisors expert in the laws and regulations that apply to private foundations active in this area. The following summary information highlights key aspects of the rules generally as an orientation to practical considerations. As for the Study report as a whole, this discussion of considerations in

practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

## **The Uses of Art Collections**

An art collection can play a number of roles in furthering a foundation's charitable purpose. It might be used as a resource in conducting direct charitable activities, such as an exhibition program, or distributed charitably by grants and partial grants/partial sales to museums and other tax-exempt organizations. Alternatively, it might be designated as an inventory for sale to fund the foundation and its programs. More often than not, however, artworks owned by a foundation are resources for multiple purposes in combination. For example, art inventories intended for sale might be used in direct charitable activities, such as exhibitions and educational programs, until they are sold.

The time frame for a foundation's activities involving an art collection can vary as well. For some foundations, the time frame is in perpetuity. For others, it is limited, either with respect to the existence of the foundation itself or for its ownership of the art collection. In these cases, the foundation might distribute the art collection according to its charitable purpose. This could be through grants of artworks to museums and other tax-exempt organizations or through sale of the art and use of the proceeds as grants to tax-exempt organizations and to individuals, such as artists and scholars.

## **The Varieties of Art Collections**

Of those artist-endowed foundations with assets of \$1 million and above with data available to the Study, more than two-thirds own art assets. In most cases, the bulk of art collections owned by artist-endowed foundations comprise the artists' own completed works. In some cases, unfinished work and work not intended for completion, such as studies or preparatory works, also are held by the foundation, assigned either to the art collection or the archive. Based on a foundation's charitable purpose and scale of resources, the artist's archive and library, discussed in the preceding chapter, might be retained by a foundation alongside its art collection, or alternatively donated to a separate repository.

As noted, an artist's lifetime foundation—one whose artist-donor is living—would not be involved in owning and managing a collection of the artist's own works. Owning or administering a collection of an artist-donor's works during the artist's lifetime might inadvertently breach laws prohibiting private benefit and self-dealing if a foundation's activities with its collection serve to promote the artist's career, thereby benefiting the artist economically.<sup>1</sup> However, this constraint generally would not apply to collections of artworks by other artists owned by an artist's lifetime foundation.

In his briefing paper prepared for the Study, Robert Storr notes the ways a foundation's collection might be formed. Some collections comprise works set aside purposefully by the

artist, possibly reflecting the artist's oeuvre as it developed over a creative career or representing a particular category, such as more experimental works. Other collections have accrued incidentally as an artist's career evolves. Still others reflect the practical reality of choices made when an artist's estate is divided between a foundation and the artist's other beneficiaries. On this last point, Storr notes the importance of professional curatorial expertise to inform choices about foundations' art holdings so that decisions compelled by estate tax considerations are not guided exclusively by legal and financial advisors. Finally, a collection also might be the result of a foundation's acquisitions to develop a particular focus for its holdings.

Once received by the foundation, collections can change significantly—expanded by acquisitions or reduced in scale or scope by charitable distributions or sales to support the foundation and its programs. Not surprisingly, there are wide permutations among foundations' art collections, which are diverse in size as well as breadth.

The Richard Avedon Foundation owns, exhibits, and publishes about photographs from a comprehensive collection comprising the artist's fashion, documentary, and studio works created throughout his career—reportedly including more than 14,000 edition prints, exhibition prints, portfolios, and engraver's prints.<sup>2</sup> Consistent with the proviso by Jacques Lipchitz that no casts were to be made from his models posthumously and these should be distributed charitably to museums, the models were committed to his foundation for this purpose.<sup>3</sup> The Jacques and Yulla Lipchitz Foundation exhibits and grants works from a collection of his plaster models, numbering more than 100 pieces.<sup>4</sup>

Willem de Kooning retained little of his early work. In addition to the artist's archive, the Willem de Kooning Foundation reportedly received more than 1,300 works created in the artist's final decades—primarily drawings, prints, and paintings—for use as a study and exhibition collection.<sup>5</sup> In contrast, the Andy Warhol Foundation for the Visual Arts, beneficiary of the artist's estate plan that famously conveyed a vast array of art and non-art property, received thousands of the artist's works in multiple media. Subsequently, the Foundation contributed a selection of 3,000 works to establish the Andy Warhol Museum, more recently distributed 28,500 photographs as grants to university museums and galleries, and continues to exhibit and make periodic sales from its art inventory to endow its grant program.<sup>6</sup>

Artists often collect art by other artists, as well as assemble source materials. Where not central to a foundation's purpose, these might be contributed to museums or sold to fund operation of the foundation and its programs. Some foundations, however, might choose to retain these, such as foundations functioning as house museums or as study centers with exhibition collections.



Practice in reporting artworks owned by foundations varies. Reflecting the diversity of purposes intended for their art holdings, foundations report their art assets on the annual information return (Form 990-PF) in a number of categories—*pledges receivable, inventories for sale or use, corporate stock, investments—other, and other assets*. These art assets are described variously as *artworks, art collection, paintings, art inventories, collectibles, personal property from the estate, program-related assets, works held for educational purposes, and works held for sale*, among other descriptions.

## Options in Placement of Foundation Art Collections

Caring for an art collection can be expensive: there are costs for insurance, conservation, and exhibition preparation, as well as for secured storage if the artworks are not housed in the foundation's own secure facility or by the foundation's art dealer. Conducting direct charitable activities associated with owning an art collection classified as a charitable-use asset involves a program expense, and in many cases also requires professional expertise, such as a curator or collection manager. As an alternative, some artist-endowed foundations focused primarily on grantmaking choose to donate an art collection to a separate public charity, typically a museum or university, and collaborate to support collection development and related public programs.

Likewise, foundations that operate study centers and have a mission to conduct scholarship and educate about an artist's oeuvre do not necessarily require a comprehensive art collection to fulfill that purpose. This type of foundation might undertake charitable distribution of the major pieces received in the bequest so that the artist is represented in public collections broadly, but retain focused art holdings along with the artist's archive and use these as resources for scholarly research and to develop exhibitions collaboratively with museums. **4. Field Charitable Activity** notes examples of foundations taking this approach.

## Art Collections and Foundation Planning, Governance, and Management

**7. Forming, Sustaining, and Terminating Foundations** comments on foundation planning, classification of artworks as charitable-use assets, and how this aligns with a foundation's elected status to support its charitable purpose. The same section considers foundation viability, including observations about the optimal mix of art assets and financial assets, and the role of periodic art sales in a foundation's economic model. It also discusses foundation termination, including distribution of art assets in that context, and comments on the types of expertise required by foundations generally, including with respect to art collections.

## **Varieties of Direct Charitable Activities Involving Art Collections**

Many of the direct charitable activities conducted by artist-endowed foundations involve foundation art collections. Activities could include conservation, documentation, and development of art collections themselves; administration of exhibition collections, including lending to museum exhibitions and circulation of touring exhibitions to national and international venues; operation of study centers featuring study collections as resources for scholars, curators, educators, artists, and students with study purposes; operation of house museums exhibiting art collections; scholarly research, including catalogues raisonnés and art authentication; collection-related publications; digital documentation of collections and dissemination online via foundations' content-rich websites and other external platforms; operation of internship programs engaging students in collection-related research and programs; and development of public programs educating about art collections.

### **Summary of Rules for Ownership of Art Collections**

Briefing papers prepared for the Study discuss many considerations concerning ownership of art collections and other art-related assets by artist-endowed foundations. It is useful to summarize the basics about private foundation ownership and administration of an art collection as informed potentially by private foundation law. These rules differ significantly from ownership by private individuals and entities, and also are different in many cases from ownership by public charities, which is the legal status of many art museums. The following points are applicable generally to private foundations owning and administering art collections. As fiduciaries, foundation trustees, directors, and officers are responsible for knowing these rules, although they also should consult with legal counsel expert in private foundation law on the details of their particular circumstance.

#### **Art Collection Basics**

An art collection owned by an artist-endowed foundation must be administered so that it furthers the foundation's charitable purpose, benefits a charitable class that is broadly public, and does not provide a private benefit to particular individuals or limited groups.<sup>7</sup>

As fiduciaries, foundation trustees, directors, and officers are bound by the duty of care to protect the foundation's assets.<sup>8</sup> Whether in its possession or that of its agents, artworks owned by a private foundation should be appropriately insured and secured from potential damage and threats. This is likely to be a higher standard of care than was the case during the artist's lifetime.

Likewise, a foundation must maintain adequate internal controls to account for its art collection at all times, whatever its location.<sup>9</sup> Even if it was customary during an artist's lifetime, access to and control of an art collection or individual works by handshake

arrangements with an art dealer, studio assistant, personal associate, or storage facility owner will not fulfill fiduciaries' duty of care.

Artworks classified as charitable-use assets must be used or held for use in direct charitable activities furthering the foundation's charitable purpose.<sup>10</sup> Presumably this involves presentations in public exhibitions, loans to museums, and being made available for study by scholars, curators, educators, artists, students, and the like.

A foundation cannot limit access to its art collection based on the private purposes of its insiders.<sup>11</sup> Access should be determined according to an institutional policy, based on objective criteria, adopted by the foundation's board, and implemented equitably. As a matter of best practice, the policy should be published on the foundation's website.

In line with the private benefit prohibition that is a fundamental criterion for tax exemption, a foundation's art collection cannot be made available to one individual exclusively or on terms more favorable than those that apply to other individuals.<sup>12</sup>

Whether or not they are held for charitable use, the fair market value of art assets owned by a foundation should be reported annually on the foundation's information return (Form 990-PF).<sup>13</sup> With appropriate procedures, a professional appraisal can be updated in subsequent years by knowledgeable foundation staff or advisors.

If artworks are classified as charitable-use assets, and as such are not included in calculation of charitable distribution requirements based on net noncharitable-use assets, the direct charitable activities for which the artworks are used or planned for use should be reported on the annual information return (Form 990-PF).<sup>14</sup>

### **Art Collections and Insiders**

A private foundation cannot use its resources to store, care for, insure, or manage artworks owned by foundation insiders unless the artworks have been pledged irrevocably to the foundation.<sup>15</sup> Whether directly or indirectly through others, a private foundation cannot trade or purchase artworks from its insiders, nor can it trade, sell, or give its artworks to its insiders.<sup>16</sup>

A foundation's artworks cannot be displayed privately in the residence of or on property owned by an insider.<sup>17</sup> A foundation's artworks may be stored in premises owned by an insider as long as storage conditions meet required standards and do not impede access. However, the foundation cannot pay rent or reimburse expenses to the insider, nor can it expend its funds to upgrade the facility unless the property has been pledged irrevocably to the foundation.<sup>18</sup>

As a general rule, a foundation cannot undertake activities that provide an economic benefit to its insiders. As such, to the extent that these increase the economic value of artworks owned by insiders, a foundation generally should not organize or conduct

public exhibitions of artworks owned by insiders unless the artworks have been pledged irrevocably to the foundation.<sup>19</sup> The same is true of activities to publish about or authenticate works owned by insiders.<sup>20</sup>

Likewise, as a general rule, a foundation should not promote or facilitate the sale of artworks owned by insiders, thereby benefiting them economically.<sup>21</sup> For example, a foundation's website generally should not feature links to websites of art galleries selling works owned by insiders, nor should it research or produce publications for use in conjunction with sales of artworks owned by insiders, nor should it share gallery representation with insiders or place its works for sale in exhibitions selling works owned by insiders.<sup>22</sup>

In summary, to fulfill the duty of care and to meet the charitable purpose and charitable-use requirements, private foundation ownership of an art collection will involve expenses and activities for which private individuals or entities are not obligated. In addition, to comply with the prohibitions on private benefit and self-dealing, a foundation's activities related to its art collection necessarily will be restricted, in some cases significantly, if those activities benefit its insiders economically. These constraints are stricter than those applicable to public charities, which is the status of many museums.

As with archives, it might be the case that over time a foundation cannot meet these criteria in administering a collection of artworks it owns. If so, the fiduciary responsibility of its trustees, directors, and officers generally obligates them to place the collection with an appropriate organization where it will be used to fulfill its intended role as a resource for exempt purposes, or alternatively, to sell the collection and use the proceeds to further the foundation's charitable purpose. How private foundations utilize their assets for public benefit purposes is regulated by the Internal Revenue Service (IRS) and state attorneys general, and in some cases by local courts supervising administration of estates. Foundations planning the charitable distribution of a major asset will develop their plans with the guidance of legal advisors expert in these rules.

## **Standards for Administration of Art Collections**

As private foundations, artist-endowed foundations differ from art museums in the broader array of purposes to which they put their art assets and art sales proceeds (for example, art museums maintain art collections permanently, and use art sales proceeds exclusively for art acquisitions). Foundations also differ from museums organized as public charities in terms of the stricter rules applicable to private foundations with respect to transactions with insiders and how these rules inform management of art collections and inventories. Despite these differences, the general standards for administration of art collections held by tax-exempt organizations for use as scholarly and educational resources are those established by the museum field; certainly they are the standards that artist-endowed

foundations engage most frequently when collaborating with professionals and institutions to implement direct charitable activities using artworks they own.

Among the best practices promulgated by the museum field for art collection administration are the responsibilities to conduct the preservation, conservation, documentation, handling, storing, and presentation of works of art to meet professional standards; to prudently make the collection as accessible as possible for scholarship and for public exhibition; and to visually document and provide information about the collection and respond appropriately to serious inquiries.<sup>23</sup> Also cited among best practice standards is the responsibility to loan artworks for exhibition in the spirit of cooperation and collegiality, and on the basis of intellectual merit and educational benefit, rather than possible financial gain.<sup>24</sup> Finally, professional standards for art historians cite as improper professional practice any request to reserve exclusive research or publication rights from an institution with respect to its art collection.<sup>25</sup>

## Summary of Copyright Issues Related to Collections

**8.2.3 Copyrights and Intellectual Property** focuses specifically on foundation practice owning and administering copyrights and intellectual properties. However, important aspects of copyright administration pertain directly to administration of foundation art collections and merit comment here. As with artists' archives, requests by scholars to publish visual material for scholarly and academic purposes is a central aspect of rights and reproduction permissions related to artworks owned by artist-endowed foundations.<sup>26</sup> The key basics about administration of copyrights by private foundations as they relate to this and are informed potentially by private foundation law are worth summarizing.

The rules for private foundations that bear on administration of art collections also pertain to foundation administration of copyrights for scholarly and academic purposes. As before, these rules differ significantly from ownership by private individuals and entities, as well as being distinct in many cases from ownership by public charities. The following points are applicable generally to private foundations administering copyrights for scholarly and academic purposes. As fiduciaries, a foundation's trustees, directors, and officers are responsible for knowing these rules, although they also should consult with legal counsel expert in private foundation law on the details of their particular circumstance.

### Collection-Related Copyright Basics

Copyrights owned by a private foundation must be administered to further the foundation's charitable purpose, benefit a charitable class that is broadly public, and not provide a private benefit to particular individuals or limited groups.<sup>27</sup>

Copyright permissions by a foundation cannot be granted based on the private purposes of its insiders.<sup>28</sup> Rights and reproduction authorizations should be made according to an

institutional policy, based on objective criteria, adopted by the foundation's board, and implemented equitably. As a matter of best practice, these should be published on the foundation's website.

Consistent with the private benefit prohibition fundamental to tax exemption, a private foundation cannot authorize exclusive publication by one scholar or publication on terms more favorable than those applied to other scholars.<sup>29</sup>

As is true for all copyright owners, a private foundation's exclusive rights are limited by the doctrine of *fair use*, described generally as pertaining to use for limited, noncommercial purposes, such as criticism, comment, news reporting, teaching, scholarship, or research.<sup>30</sup>

### **Copyrights and Insiders**

A private foundation cannot administer copyrights owned by an insider, unless the rights have been pledged irrevocably to the foundation.<sup>31</sup>

As a general rule, a foundation cannot undertake activities that provide an economic benefit to its insiders. As such, a foundation generally should not conduct activities that produce intellectual property rights revenue paid to insiders, thereby benefiting them economically.<sup>32</sup> For example, a foundation generally should not undertake publications, exhibitions, and film projects that generate copyright fees paid to insiders, nor sell products licensed by insiders.

Transactions between a foundation and its insiders are prohibited. Payment of copyright fees by a foundation to its insiders, or for their benefit, constitutes self-dealing and inurement, which is a basis for revocation of tax-exemption.<sup>33</sup> Likewise, a foundation cannot license its intellectual property to insiders or for their benefit, or permit its intellectual property to be used at no cost by insiders or for their benefit.<sup>34</sup>

In formulating guidelines to administer rights and reproduction permissions, foundations should confer with legal advisors who are expert in private foundation law, as well as those who are knowledgeable about intellectual property law.

### **Effective Practice Enhancing Foundations' Educational and Scholarly Purposes**

A number of effective practices can be identified among artist-endowed foundations that contribute to the central goal of optimizing the scholarly and educational role of art collections, including:

- professional curatorial guidance in determining the disposition of an artist's works when these are intended in whole or in part to form a foundation's art collection for use in scholarly and educational activities;

- website publication of the institutional access policy and the rights and reproductions policy, adopted by the foundation's board and reviewed annually;
- planning and organization of cataloguing and collection management systems by experienced professionals to meet professional standards;
- appropriate procedures and facilities to house, insure, secure, and protect the art collection, whether in the foundation's direct control, that of its agents, or on loan, as well as review of collection-related internal controls during the foundation's annual audit;
- supervision of the collection by a credentialed curator or art historian, collection management by trained staff, and documentation and conservation of artworks by professionals;
- digital documentation of artworks for website publication and dissemination to external platforms;
- website publication of collection-related bibliographic information, exhibition chronologies, lists of public collections and repositories holding the artists' works and archives, and notice of collection-related scholarly and curatorial initiatives;
- exhibition activities that encompass lending to initiatives generated independently from the foundation's own program, as well as foundation-initiated projects;
- exhibition activities involving smaller, regional, and academic museums, as well as larger, urban museums;
- stipends and fellowships, awarded objectively by committee, to assist scholars with collection-related study projects;
- internships engaging students in collection-related scholarship and exhibition research;
- facilitated exchange of curricula among educators that have developed teaching resources based on the collection; and
- website links to online information resources for scholars, curators, educators, artists, and students.

## **Artist-Endowed Foundations, Art Collections, and Museums**

Among artist-endowed foundations that conduct direct charitable activities involving their art collections, museums provide the primary venue by which these artworks are made accessible to public audiences. Museums' curatorial expertise and associated holdings provide an important context for foundations' artworks. Likewise, their public programming capacities and publication programs enhance the public's reception of the works. In some cases, museums have collaborated with artist-endowed foundations to produce catalogues raisonnés, mount retrospectives, and present exhibits exploring lesser known aspects of artists' oeuvres.

In turn, as noted in the briefing paper prepared for the Study by James T. Demetrion and Lowery Stokes Sims, artist-endowed foundations are important resources to museums. Their collections often encompass a depth of material that cannot be maintained by museums individually, affording an opportunity to consider an artist's oeuvre beyond familiar works that have been accessioned and exhibited widely. Some foundations own artists' studio materials that are essential to conservation efforts. Foundations lend to exhibitions, assist in research for preparation of exhibitions and publications, donate artworks to expand collections, and in some cases provide conservation advice and specialized art historical expertise.

More broadly, artist-endowed foundations circulate exhibitions, often to smaller, regional, and university museums where there might be less capacity to organize national loan exhibitions. Some foundations provide financial support for museums and their initiatives, making grants to aid artists' commissions and artist residency projects; support curatorial research, exhibitions, publications, and conservation initiatives; assist development of collections; and fund collection-related capital projects.

Recognizing the generally productive relationship between artist-endowed foundations and museums, Demetrion and Sims also observe that there are challenges. A chief point of concern from the perspective of artist-endowed foundations is deaccessioning of artworks donated to museums by foundations or given as lifetime gifts by the artists themselves. Similar concerns exist with the notion that museums would be unable to honor terms of such gifts (for example, commitments to place works on public exhibition for a defined period of time, or to provide sufficiently for conservation).

Conversely, a key concern among museums is the challenge to curatorial independence if a foundation conditions its loans on compliance with a particular perspective about an artist's works or declines to lend to exhibitions other than those it has a role in organizing. Likewise, there are concerns if a foundation charges loan fees, although this mirrors an increasing practice among museums. Exhibition of artworks that may be for sale by a foundation to support its charitable programs raises concerns about market influences



regardless that art sales to support foundations' charitable purposes are different in kind from art sales by private collectors.

These tensions in many respects are similar to long-recognized challenges inherent in the relationship between museums and their individual patrons who are private art collectors. The museum field has promulgated ethical standards and guidelines for professional practice on all of these topics, based on a stated aspiration to exceed the legal minimums required of the field.<sup>35</sup> Individual museums develop and implement their policies informed by these standards and guidelines. Likewise, the greater private foundation universe has promulgated best practice standards for its members, also calling for ethical conduct beyond the bare legal minimum.<sup>36</sup> Artist-endowed foundations are members of this constituency, and individual foundations develop and implement their policies in light of these principles.

## **The Appropriate Role for an Artist-Endowed Foundation**

The duties of foundation fiduciaries and the public benefit obligations and private benefit prohibitions of private foundations together set the parameters for artist-endowed foundations' roles owning and administering art collections for scholarly and educational purposes. Likewise, foundations conduct exhibitions and undertake collection-related scholarship and educational activities within the framework of professional standards established by the museum and art history fields. Within these overall parameters, and given sufficient resources to properly care for and utilize art assets, a private foundation is one option for artists or their heirs and beneficiaries who want to see the fruits of a creative life used for public benefit, whether this is to make the artist's oeuvre accessible to the broadest possible audiences or advance a particular artistic practice or philosophy embraced by the artist.

Nonetheless, a foundation is only one of a number of philanthropic forms being used by artists who want to realize a posthumous public benefit with the disposition of their art collections. As discussed in **2. Field Dimensions and Taxonomy**, artists increasingly are taking other approaches. Among these is donating an art collection to an established foundation, creating supporting organizations or dedicated public charities to steward an art collection, setting up defined programs to hold art collections at established public charities such as universities or museums, or distributing artworks directly to tax-exempt organizations as lifetime gifts or as promised bequests. Additional alternative approaches can be expected to emerge in the coming decade. Encouraging continued exploration of new models and a broader responsiveness to this trend among a wider range of organizations (for example, community foundations, public charity arts service organizations, and established artist-endowed foundations) should be a priority for the field's leaders.

## **Resources: Art Collections**

### **Art Collection Fundamentals**

*Benchmarks in Collection Care for Museums, Archives and Libraries.* The Council for Museums, Archives and Libraries. <http://www.mla.gov.uk/>.

Malaro, Marie C. *A Legal Primer on Managing Museum Collections.* 2nd ed. Washington, DC: Smithsonian Institution, 1998.

Snyder, Jill. *Caring for Your Art: A Guide for Artists, Collectors, Galleries and Art Institutions.* 3rd ed. New York: Allworth Press, 2001.

### **Best Practice Guidelines**

#### **Collection-Related Professional Practice**

Association of Art Museum Directors. *Professional Practices in Art Museums.* New York: Association of Art Museum Directors, 2001.

Code of Ethics for Museums. American Association of Museums. <http://www.aam-us.org/>.

ICOM Code of Ethics for Museums, 2006. International Council of Museums. <http://icom.museum/ethics.html>.

*Professional Practices for Art Museum Curators.* Association of Art Museum Curators. [http://www.collegeart.org/pdf/AAMC\\_Professional\\_Practices.pdf](http://www.collegeart.org/pdf/AAMC_Professional_Practices.pdf).

### **Conservation**

Basic Guidelines for the Care of Special Collections. American Institute for Conservation of Historic and Artistic Works. <http://www.conservation-us.org/>.

### **Cataloguing**

Baca, Murtha, Visual Resources Association, et. al. *Cataloging Cultural Objects, A Guide to Describing Cultural Works and Their Images.* Chicago: American Library Association, 2006. Summaries and selections from the full text are available at <http://www.vrafoundation.org/ccoweb/>.

### **Digital Image Collections**

*ARTstor Core: Data Dictionary and Cataloging Guidance for Use with Institutional Collections in ARTstor.* ARTstor. <http://www.artstor.org/>.

### **Internship Programs**

Dubberly, Sara. *Standards and Guidelines for Museum Internships.* Washington, DC: American Association of Museums, 1993.

### **Loans for Exhibition**

"Guidelines for Borrowing and Lending Special Collections Materials for Exhibitions." Rare Books and Manuscripts Section, American Library Association: Association of College and Research Libraries. <http://www.ala.org/>.

### **Lender Involvement in Exhibitions**

"Guidelines on Exhibiting Borrowed Objects." American Association of Museums. <http://www.aam-us.org/>.

### **Online Exhibitions**

Kalfatovic, Martin R. *Creating a Winning Online Exhibition: A Guide for Libraries, Archives, and Museums*. Chicago: American Library Association, 2002.

### **Private Foundation Ethics**

*Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations*. Panel on the Nonprofit Sector, Convened by Independent Sector. <http://www.nonprofitpanel.org/>.

### **Scholarly Permissions**

Bober, Phyllis Prayer. "Guidelines for Fair Use of Visual Materials in Scholarly Publication and Research." In *Copyrights and Permissions in Scholarly and Educational Publishing. Standards and Guidelines*. College Art Association. <http://www.collegeart.org/guidelines/reprorights.html>.

### **Storage**

Hogarth, Tim, ed. *Best Practices in Fine Arts Storage*. Hamilton, NY: Exhibition Alliance, 2006.

### **Best Practice Perspectives: Artist-Endowed Foundations and Art Collections**

Demetrion, James T. and Lowery Stokes Sims. "Artist-Endowed Foundations and Museums: Observations on the Relationship." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Sax, Joseph L. "Public Benefit Obligations and Legacy Stewardship Activities of Artist-Endowed Foundations: Are They in Conflict?" In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Storr, Robert. "Toward a Public Library of American Culture: Reflections on the Centrality of Art and Importance of Access in Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

## **Documentation: Artist-Endowed Foundations and Art Collection Management**

Anthony, David R., Bonnie L. Clearwater, and Dana Cramer. "Organization and Administration of the Collection," "Cataloguing, Exhibiting, and Distributing the Collection," and "Conserving the Collection." In *Eliminating the Obstacles Between the Painter and the Observer, The Mark Rothko Foundation: 1976–1986*. New York: Mark Rothko Foundation, 1987.

Moore, Henry, David Mitchinson, and Julian Andrews. *Celebrating Moore: Works from the Collection of the Henry Moore Foundation*. Berkeley: University of California Press, 1998.

## **Private Foundation Rules and Artist-Endowed Foundations**

Fremont-Smith, Marion R. "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Hill, Frances R. "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

## **Private Foundation Law**

Fremont-Smith, Marion R. *Governing Nonprofit Organizations, Federal and State Law and Regulation*. Cambridge, MA: Belknap Press of Harvard University Press, 2004.

Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008.

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<sup>1</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).

<sup>2</sup> "Art Handlers: Art Foundations," *V Magazine* 43 (Fall 2006).

<sup>3</sup> Jacques Lipchitz and H. H. Arnason, *The Documents of 20th-Century Art: My Life in Sculpture* (New York: Viking Press, 1972).

<sup>4</sup> Jacques and Yulla Lipchitz Foundation, Annual Information Return 2005 (Form 990-PF), <http://www.guidestar.org/>

<sup>5</sup> Kelly Devine Thomas, "De Kooning's Hidden Legacy," *ARTnews* (March 2006): 114–119.

<sup>6</sup> The Andy Warhol Foundation for the Visual Arts, *Andy Warhol Foundation for the Visual Arts 20-Year Report, 1987–2007* (New York: Andy Warhol Foundation for the Visual Arts, 2007).

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- <sup>7</sup> Frances R. Hill, "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>8</sup> Marion R. Fremont-Smith, "Fiduciary Duties: Duty of Care," in *Governing Nonprofit Organizations, Federal and State Law and Regulation* (Cambridge, MA: Belknap Press of Harvard University Press), 199–215.
- <sup>9</sup> *Internal Controls and Financial Accountability for Not-for-Profit Boards*, State of New York Office of the Attorney General Charities Bureau, <http://www.charitiesnys.com/>.
- <sup>10</sup> Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* (Valhalla, NY: Thomson/RIA, 2002–2008), 11-9–11-10.
- <sup>11</sup> Hill, "Public Benefit."
- <sup>12</sup> *Ibid.*
- <sup>13</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 11–35.
- <sup>14</sup> *Ibid.*
- <sup>15</sup> Fremont-Smith, "Federal and State Laws."
- <sup>16</sup> *Ibid.*
- <sup>17</sup> *Ibid.*
- <sup>18</sup> *Ibid.*
- <sup>19</sup> *Ibid.*
- <sup>20</sup> *Ibid.*
- <sup>21</sup> *Ibid.*
- <sup>22</sup> *Ibid.*
- <sup>23</sup> Association of Art Museum Directors, *Professional Practices in Art Museums* (New York: Association of Art Museum Directors, 2001).
- <sup>24</sup> *Ibid.*
- <sup>25</sup> "A Code of Ethics for Art Historians and Guidelines for the Professional Practice of Art History," College Art Association, <http://www.collegeart.org/>.
- <sup>26</sup> "Guidelines for Fair Use of Visual Materials in Scholarly Publication and Research," College Art Association, <http://www.collegeart.org/>.
- <sup>27</sup> Hill, "Public Benefit."
- <sup>28</sup> *Ibid.*
- <sup>29</sup> *Ibid.*
- <sup>30</sup> United States Copyright Office, Library of Congress, *Copyright: Fair Use*, <http://www.copyright.gov/>.
- <sup>31</sup> Fremont-Smith, "Federal and State Laws."
- <sup>32</sup> *Ibid.*
- <sup>33</sup> *Ibid.*
- <sup>34</sup> *Ibid.*
- <sup>35</sup> "Code of Ethics for Museums," American Association of Museums, <http://www.aam-org/>.
- <sup>36</sup> Panel on the Nonprofit Sector, Convened by Independent Sector, *Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations*, <http://www.nonprofitpanel.org/>.

## 8.2.3 Copyrights and Intellectual Property

Many artist-endowed foundations receive bequests of their artists' works; some also receive intellectual property intended by artist-donors for use in furthering foundations' exempt purposes. As a practical matter, intellectual property has limited significance for many foundations; for others, however, it represents a significant resource. Public policies enhancing the importance of intellectual property have added a new aspect to activities of artist-endowed foundations created in recent decades. These policies include US laws that clarify and confirm that artists own rights in their works separate from ownership of the physical object itself; affirm rights not recognized previously for certain categories of artists, such as architects; and extend the basic copyright term for works created after 1978 to the artist's life plus 70 years.<sup>1</sup>

Because of the unique nature of art—embodying aesthetic, cultural, scholarly, and educational significance, as well as economic value—a foundation's intellectual property assets can be deployed in a variety of ways to fulfill a donor's charitable intentions. Considerations in owning and administering artists' intellectual property include the potential for rights to be used and developed in furtherance of the foundation's exempt purpose; the necessary capacity and possible costs involved in accomplishing that activity; and alignment of the foundation's intended term, if not perpetual, with the period of the rights, or appropriate provisions for charitable disposition of rights in the event a foundation were to terminate. The foremost institutional consideration from the outset is whether rights are owned exclusively by the foundation.

This chapter considers foundation practice in owning copyrights and intellectual property and conducting direct charitable activities involving the rights, noting considerations relevant to new artist-endowed foundations. **4. Field Charitable Activity** includes examples of foundations conducting direct charitable activities involving copyrights and intellectual property. **7. Forming, Sustaining, and Terminating Foundations** reviews considerations about intellectual property ownership in foundation formation and discusses charitable disposition of intellectual property as an aspect of foundation termination. A selection of resources is featured at the close of this chapter, along with briefing papers prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study) that pertain to this topic.

Foundation trustees, directors, and officers preparing plans to own and administer an artist's intellectual property should do so with the guidance of legal advisors expert in the laws and regulations that apply to private foundations active in this area. The following summary information highlights key aspects of the rules generally as an orientation to practical considerations. As for the Study report as a whole, this discussion of

considerations in practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

## **The Uses of Intellectual Property**

Intellectual property can play a number of roles in furthering a foundation's charitable purpose. Rights in artists' works might be intended for licensing as a source of royalty revenue to fund the foundation and its charitable programs. Intellectual property also might be designated as a resource for direct charitable activities. These include educational purposes, such as increasing knowledge about and broadening public access to artists' creative principles and works by enabling the foundation to license reproductions, re-edition or re-license previously produced artworks or manufactured objects, and re-issue texts, as well as authorize adaptations, permit new publications and products, and license publication in new media and dissemination by new technologies. Direct charitable activities supported by intellectual property might also include scholarly purposes, such as assisting to develop and broaden knowledge about artists' oeuvres and creative principles by ensuring appropriate attribution of works, maintaining image integrity, and providing for factually correct texts. Given the broad significance of intellectual property, it is often a resource for a number of purposes in combination.

An artist's lifetime foundation—one whose artist-donor is living—would not be involved in owning or administering the artists' copyrights. Owning and administering the artist's intellectual property during the artist's lifetime might inadvertently breach laws prohibiting private benefit and self-dealing if a foundation's activities with the rights served to promote the artist's career, thereby benefiting the artist economically.<sup>2</sup>

## **The Varieties of Intellectual Property**

The World Intellectual Property Organization defines intellectual property as "creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce."<sup>3</sup> These creations are protected for defined periods of time. Protection for original artistic and literary works is by copyright, while patents and trademarks are used for original inventions, industrial designs, and other forms of industrial property. As with artists themselves, artist-endowed foundations that own artists' copyrights and other intellectual property own those rights whether or not they own the respective artwork or physical object.

### **Copyright**

A copyright is a property right accorded to creators in order to protect the economic value of original created works. Copyright protection is an incentive to encourage the production of creative works by ensuring creators the exclusive ability to benefit from their efforts for a defined period.<sup>4</sup> An artist-endowed foundation that owns the artist's copyright in a work has the exclusive right to reproduce or make copies of the work; to prepare derivative

works; to sell, lease, lend or otherwise distribute copies; and to display the work publicly.<sup>5</sup> Use of the work in this way by others requires permission of the foundation as the copyright owner. These exclusive rights are limited by the fair use doctrine, allowing use for limited, noncommercial purposes, discussed below. The right to authorize public display of a work is limited by the right of a work's owner to display the work publicly.<sup>6</sup> Copyrights can be transferred during the creator's lifetime and by testamentary bequest.

In the US, the copyright for a work created after 1978 runs for 70 years beyond the artist's death.<sup>7</sup> Works created prior to 1978 are subject to different terms based on factors such as initial publication, registration, or renewal status. Rights in works created for hire are owned by the creator's employer, as is the case for some photographers, illustrators, cartoonists, and other artists creating work as employees or creating specially ordered or commissioned work. Rights in the design of original architectural works created by an individual after 1990 run for 70 years after the artist's death; designs in works created prior to 1990 are not eligible for copyright protection.<sup>8</sup>

In addition to owning copyrights in visual artworks (defined broadly as original pictorial, graphic, and sculptural works of two- and three-dimensional fine, graphic, and applied art), as well as in film and videos, multimedia works, and architectural works, an artist-endowed foundation also might hold copyrights in texts and written expression contained in artists' works. This can be the case for foundations of visual artists who created independently as book illustrators and authors, cartoonists, comic strip artists, and animators, as well as those who published as critics, theorists, educators, and poets.

### **Patents and Trademarks**

Apart from copyrights, foundations also might own artists' original design patents, these being for creation of new, original, and ornamental designs for articles of manufacture. An original design patent runs for 14 years.<sup>9</sup> More likely, foundations might own artists' trademarks—a word, phrase, symbol or design, or a combination of these—that identifies and distinguishes the source of the goods of one party from those of others. Under appropriate circumstances and procedures, trademarks are renewable indefinitely.<sup>10</sup> Both design patents and trademarks can be transferred during a creator's lifetime and by testamentary bequest.

### **Moral Rights**

Visual artists during their lifetimes are accorded moral rights, distinct from economic rights. In the US, however, artists' moral rights are much more limited than for those of artists in some other countries. In the US, moral rights comprise the *right of attribution*—the right of artists to be correctly identified with their works and not identified with works they did not create—and the *right of integrity*—the right of artists to protect their works against modification and destruction that is prejudicial to the artist's honor or reputation.<sup>11</sup> As an



exception to this latter right, although architects own copyrights in the original design of an architectural structure, with respect to their moral rights, the structure itself can be altered or demolished by owners without consent of the architect.<sup>12</sup>

In the US, an artist's moral rights are not transferable and terminate upon death. As such, in the US, neither artist-endowed foundations nor artists' heirs or beneficiaries own their artists' moral rights. However, some artist-endowed foundations describe themselves as protecting their artists' moral rights. Setting aside the question of whether that activity as stated comprises a charitable purpose, what this statement effectively means is that the foundation manages copyrights and other intellectual property and affirms appropriate attribution through scholarly research, such as catalogues raisonnés and related authentication activities.

Beyond moral rights, some states recognize a *right of publicity*—the exclusive right of a public personality to authorize for commercial purposes the use of that person's name, signature, likeness, or identity; this exclusive right is not limited by fair use. In some states, publicity rights can be transferred to heirs and beneficiaries, making ownership by an artist-endowed foundation a possibility under some circumstances.<sup>13</sup>

## **Intellectual Property Owned by Artist-Endowed Foundations**

Many artist-endowed foundations do not own intellectual property. For the most part, those that do not are artists' lifetime foundations, older foundations whose artists' copyrights have expired, and foundations with a limited mandate. However, more than one-third of foundations with assets of \$1 million and above report assets or revenue associated with copyrights and intellectual property on their annual information returns (Forms 990-PF) or can be found among owners of registered trademarks.<sup>14</sup> The majority of these own rights in unique art works or limited edition works. In contrast, some artists who established foundations also created publications and designs manufactured for wide distribution. Children's book illustrator Ezra Jack Keats, deceased in 1983, was the first artist to endow his foundation primarily with intellectual property rights. Isamu Noguchi, deceased in 1988, owned copyrights in unique sculptures, set designs, public artworks, and works on paper; licensed manufacture of designs for interior furnishings and biomorphic furniture; and trademarked his Akari light sculpture lamps. These rights were received by his foundation.

In addition to owning artists' intellectual property received as bequests, foundations in some cases re-assemble rights, purchasing those that were sold or forfeited during the artist's lifetime. Foundations involved in broader licensing efforts, including authorizing adaptations and new uses based on artists' works, might extend their property beyond copyrights (for example, by registering trademarks, in some cases the artist's name, signature, or likeness).<sup>15</sup> Foundations also may create intellectual property by their own exempt activities, typically

involving production of copyrighted publications, multimedia projects, websites, and educational materials.

If copyrights and intellectual property have been committed as a means, in whole or in part, to generate financial support for a foundation and its charitable program, a foundation in such cases generally is obligated to optimize the value of these rights in serving that purpose. As noted in a review of the subject, "for an exempt organization, seeing to the appropriate exploitation of its intellectual property rights is no less a fiduciary duty than managing its financial endowment."<sup>16</sup>

Practice in reporting copyrights and intellectual property assets owned by foundations varies. In many cases, intellectual property is not reflected separately from art assets when reported on foundations' annual information returns (Forms 990-PF), although income and royalties from copyrights and other licensing fees might be reported specifically. Foundations that do report these assets separately for the most part list them either as *investments—other* or as *other assets*. These are described variously as *intangible assets*, *copyrights*, *publishing rights*, *reproduction rights*, and *intellectual rights*, among other terms.

## Varieties of Direct Charitable Activities Involving Intellectual Property

**4. Sector Charitable Activity** surveys the types of direct charitable activities conducted by artist-endowed foundations. A number of these involve administration of copyrights and intellectual property, by which a foundation might grant permission to other parties to use rights the foundation owns.

Foundations' direct charitable activities related to intellectual property include:

- maintaining archives and operating study centers, involving permissions for educational and scholarly publication of archival materials;
- maintaining and developing art collections, involving permissions for scholarly and educational publication of visual materials and images;
- exhibiting artworks and lending to exhibitions, involving permissions for publication and electronic dissemination of visual and archival materials for catalogues and related objects;
- developing digital image collections documenting artists' oeuvres, involving permissions for educational publication by online digital libraries used for scholarly and pedagogic purposes; and
- developing educational resources, involving licensing reproductions and re-editions of artists' works, adaptations of artists' works in new media or new forms,

publication or re-issue of artists' texts, and publication of new books, films, and multimedia featuring artists' works.

Scholarly research initiatives undertaken or facilitated by foundations, particularly catalogues raisonnés and attribution-related research, relate to copyrights and intellectual property and are discussed specifically in the following chapter.

## **Administrative Practice**

Although some foundations handle licensing requests directly, most undertake licensing by arrangement with rights clearance organizations or cooperatives, such as Artists Rights Society, VAGA (Visual Artists and Galleries Association), Art + Commerce, Magnum Photos, and related organizations with geographic purviews internationally. Industry practice makes a distinction between fees charged for commercial uses—involving wide distribution—and those for educational, scholarly, and artistic uses—involving limited distribution. In many cases, fees charged by foundations for noncommercial use are nominal, sufficient solely to cover administrative costs, which might be waived entirely. Separate from licensing the rights to publish an artwork, a user also must license the photographic image of that artwork. Photographic images often are licensed by a museum or by a photographer. However, in some cases, foundations themselves make the photographic image available for licensing via a photography archive agency, such as Art Resource or Corbis Corporation.

In licensing rights, foundations adopt reproduction guidelines for use of the artists' works. This might be to protect visual integrity (for example, specifying how an image is to be presented) and, accordingly, restricting uses that obscure or alter an image, or fail to present it fully or in the scale and of the quality specified originally by the artist. It also might be to protect the image from devaluation (for example, restricting use in products such as refrigerator magnets and coffee cups, if these are not appropriate; or in settings that undermine the image by association, such as advertisements for products or messages inconsistent with the work's meaning or the artist's intentions).

Based on their charitable purpose, foundations might license new uses to bring an artist's vision to the intended audiences. The Ezra Jack Keats Foundation has licensed production of the artist's children's books in new formats, including films and DVDs, along with supplementary materials to support educational uses. A few foundations license a wide range of products based on or inspired by their artists' works or the artist's name and image. The Andy Warhol Foundation for the Visual Arts is recognized for its expansive licensing program implemented in the spirit of the artist's lifetime creative practice and his beginnings in advertising illustration. To a lesser extent, other foundations—such as those of Charles Addams, Keith Haring, and Niki de Saint Phalle—continue an involvement in licensing initiatives, consistent with their artists' lifetime practices.

Depending on the scale of royalty revenues, unauthorized use of intellectual property can be a costly problem. Optimizing the value of intellectual property requires maintaining and protecting that value, with associated expenses. Foundations involved broadly in licensing intellectual property typically retain legal advisors who specialize in that practice. In addition to dealing with unauthorized use, this might be for the purpose of negotiating licensing agreements for new uses or for optimal renewals of licenses. Specialists also assist foundations in re-acquiring rights dispersed during an artist's lifetime, and establishing agreements for works in which others hold rights, such as works created collaboratively or featuring the image of a public personality. In developing new uses, foundations work with licensing firms expert in particular industries, such as publishing, film and television, fashion, or manufacturing. Some foundations active in licensing employ staff dedicated to managing intellectual property.

## **Summary of Rules for Ownership of Intellectual Property**

Private foundation rules bear on foundation administration of copyrights and intellectual property for scholarly and educational purposes, as well as for commercial purposes. As in other cases, these rules differ significantly from ownership by private individuals and entities, as well as being distinct in many cases from ownership by public charities, which is the status of most art museums and cultural institutions. The following points are applicable generally to private foundations administering artists' copyrights and intellectual property as these activities are informed by private foundation law. As fiduciaries, foundation trustees, directors, and officers are responsible for knowing these rules, although they also should consult with legal counsel expert in private foundation law on the details of their particular circumstance.

### **Copyright and Intellectual Property Basics**

Copyrights and intellectual property owned by a private foundation, whether utilized to provide financial support or as a resource for direct charitable activities, must be administered to further the foundation's exempt purpose, benefit a charitable class that is broadly public, and not provide a private benefit to particular individuals or limited groups.<sup>17</sup>

Rights and reproduction permissions by a foundation cannot be granted based on the private purposes of its insiders.<sup>18</sup> Permissions should be determined according to an institutional policy, based on objective criteria, adopted by the foundation's board, and applied equitably. Rights and reproduction guidelines should be published on the foundation's website.

In line with the private benefit prohibition that is a fundamental criterion for tax exemption, a private foundation cannot license publication by one scholar exclusively or on terms more favorable than those applied to other scholars.<sup>19</sup>

In exploiting its intellectual properties commercially, a private foundation cannot confer a private benefit on for-profit entities (for example, by licensing rights at below market rates or by giving an exclusive license, unless this can be shown to be the only practical way to optimize the value of the rights in support of the foundation's charitable purpose).<sup>20</sup> Licensing should be conducted according to an institutional policy, based on objective criteria, and in alignment with market rates.

As is the case for all copyright owners, a private foundation's exclusive rights are limited by the doctrine of fair use, described generally as pertaining to use for limited, noncommercial purposes, such as criticism, comment, news reporting, teaching, scholarship, or research.<sup>21</sup>

### **Copyrights and Insiders**

A private foundation cannot administer copyrights and intellectual property owned by a foundation insider unless these have been pledged irrevocably to the foundation.<sup>22</sup>

As a general rule, a foundation cannot undertake activities that provide an economic benefit to its insiders. As such, a foundation generally should not conduct activities that produce intellectual property rights revenue paid to insiders, thereby benefiting them economically.<sup>23</sup> Likewise, a foundation generally should not undertake publications, exhibitions, and film projects that generate copyright fees paid to insiders, nor sell products licensed by insiders.

Transactions between a foundation and its insiders are prohibited. Payment of fees and royalties to its insiders, or for their benefit, by the private foundation constitutes self-dealing as well as inurement, which is a basis for revocation of exemption.<sup>24</sup> Likewise, a foundation cannot license its intellectual property to insiders or for their benefit, or permit its intellectual property to be used at no cost by insiders or for their benefit.<sup>25</sup>

In summary, foundation ownership and administration of copyrights and intellectual property are conducted according to rules that for the most part are not applicable to private individuals and entities. Likewise, to comply with prohibitions on private benefit and self-dealing, a foundation's activities will be restricted, in some cases significantly, if these generate a financial benefit to insiders who own or benefit economically from the artist's copyrights and intellectual property.

In crafting institutional guidelines to administer copyright permissions and intellectual property licensing, foundations should confer with legal advisors who are expert in private foundation law, as well as those who are knowledgeable about intellectual property law.

## **Standards for Administration of Intellectual Property**

Artist-endowed foundations administer their copyrights and intellectual property amid continuing debate about the doctrine of fair use and ongoing concerns among scholars and educators regarding access, permissions, and costs that limit their abilities to license rights for scholarly and educational purposes. Professional associations have developed guidelines and recommended standards addressing these concerns, applicable to artist-endowed foundations as one among several types of nonprofit entities that own archival materials and visual collections and license the associated rights.

Among these guidelines is the responsibility to make art historical research materials and artworks freely and fully accessible to art historians for research and publication, subject to appropriate restrictions bearing on privacy rights of living persons.<sup>26</sup> Relatedly, professional standards for art historians cite as improper professional practice any request to reserve exclusive publication rights from an institution.<sup>27</sup> Also cited among guidelines for best practice is the charge of minimal fees, or no fees, for reproduction of visual materials for scholarly and educational publications serving limited educational and professional audiences, distinct from commercial publications with wide distribution.<sup>28</sup>

## **Effective Practice Enhancing Foundations' Educational and Scholarly Purposes**

Several effective practices can be identified among artist-endowed foundations that support and enhance the scholarly and educational role of copyrights and intellectual property, including:

- website publication of a notice outlining the copyrights and intellectual property owned by the foundation, and the means to submit inquiries with respect to these;
- website publication of the institution's rights and reproduction policy and guidelines, adopted by the foundation's board and reviewed annually; and
- rights and reproduction fee schedules that recognize industry practice by differentiating between educational and scholarly purposes and commercial use.

## **Considerations in Owning and Administering Intellectual Property**

To the extent that it supports their charitable purposes and is consistent with donors' charitable intentions, artist-endowed foundations own and administer intellectual property. Questions of alignment with charitable purpose, as well as availability of resources and capability, are central to foundations' choices in this role. As important are the broader issues, including the potential legal complexity of defending against unauthorized use of rights and the fact that, in some circumstances, a private foundation will not be the appropriate vehicle for this work due to prohibitions on benefits to insiders.

The briefing paper prepared for the Study by Frances R. Hill proposes use of the public benefit requirement, an obligation of all tax-exempt organizations, as an aid in designing and operating artist-endowed foundations.<sup>29</sup> The paper poses questions helpful in decisions concerning potential activities, including the following types of considerations.

Does the foundation own or hold a legally binding pledge for the intellectual property of the deceased artist?

How would management and development of the artist's intellectual property advance a foundation's charitable purpose?

What public benefit would result from managing and developing the intellectual property? Who under applicable law are the *permitted beneficiaries* of this activity? How would this charitable class actually benefit?

What are the potential risks and costs to the foundation?

## **The Appropriate Role for an Artist-Endowed Foundation**

The number of artist-endowed foundations that own artists' copyrights and intellectual property will likely increase in the coming decades, and the diversity of their interests will evolve. The key factor in this will be choices by artists working in newer forms, such as animation and design, and creating in forms accorded rights more recently, such as architecture, to endow foundations with copyrights and intellectual property, even as new types of dissemination technologies continue to emerge and expand.

The duties of foundation fiduciaries and the public benefit obligations and private benefit prohibitions of private foundations together set the parameters for artist-endowed foundations' roles owning and administering copyrights and intellectual property. Within this framework, a private foundation might be an appropriate means to deploy an artist's intellectual property in ways that serve a public benefit. However, a private foundation might not be an option for this role given its inherent limitations, or at the least it might be significantly restricted in its activities. This should be determined early in foundation planning. The testamentary transfer of intellectual property rights by an artist to a private foundation or for its benefit is an area of specific expertise within trust and estate law. Likewise, the nature of intellectual property rights and how these align with a foundation's exempt purpose and legal status have direct bearing on choices for an artist-endowed foundation, including its governance structure. Legal advisors expert in private foundation law are key to planning foundations that will own intellectual property or undertake activities involving rights, alongside advisors who are expert in estate planning and those knowledgeable about intellectual property.

## **Resources: Copyrights and Intellectual Property**

### **Intellectual Property Fundamentals**

*Copyright Basics*. United States Copyright Office, Library of Congress.  
<http://www.copyright.gov/>.

*Copyright Fair Use*. United States Copyright Office, Library of Congress.  
<http://www.copyright.gov/>.

World Intellectual Property Organization. *WIPO Intellectual Property Handbook: Policy, Law and Use*. 2nd ed. Geneva: World Intellectual Property Organization, 2004. Also available at <http://www.wipo.int/>.

### **Best Practice Guidelines**

#### ***Scholarly Permissions***

Bober, Phyllis Prayer. "Guidelines for Fair Use of Visual Materials in Scholarly Publication and Research." In *Copyrights and Permissions in Scholarly and Educational Publishing. Standards and Guidelines*. College Art Association.  
<http://www.collegeart.org/guidelines/reprorights.html>.

#### ***Educational Permissions***

Stanford University Libraries. "Academic and Educational Permissions." In *Copyright and Fair Use*. Last modified 2007.  
[http://fairuse.stanford.edu/Copyright\\_and\\_Fair\\_Use\\_Overview/chapter7/7-c.html#2](http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter7/7-c.html#2).

### **General Resources**

#### ***Charitable Transfer of Copyrights***

Lerner, Ralph E., and Judith Bresler. "Tax and Estate Planning for Artists: Charitable Transfers." In *Art Law, The Guide for Collectors, Investors, Dealers, and Artists*. 3rd ed., 1767–1783. New York: Practising Law Institute, 2005.

#### ***Exempt Organizations and Intellectual Property***

Darling, Roderick, and Marvin Friedlander. "Intellectual Property." In *Exempt Organization Continuing Professional Education Technical Instruction Program*. Washington, DC: Internal Revenue Service, 1999.

#### ***Private Foundations and Intangible Assets***

Hill, Frances R., and Douglas M. Mancino. "Royalty Exclusions Under Section 512(b)(2)." In *Taxation of Exempt Organizations*, 23-16–23-23. Valhalla, NY: Thomson/RIA, 2002–2008.



## **Valuation of Intellectual Property**

Halpern, Richard E. "Depreciation of Copyrights." In *Art Law Handbook*. Edited by Roy S. Kaufman, 1126–1127. New York: Aspen Law & Business, 2000.

## **Private Foundation Rules and Artist-Endowed Foundations**

Fremont-Smith, Marion R. "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Hill, Frances R. "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

## **Private Foundation Law**

Fremont-Smith, Marion R. *Governing Nonprofit Organizations, Federal and State Law and Regulation*. Cambridge, MA: Belknap Press of Harvard University Press, 2004.

Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008.

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<sup>1</sup> United States Copyright Office, Library of Congress, *Circular 1: Copyright Basics*, (Washington, DC: Library of Congress, 2008).

<sup>2</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).

<sup>3</sup> World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, 2nd ed. (Geneva: World Intellectual Property Organization, 2004).

<sup>4</sup> United States Copyright Office, Library of Congress, *Circular 1a: A Brief Introduction and History* (Washington, DC: Library of Congress, 2009).

<sup>5</sup> United States Copyright Office, Library of Congress, *Circular 40: Copyright Registration for Works of the Visual Arts* (Washington, DC: Library of Congress, 2008).

<sup>6</sup> Lee Cort, "The Artist's Right to Control Public Display," in *Law, Ethics and the Visual Arts*, 5th ed., ed. John Henry Merryman, Albert E. Elsen, and Stephen K. Urice (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2007), 544–546.

<sup>7</sup> United States Copyright Office, *Circular 1*.

<sup>8</sup> United States Copyright Office, Library of Congress, *Circular 41: Copyright Claims in Architectural Works* (Washington, DC: Library of Congress, 2009).

<sup>9</sup> United States Department of Commerce, Patent and Trademark Office, *General Information Concerning Patents*, <http://www.uspto.gov/>.

<sup>10</sup> United States Department of Commerce, Patent and Trademark Office, *Maintaining a Federal Trademark Registration*, <http://www.uspto.gov/>.

<sup>11</sup> United States Copyright Office, *Circular 40*.

<sup>12</sup> John Henry Merryman, Albert E. Elsen, and, Stephen K. Urice, eds., "The Artist's Rights in the Work of Art," in *Law, Ethics and the Visual Arts* (New York: Kluwer Law International, 2002), 519.

<sup>13</sup> *Legal: Privacy and Publicity Rights*, Library of Congress, <http://www.loc.gov/>.

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- <sup>14</sup> *General Information Concerning Patents*, Patent and Trademark Office, United States Department of Commerce, <http://www.uspto.gov/>.
- <sup>15</sup> See foundations of Charles Addams, Ettore de Grazia, Edward Gorey, Keith Haring, Robert Mapplethorpe, Niki de Saint Phalle, and Andy Warhol, among others.
- <sup>16</sup> Roderick Darling and Marvin Friedlander, "Intellectual Property," in *Exempt Organization Continuing Professional Education Technical Instruction Program* (Washington, DC: Internal Revenue Service, 1999).
- <sup>17</sup> Frances R. Hill, "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>18</sup> *Ibid.*
- <sup>19</sup> *Ibid.*
- <sup>20</sup> Darling and Friedlander, "Intellectual Property."
- <sup>21</sup> United States Copyright Office, Library of Congress, *FL-102: Copyright: Fair Use* (Washington, DC: Library of Congress, 2009).
- <sup>22</sup> Fremont-Smith, "Federal and State Laws."
- <sup>23</sup> *Ibid.*
- <sup>24</sup> *Ibid.*
- <sup>25</sup> *Ibid.*
- <sup>26</sup> *A Code of Ethics for Art Historians and Guidelines for the Professional Practice of Art History*, College Art Association, <http://www.collegeart.org/>.
- <sup>27</sup> *Ibid.*
- <sup>28</sup> Phyllis Pray Bober, "Guidelines for Fair Use of Visual Materials in Scholarly Publication and Research," in *Standards and Guidelines: Copyrights and Permissions in Scholarly and Educational Publishing*. New York: College Art Association, n.d. <http://www.collegeart.org/>
- <sup>29</sup> Hill, "Public Benefit."



## 8.2.4 Oeuvres: Catalogues Raisonnés and Authentication

Preparation of a catalogue raisonné, defined as a systematic documentation of all works by an artist, is an important contribution to art historical knowledge, and in particular to the body of scholarship about an artist's lifework, the *oeuvre*.<sup>1</sup> In some cases, a detailed and reliable catalogue raisonné also can bear on the market for an artist's works.<sup>2</sup> Central to preparation of a catalogue raisonné is the process of art authentication, involving the determination by scholarly experts that an artwork is by a purported creator.<sup>3</sup>

Authentication is inherent in other scholarly activities that aim to organize and disseminate definitive information about an artist's *oeuvre*. These include preparation of an authoritative database or registry documenting the artist's authentic works, and curating of retrospective exhibitions or exhibitions focused in-depth on a specific aspect of an artist's *oeuvre*. Beyond the scholarly realm, verification of authenticity is involved when a work of art is offered for sale or considered for purchase. Likewise, affirmation of attribution is inherent in licensing publication rights in artworks and administering intellectual property.

Artist-endowed foundations have produced only a small portion of the catalogues raisonnés for US artists published in the past four decades, and then only recently.<sup>4</sup> Many catalogues raisonnés are prepared by independent scholars or committees of scholars and published by university presses and art book publishers. Some are produced by museums. Quite a few are produced by commercial art galleries or with their facilitation, either representing living artists or representing artists' heirs or beneficiaries under the rubric of the *artist's estate*. Most artist-endowed foundations are not preparing catalogues raisonnés currently. Likewise, most do not authenticate their artist's works apart from a catalogue initiative. Nonetheless, as new artist-endowed foundations increasingly incorporate a study and education mission, the number of foundations involved in producing a definitive catalogue or database documenting their artist's authentic *oeuvre* is likely to grow.

The decision that a foundation will sponsor or facilitate a catalogue raisonné or comparable project documenting an artist's authentic *oeuvre* involves a number of choices, as does the decision to authenticate an artist's works on an ongoing basis. The foremost institutional consideration is the relationship of such activities to a foundation's charitable purpose. Important factors also include the availability of sufficient resources and necessary administrative capacity. A central concern is the ability to marshal independent, objective, scholarly authority necessary to ensure credibility. Depending on market valuation and demand for an artist's works, questions of authenticity can involve substantial stakes, and these heighten potential liability associated with definitive scholarship. This risk will be a concern for some foundations and not for others. In any case, factors contributing to potential liability and a foundation's ability to minimize risk are significant considerations.

This chapter reviews foundation practice in conducting initiatives to research, document, and disseminate definitive information about an artist's authentic oeuvre, with attention to issues pertinent to new artist-endowed foundations. Examples of artist-endowed foundations involved in these types of activities are noted in **4. Field Charitable Activity**. Best practice in preparing catalogues raisonnés, and by extension undertaking art authentication, is a focus of a growing body of literature, reflecting ongoing discussions and debates on the topic among professionals in the art and legal communities. A selection of these texts is cited at the close of this chapter, along with briefing papers prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study) that pertain to this topic.

Foundation trustees, directors, and officers preparing plans to produce a catalogue raisonné or to conduct authentication of an artist's works should do so with the guidance of legal advisors expert in the laws and regulations that apply to private foundations active in this area. The following summary information highlights key aspects of the rules generally as an orientation to practical considerations. As for the Study report as a whole, this discussion of considerations in practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

## **Artist-Endowed Foundations, Catalogues Raisonnés, and Art Authentication**

As noted in **Addendum A. Brief History: Artist-Endowed Foundations and Catalogues Raisonnés**, artist-endowed foundations have existed in the US since the early twentieth century, but few have produced catalogues raisonnés or conducted art authentication until recently. Earlier foundations typically supported exhibitions and publications, including catalogues raisonnés, undertaken by museums and academic institutions or issued by university presses. Likewise, they looked to other parties, such as their art dealers, to assess authenticity of the artists' works. Whatever the reason for this segregation of functions, it accorded generally with a view that artist-endowed foundations, as with other types of parties having an interest in an artist's works, could be valuable resources to preparation of a catalogue raisonné, but direct control of the preparation itself could raise questions about objectivity, given advocacy commitments and financial stakes.<sup>5</sup>

The first catalogue to be published by an artist-endowed foundation was the Barnett Newman prints catalogue raisonné published by the Barnett Newman Foundation in 1983.<sup>6</sup> Since then, some 11 catalogues, catalogue volumes, or updated editions have been issued by artist-endowed foundations to date, with the Andy Warhol Foundation for the Visual Arts accounting for four of these and the Barnett Newman Foundation and Josef and Anni Albers Foundation accounting for two each.

Even as artist-endowed foundations began to undertake catalogues raisonnés directly, museums continued to play key roles in some of these efforts. The Georgia O'Keeffe catalogue raisonné was released in 1999 by the National Gallery of Art in partnership with the Georgia O'Keeffe Foundation, which also was one of the funders.<sup>7</sup> The Foundation's president at that time served as co-director with the museum's curator. The Robert Motherwell prints catalogue raisonné was produced by the Walker Art Center in 2003 with Motherwell's Dedalus Foundation as a funder and the Foundation's vice president and curator at the time serving as co-author with the museum's curator.<sup>8</sup> Apart from the Andy Warhol Foundation for the Visual Arts' multivolume initiative for the artist's paintings and sculpture catalogue, the first volume of the two-part film catalogue was released in 2006 by the Whitney Museum of American Art, with the Foundation as the exclusive funder.<sup>9</sup>

As suggested by the brief history, most authentication determinations by artist-endowed foundations have taken place only within recent decades and in the context of catalogue raisonné initiatives or comparable definitive curatorial projects. As a general rule, denials of authenticity resulting from these scholarly activities have not been publicized, but a few have reached the public record. Among the most significant, a group of 28 watercolors attributed to Georgia O'Keeffe was disallowed from that catalogue based in part on scientific analysis of art materials; another 220 individual works reportedly also were disallowed, but with less press interest.<sup>10</sup> Also reported publicly, individual works have been denied authentication and so disallowed from the Jackson Pollock catalogue supplement,<sup>11</sup> the Andy Warhol catalogue,<sup>12</sup> and the Alexander Calder catalogue or registry.<sup>13</sup>

## **Scholarly Research, Art Authentication, and Definitive Publications on Artists' Oeuvres**

Preparation of a definitive catalogue or registry of an artist's authentic works can play a number of roles in furthering a foundation's charitable purpose. These roles take shape based on the nature of a foundation's art and intellectual property assets and the ways in which these are intended to be utilized by the foundation. For example, many artist-endowed foundations are established with a charitable purpose that incorporates a mission to contribute to and disseminate knowledge about their artists' oeuvres and creative principles. This type of educational and scholarly purpose is furthered directly by such activities as conducting research, documenting artworks, undertaking art authentication, and publishing definitive catalogues or producing registries affirming the provenance and authenticity of an artist's oeuvre.

Other foundations are endowed with their artist's artworks and copyrights for sale and licensing to fund operation of the foundation and its charitable programs. Foundations in such cases generally are obligated to optimize the value of these holdings in serving that purpose. Producing and disseminating a comprehensive, reliable publication on an artist's authentic oeuvre can help to protect the market for that artist's work, minimizing questions

of attribution that can diminish collectors' confidence. The same activities can help to clarify a foundation's interests in the copyrights and intellectual property of its artist's oeuvre.

Foundations might combine multiple interests—those educational and scholarly, as well as those fiduciary—in researching the provenance and documenting and disseminating information about the artist's authentic oeuvre and creative principles. The powerful intersection of scholarly enterprise with marketplace interests—recognized widely among art scholars, art dealers, and art collectors—reflects the complex nature of artworks themselves, in which aesthetic and cultural significance informs scholarly, educational, and economic value.<sup>14</sup>

Regardless of the way in which a foundation's charitable purpose is served, excellence in scholarship is a fundamental necessity. A foundation with an educational and scholarly purpose is not serving that mission fully unless the scholarship it conducts is of the highest order. A foundation with a duty to optimize its assets in support of charitable programs is not fulfilling that fiduciary responsibility unless the scholarship it supports is of exemplary quality. Although there will be distinctions among foundations in terms of their artist-donors' intentions with respect to charitable purposes and how artworks and copyrights should be used in serving these, the caliber of the scholarly enterprise should be comparable with respect to efforts to ensure excellence.

That said, there is no requirement that a foundation must conduct scholarly research, authenticate art, and produce a definitive publication or registry, whether it is pursuing an educational and scholarly purpose or fulfilling a fiduciary obligation. Any number of considerations might inform a prudent decision against such activities. Among other factors, the expense can be considerable, potential liabilities can be substantial, a legal form or governance structure might make a foundation particularly vulnerable to potential liabilities, and circumstances might create a risk of conferring private benefit on foundation insiders. It might also be the case that a foundation's choice is to focus scholarly research initially on a specific aspect of an artist's oeuvre (for example, work of a period or medium that has been less examined or undervalued), with the expectation that a comprehensive effort will be undertaken later.

An artist's lifetime foundation—one whose artist-donor is living—would not be involved in producing the artist's catalogue raisonné or authenticating the artist's works. Authenticating and publishing about an artist's works during the artist's lifetime might inadvertently breach laws prohibiting private benefit and self-dealing if a foundation's activities of this nature serve to promote the artist's career, thereby benefiting the artist economically.<sup>15</sup>

## Administrative Practice

More than two dozen artist-endowed foundations are involved currently in preparing catalogues raisonnés or producing databases or registries of authentic works.<sup>16</sup> The status of these efforts ranges from inception to pending publication. Most of the projects are being undertaken directly by foundations themselves, with about two-thirds drawing fully or to some extent on the expertise of staff or trustees. The remaining third have commissioned independent scholars as authors or editors of the catalogue, to be published by the foundation, or they are facilitating projects under the auspices of separate institutions, such as museums or universities. In a few cases, a foundation's art dealer is administering the project.

The range among foundations involved in these activities is broad, from those with less than \$1 million in assets to the very largest, at over \$300 million. Foundations include those that primarily make grants (such as the Renate, Hans and Maria Hofmann Trust and the Andy Warhol Foundation for the Visual Arts); those that operate study centers or exhibition collections (such as the Frederick and Francis Sommer Foundation and the Lachaise Foundation); and those that combine multiple roles, like grantmaking and operating study centers or exhibition collections (such as the Dedalus Foundation and the Adolf and Esther Gottlieb Foundation).

Foundations preparing catalogues raisonnés directly have organized their activities using several formats. Some have established expert committees as *authentication boards* incorporated separately from the foundation. The authentication board might author the catalogue, as did the Pollock-Krasner Authentication Board for the 1995 Pollock catalogue supplement published by the Pollock-Krasner Foundation.<sup>17</sup> Alternatively, the foundation-sponsored catalogue might be authored or edited by foundation staff members who are also among the expert members of a separately incorporated authentication board. This is the case for the Andy Warhol Art Authentication Board created in 1995 by the Andy Warhol Foundation for the Visual Arts to formalize the authentication activities initiated by the artist's executors after his death in 1987.<sup>18</sup>

Other foundations have organized activities under the auspices of expert catalogue raisonné committees or review boards that are distinct from the foundation's governance structure, although not separate legal entities. These include among their expert members the foundation curators or directors who are authoring the catalogue, either individually or among a group of authors. Examples include the Josef and Anni Albers Foundation, the Dedalus Foundation, and the Sam Francis Foundation.

To alert art collectors, scholars, and the arts community about these activities, most foundations have posted notice of the catalogue initiative on their website, advertised in journals and magazines, listed with peer associations,<sup>19</sup> and in some cases joined relevant



professional organizations.<sup>20</sup> Many websites include an information form, questionnaire, or online registration page enabling individual owners of artworks to submit information about specific works for inclusion in the catalogue or registration in the database.

Foundations have taken different approaches to art authentication within the context of preparing catalogues raisonnés. One common approach is to authenticate individual artworks during the course of researching a catalogue raisonné, providing determinations of authenticity on an ongoing basis, typically convening a committee or board several times a year. The Albers Foundation outlines authentication procedures of this type on its website.<sup>21</sup> In contrast, another approach declines to provide decisions as to the authenticity of individual artworks during the course of research, holding instead that inclusion in the published catalogue is the determination of authenticity, made when all research on the oeuvre is complete. Preparation of the Georgia O'Keeffe catalogue raisonné dealt with authentication on this principle.<sup>22</sup>

Some foundations authenticate their artists' works even though they are not currently involved in preparing catalogues raisonnés or definitive scholarship. The Keith Haring Foundation and Robert Mapplethorpe Foundation are among these, as noted on their websites.<sup>23</sup> The choice to authenticate outside an active catalogue raisonné project or other scholarly initiative might be made in preparation for likely future involvement in such an undertaking or in cases where market demand and broad appeal of an artist's works create a frequent need to address matters of attribution or to protect copyrights. Conversely, some foundations do not conduct ongoing authentication once a catalogue raisonné has been issued. Examples include the Barnett Newman Foundation and the Pollock-Krasner Foundation, as well as the Georgia O'Keeffe Foundation, which did not authenticate works during the seven-year period that followed release of its catalogue up to the planned termination of its activities in 2006.

The potential liability associated with art authentication, conducted separately or as an aspect of preparing a catalogue raisonné, continues to be a concern among professionals in the art history, curatorial, conservation, legal, and art sales realms, as well as among artist-endowed foundations.<sup>24</sup> Foundations have been involved in litigation concerning their refusals to authenticate works and decisions to exclude works from a catalogue or registry of authentic works. Among these are the Pollock-Krasner Foundation, the Andy Warhol Foundation for the Visual Arts, and the Calder Foundation.<sup>25</sup> Legal advisors have developed recommendations for procedures to limit liability in conducting authentication and preparing catalogues raisonnés.<sup>26</sup> In defining their involvement in these activities, some foundations retain legal advisors who specialize in authentication matters.

The expense to defend a legal action can be substantial, and the potential diversion of resources from a foundation's charitable purpose significant. Because legal actions may be

brought against a foundation as an entity, as well as individually against its officers and directors, it is critical that a foundation be able to indemnify its officers and directors by securing sufficient directors and officers liability insurance. Laws in some states limit the ability of foundations incorporated in those states to indemnify or compensate their officers and directors if the organizations are controlled by boards with related majorities, such as family members.<sup>27</sup> This factor is a consideration in light of the growing number of artist-endowed foundations with family-majority boards.

Legal actions against foundations have alleged that a failure to authenticate an artwork is a monopolistic practice intended to minimize market supply in order to heighten the value of a foundation's art assets.<sup>28</sup> Another argument alleges that a foundation's failure to authenticate an artwork is in the interest of related insiders who privately own and sell the artist's works and so benefit from steps to limit market supply.<sup>29</sup> Neither line of argument has been successful to date; nonetheless, litigation efforts by those holding works denied authentication continue and are likely to do so.

Apart from legal concerns, the expense of authentication-related research is also a consideration. Catalogues raisonnés vary in scope and scale based on many factors, among them the size and diversity of the artist's oeuvre and the scholarly mandate as a comprehensive or medium-specific effort. The comprehensive catalogue for the works of Georgia O'Keeffe dealt with more than 2,000 works in two volumes totaling 1,200 pages, prepared over eight years. The Robert Motherwell prints catalogue documented more than 500 print editions in a single volume totaling 430 pages, prepared over four years. Extended terms are not unusual, nor are changes in editors or authors between inception and final publication. Implementation by foundation staff and directors or by outside expert committees and consulting editors can influence expense as well.

Most foundations do not disaggregate the multi-year costs of their catalogue initiatives from overall expenses reported for research, documentation, or education activities, so comparison of costs is difficult. Catalogues raisonnés typically are funded exclusively by the respective foundation (for example, those for Barnett Newman and Hans Hofmann). There are exceptions. The Josef and Anni Albers Foundation's current catalogue projects are implemented in conjunction with a comprehensive initiative to document, catalogue, and preserve its art collections, undertaken with support from outside donors. Catalogues produced through foundations' collaborations with museums, such as those for Georgia O'Keeffe and for the prints of Robert Motherwell, also have garnered funds from sources beyond the respective foundations.

Whether an online catalogue raisonné or database can be less expensive, while also offering the advantage of ongoing updates, is of interest among art scholars and professionals broadly. The expense of project administration, research, and high quality visual

documentation is not likely to differ, but the cost of publication in some cases might be less and the access much greater for audiences such as students and independent scholars. Digitization of previously published catalogues for re-dissemination online suggests an opportunity to broaden scholarly and educational access to out-of-print catalogues. Likewise, among foundations that do have ongoing involvement in matters of authentication, a widely available catalogue raisonné might help to curtail confused or intentional misrepresentation of authorship. However, despite possible advantages, only a few online catalogues have been published to date, and there is a view among some scholars that the potential complexity of online publication has yet to be fully grasped.<sup>30</sup>

## **Summary of Rules for Art Authentication and Catalogues Raisonnés**

Private foundation rules bear on foundation activities involving the authentication of artworks and creation of publications or archives embodying research, such as catalogues raisonnés, databases, and registries. As noted previously, private foundation rules differ significantly from those that pertain to private individuals and entities, as well as being distinct in some respects from those for public charities, which is the status of many museums and academic institutions. The following points are applicable generally to private foundations implementing scholarly research, art authentication, and related publication or documentation activities as these are informed by private foundation law. As fiduciaries, foundation trustees, directors, and officers are responsible for knowing these rules, although they also should consult with legal counsel expert in private foundation law on the details of their particular circumstance.

### **Scholarly Research Basics**

A foundation's scholarly research, art authentication, formation of a database or registry of authentic works, and production of a catalogue raisonné must be conducted so that these activities further the foundation's charitable purpose, benefit a charitable class that is broadly public, and do not provide a private benefit to particular individuals or limited groups.<sup>31</sup>

A foundation cannot make its art authentication expertise available based on the private purposes of its insiders.<sup>32</sup> Access to a foundation's art authentication expertise should be made available according to an institutional policy, based on objective criteria, adopted by the foundation's board, and implemented equitably. As a matter of best practice, the policy should be published on the foundation's website.

In line with the private benefit prohibition that is a fundamental criterion for tax exemption, a foundation cannot make its art authentication process available to one art owner on terms more favorable than those given to other art owners.<sup>33</sup> Likewise, a foundation cannot make its authentication process available to a for-profit art gallery and its clients on a preferential basis or exclusively.<sup>34</sup>

As with foundation-owned archives, a foundation's database or registry of authentic works must be administered so that it furthers the foundation's charitable purpose, benefits a broad charitable class, and does not provide a private benefit to specific individuals or limited groups.<sup>35</sup> In addition, the database or registry should be made available for study and review under objective access guidelines not based on insiders' private purposes, and made accessible equitably without conferring private benefit on certain individuals or for-profit firms by favorable terms or exclusivity.<sup>36</sup>

As fiduciaries, foundation trustees, directors, and officers are bound by the duty of care to protect the foundation's assets.<sup>37</sup> A decision to undertake activities potentially involving significant liability, such as art authentication, should be made in light of this duty.

### **Scholarly Research Activities and Insiders**

As a general rule, a foundation cannot undertake activities that provide an economic benefit to its insiders. As such, to the extent that these increase the economic value of artworks owned by insiders, a foundation generally should not conduct scholarly research, publish about, or authenticate artworks owned by insiders, unless the artworks have been pledged irrevocably to the foundation.<sup>38</sup>

Likewise, a foundation generally should not make grants designated to support activities, such as research projects and scholarly publications, that will increase the economic value of artworks owned by insiders, thereby benefiting them economically.<sup>39</sup>

In summary, private foundations engage in art authentication, scholarly research, and publication initiatives in compliance with rules that to a great extent are not applicable to private individuals or entities. Further, in accordance with prohibitions on private benefit and self-dealing, a foundation's activities will be restricted, in some cases significantly, if these activities generate an economic benefit to insiders who own and sell or license the artist's works or intellectual property. These constraints are stricter than those applicable to public charities, which is the status of many museums and academic institutions.

In developing institutional policies to conduct authentication and implement a catalogue raisonné or comparable initiative, foundations should confer with legal advisors who are expert in private foundation law, as well as with those who are knowledgeable about the legal aspects of art authentication practice.

## **Standards for Conducting Art Authentication and Preparing Catalogues Raisonnés**

The involvement of artist-endowed foundations in art authentication and preparation of definitive publications, databases, or registries about artists' oeuvres is increasing even as art scholars, conservators, legal advisors, and art dealers continue to debate the ethics and risks associated with these activities and the ways in which scholarship is influenced by such concerns. That debate has been urgent for some time. For example, it was the featured topic for catalogue raisonné scholars at the inaugural convening of their professional association almost 15 years ago.<sup>40</sup> Reflecting this widespread concern, a number of publications have been issued in recent years addressing questions of standards and best practice.

Beyond important procedural specifics, guidelines developed for art history professionals include several broad points.<sup>41</sup> Chief among recommended practices is that authentication determinations be made by committees whose members together contribute art historical, stylistic connoisseurship, and scientific analysis capabilities to consensus decisions. Related to this is the guidance that scholars should provide authentication opinions only if they are expert in the works of the specific artist. As a practical matter, prudent authentication will involve such steps as use of appropriate release agreements, provision of indemnification for scholars and experts, sufficient insurance for institutions and their officers and directors, and inclusion of a disclaimer in a resulting publication.<sup>42</sup>

## **Effective Practice Enhancing Foundations' Educational and Scholarly Purposes**

Although artist-endowed foundations are only beginning to be involved broadly in producing definitive catalogues or registries documenting artists' authentic oeuvres, effective practices are emerging that support and enhance the educational and scholarly purposes of these activities. A selection of these includes:

- planning and implementing research and production of definitive publications, databases, and registries by experienced professionals and qualified art historians to meet professional, scholarly standards;
- website publication of a notice stating the foundation's sponsorship of a catalogue raisonné, database, or registry of authentic works, the status of the initiative, and the means to submit inquiries;
- website publication of the institutional policy to access the art authentication process, with that policy adopted by the foundation's board and reviewed annually;
- an internship program to engage students in scholarly research and documentation activities;

- broad dissemination of publications, databases, and registries embodying scholarly research (for example, through website publication or via external online platforms accessible for scholarly and educational use); and
- website publication of the institution's access policy for its databases and registries documenting authentic works, with that policy adopted by the foundation's board and reviewed annually.

## Considerations in Conducting Art Authentication and Preparing Catalogues Raisonnés

To the extent that it furthers their charitable purposes, artist-endowed foundations will have reason to consider undertaking art authentication and production of catalogues raisonnés. Questions of resources and capacity are central to foundations' choices. The ability to marshal independent, objective scholarship is key. Also important are broader issues, including the legal uncertainty of this terrain and the fact that in some circumstances a private foundation may not be an appropriate vehicle for this work based on the private interests of foundation insiders. The briefing paper prepared for the Study by Frances R. Hill proposes use of the public benefit requirement, an obligation of all tax-exempt organizations, as an aid in designing and operating artist-endowed foundations.<sup>43</sup> The paper poses several questions helpful in decisions about potential activities, reflected in the following types of considerations.

How would conducting art authentication further the foundation's charitable purpose?

What public benefit would result from authentication of the artist's works? Who under applicable law are the *permitted beneficiaries* of this activity? How would this charitable class actually benefit?

How would producing a catalogue raisonné further the foundation's charitable purpose? What public benefit would result from publication of a catalogue? Who under applicable law are the *permitted beneficiaries* of this activity? How would this charitable class actually benefit?

Is the foundation's legal form and governance structure appropriate to engage in art authentication? Are these suited to implementing and publishing a catalogue raisonné?

What are the potential risks and costs to the foundation in conducting art authentication or in publishing a catalogue raisonné? Is the foundation properly insured and aware of procedures to limit liability?

On what basis would the foundation's scholarly authority to authenticate be grounded? On what basis would its published catalogue or its organized database or registry be received as definitive scholarship?

## The Appropriate Role for an Artist-Endowed Foundation

As clear from **Addendum A. Brief History: Artist-Endowed Foundations and Catalogues Raisonnés**, the involvement of private foundations in conducting definitive scholarship on artists' oeuvres is a recent development in the US. Under this country's laws, the duties of foundation fiduciaries and the public benefit obligations and private benefit prohibitions of private foundations together define the framework for artist-endowed foundations' roles in conducting art authentication and producing catalogues raisonnés and databases or registries of artists' authentic works.

Within these parameters, a private foundation might be the appropriate vehicle to organize the scholarly enterprise and prepare and disseminate the resulting publication or scholarly resource. However, a foundation could prove nonviable for this role in some circumstances (for example, where the limits on private foundations would make it difficult to produce a comprehensive catalogue). In such cases, an alternative approach with a different, appropriate organizational structure would be necessary.

## **ADDENDUM A.**

### **Brief History: Artist-Endowed Foundations and Catalogues Raisonnés**

Artist-endowed foundations have existed in the US since the early twentieth century, but few have produced catalogues raisonnés or conducted art authentication until recently. In most cases, earlier foundations advanced scholarly initiatives by lending artworks and providing grants for the exhibition and publication projects of museums or academic institutions. Likewise, other parties, such as foundations' art dealers, generally assessed authenticity. Three years after the artist's death, the Charles E. Burchfield Foundation (Ruling Year 1967) assisted a museum's 1970 exhibition and publication cataloguing the artist's paintings in private and public collections.<sup>44</sup> In 1991, four decades after the artist's death, the John Sloan Memorial Foundation (Ruling Year 1980) funded publication of the artist's paintings catalogue raisonné by a university press.<sup>45</sup> The Ezra Jack Keats Foundation (Ruling Year 1970) facilitated a university's publication of the artist's catalogue raisonné released in two volumes—in 1994, 11 years after the artist's death, and in 2002.<sup>46</sup>

Direct involvement by foundations in catalogues raisonnés started in the 1980s. In 1981, the Mark Rothko Foundation (Ruling Year 1971) initiated planning for a catalogue raisonné. Its trustees terminated the foundation in 1986, placing a core collection of works with the National Gallery of Art, which agreed to carry forward the catalogue.<sup>47</sup> It did so, releasing the catalogue for works on canvas in 1998, almost three decades after the artist's death, and is now preparing the catalogue for works on paper.<sup>48</sup> In 1983, the Barnett Newman Foundation (Ruling Year 1980) published the artist's prints catalogue in conjunction with a touring exhibition.<sup>49</sup> In 2004, more than three decades after the artist's death, the Foundation released the catalogue of his works in all media.<sup>50</sup> In 1988, nine years after the artist's death, the Richard Florsheim Art Fund, in collaboration with a university art museum, published the catalogue of his graphic works.<sup>51</sup>

In 1995, the Pollock-Krasner Authentication Board, established in 1990 as a separate entity by the Pollock-Krasner Foundation (Ruling Year 1985), authored a supplement to the original four-volume Pollock catalogue raisonné.<sup>52</sup> The original catalogue, published in 1978, two decades after the artist's death, had been authored by a prior catalogue committee organized in 1971 with Lee Krasner's participation. Also in 1995, the Lee Krasner catalogue raisonné, authored by a scholar associated with the Pollock-Krasner Authentication Board, was issued nine years after the artist's death.<sup>53</sup> The Board ceased activities in 1995 following publication of the Pollock supplement.

In 1997, the Andy Warhol Foundation for the Visual Arts (Ruling Year 1988) collaborated with a commercial gallery that had solely authored prior editions to release the third edition of the artist's prints catalogue; a fourth was issued collaboratively in 2003.<sup>54</sup> The



Foundation partnered with a commercial gallery that had begun work on a catalogue during the artist's lifetime to produce the first and second volumes of the paintings and sculptures catalogue raisonné. The first was issued in 2002, 13 years after the artist's death.<sup>55</sup> The second followed in 2004.<sup>56</sup> On its own, the Foundation is implementing the third volume of the catalogue, with numerous subsequent volumes planned.<sup>57</sup> Separately, the first volume of a two-part catalogue of the artist's films was released in 2006 by the Whitney Museum of American Art, produced with the Foundation's exclusive support.<sup>58</sup> The second volume is in preparation.

In 1999, 13 years after the artist's death, the catalogue raisonné of works by Georgia O'Keeffe was published by the National Gallery of Art, issued in collaboration with the Georgia O'Keeffe Foundation (Ruling Year 1989), which also provided grant support.<sup>59</sup> The National Gallery of Art implemented the project with the Foundation's president and the museum's curator serving as co-directors of the catalogue. As planned, the Georgia O'Keeffe Foundation subsequently concluded activities, transferring its assets to the Georgia O'Keeffe Museum in 2006.

In 2001, the Josef and Anni Albers Foundation (Ruling Year 1972) released the first edition of the Josef Albers prints catalogue raisonné.<sup>60</sup> The catalogue of Anni Albers's prints followed in 2009.<sup>61</sup> The catalogue raisonné of Josef Albers's paintings is to be published in 2013, almost four decades after his death, and a second edition of his prints catalogue is being prepared by the Foundation. In 2003, more than a decade after the artist's death, the Walker Art Center issued the Robert Motherwell prints catalogue, accomplished with support from the Dedalus Foundation (Ruling Year 1983).<sup>62</sup> The Foundation's vice president and curator at the time served as co-author of the catalogue together with the museum's curator. The Foundation now is implementing the artist's paintings and collages catalogue, directed by its current president, to be published in 2011.

One other aspect of this history rounds out the picture—those cases in which an artist-endowed foundation was formed following closely on a catalogue raisonné initiative. The Jacob and Gwendolyn Lawrence Foundation (Ruling Year 2000) was formed following publication of the Jacob Lawrence catalogue raisonné that same year, issued by a university press and authored by a scholarly committee.<sup>63</sup> Formation of the Richard Diebenkorn Foundation (Ruling Year 2009) was preceded by the Richard Diebenkorn Catalogue Raisonné project, publication pending, sponsored jointly by a museum and the artist's heirs.<sup>64</sup>

## Resources: Catalogues Raisonnés and Art Authentication

### Overviews: Catalogues Raisonnés and Art Authentication

Findlay, Michael. "The Catalogue Raisonné." In *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts*. Edited by Ronald D. Spencer, 55–62. New York: Oxford University Press, 2004.

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O'Connor, Francis V. "Authenticating the Attribution of Art." In *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts*. Edited by Ronald D. Spencer, 3–27. New York: Oxford University Press, 2004.

### Best Practice Guidelines

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### General Resources

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*ARTstor Core: Data Dictionary and Cataloging Guidance for Use with Institutional Collections in ARTstor*. ARTstor. <http://www.artstor.org/>.

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Educational Resources: Catalogues Raisonnés. International Foundation for Art Research.  
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Levy, Steven Mark. "Authentication and Appraisal of Artwork." In *Art Law Handbook*. Edited by Roy S. Kaufman, 829–881. New York: Aspen Law & Business, 2000 and 2004.

Spencer, Ronald D. "The Risk of Legal Liability for Attributions of Visual Art" and "Authentication in Court: Factors Considered and Standards Proposed." In *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts*. Edited by Ronald D. Spencer, 143–215. New York: Oxford University Press, 2004.

### **Private Foundation Rules and Artist-Endowed Foundations**

Fremont-Smith, Marion R. "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Hill, Frances R. "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

### **Private Foundation Law**

Fremont-Smith, Marion R. *Governing Nonprofit Organizations, Federal and State Law and Regulation*. Cambridge, MA: Belknap Press of Harvard University Press, 2004.

Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008.

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<sup>1</sup> FAQs: *The Catalogues Raisonnés Database*, International Foundation for Art Research, <http://www.ifar.org/faq.php#catrais>.

<sup>2</sup> Peter Kraus, "The Role of the Catalogue Raisonné in the Art Market," in *The Expert Versus the Object, Judging Fakes and False Attributions in the Visual Arts*, ed. Ronald D. Spencer (New York: Oxford University Press, 2004), 63–71.

<sup>3</sup> Samuel Sachs II, "Right or Wrong, Real or Fake: Who Cares?" in *IFAR Journal* 8, nos. 3/4 (2006): 6–8.

<sup>4</sup> Catalogues Raisonnés, Educational Resources, International Foundation for Art Research, [http://www.ifar.org/cat\\_rais.php](http://www.ifar.org/cat_rais.php).

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- <sup>5</sup> Michael Findlay, "The Catalogue Raisonné," in *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts*, ed. Ronald D. Spencer (New York: Oxford University Press, 2004), 55–62.
- <sup>6</sup> Barnett Newman, Hugh M. Davies, and Riva Castleman, *The Prints of Barnett Newman* (New York: Barnett Newman Foundation, 1983).
- <sup>7</sup> Georgia O'Keeffe and Barbara Buhler Lynes, *Georgia O'Keeffe: Catalogue Raisonné, Volume One and Volume Two* (New Haven, CT: Yale University Press / National Gallery of Art / Georgia O'Keeffe Foundation, Albuquerque, 1999).
- <sup>8</sup> Robert Motherwell, Siri Engberg, and Joan Banach, *Robert Motherwell: The Complete Prints 1940–1991: Catalogue Raisonné* (Minneapolis, MN: Walker Art Center, 2003).
- <sup>9</sup> Andy Warhol and Callie Angell, *Andy Warhol Screen Tests: The Films of Andy Warhol; Catalogue Raisonné*, vol. I. (New York: Harry N. Abrams, 2006).
- <sup>10</sup> Jo Ann Lewis, "The Art That Went from Boon to Bust," *The Washington Post*, December 3, 1999, sec. C, p. 1.
- <sup>11</sup> Ronald D. Spencer, "A Legal Decision in New York Gives Experts Protection for Their Opinions on Authenticity," *IFAR Journal* 3, no. 2 (2002): 23–26.
- <sup>12</sup> "Warhol Copy Row Hits Art World," *BBC News*, October 26, 2003, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/entertainment/3215199.stm>.
- <sup>13</sup> Steven Mark Levy, "Authentication and Appraisal of Artwork," in *Art Law Handbook*, 2004, cumulative supplement, ed. Roy S. Kaufman (New York: Aspen Law & Business, 2004), 829–881.
- <sup>14</sup> Kraus, "The Role of the Catalogue Raisonné."
- <sup>15</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>16</sup> For some of these, see the database of Catalogues Raisonnés, Catalogues in Preparation, on the International Foundation for Art Research website, <http://www.ifar.org/>.
- <sup>17</sup> Jackson Pollock, Francis V. O'Connor, et al., *Jackson Pollock: A Catalogue Raisonné of Paintings, Drawings, and Other Works*, supplement I (New York: Pollock Krasner Foundation, 1995).
- <sup>18</sup> The Andy Warhol Foundation for the Visual Arts, "Authentication Board" and "Catalogues Raisonné," in *20-Year Report 1987–2007* (New York: Andy Warhol Foundation for the Visual Arts, 2007), 86 and 42–45.
- <sup>19</sup> International Foundation for Art Research, <http://www.ifar.org/>.
- <sup>20</sup> See Art Libraries Society of North America (<http://www.arlisna.org/>), Catalogue Raisonné Scholars Association (<http://www.catalogueraisonne.org/>), and Visual Resource Association (<http://www.vraweb.org/>).
- <sup>21</sup> The Josef and Anni Albers Foundation, <http://www.albersfoundation.org/>.
- <sup>22</sup> Barbara Buhler Lynes, "Georgia O'Keeffe Catalogue Raisonné and the CAA's Code of Ethics for Art Historians," *IFAR Journal* 8, nos. 3/4 (2006): 99–103.
- <sup>23</sup> See the Keith Haring Foundation (<http://www.haring.com/foundation/>) and the Robert Mapplethorpe Foundation (<http://www.mapplethorpe.org/>).
- <sup>24</sup> International Foundation for Art Research, "Legal Liability for Giving Opinions," *IFAR Journal* 8, nos. 3/4 (2006): 64–86.
- <sup>25</sup> "VI. Art Fraud, Attribution, Authenticity, Forgery, Libel, Defamatory Statements," Case Law and Statutes, Art Law and Cultural Property, Educational Resources. International Foundation for Art Research, [http://www.ifar.org/case\\_law\\_statutes.php](http://www.ifar.org/case_law_statutes.php).
- <sup>26</sup> For examples, see Ralph E. Lerner and Judith Bresler, Steven Mark Levy, and Ronald D. Spencer.
- <sup>27</sup> Fremont-Smith, "Federal and State Laws."
- <sup>28</sup> Ralph E. Lerner and Judith Bresler, "Antitrust Claims and Authentication," in *Art Law, The Guide for Collectors, Investors, Dealers, and Artists*. 3rd ed. (New York: Practising Law Institute, 2005), 624–626.

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- <sup>30</sup> Catalogue Raisonné Scholars Association. "A Summary of the Seminar." *CRSA Forum* 14 (2004): 12.
- <sup>31</sup> Frances R. Hill, "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>32</sup> *Ibid.*
- <sup>33</sup> *Ibid.*
- <sup>34</sup> Andrew Megosh, Lary Scollick, Mary Jo Sallins, and Cheryl Chasin, "Private Benefit Under IRC 501(c)(3)," in *Exempt Organization Continuing Professional Education Technical Instruction Program* (Washington, DC: Internal Revenue Service, 2001).
- <sup>35</sup> Hill, "Public Benefit."
- <sup>36</sup> Megosh, Scollick, Sallins, Casin, "Private Benefit."
- <sup>37</sup> Marion R. Fremont Smith, "Fiduciary Duties: Duty of Care," in *Governing Nonprofit Organizations, Federal and State Law and Regulation* (Cambridge, MA: Belknap Press of Harvard University Press).
- <sup>38</sup> Fremont-Smith, "Federal and State Laws."
- <sup>39</sup> *Ibid.*
- <sup>40</sup> Catalogue Raisonné Scholars Association, "The Catalogue Raisonné: Authenticity and Legal Issues," *News Letter* (June 1994).
- <sup>41</sup> "Authentications and Attributions," Standards and Guidelines, College Art Association. last modified October 2009, <http://www.collegeart.org/guidelines/authentications>.
- <sup>42</sup> Levy, "Authentication and Appraisal of Artwork."
- <sup>43</sup> Hill, "Public Benefit."
- <sup>44</sup> Charles E. Burchfield and Joseph S. Trovato, *Charles Burchfield, A Catalogue of Paintings in Public and Private Collections* (Utica, NY: Munson-Williams-Proctor Institute, 1970).
- <sup>45</sup> John Sloan and Rowland Elzea, *John Sloan's Oil Paintings: A Catalogue Raisonné* (Newark: University of Delaware Press, 1991).
- <sup>46</sup> Ezra Jack Keats and Brian Alderson, *Ezra Jack Keats, Artist and Picture-Book Maker* (Gretna, LA: Pelican Publishing, 1994); and *Ezra Jack Keats, A Catalogue Raisonné* (Gretna, LA: Pelican Publishing, 2002).
- <sup>47</sup> Donald M. Blinksen, Bonnie Clearwater, et al., *Eliminating the Obstacles between the Painter and the Observer, The Mark Rothko Foundation: 1976–1986*, (New York: Mark Rothko Foundation, 1987).
- <sup>48</sup> Mark Rothko and David Anfam, *Mark Rothko: The Works on Canvas; Catalogue Raisonné* (New Haven, CT: Yale University Press, 1998).
- <sup>49</sup> Barnett Newman, Hugh M. Davies, and Riva Castleman, *The Prints of Barnett Newman* (New York: Barnett Newman Foundation, 1983).
- <sup>50</sup> Barnett Newman, Richard Schiff, Carol Mancusi-Ungaro, Heidemarie Colsman-Freyberger, et al., *Barnett Newman: A Catalogue Raisonné* (New York: Barnett Newman Foundation, 2004).
- <sup>51</sup> Richard A. Florsheim and Domenic J. Iacono, *A Catalogue Raisonné of the Graphic Work of Richard Florsheim* (New York: Syracuse University Art Collection / Richard Florsheim Art Fund, 1988).
- <sup>52</sup> Jackson Pollock, Francis V. O'Connor, et al., *Jackson Pollock. A Catalogue Raisonné of Paintings, Drawings, and Other Works, supplement I* (New York: Pollock Krasner Foundation, 1995).
- <sup>53</sup> Lee Krasner, Ellen Landau, and Jeffrey D. Grove, *Lee Krasner: A Catalogue Raisonné* (New York, Harry N. Abrams, 1995).
- <sup>54</sup> Andy Warhol, Frayda Feldman, and Claudia Defendi, *Andy Warhol Prints: A Catalogue Raisonné; 1962–1987*, 4th ed. (New York: Distributed Art Publishers / Ronald Feldman Fine Arts, 2003).
- <sup>55</sup> Andy Warhol, Georg Frei, and Neil Printz, *Paintings and Sculptures 1961–1963: Warhol 01; The Andy Warhol Catalogue Raisonné* (New York: Phaidon Press, 2002).
- <sup>56</sup> Andy Warhol, Georg Frei, and Neil Printz, *Paintings and Sculptures 1964–1969 and 1964–1969: Warhol 02A–B; The Andy Warhol Catalogue Raisonné* (New York: Phaidon Press, 2004).

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- <sup>57</sup> The Andy Warhol Foundation for the Visual Arts, "Catalogues Raisonné (sic)," in *20-Year Report 1987–2007* (New York: Andy Warhol Foundation for the Visual Arts, 2007).
- <sup>58</sup> Andy Warhol and Callie Angell, *Andy Warhol Screen Tests: The Films of Andy Warhol; Catalogue Raisonné*, vol. I (New York: Harry N. Abrams, 2006).
- <sup>59</sup> Georgia O'Keeffe and Barbara Buhler Lynes, *Georgia O'Keeffe: Catalogue Raisonné*, vols. I and 2 (New Haven, CT: Yale University Press / National Gallery of Art, Washington / Georgia O'Keeffe Foundation, 1999).
- <sup>60</sup> Josef Albers and Brenda Danilowitz, *The Prints of Josef Albers: A Catalogue Raisonné, 1915–1976* (New York: Hudson Hills Press / Josef and Anni Albers Foundation, 2001).
- <sup>61</sup> Anni Albers, Brenda Danilowitz, and Nicholas Fox-Weber, *The Prints of Anni Albers: Catalogue Raisonné* (New York: RM Verlag / Josef and Anni Albers Foundation, 2009).
- <sup>62</sup> Robert Motherwell, Siri Engberg, and Joan Banach, *Robert Motherwell: The Complete Prints 1940–1991; Catalogue Raisonné* (Minneapolis, MN: Walker Art Center, 2003).
- <sup>63</sup> Jacob Lawrence, Peter Nesbett, Michelle DuBois, and Stephanie Ellis-Smith, *The Complete Jacob Lawrence* (Seattle: University of Washington Press / Jacob Lawrence Catalogue Raisonné Project, 2000).
- <sup>64</sup> Richard Diebenkorn and Jane Livingston, *Richard Diebenkorn Catalogue Raisonné* (San Francisco: Fine Arts Museums of San Francisco, forthcoming).



## 8.2.5 Real Property

An artist's real property—which might be a residence, studio, exhibition gallery, related structures, or parcel of land—can be the chief lifetime asset and central element in the artist's estate plan. Where this involves creation of a private foundation, real property can be the asset sold to finance establishment of the foundation and fund its programs. It also can be the essential infrastructure that houses a foundation's direct charitable activities. In some cases, real property is the focus of a foundation's charitable purpose (for example, to preserve and make available to the public an historic structure embodying significant architectural and design principles). Finally, an artist's estate plan might not convey the type of facility required by a foundation, in which case adaptation, acquisition, or development of an appropriate property is necessary.

Whether it involves the decision to establish a private foundation as the means to preserve an artist's real property for use in conducting direct charitable activities or, conversely, to acquire or develop a property in order to support a foundation's program, a number of considerations must be weighed. Programmatically, the key issue is a proper fit between the foundation's functions and the property. Institutionally, the overarching question is one of resources, both those required to update or develop a facility and those necessary to maintain and operate it. Over the longer term, a central concern is the ability to support fixed costs associated with owning and operating a property, particularly during the downside of art market cycles if a foundation depends on periodic art sales to fund operations.

This chapter reviews foundation practice in conducting direct charitable activities that incorporate owning and operating real property—facilities and land. Particular note is made of issues relevant to new artist-endowed foundations. **4. Field Charitable Activity** reviews examples of foundations involved in these types of activities. **7. Forming, Sustaining, and Terminating Foundations** discusses considerations about real property in foundation formation. A substantial literature is available on facility-related concerns of museums and exhibition spaces, archives, residency programs, community arts facilities, and nature preserves. Publications also address the broader topic of cultural facilities and how they are developed by charitable organizations. Much of this is relevant to artist-endowed foundations. A selection of resources is featured at the close of this chapter, along with briefing papers authored for the Aspen Institute's National Study of Artist-Endowed Foundations (Study) that are pertinent to this topic.

Foundation trustees, directors, and officers preparing plans to own and operate real property should do so with the guidance of legal advisors expert in the laws and regulations that apply to private foundations active in this area. The following summary information highlights key aspects of the rules generally as an orientation to practical considerations. As



for the Study report as a whole, this discussion of considerations in practice is provided as an educational and informational resource and is not intended, nor can it be used, as a source of legal guidance.

## **The Uses of Real Property**

Real property, comprising facilities and land, can play a number of roles in furthering an artist-endowed foundation's charitable purpose. Some foundations focus on scholarly and educational activities to develop and disseminate knowledge about an artist's works and creative principles. For these, real property provides the specialized physical environment required for the appropriate care of artworks and archives, as well as the proper setting necessary to make these available under optimal conditions for research and study or, more broadly, for public exhibition.

Other foundations preserve an artist's architectural creation, in which case the property is a primary resource for study and direct experience of the artist's theories and practice, both for scholars and general audiences. Finally, some foundations have a broader charitable purpose, such as to support artists' creative development, to educate artists and students, to exhibit artworks to a community, or to advance knowledge about an art form or philosophy. For these, real property provides the tailored context in which such direct charitable activities can be conducted most effectively.

## **Real Property Owned by Artist-Endowed Foundations**

Many artist-endowed foundations do not own real property. These include foundations that rent office space; those that are administered by institutional trustees such as banks, trust companies, or law firms; and those housed at no cost in space provided by foundation insiders. Likewise, foundations with art assets might lease space, housing their art collections in commercial art storage facilities and renting an administrative office or renting space to operate a study center incorporating an archive or study collection.

However, one-third of foundations holding \$1 million or more in assets report owning real property, primarily facilities but in some cases substantial parcels of land, such as nature preserves. Of these foundations, one-third operate house museums or public exhibition spaces, one-third operate study centers holding archives or art collections, and one third either operate residency programs or conduct other types of specialized programs, while a few own administrative facilities. Most of these foundations count real property assets among a mix of other assets types. In contrast, for one-fourth of the foundations, real property assets represent one-half or more of all assets.

A foundation's real property assets typically comprise an artist's former residence or studio, sometimes including acreage, received under the estate plan of the artist or the artist's heirs or beneficiaries. Examples of this are the Tee and Charles Addams Foundation, which owns

the artist's former residence and nature sanctuary; (Ettore) DeGrazia Art and Cultural Foundation, which owns the former residence, studio, and gallery of the artist; and (Suzy) Frelinghuysen-(George L.K.) Morris Foundation, which owns the artists' former residence and nature preserve.

Not included in this group are foundations that for the purpose of direct charitable activities occupy but do not report owning or paying rent on the artists' former house, studio, or related property. Examples include the Archipenko Foundation, Roy Lichtenstein Foundation, and the George and Helen Segal Foundation. This can be the case when occupancy is made available at no cost by property owners or by related parties that hold life estates in properties. The various considerations for private foundations involved in this type of arrangement are noted below.

In contrast to those housed in real property received as a bequest, almost one-third of foundations own real property acquired or developed to house direct charitable activities or related administrative functions.<sup>1</sup> Among these are the Josef and Anni Albers Foundation and Niki Charitable Art Foundation, each operating a study center facility with an archive housed in a secure, purpose-built space; Leslie Powell Foundation, operating a community art exhibition program housed in an historic commercial property renovated for the purpose; (Neltje) Jentel Foundation, operating an artists' residency program in a purpose-built facility; and (Ernest R.) Graham Foundation for Advanced Study in the Fine Arts, operating grantmaking and public programming in an historic residential property acquired for that purpose.

Almost all real property assets reported by foundations on their annual information return (Form 990-PF) are categorized as *land, buildings, and equipment*. A few report real property assets as *investments*.

## **Disposition of Real Property**

Foundations have disposed of their real property assets at points of programmatic or institutional change. The Georgia O'Keeffe Foundation transferred the artist's home and studio, along with its remaining assets, to the Georgia O'Keeffe Museum and concluded its activities as planned in 2006. Although Louis Comfort Tiffany funded his foundation with \$1.5 million in financial assets, a substantial sum in 1918, its mission to operate his Long Island mansion as a house museum and site of an artists' residency program was unsustainable after the economic downturn of the 1930s. The mansion was sold and proceeds used to endow the Foundation's program of grants to artists.

## Varieties of Direct Charitable Activities Supported by Real Property

Observations can be made about trends associated with the three most common direct charitable activities for which artist-endowed foundations utilize real property assets.

### House Museums and Public Exhibition Spaces

The growth in artists' properties operated as house museums is evidenced by the recently-formed Historic Artists' Homes and Studios consortium of the National Trust for Historic Preservation, a group of 30 such sites whose members report serving more than 600,000 visitors annually.<sup>2</sup> One-third of these are associated with artist-endowed foundations, although not all artist-endowed foundations owning such properties are members of the consortium. Literature is available concerning the practical considerations involved in the operation of historic house museums, some of which is pertinent to artists' former residences and studios. More extensive professional literature exists that addresses the full range of considerations—practical, financial, legal, scholarly, and educational—in operating a museum or exhibition space serving public audiences. Much of this is pertinent to exhibition properties operated by artist-endowed foundations, although few of these foundations have chosen to seek formal credentialing as museums.

A chief concern in operating house museums and public exhibition spaces is the cost to upgrade, maintain, and operate a historic structure to meet standards for public access, care of artworks, and architectural preservation. Artist-endowed foundations operating museums are the most likely to convert from private foundation to public charity status, typically motivated by the need to develop a base of public support beyond resources provided by artists' estate plans. The Isamu Noguchi Foundation and Garden Museum, (Donald) Judd Foundation, and Albin Polasek Foundation are examples of this. Others have been organized as operating foundations and actively raise funds or conduct membership programs to increase financial resources. Among these are Charles and Ray Eames Preservation Foundation; (Esphyr) Slobodkina Foundation; and (Vance) Kirkland Museum of Fine and Decorative Art.

More recently, artist-endowed entities formed to operate artists' properties as house museums are being organized from the outset as public charities. The Sam and Alfreda Maloof Foundation for Arts and Crafts, Charles W. Moore Foundation, and LongHouse Reserve (Jack Lenor Larsen) exemplify this trend. As discussed in **7. Forming, Sustaining, and Terminating Foundations**, public charity status affords more appealing terms for contributions by individuals and grants by private foundations. In addition, in those cases where charitable organizations will be involved necessarily in purchasing property from living artists or from artists' heirs and beneficiaries, public charity status accommodates related party transactions that would be prohibited for private foundations.<sup>3</sup> However, public charity status is viable only if a foundation's artist is of the stature necessary to garner

public interest and contributions sufficient to meet the public support rule. This requires that a substantial portion of a public charity's annual income be from members of the general public; the inability to meet that standard can compel reversion to private foundation status.<sup>4</sup>

## **Study Centers**

One-third of those artist-endowed foundations that own real property operate study centers or incorporate a study center among multiple functions. Typically this involves a secure facility where scholars, curators, educators, artists, and students by appointment can research the artists' archive and library, and in some cases, consult a study collection or examine the artist's intact studio with equipment, materials, and related files. Study centers typically are not open to the general public on a walk-in basis. Some study centers are purpose-built facilities designed to meet necessary standards for security and conservation of archives and artworks. The Josef and Anni Albers Foundation and Niki Charitable Art Foundation are examples.

In other instances, foundations occupy the artist's former studio or a related facility, in which case the property is upgraded to meet standards for security and care of a foundation's assets, whether these are archives and libraries exclusively or also artworks. Among examples of foundations upgrading facilities are Frederick and Francis Sommer Foundation and the Georgia O'Keeffe Foundation, prior to termination of its activities in 2006. Many considerations for facilities operated as study centers are comparable to issues identified in owning artists' archives, addressed in **8.2.1 Archives**. Among these is development and use of an institutional policy in which access is made available based on objective guidelines, applied equitably, with the policy published on the foundation's website.

## **Residencies**

Although fewer than those operating house museums, public exhibition spaces, or study centers, an increasing number of artist-endowed foundations are being formed to operate residency programs using artists' former homes and studios. The vision is for a property that afforded creative inspiration and studio space during an artist's lifetime to be made available for the benefit of artists, scholars, educators, and students after the artist's death. Examples include the Camargo Foundation, with Jerome Hill's former residence in southern France; Heliker-La Hotan Foundation, with the Maine island summer home and studios of John Heliker and Robert La Hotan; and Morris Graves Foundation, with the artist's nature preserve and private retreat in northern California. Other foundations incorporate residency facilities with properties that support a broader range of functions.

Several artist-endowed foundations are members of the Alliance of Artists Communities, a network of organizations providing residencies to artists of all art disciplines, which reports a four-fold increase in the number of these entities nationally in the past three decades.<sup>5</sup>

Statistics for the field note that many organizations operating residencies are landholders with substantial acreage or are located on or adjacent to protected land. A growing literature for the residency field is pertinent to artist-endowed foundations.

Despite the assumption that conversion of an artist's private home and studio can be accomplished easily, this is not always the case. As one example, local zoning laws can present challenges in converting a property from residential use to educational and public use. In addition, beyond financing upgrades to facilities for charitable use, foundations operating artists' residencies require sufficient resources to support ongoing maintenance and program costs. Some residencies organized as operating foundations find it necessary to raise funds to supplement resources provided by artists' estate plans.

Beyond sufficient resources, an important consideration is securing pre-approval of procedures to make residency awards to individual artists and scholars, comparable to grants to individuals. In addition, although foundations may provide meals and lodging to foundation trustees, directors, or officers if these are reasonable compensation for services necessary to carry out the foundation's exempt purpose,<sup>6</sup> residencies—comparable to grants to individuals—cannot be awarded to foundation insiders.<sup>7</sup>

## **Administrative Practice**

Artist-endowed foundations operating real property for the most part own and administer these properties directly. As an alternative, some foundations have accomplished effective stewardship of real properties by creating or assisting development of a new entity, or a new program of an existing entity, to own and operate or lease and operate the property separately. Differentiating functions in this way enables a foundation to direct periodic, targeted support as needed to assist charitable use of a property, which is overseen by an appropriate governance structure that manages ongoing operation and develops public engagement in the property. These arrangements are accomplished variously under artists' estate plans, by executors during estate administration, or directly by foundations, typically early in their formation.

Among examples of this are the Alden B. Dow Home and Studio, owned and operated by Alden B. and Vada B. Dow Creativity Foundation, an operating foundation established separately from Alden and Vada Dow Fund; Pollock-Krasner House and Study Center, owned and operated by Stony Brook Foundation, a public charity, to which it was donated under Lee Krasner's estate plan concurrent to organization of the Pollock-Krasner Foundation; and the Andy Warhol Nature Preserve, owned and operated by the Nature Conservancy, a public charity, which received it as a donation from the Andy Warhol Foundation for the Visual Arts.

## Summary of Rules for Ownership of Real Property

Private foundation rules apply to foundation activities involving ownership and operation of real property, such as facilities used programmatically or administratively. As discussed in prior chapters, private foundation rules differ markedly from those that apply to private individuals and entities, as well as being distinct in some respects from those for public charities. The following points are applicable generally to private foundations owning and operating real property as these activities are informed by private foundation law. As fiduciaries, foundation trustees, directors, and officers are responsible for knowing these rules, although they also should consult with legal counsel expert in private foundation law on the details of their particular circumstance.

### Real Property Basics

Real property owned by a foundation must be operated so that it furthers the foundation's charitable purpose, benefits a charitable class that is broadly public, and does not provide a private benefit to particular individuals and limited groups.<sup>8</sup>

Real property owned by a foundation and classified as a charitable-use asset must be used or held for use in direct charitable activities supporting the foundation's charitable purpose.<sup>9</sup> Whether these activities involve use by public audiences generally or by specific groups (such as artists, scholars, curators, educators, or students) or use for nonpublic functions (such as storage of an art collection), the property should be in a condition to be used and available for use.

Real property owned by a foundation must be maintained to a standard that fulfills its trustees' duty of care to protect the foundation's assets.<sup>10</sup> If the property is the artists' former residence or studio, this might mean upgrades and maintenance at a level beyond that undertaken during the artist's lifetime.

Whether owned, leased, or occupied at no cost, a property operated by a foundation and used to house its assets, such as art collections and archives, must meet the standard necessary to fulfill its fiduciaries' duty of care for those assets.<sup>11</sup>

A foundation cannot make its real property accessible or available for use based on the private purposes of foundation insiders.<sup>12</sup> Access and use policies should be institutional, based on objective guidelines, and applied equitably. As a matter of best practice, these should be published on the foundation's website.

In line with the private benefit prohibition that is a fundamental criterion for tax exemption, access to a foundation's real property cannot be made available to one individual exclusively or on terms more favorable than those that apply to other individuals.<sup>13</sup>

## Real Property and Insiders

A foundation cannot expend its funds to improve real property owned by a foundation insider unless the property has been pledged irrevocably to the foundation.<sup>14</sup>

A private foundation cannot purchase real property from a foundation insider and can lease real property from an insider only if the lease is at no cost, the foundation's use is exclusively for its charitable purpose, and the foundation pays its occupancy expenses directly to vendors.<sup>15</sup>

A foundation cannot accept as a gift from a foundation insider a property encumbered by debt if the gift requires assumption of the debt.<sup>16</sup>

Real property owned by a private foundation cannot be leased or sold to foundation insiders, nor can it be made available for use by foundation insiders unless it is available on the same terms to members of the general public.<sup>17</sup>

A foundation's artworks cannot be displayed privately in the residence of or on property owned by a foundation insider; however, its artworks may be stored at no cost in premises owned by an insider.<sup>18</sup> Storage conditions cannot impeded access and must meet required standards to fulfill fiduciaries' duty of care for these assets.

A foundation's archive may be located at no cost in premises owned by a foundation insider as long as that location does not impede access.<sup>19</sup> Storage conditions must meet required standards to fulfill fiduciaries' duty of care.

With respect to foundations that operate residency programs, although meals and lodging can be provided to a foundation trustee, director, or officer if these are reasonable compensation for services necessary to carry out the foundation's exempt purpose,<sup>20</sup> a residency—comparable to a grant—cannot be awarded to a foundation insider.<sup>21</sup>

In summary, to fulfill the duty of care and to meet the charitable purpose and charitable use requirements, private foundation ownership and operation of real property will involve expenses and procedures for which private individuals or entities are not obligated. Likewise, in compliance with prohibitions on private benefit and self-dealing, foundations' transactions with their insiders will be limited substantially. These constraints are stricter than those that apply to public charities, which is the status of most tax-exempt organizations operating cultural facilities generally.

As with an archive or art collection, it might be the case that a foundation is not able to meet these criteria in maintaining and operating real property that it owns. If this proves to be true, the fiduciary responsibility of its trustees, directors, and officers generally requires them to distribute the property to an appropriate organization that will use it in fulfillment

of its intended role as a resource for exempt purposes or, alternatively, sell the property and use the proceeds to further the foundation's other charitable programs. How private foundations utilize their assets for public benefit purposes is regulated by the Internal Revenue Service (IRS) and state attorneys general, and in some cases by local courts supervising administration of estates. Foundations planning the charitable distribution of a major asset will develop their plans with the guidance of legal advisors expert in these rules.

## **Standards for Operating Real Property**

These private foundation rules—in combination with federal, state, and local laws, regulations, and codes that apply to facilities used for public purposes and to other types of property, such as historic structures or conservation areas—set the framework for foundation ownership and operation of real property. In addition, foundations own and operate real property within standards promulgated by the respective professional fields in which they participate. In some cases, these standards are embodied in criteria associated with credentialing, such as museum accreditation.<sup>22</sup> In other cases, they are guidelines on best practice advanced by professional associations, such as those for archives and special collections,<sup>23</sup> visual resources collections,<sup>24</sup> residency programs,<sup>25</sup> historic house museums,<sup>26</sup> community arts centers,<sup>27</sup> and nature preserves.<sup>28</sup>

While the functions associated with these multiple fields are diverse, best practices reflected in standards and guidelines across these professional fields boil down to several common themes. Among these is the responsibility to operate real property (facilities and land) so that the property is well maintained, safe, accessible, secure, properly staffed, and able to function optimally to advance the organization's charitable purpose and protect the resources committed to that mission.

## **Considerations in Owning and Operating Real Property**

With respect to owning, maintaining, and utilizing real property, artist-endowed foundations share many of the same challenges experienced by all charitable organizations owning facilities. Chief among these is ensuring the availability of sufficient financial resources to afford necessary maintenance and support appropriate programming. Recognizing this, the following considerations are important for artists, or artists' heirs and beneficiaries, as they evaluate the potential role of real property assets for a private foundation.

Does the property support the intended charitable purpose, and does the intended charitable purpose align with the property?

Will substantial costs be involved in converting the property for charitable use?

If so, will sufficient financial resources be available to fund the conversion, and then maintain and operate the property, as well as to fund programs?



If the foundation depends on periodic art sales to fund its activities, can fixed costs to maintain and operate real property be supported during the downside of art market cycles?

What type of expertise is required to operate the property? What type of governance is required to steward the property and its charitable program?

## **The Appropriate Role for an Artist-Endowed Foundation**

Real property can be an important element of a foundation's operation and central to its charitable purpose, whether this pertains to the artworks and creative principles of a specific artist or support of direct charitable activities serving a broader mission. In any case, planning for foundation ownership of real property assets must place a priority on providing sufficient resources, or creating conditions in which necessary resources can be attracted, to ensure that the property will be maintained appropriately and operated optimally in fulfillment of the foundation's charitable purpose. An artist-endowed foundation that receives only an artists' real property and few or no other assets to support that property's charitable use is unlikely to be viable.

The duties of the foundation fiduciaries and the public benefit obligations and private benefit prohibitions of private foundations together define the parameters for artist-endowed foundations' roles owning and operating real property. Within these bounds, a private foundation might be an effective means to preserve and use an artists' real property for charitable purposes. However, in some cases, particularly when a property is intended to serve public audiences and potentially will need to garner additional resources for that purpose beyond what can be provided under an artist's estate plan, evidence suggests other legal forms or ownership arrangements will be more viable.

## **Resources: Real Property**

### **Best Practice Guidelines and Perspectives**

#### **Archives and Study Centers**

Pacifico, Michele F., and Thomas P. Wilsted. *Archival and Special Collections Facilities: Guidelines for Archivists, Libraries, Architects and Engineers*. Chicago: Society of American Archivists, 2009.

#### **Art Libraries**

Irvine, Betty Jo, ed. *Facilities Standards for Art Libraries and Visual Resources Collections*. Englewood, CO: Libraries Unlimited / Art Libraries Society of North America, 1991.

#### **Art Storage**

The Exhibition Alliance. *Best Practices in Fine Arts Storage*. Edited by Tim Hogarth. Hamilton, NY: Exhibition Alliance, 2006.

#### **Community Arts Centers**

Golden, Joseph. *Olympus on Mains Street, A Process for Planning a Community Arts Facility*. New York: Syracuse University Press, 1980.

#### **Exhibition Facilities**

"AAM Standards Regarding Facilities and Risk Management." American Association of Museums. <http://www.aam-us.org/>.

#### **House Museums**

Butcher-Young, Sherry. *Historic House Museums: A Practical Handbook*. New York: Oxford University Press, 1993.

#### **Nature Preserves**

"Private Lands Conservation." The Nature Conservancy. <http://www.nature.org/>.

#### **Residency Facilities**

Alliance of Artists Communities. "Facilities." In *Ultimate Residency Resource Guide*. Providence, RI: Alliance of Artists Communities, 2005.

### **General Resources**

#### **Cultural Facilities Development**

Jenkins, Chris. "Planning Guide: What is a Facilities Project?" and "Planning Guide: Deciding on a Facilities Project," Nonprofit Finance Fund. <http://nonprofitfinancefund.org/articles-publications/research-resources>.

### **Facility Insurance**

Oliver, Barbara B. *Managing Facility Risk*. Washington, DC: Nonprofit Risk Management Center, 2004.

### **Facility Management**

Genoways, Hugh H., and Lynne M. Ireland. "Facilities Management." In *Museum Administration, an Introduction*, 197–222. Walnut Creek, CA: Altamira Press / American Association for State and Local History, 2003.

### **Documentation: Artist-Endowed Foundations and Real Property Converting Artists' Properties to Foundation Use**

Moore, Henry, David Mitchinson, and Julian Andrews. *Celebrating Moore: Works from the Collection of the Henry Moore Foundation*. Berkeley: University of California Press, 1998.

### **Preserving Historic Properties**

The Georgia O'Keeffe Foundation. *The Georgia O'Keeffe Foundation, 1994–2000*. Abiqui, NM: The Georgia O'Keeffe Foundation, 2001.

### **Proper Fit Between Foundation Mission and Real Property**

Kemeny, George A., and Donald Miller. "Louis Comfort Tiffany: The Artist as Business Man." In *Tiffany Desk Treasures: A Collector's Guide*, 16–18. New York: Hudson Hills Press, 2002.

### **Purpose-Built Facilities**

Anthony, David R. "Organization and Administration of the Collection." In *Eliminating the Obstacles Between the Painter and the Observer, The Mark Rothko Foundation: 1976–1986*. New York: Mark Rothko Foundation, 1987.

### **Private Foundation Rules and Artist-Endowed Foundations**

Fremont-Smith, Marion R. "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Hill, Frances R. "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing and Operating Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

### **Private Foundation Law**

Fremont-Smith, Marion R. *Governing Nonprofit Organizations, Federal and State Law and Regulation*. Cambridge, MA: Belknap Press of Harvard University Press, 2004.

Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008.

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- <sup>1</sup> Improvements to leaseholds are not included.
- <sup>2</sup> National Trust for Historic Preservation, <http://www.preservationnation.org/>.
- <sup>3</sup> Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>4</sup> Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations*. (Valhalla, NY: Thomson/RIA, 2002–2008), 8-11–8-13.
- <sup>5</sup> Alliance of Artist Communities, <http://www.artistcommunities.org/>
- <sup>6</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 10-21–10-22.
- <sup>7</sup> Fremont-Smith, "Federal and State Laws."
- <sup>8</sup> Frances R. Hill, "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations," in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>9</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 11-9–11-10.
- <sup>10</sup> Marion R. Fremont-Smith, "Fiduciary Duties: Duty of Care," in *Governing Nonprofit Organizations, Federal and State Law and Regulation* (Cambridge, MA: Belknap Press of Harvard University Press), 199–215.
- <sup>11</sup> Ibid.
- <sup>12</sup> Hill, "Public Benefit."
- <sup>13</sup> Ibid.
- <sup>14</sup> Fremont-Smith, "Federal and State Laws."
- <sup>15</sup> Ibid.
- <sup>16</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 10-15–10-18.
- <sup>17</sup> Fremont-Smith, "Federal and State Laws."
- <sup>18</sup> Ibid.
- <sup>19</sup> Ibid.
- <sup>20</sup> Hill and Mancino, *Taxation of Exempt Organizations*, 10-21–10-22.
- <sup>21</sup> Fremont-Smith, "Federal and State Laws."
- <sup>22</sup> "AAM Standards Regarding Facilities and Risk Management," American Association of Museums, <http://www.aam-us.org/>.
- <sup>23</sup> Michele F. Pacifico and Thomas P. Winstead, *Archival and Special Collections Facilities: Guidelines for Archivists, Librarians, Architects, and Engineers* (Chicago: Society of American Archivists, 2009). <http://www2.archivists.org/>.
- <sup>24</sup> Betty Jo Irvine, ed., *Facilities Standards for Art Libraries and Visual Resources Collections* (n.p., Art Libraries Society of North America, 1991).
- <sup>25</sup> Alliance of Artist Communities, *The Ultimate Residency Resource Guide* (Providence, RI: Alliance of Artist Communities, 2005).
- <sup>26</sup> Historic Artists' Homes and Studios, National Trust for Historic Preservation, <http://www.preservationnation.org/travel-and-sites/sites/artists-homes.html>.
- <sup>27</sup> Community Arts Network, <http://www.communityarts.net/>.
- <sup>28</sup> The Nature Conservancy, <http://www.nature.org/>.



# APPENDIX B.

## FOUNDATION PRACTICE

## A. References

The following select citations include widely recognized texts and more recent offerings addressing key issues in the operation of private foundations generally, and in the formation and administration of artist-endowed foundations and their charitable programs specifically. Some of these references have been cited in the respective chapters on foundation practice and are summarized here, with annotations, to serve as a single resource. Briefing papers prepared for the Aspen Institute's National Study of Artist-Endowed Foundations have been cited where relevant.

Issues pertaining to private foundations addressed in these references include foundation law and regulation in practice, planning and forming private foundations, governing private foundations, managing private foundations, terminating private foundations, and conducting foundation charitable programs.

With respect to charitable programs of artist-endowed foundations, topics include conducting grantmaking, both to individuals and to organizations as well as with artworks; and conducting direct charitable activities, including those involving archives, art collections, copyrights and intellectual property, catalogues raisonnés and art authentication, and real property—such as study centers, house museums, community art centers and exhibition facilities, and residency programs.

### **Bibliographic Research Team**

This compilation of references in foundation practice was prepared as one part of the bibliographic research undertaken for the Aspen Institute's National Study of Artist-Endowed Foundations (Study). The compilation was prepared as an initial draft in June 2008. It was researched and compiled by Kavie Barnes, Master of Arts Program in Visual Art Administration, Steinhardt School of Culture, Education, and Human Development, New York University, 2008. Preliminary research was conducted by Carmen Marie Rogers, PhD candidate, Public Policy, Robert F. Wagner Graduate School of Public Service, New York University. Barnes and Rogers worked with supervising faculty Ruth Ann Stewart, clinical professor of public policy, Robert F. Wagner Graduate School of Public Service, New York University, and consulting scholar Lowery Stoke Sims, curator, Museum of Arts and Design. The compilation was edited and updated in June 2010 by Study Director Christine J. Vincent.

Two other aspects of bibliographic research undertaken for the Study include a select bibliography of the literature of philanthropy and a selection of publications issued by or in association with artist-endowed foundations or with their permission or funding support.<sup>1</sup>

## Foundation Law and Regulation in Practice

Fremont-Smith, Marion R. *Governing Nonprofit Organizations: Federal and State Law and Regulation*. Cambridge, MA: Belknap Press of Harvard University Press, 2004.

Reviews the history, current status, and emerging trends in law and regulation of the nonprofit sector, including private foundations, at the state and federal levels.

Gross, Malvern J. "Special Accounting Issues for Specific Organizations: Private Foundations." In *Financial and Accounting Guide for Not-for-Profit Organizations*. 7th ed. Hoboken, NJ: John Wiley & Sons, 2005–2010.

Provides a detailed reference with respect to accounting, financial reporting, and tax and regulatory compliance issues particular to private foundations.

Hill, Frances R., and Douglas M. Mancino. *Taxation of Exempt Organizations*. Valhalla, NY: Thomson/RIA, 2002–2008.

Offers a comprehensive reference for organization managers and their professional advisors involved in daily operation and strategic planning. Addresses all dimensions of exempt organization law, including private foundation law.

Hopkins, Bruce R., and Jody Blazek. *Private Foundations: Tax Law and Compliance*. 2nd ed. Hoboken, NJ: Wiley, 2003–2008.

Serves as a detailed reference addressing rules that bear on all aspects of foundation creation, operation, and termination. Written for attorneys and accountants who are less familiar with the law of private foundations.

Internal Revenue Service. *Compliance Guide for 501(c)(3) Private Foundations*. Publication 4221-PF (06-07), Catalog 49830S. Washington, DC: Department of the Treasury, 2006–2007.

Summarizes the definition of a private foundation; outlines prohibited activities and sanctions; lists required reporting, record keeping, disclosures, and procedures for change; and gives sources for further information.

Life Cycle of a Private Foundation. Internal Revenue Service.  
<http://www.irs.gov/charities/foundations/>.

Provides an interactive format that explains the requisite interactions with the IRS that will take place throughout the process of forming, starting up, operating, and terminating a private foundation. Provides links to related materials, forms, and guidance available on the larger website.



## **Planning and Forming Private Foundations**

### ***Private Foundations Generally***

Beggs, Sara. "How to Start a Private Foundation." *Primer Series*. Washington, DC: Association of Small Foundations, 2006.

Sets out in simple terms the considerations and steps in creating a private foundation and operating it according to the law.

Council on Foundations. *Starting a Private Foundation: Options for Administering a Private Foundation*. Arlington, VA: Council on Foundations, 2008.

Tackles the common question of how much money is needed to establish a foundation by focusing on likely costs of administration, considering different asset levels, administrative options, and their pros and cons.

Edie, John A. *First Steps in Starting a Foundation*. 5th ed. Washington, DC: Council on Foundations, 2005.

Outlines practical considerations about philanthropic goals, the appropriate foundation form and governance model, necessary legal and technical assistance, and steps to establish a foundation, acquire exempt status, and start up charitable activities. (Note: Published prior to the 2006 Tax Act.)

Sare, John. "Facing Important Legal Issues." In *Splendid Legacy: The Guide to Creating Your Family Foundation*. Edited by Virginia M. Esposito, 59–75. Washington, DC: National Center for Family Philanthropy, 2002.

Addresses foundation formation, start-up, and operation specifically for family foundations. Discusses legal issues pertinent to family majority boards, including factors in state law, such as limits on corporations' board members defined as related under California law.

### ***Artist-Endowed Foundations Specifically***

Bjorklund, Victoria, and Thanya A. Polonio-Jones. "Artists' Foundations." In *A Visual Artist's Guide to Estate Planning: The 2008 Supplement Update*. Edited by Barbara Hofmann, 40–50. Colorado Springs, CO: Marie Walsh Sharpe Art Foundation, 2008.

Discusses practical concerns to be weighed by artists in forming private foundations and in conducting their charitable activities, including potential self-dealing risks. Notes that the costs of operating private foundations will make them an inappropriate choice for many artists.

Gillers, Stephen. "Enter the Lawyers: Choosing and Working with Estate and Foundation Counsel to Secure an Artistic and Philanthropic Legacy." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Discusses what clients should know about best practice of legal advisors selected to assist in creating and operating artist-endowed foundations. Notes the responsibilities of foundation creators and managers in selecting and retaining appropriate counsel.

Hill, Frances R. "Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: The Aspen Institute, 2010.

Considers the public benefit requirement as it derives from tax exemption. Explores planning considerations based on public benefit and comments on artworks as educational and economic resources.

Sims, Lowery Stokes. "Alternatives to Artist-Endowed Foundations: Other Options for Artists." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Discusses cases where creation of a private foundation is an unlikely choice because artworks have historical or cultural value, but little marketable potential. Notes alternatives used by artists in the visual arts and other arts disciplines.

Storr, Robert. "Toward a Public Library of American Culture: Reflections on the Centrality of Art and Importance of Access in Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Comments on factors involved in formation of artist-endowed foundations and considers access to archives and artworks as a central factor in fulfilling the public benefit responsibility of an artist-endowed foundation. Calls for greater diversity among artist-endowed foundations and asks how their roots in the artist community can inform more effective efforts on behalf of artists' needs.

Urice, Stephen K. "Creativity and Generosity: Considerations in Establishing an Artist-Endowed Foundation." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Outlines key considerations in the formation of artist-endowed foundations. Discusses choices made by artists, family members, and advisors based on donors' intent for charitable purpose, nature and scale of resources, practical business planning, and appropriate governance.

## **Governing Private Foundations**

### **Board Competence**

Ingram, Richard T. *Ten Basic Responsibilities of Nonprofit Boards*. Washington, DC: Board Source, 2002.

Details the role of the board of directors and its responsibilities in governing a nonprofit organization.

Nober, Jane C. *Directors and Officers Liability Insurance and Indemnification*. 2nd ed. Washington, DC: Council on Foundations, 2007.

Reviews the potential liability risks of private foundation trustees, directors, and officers, and discusses their indemnification, as well as considerations in acquiring liability insurance.

### **Compensation**

Council on Foundations. *Determining Reasonable Compensation for Foundation Directors and Trustees: A Guidance Memorandum*. Washington, DC: Council on Foundations, 2002.

Outlines procedures required to set compensation levels that will not be subject to sanctions.

Kroll, Judith A. *Grantmakers Salary and Benefits Report*. Washington, DC: Council on Foundations, issued annually.

Offers comparable annual data on compensation by foundation type and size. This is a key resource in setting compensation levels that will not be subject to sanctions.

National Center for Family Philanthropy. *Board Compensation: Reasonable and Necessary?* Washington, DC: National Center for Family Philanthropy, 2001.

Probes the rationale for compensation of foundation board members.

### **Conflict of Interest**

Council on Foundations. *Conflict of Interest: IRS Sample Policy Annotated for Grantmakers*. Washington, DC: Council on Foundations, 2006.

Suggests revisions to the sample conflict of interest policy provided by the IRS in its *Form 1023 Application for Recognition of Exemption*, which is meant for public charities, so that it will comply with private foundation rules.

Edie, John A. *Self-Dealing: A Concise Guide for Foundation Board and Staff*. Washington, DC: Forum of Regional Associations of Grantmakers, 2008.

Reviews the law prohibiting self-dealing, discusses common problem areas where self-dealing takes place, and suggests practical steps to address these.

Edie, John A. *What You Should Know Before Signing Your Organization's Form 990-PF: A Guide for Foundation Officers*. Rev. ed. Washington, DC: Forum of Regional Associations of Grantmakers, 2007.

Outlines foundation officers' responsibility in signing an annual information return (Form 990-PF) and provides pointers on how to confirm that the form is prepared in compliance with IRS regulations.

Fremont-Smith, Marion R. "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Considers the application of conflict of interest rules and regulations to artist-endowed foundations, and how these bear on their distinctive characteristics and activities.

Legal Services and Ethical Standards Group. *Drafting a Conflict of Interest Policy: A Guide to Key Provisions*. Washington, DC: Council on Foundations, 2006.

Outlines the necessary elements of an effective conflict of interest policy and notes ways in which individual foundations have developed policies reflecting their particular conflict of interest concerns.

### ***Ethics and Efficacy***

Independent Sector, Panel on the Nonprofit Sector. *Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations*. Washington, DC: Independent Sector, 2007.

Addresses criticism of the sector's ethics by the public, the press, and Congress. Offers principles for legal compliance and public disclosure, effective governance, strong financial oversight, and responsible fundraising.

Independent Sector and Board Source. *The Principles Workbook: Steering Your Board Toward Good Governance and Ethical Practice: A Guide for Charities and Foundations*. Washington, DC: Independent Sector and Board Source, 2009.

Provides a series of focused planning and organizational reviews to assist foundation leaders and board members in strengthening governance policy and practice.

### ***Institutional Diversity***

Bell, Lydia D. *Arts & Culture: A Best Practice Case Study*. New York: Diversity in Philanthropy Project, 2009. [http://www.diversityinphilanthropy.com/news/case\\_studies/](http://www.diversityinphilanthropy.com/news/case_studies/).

Grantmakers in the arts offer practical advice on efforts to increase diversity in their organizations and their grantmaking practice.

## **Transparency**

Fleishman, Joel. "What Ails Foundations: Transparency and Accountability." In *The Foundation: A Great American Secret, How Private Wealth is Changing the World*, 215–233. Philadelphia: Public Affairs Books, 2007.

Considers the link between foundations' lack of transparency, lack of accountability, public invisibility, and vulnerability to increased regulation.

Szántó, András. "Artist-Endowed Foundations, the Press and Public Perception." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Discusses the media environment for artist-endowed foundations and the potential to increase visibility of the public benefit that derives from foundations' educational and charitable programs.

## **Managing Private Foundations**

### **Private Foundations Generally**

Association of Small Foundations. *Foundation Operations & Management Survey: The Tool for Small Foundation Benchmarking*. Washington, DC: Association of Small Foundations, 2007.

Presents benchmark data from a universe of small foundations, those with few or no staff, on a variety of topics: governance practices, administration options (such as staffing, consultants, and offices), investment management, and charitable activities.

Audit Committee Effectiveness Center. *The AICPA Audit Committee Toolkit: Not-for-Profit Organizations*. 2nd ed. New York: American Institute of Certified Public Accountants, 2010.

Introduces the roles and responsibilities of nonprofit organizations' board members and audit committee members in selecting, retaining, and working with external auditors and establishing and implementing internal controls.

Boris, Elizabeth T., Loren Renz, Mark A. Hager, Rachel Elias, and Mahesh Somashekhar. *What Drives Foundation Expenses & Compensation? Results of a Three-Year Study*. Washington, DC: Urban Institute; New York: Foundation Center, 2008.

Examines foundation characteristics associated with compensation levels and charitable administrative expense ratios. Offers a basis for foundations to benchmark their own expenditures with those of comparable peers.

Cafferata, Reynolds. "The Role of Counsel in Foundations: Choices, Beginnings and Service." In *Foundation Management: Innovation and Responsibility at Home and Abroad*. Edited by Frank L. Ellsworth and Joe Lumarda, 205–246. Hoboken NJ: John Wiley & Sons, 2003.

Discusses the role of legal counsel generally, summarizing the areas of legal expertise required to form and operate private foundations. Notes how conflict of interest can

arise in counsel's joint representation of a foundation's creator and the foundation itself.

Freeman, David F., Jane C. Nober, John A. Edie, and Council on Foundations. *The Handbook on Private Foundations*. 3rd ed. Washington, DC: Council on Foundations, 2005.

Addresses all aspects of starting and managing a private foundation: choice of form and governance, start-up, and implementation of charitable activities; conducting effective governance and administration; investing assets; and seeking qualified legal, accounting, and investment assistance. (Note: Published prior to the 2006 Tax Act.)

Griswold, John S., Jr. *Principals of Foundation Investment Management*. Washington, DC: Association of Small Foundations, 2006.

Introduces the roles and responsibilities of foundation trustees and investment committees in identifying and using investment advisory services and setting and implementing investment and spending policies.

*Uniform Prudent Management of Institutional Funds Act*. Uniform Law Commission.  
<http://www.upmifa.org>.

Provides an overview of legislation enacted in most states establishing uniform rules for the investment of funds held by charitable institutions and the expenditure of funds donated as *endowments*. Notes special considerations for program-related assets.

### ***Management Concerns of Artist-Endowed Foundations Specifically***

Lerner, Ralph E., and Judith Bresler. "Artwork Transactions: Private Sales." In *Art Law, The Guide for Collectors, Investors, Dealers and Artists*. 3rd ed., 76–244. New York: Practising Law Institute, 2005.

Discusses the sale of fine art, noting the roles, rights, and responsibilities of all parties involved as defined by law and regulations applicable to commercial transactions generally or by various consumer protection laws that bear on sales of art specifically.

Urice, Stephen K., and Valerie Prochazka. "Art Sales by Charitable Organizations: A Summary of Rulings and Determinations." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Summarizes a variety of IRS rulings and determinations concerning sales of artworks by public charities and private foundations.

### **Terminating Private Foundations**

Masterson, Ruth, Sara Beggs, and Ingrid Mittermaier. *Closing Shop: When Small Foundations Get Out of the Foundation Business*. Washington, DC: Association of Small Foundations, 2009.

Discusses choices of strategy, required legal steps, and tasks involved in terminating a private foundation.

Nober, Jane C. "Legal Brief: Choreographing a Foundation Disappearing Act." *Foundation News & Commentary* (May/June 2003).

Reviews steps to be taken by foundations choosing to terminate by transferring assets to a public charity or to another private foundation. Comments on IRS rulings detailing required procedures, which if followed relieve individual foundations of the need to request rulings on termination.

Renz, Loren, and David Wolcheck. *Perpetuity or Limited Lifespan, How Do Family Foundations Decide? Intentions, Practices and Attitudes*. New York: Foundation Center, 2009.

Presents findings of a trend toward non-perpetuity among family foundations, with one-third of foundations either uncertain about the choice or intending to terminate in a specified time frame.

Thelin, John R., and Richard W. Trollinger. *Time is of the Essence: Foundations and the Policies of Limited Life and Endowment Spend-Down*. Washington, DC: Aspen Institute Program on Philanthropy and Social Innovation, 2009.

Presents case studies of foundations that existed for limited terms and spent down their assets over a defined period as opposed to existing in perpetuity.

### **Planning and Managing Charitable Activities Generally**

Arthurs, Alberta. "Artist-Endowed Foundations: Meaningful Philanthropic Opportunities in the Arts and Culture." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Highlights current issues in the arts, humanities, and art education fields, and how foundations have addressed these to date. Considers opportunities where the unique resources of artist-endowed foundations could play a significant role.

Foundation Source. *Strategic Philanthropy: Five Approaches for Making a Difference*. Fairfield, CT: Foundation Source, 2007. <http://www.foundationsource.com/strategic-philanthropy-five-approaches-making-difference>.

Identifies the various ways in which donors conceptualize their philanthropy, from purely charitable contributions to strategic investments. Discusses the pros and cons of each approach and highlights ways in which each can be practiced most effectively.

Grantcraft. *Scanning the Landscape, Finding Out What's Going on in Your Field*. New York: GrantCraft, 2002. <http://www.grantcraft.org/>.

Discusses strategies for foundations to explore current issues and identify needs in the fields in which they will be developing charitable programs. Draws on the experiences of different types of foundations.

Renz, Loren, and Rachel Elias. *More Than Grantmaking: A First Look at Foundations' Direct Charitable Activities*. New York: Foundation Center, 2007.

Reports on foundations' direct charitable activities, associated expenditures, and trends.

Rutnik, Tracey A., and Marty Campbell. *When and How to Use External Evaluators*. Baltimore, MD: Association of Baltimore Area Grantmakers, 2002.

Explains how to use evaluation consultants to design foundation programs, make midcourse corrections, and assess effectiveness. Advises how to select, contract with, and manage a consultant.

Topical Resource List. Catalogue of Nonprofit Literature, Foundation Center.  
<http://www.foundationcenter.org/>.

Provides short lists of "how to" resource publications organized by topic, such as expenditure responsibility, grantmaking to individuals, grantmaking procedures, international grantmaking, program evaluation, etc.

### **Conducting Grantmaking**

#### ***Making Grants to Individuals***

Beggs, Sarah. *Awarding Grants to Individuals*. Washington, DC: Association of Small Foundations, 2005.

Offers a step-by-step process for foundations to develop and secure approval of guidelines for their grantmaking to individuals, along with key pointers in implementing grant programs effectively.

Bergman, Charles C. "A Commitment to Support Individual Artists Worldwide: Reflections on the Experience of One Artist-Endowed Foundation." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Discusses the design and development of a foundation's international program of grants to individual artists and the policies and organizational capacities required for its implementation.

Gehrig, Cynthia A. "Supporting Individual Artists, A Tool Box." In *Grantmakers in the Arts Reader* 16, no. 3 (Fall, 2005). <http://www.giarts.org/>.

Reviews a variety of strategies that can be used by foundations to support individual artists, including direct grants as well as support for re-grant programs operated by intermediary organizations to assist artists.



VanDecarr, Paul. *Grants to Individuals: Investing in People and Their Communities*. New York: GrantCraft, 2008. <http://www.grantcraft.org/>.

Discusses program strategies for grantmaking focused on individuals, drawing on experiences of different types of grantmakers. Reviews legal requirements for private foundations making grants to individuals.

### ***Making Grants to Organizations***

Carlson, Neil. *Program-Related Investments: Skills & Strategies for New PRI Funders*. New York: Foundation, 2006. <http://www.grantcraft.org/>.

Introduces the concept of foundation investments made to grantees in support of charitable purposes, reviewing the ways these have been used by different types of foundations. Discusses the legal requirements for such loans and investments.

Edie, John A. *Expenditure Responsibility Step by Step*. 3rd ed. Washington, DC: Council on Foundations, 2002.

Provides practical guidance in the specific procedures that must be used by private foundations to make grants to entities other than public charities; these procedures apply in many cases to grants made to non-US organizations. (Note: Published prior to the 2006 Tax Act.)

Hollahan, Jennifer. *The Complete Guide to Grantmaking Basics: A Field Guide for Funders*. Washington, DC: Council on Foundations, 2008.

A comprehensive resource providing practical advice and guidance in all steps of developing and operating a grantmaking program.

*International Grantmaking Basics*. United States International Grantmaking. <http://www.usig.org/>.

An online compendium of information and resources for US grantmakers making grants to organizations located outside the US. Describes the legal framework for international grantmaking by private foundations and discusses stricter regulations in place post-9/11.

Remmer, Ellen. *Making a Difference: Evaluating Your Philanthropy*. Boston: Philanthropic Initiative, 2009. <http://www.tpi.org/>.

Provides a practical discussion of basic approaches used to evaluate the effectiveness of grants and incorporate what is learned from the results in order to improve programs.

## **Conducting Direct Charitable Activities**

### **Direct Charitable Activities: Archives**

"ACRL/SAA Joint Statement on Access to Research Materials in Archives and Special Collection Libraries." American Library Association: Association of College and Research Libraries and Society of American Archivists. <http://www.ala.org/>

A statement of professional practice for the library and archival fields, addressed specifically to institutions owning and operating archives and special collections, with respect to access policies and donor privacy provisions.

Artist Files Revealed Online Directory. Art Libraries Society of North America. <http://www.artistfilesrevealed.com/tiki/tiki-index.php>.

A centralized repository of information records for cultural institutions owning collections of artist files and information files related to the visual arts.

Bober, Phyllis Prayer. "Guidelines for Fair Use of Visual Materials in Scholarly Publication and Research." In *Copyrights and Permissions in Scholarly and Educational Publishing. Standards and Guidelines*. College Art Association. <http://www.collegeart.org/guidelines/reprorights.html>.

A statement of professional practices for the fields of art and art history with respect to licensing and permission fees, addressed to institutions and individuals owning and administering copyrights for texts and visual materials to be published for scholarly and academic purposes.

"Guidelines Regarding Security and Theft in Special Collections." Rare Books and Manuscripts Section. American Library Association: Association of College and Research Libraries. <http://www.ala.org/>.

A statement of professional practice for the library and archival fields, addressed specifically to institutions owning and operating archives and special collections, with respect to collection security and theft prevention.

Hunter, Gregory S. *Developing and Maintaining Practical Archives*. 2nd ed. New York: Neal-Schuman Publishers, 2003

A practical overview of planning, organizing, and operating archives, including the institutional archives of organizations that do not specialize exclusively as libraries or information repositories.

Mackay, Nancy. *Curating Oral Histories: From Interview to Archive*. Walnut Creek, CA: Left Coast Press, 2006.

Reviews the practice of oral history documentation with an emphasis on how the resulting materials can be organized and managed for optimal accessibility as a resource for scholarly and educational use.

Marter, Joan. "Artist-Endowed Foundations: Archives, Access, and Scholarship." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Considers artist-endowed foundations as owners of artists' archives and how receptivity to scholars might shape long-term recognition of artists' position in art history.

McNulty, Tom. "Artist-Endowed Foundations Stewarding Artists' Archives and Libraries: The Importance of Standards and Access." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Outlines considerations in providing optimal access to artists' archives and libraries as resources for scholars, artists, educators, and students. Discusses factors in whether to retain an archive for operation by a foundation or place it with an institutional repository.

Nordström, Alison D. "Artists and Archives: Making the Match." In *A Visual Artist's Guide to Estate Planning: The 2008 Supplement Update*. Edited by Barbara Hofmann, 119-122. Colorado Springs, CO: Marie Walsh Sharpe Art Foundation, 2008.

Discusses different types of institutional repositories, their missions and responsibilities, as these might inform choices for placement of an artists' archive.

Sax, Joseph L. "Public Benefit Obligations and Legacy Stewardship Activities of Artist-Endowed Foundations: Are They in Conflict?" In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Explores the question of whether interested parties' control of a foundation that owns an artist's archive leads to conflicts with the foundation's public benefit obligation.

### **Direct Charitable Activities: Art Collections**

ARTstor. <http://www.artstor.org/>

A nonprofit online library featuring digital image collections in the arts and humanities, used by scholars, educators, students, and curators as a scholarly and pedagogic resource.

Baca, Murtha, Visual Resources Association, et. al. *Cataloging Cultural Objects, A Guide to Describing Cultural Works and Their Images*. Chicago: American Library Association, 2006. <http://www.vrafoundation.org/ccoweb/>.

An online compendium of information and guidance on cataloguing visual resources and art and cultural object collections, presented as an initiative for data content standards.

*Basic Guidelines for the Care of Special Collections.* American Institute for Conservation of Historic and Artistic Works. <http://www.conservation-us.org/>.

Introduces the basic principles of object preservation, with a discussion of environmental considerations, steps for preservation, and identification of professional resources.

Demetrion, James T., and Lowery Stokes Sims. "Artist-Endowed Foundations and Museums: Observations on the Relationship." In *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: Aspen Institute, 2010.

Examines artist-endowed foundations' contributions to the art historical enterprise. Considers the dynamic among foundations, which steward specialized collections, and museums, which conduct public programs and develop public collections that bring artists' works to broad audiences.

Dubberly, Sara. *Standards and Guidelines for Museum Internships*. Washington, DC: American Association of Museums, 1993.

A guide to best practice in planning and implementing internship programs engaging college students in collections and education-related activities. Discusses recruiting, interviewing, placement, orientation, and management of interns.

The Exhibition Alliance. *Best Practices in Fine Arts Storage*. Edited by Tim Hogarth. Hamilton, NY: Exhibition Alliance, 2006.

Practical guidance on fine art storage, techniques, and practices, with a discussion of facilities and strategies for institutions of varied sizes and capacities. DVD, 120 min.

*Guidelines for Borrowing and Lending Special Collections Materials for Exhibitions.* Rare Books and Manuscripts Section. American Library Association: Association of College and Research Libraries. <http://www.ala.org/>.

A statement of professional practice for the library and archival fields with respect to borrowing and lending special collections materials for exhibition purposes, addressed to individuals responsible for activities involved in implementing loans of cultural material.

"Guidelines on Exhibiting Borrowed Objects." In *Museum Ethics*. American Association of Museums. <http://www.aam-us.org/>.

A statement of professional practice for the museum field with respect to lender involvement in exhibitions, addressed to museum curators and directors whose institutions exhibit privately owned works.

ICOM Code of Ethics for Museums. International Council of Museum. Last modified 2006. <http://icom.museum/ethics.html>.

A statement of professional practice for the museum field internationally with respect to the responsibilities of institutions and individuals in acquiring, owning, caring for, researching about, and providing access to collections held for the benefit of society.

Malaro, Marie C. *A Legal Primer on Managing Museum Collections*. 2nd ed. Washington, DC: Smithsonian Institution, 1998.

A comprehensive review of legal considerations for museums in acquiring, exhibiting, lending, borrowing, and selling collection objects, as well as accepting gifts to the collection.

Resource: The Council for Museums, Archives and Libraries. *Benchmarks in Collection Care for Museums, Archives and Libraries: A Self-Assessment Checklist*. London: Resource: The Council for Museums, Archives and Libraries, 2002. <http://www.mla.gov.uk/>.

A self-assessment checklist enabling institutions to evaluate how well they are caring for their collections, identify necessary improvements, and provide a framework for measuring improvement.

Snyder, Jill. *Caring for Your Art: A Guide for Artists, Collectors, Galleries and Art Institutions*. 3rd ed. New York: Allworth Press, 2001.

A basic overview of concerns in managing, storing, transporting, and exhibiting works of art, with discussions of insurance, risk management, and conservation.

### ***Direct Charitable Activities: Copyrights and Intellectual Property***

*Copyright Fair Use*. United States Copyright Office, Library of Congress. <http://www.copyright.gov/>.

Explains the limitation to the exclusive rights of copyright owners in the US presented by the doctrine of fair use.

United States Copyright Office, Library of Congress. *Circular 1: Copyright Basics*. Rev. ed. July 2008. <http://www.copyright.gov/>.

Provides an overview of copyright law in the US. Discusses the provisions of copyright law, its application, eligibility criteria, and procedures to secure and maintain copyright. Ties to a series of related publications addressing copyright for creations in particular genre, including for works of visual art, architectural works, cartoons and comic strips, motion pictures (including video recordings), multimedia works, online works, etc.

WIPO *Intellectual Property Handbook: Policy, Law and Use*. Publication 489. World Intellectual Property Organization. <http://www.wipo.int/>.

Discusses intellectual property licensing from an international perspective, providing an overview of patent, trademark, and copyright law worldwide.

***Direct Charitable Activities: Catalogues Raisonnés and Authentication***

"Authentications and Attributions." Standards and Guidelines. College Art Association. Last modified October 2009. <http://www.collegeart.org/guidelines/authentications>.

A statement of professional practice for the fields of art and art history with respect to the promulgation of scholarly opinions concerning authenticity and authorship of artworks, directed to art historians involved in such activities. Advocates opinions formulated by consensus among groups of experts.

Catalogue Raisonne Scholars Association. "CRSA Guidelines for Issuing Scholarly Opinions about Authenticity." *CRSA Forum* 23 (2010): 3.

A statement of standards for scholars issuing opinions about authenticity of artworks, detailing qualifications for issuing an opinion, describing the elements to be considered in forming an opinion, and recommending practical guidelines for issuing opinions.

Catalogues Raisonnés. Educational Resources, International Foundation for Art Research. <http://www.ifar.org/>.

An online database that includes an evolving listing of catalogues raisonnés that have been published or are in preparation, noting authors, sponsors, and general characteristics of publications.

Findlay, Michael. "The Catalogue Raisonné." In *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts*. Edited by Ronald D. Spencer, 55–62. New York: Oxford University Press, 2004.

Discusses production of catalogues raisonnés as a practice rooted in scholarly and commercial purposes and notes how they vary in reliability. Comments that interested parties are critical to a catalogue's production, but if they control preparation, it may be less objective.

International Foundation for Art Research. "Catalogues Raisonnés and the Authentication Process: Where the Ivory Tower Meets the Marketplace." Proceedings of IFAR Conference (December 2001). *IFAR Journal* 8, nos. 3/4 (2006).

Documentation of a conference featuring experts and practitioners addressing a wide range of topics related to the scholarly conduct of catalogues raisonnés, how they are organized and funded, and the ways they intersect with the market for art.

Lerner, Ralph E. and Judith Bresler. "Expert Opinions and Liabilities." In *Art Law, The Guide for Collectors, Investors, Dealers, and Artists*. 3rd ed., 553–689. New York: Practising Law Institute, 2005.

Discusses expert opinions made to appraise and authenticate artworks; reviews legal cases involving claims of disparagement, defamation, negligence, and fraud against experts; and notes possible strategies to limit experts' liability by contract and by insurance.

Levy, Steven Mark. "Authentication and Appraisal of Artwork." In *Art Law Handbook*. Edited by Roy S. Kaufman, 829–881. New York: Aspen Law & Business, 2000 and 2004.

Offers a comprehensive discussion of art authentication and appraisal, with associated considerations and guidance; notes types of experts involved in these activities, their qualifications, and processes; and reviews theories of liability and procedures to mitigate risk.

O'Connor, Francis V. "Authenticating the Attribution of Art." In *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts*. Edited by Ronald D. Spencer, 3–27. New York: Oxford University Press, 2004.

Discusses practice in the scholarly authentication of artworks, the role of historical documentation to affirm provenance, importance of scientific analysis of materials, and long-standing emphasis on art historical expertise.

Spencer, Ronald D. "The Risk of Legal Liability for Attributions of Visual Art" and "Authentication in Court: Factors Considered and Standards Proposed." In *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts*. Edited by Ronald D. Spencer, 143–215. New York: Oxford University Press, 2004.

Discusses the types of legal claims made against experts authenticating artworks and suggests means to defend against and lessen risks of such claims. Reviews how judicial decisions in such matters are made and outlines procedures for experts in accord with those reasoning methods.

### **Direct Charitable Activities: Real Property Generally**

Jenkins, Chris. "Planning Guide: What is a Facilities Project?" and "Planning Guide: Deciding on a Facilities Project." Nonprofit Finance Fund. <http://www.nonprofitfinancefund.org/>.

Offers practical advice to nonprofit groups evaluating the benefits of, as well as planning and implementing, facilities projects. Describes its program addressing facility-intensive needs of cultural organizations via technical support, planning grants, and loans. (See the *Cultural Facilities Study Summary* on the website of the Nonprofit Finance Fund for additional information.)

Oliver, Barbara B. *Managing Facility Risk*. Washington, DC: Nonprofit Risk Management Center, 2004.

Provides guidance on mission-appropriate procedures, policies, design, maintenance, and insurance that help limit risk associated with facilities, whether owned or leased, the activities and materials they house, and their use by employees and invitees.

### ***Real Property: Archives, Libraries, and Study Centers***

Art Libraries Society of North America. *Facilities Standards for Art Libraries and Visual Resources Collections*. Edited by Betty Jo Irvine. Englewood, CO: Libraries Unlimited / Art Libraries Society of North America, 1991.

A review of considerations and steps in planning, designing, and developing a new art library or visual resource collection facility or renovating an existing facility to meet appropriate standards.

Pacifico, Michele F., and Thomas P. Wilsted. *Archival and Special Collections Facilities: Guidelines for Archivists, Libraries, Architects and Engineers*. Chicago: Society of American Archivists, 2009.

Presents guidelines for purpose-built facilities or renovations to create archival and collections facilities that meet standards for material preservation and function optimally for staff and researchers.

### ***Real Property: House Museums***

AAM *Standards Regarding Facilities and Risk Management*. American Association of Museums. <http://www.aam-us.org/>.

A statement of professional practice for the museum field with respect to developing, maintaining, operating, and securing facilities to care for and exhibit collections to public audiences.

Butcher-Youngmans, Sherry. *Historic House Museums: A Practical Handbook*. New York: Oxford University Press, 1993.

Offers guidance in preserving, maintaining, operating, and securing historic residential structures as museums serving public audiences, including care, conservation, and interpretation of collections.

Genoways, Hugh H., and Lynne M. Ireland. "Facilities Management." In *Museum Administration, An Introduction*. Walnut Creek, CA: Altamira Press / American Association for State and Local History, 2003.

An overview of elements addressed in the administration and operation of a museum facility, framed as topics considered in the development of a facilities management program.



### ***Real Property: Residency Facilities and Nature Preserves***

Alliance of Artists Communities. "Facilities." In *Ultimate Residency Resource Guide*.

Providence, RI: Alliance of Artists Communities, 2005.

<http://www.artistcommunities.org/resource-library/>.

Discusses issues of accessibility, policies for use of studio facilities, and basic insurance requirements within the context of a comprehensive guide to establishing, administering, and sustaining a nonprofit organization that operates an artist residency program.

*Private Lands Conservation*. The Nature Conservancy. <http://www.nature.org/>.

Discusses a variety of strategies used to collaborate with private individuals, businesses, and other nonprofit entities in forming local groups that will protect ecologically sensitive land.

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<sup>1</sup> See **Part A. Findings: Overview of the Field**, **Appendix A.2 The Field**, for **A. Bibliography of Philanthropy** and **C. Foundation Publications**.

## **B. Sources of Practical Information**

The artist-endowed foundation sector draws on a number of discrete professional fields and related areas of expertise with respect to its institutional and programmatic activities. This select list of information sources focuses on those that are geared as broad resources. The list addresses three general areas: (1) creation, operation, and governance of private foundations; (2) planning and conducting foundation grantmaking; and (3) planning and conducting foundation direct charitable activities, including those involving archives, art collections, copyrights and intellectual property, catalogues raisonn  and art authentication, and real property.

### **Private Foundation Creation, Operation, and Governance**

Association of Small Foundations. <http://www.smallfoundations.org/>

Practical information for donors, trustees, and board members operating foundations with few or no staff.

Board Source. <http://www.boardsource.org/>

Information resources focused on developing effective governance for nonprofit organizations.

Council on Foundations. <http://www.cof.org/>

Comprehensive information on all aspects of foundation creation, operation, governance, and charitable programs.

Foundation Center. <http://www.foundationcenter.org/>

A database of information and publications about foundations and their charitable activities.

GuideStar. <http://www.guidestar.org/>

An online database of all IRS annual information returns (Forms 990-PF and Forms 990) filed by private foundations and public charities in the US.

Independent Sector. <http://www.independentsector.org/>

Information addressing critical issues in the nonprofit sector, including a guide and workbook for good governance and ethical practice by public charities and private foundations.

Life Cycle of a Private Foundation. Internal Revenue Service. <http://www.irs.gov/charities/>

An online interactive document that explains the steps involved in forming, starting, operating, and terminating private foundations where interactions with the IRS are required.

National Center for Family Philanthropy. <http://www.ncfp.org/>

Information resources on foundation governance, operation, and programs, focused specifically on families and their foundations.

### **Planning and Conducting Foundation Grantmaking Programs**

Forum of Regional Association of Grantmakers. <http://www.givingforum.org/>

Information on new trends and practices in charitable giving and links to regional networks of grantmakers and funder interest groups.

GrantCraft. <http://www.grantcraft.org/>

This series of practical, online guides on conducting foundation grantmaking addresses a range of topics based on hands-on experiences of practitioners.

Grantmakers in the Arts. <http://www.giarts.org/>

An online library of publications and resources concerning grantmaking practice and funding interests in the arts and culture broadly.

United States International Grantmaking. <http://www.usig.org/>

An online compendium of information and resources for US foundations making grants internationally.

### **Planning and Conducting Foundation Direct Charitable Activities**

#### **Archives and Libraries**

Art Libraries Society of North America. <http://www.arlisna.org/>

Practical resources and scholarly publications on professional practice in organizing and operating art libraries and visual resource collections.

Rare Books and Manuscripts Section, Association of College and Research Libraries.

<http://www.rbms.info/index.shtml>

Guidelines and information resources on professional practice in conserving, managing, and providing access to special collections.

Society of American Archivists. <http://www.archivists.org/>

Guidelines and information resources on professional practice in identifying, preserving, and using historical records.

#### **Art Collections**

American Association of Museums. <http://www.aam-us.org/>

Publications and resources addressing professional practice in conserving, managing, exhibiting, and lending from the holdings of museum collections.

American Institute for Conservation of Historic and Artistic Works.

<http://www.conservation-us.org/>

Information resources on conserving cultural materials and using conservators' services.

ARTstor. <http://www.artstor.org/>

A nonprofit, online library of digital images in the arts and humanities, used as a scholarly and pedagogic resource.

ICOM Code of Ethics for Museums. International Council of Museums. Last modified 2006.

<http://www.icom.museum/ethics.html>

A code of ethics for museums internationally along with a list and links to codes adopted by national museum associations and museum-related fields.

Visual Resources Association. <http://www.vraweb.org/>

Resources and guidance on image management, including standards for data content in cataloguing art and cultural object collections.

### ***Copyrights and Intellectual Property***

Artist Resource Society. <http://www.arsny.com/>

Summary of copyright law pertaining to visual art, as well as a description of rights management services provided to its member copyright owners.

United States Copyright Office. <http://www.copyright.gov/>

Information on US copyright law and its application and procedures for copyright registration.

United States Patent and Trademark Office. <http://www.uspto.gov/>

Information on intellectual property law and policy and procedures for patent and trademark registration.

World Intellectual Property Organization. <http://www.wipo.int/>

An overview of intellectual property law and policy internationally and resources on intellectual property in cultural and economic development.

### ***Catalogues Raisonnés and Authentication***

Catalogue Raisonne Scholars Association. <http://www.catalogueraisonne.org/>

Discussion of theoretical and practical challenges confronting catalogue raisonné scholars, including standards and guidelines for scholars issuing opinions about authenticity of artworks.

College Art Association. <http://www.collegeart.org/>

Standards and guidelines for professional practice in art and art history for art historians, curators, artists, and institutional administrators.

International Foundation for Art Research. <http://www.ifar.org/>

Information resources and publications on art authentication and catalogues raisonnés.

### ***Real Property: Generally***

Nonprofit Finance Fund. <http://www.nonprofitfinancefund.org/>

Guidance, technical support, planning grants, and loans to nonprofit organizations planning and developing facilities.

Nonprofit Risk Management Center. <http://www.nonprofitrisk.org/>

Guidance and technical support assisting risk assessment and management for nonprofit organizations.

### ***Real Property: Specific Uses***

Alliance of Artists Communities. <http://www.artistcommunities.org/>

An online resource library about artist residency programs and related mentoring support for new residency programs.

Historic Artists' Homes and Studios. National Trust for Historic Preservation.

<http://www.preservationnation.org/>

A consortium of 30 artists' spaces open to the public as house museums.

The Nature Conservancy. <http://www.nature.org/>

Strategies to conserve ecologically sensitive land in collaboration with local partnerships of private individuals, businesses, and nonprofits.

## C. Artist-Endowed Foundations in the Literature of Estate Planning

A range of publications considers artist-endowed foundations and artists' charitable bequests in the context of estate planning for visual artists. These include texts on art law and philanthropy generally, as well as those on artists' estate planning specifically. The following is a brief survey of texts published within the past 15 years. (Note: Publications issued prior to Congress's approval of the 2006 Tax Act may not reflect that legislation's changes to laws regulating private foundations, supporting organizations, and donor advised funds.)

Bjorklund, Victoria, and Thanya A. Polonio-Jones. "Artists' Foundations." In *A Visual Artist's Guide to Estate Planning: The 2008 Supplement Update*. Edited by Barbara Hofmann, 40–50. Colorado Springs, CO: Marie Walsh Sharpe Art Foundation, 2008.

The supplement update to the first edition of this guide extends the chapter discussing private foundations created by artists' estate plans. Includes guidance on forming a foundation and conducting its operation. Discusses potential self-dealing risks for artists and others who have established foundations, and the attendant sanctions, confirming these are relevant for grantmaking foundations as well as for foundations that exhibit and educate about artists' works. Notes that costs to operate a private foundation will make it an inappropriate choice for many artists and suggests that other alternatives be explored.

Crawford, Tad. *The Legal Guide for the Visual Artist, Fourth Edition*. New York: Allworth Press, 2001.

Discusses artists' estate planning, including charitable transfers by living artists as well as charitable bequests. Notes the utility of the noncharitable, private trust as a vehicle for organizing and administering an artist's estate, in particular for the many artists whose estates will not be of sufficient scale to be subject to the federal estate tax or to support a private foundation economically.

DuBoff, Leonard D., and Sally Holt Caplan. *The Deskbook of Art Law, Second Edition*. New York: Oceana Publications, 1997–2006.

Offers a brief discussion of charitable transfers by living artists, as well as a consideration of estate planning and estate tax mitigation for artists, including how they relate to charitable bequests.

Grant, Daniel. *The Business of Being an Artist, Third Edition*. New York: Allworth Press, 2000.

Notes artist-endowed foundations within a broader discussion of artists and the law as it pertains to artists' estates and their valuation for tax purposes. Discusses criteria used by the Internal Revenue Service (IRS) to value artists' works posthumously. Cites factors

minimizing the value of artworks in an artist's estate and comments on the federal estate tax marital deduction, permitting an artist's works to pass free of federal estate tax to the surviving spouse.

Kaufman, Roy S., ed. *Art Law Handbook, Second Edition*. Gaithersburg, MD: Aspen Law & Business, 2000–2004.

Discusses artists' estates, including bequests to charitable trusts and private foundations. Notes questions concerning foundation ownership of artists' corporations and sole proprietorships with respect to restrictions on excess business holdings by private foundations. Observes that a *supporting organization*, a particular type of public charity closely affiliated with an established public charity, offers a preferred alternative to a private foundation, not being subject to the private foundation limits on excess business holdings.

Lerner, Ralph E., and Judith Bresler. *Art Law: The Guide for Collectors, Investors, Dealers, and Artists, Third Edition*. New York: Practising Law Institute, 2005.

Considers testamentary bequests to public charities and to private foundations created by artists within the context of artists' estate planning, discussing their utility with respect to estate valuation and taxation. Comments on various considerations in planning an artist's estate in order to bequeath assets for charitable use, including to a private foundation. Advises that a foundation should be created prior to the artist's death so that its tax-exempt status can be approved by the IRS prior to receipt of the artist's bequest. Notes the foundation should be created with powers broad enough to distribute artworks to other charitable organizations and to sell artwork to meet expenses. A separate discussion of art museums mentions strict prohibitions against self-dealing by trustees of entities that are organized as private foundations.

Lerner, Ralph E., and Magda Salvesen. "Ralph Lerner on Art Law." In *Artists' Estates: Reputations in Trust*. Edited by Magda Salvesen and Diane Cousineau, 329–335. New Brunswick, NJ: Rutgers University Press, 2005.

Offers a nontechnical overview of artists' estate planning strategies, relevant primarily to artists whose works have garnered strong market interest and whose estates will be of sufficient scale to incur estate tax liability. Comments on ways artist-endowed foundations serve as useful mechanisms, in combination with blockage discount of an estate's appraised value, to minimize estate taxes and optimize bequests to heirs. Discusses the utility of foundations in centralizing administration of deceased artists' works, including for purposes of conducting a catalogue raisonné, authentication, and licensing.

Marie Walsh Sharpe Art Foundation. *A Visual Artist's Guide to Estate Planning*. Edited by Barbara Hofmann. Colorado Springs, CO: Marie Walsh Sharpe Art Foundation, 1998.

The first edition of this guide addresses considerations for artists and their advisors engaged in estate planning, including philosophical questions and long-term goals, as well as practical issues of taxes, legal advising, and estate administration. Presents commentary by practicing attorneys specializing in relevant areas, including tax and estate planning, art appraisal and estate valuation, intellectual property rights, museum law, and exempt organization law. Discusses artist-endowed foundations, noting their utility for some artists but confirming the associated expense and regulatory complexity.

Merryman, John Henry, Albert E. Elsen, and Stephen K. Urice, eds. *Law, Ethics and the Visual Arts, Fifth Edition*. The Hague: Kluwer Law International, 2007.

Discusses multiple considerations in administration of artists' estates for the purpose of forming foundations, based on a review of litigation over legal fees charged to the Andy Warhol estate and valuation of the estate as the basis of those fees. Considers the private foundation as an entity controlled by executors, and the obligations of fiduciaries in this position, based on a review of litigation against executors of the Mark Rothko estate. Relates arguments as to the impact of charitable bequests on valuation of works remaining in an artist's estate based on a review of litigation concerning estate tax to be paid by the Georgia O'Keefe estate.

Nielsen, Waldemar A. *Inside American Philanthropy: The Dramas of Donorship*. Norman: University of Oklahoma Press, 1996.

Reviews biographies of foundation creators and how their choices, including with respect to estate planning, have shaped development of their foundations. Discusses artist-endowed foundations as an emerging category of foundation, noting their potential impact in cultural philanthropy. Examines activities that accompanied the establishment of the Pollock-Krasner Foundation and the Andy Warhol Foundation for the Visual Arts and offers observations about lessons that might be drawn from the respective donors' contrasting estate planning choices.

Nicholas, Frederick M. "Afterword: Artists Beware." In *Foundation Management: Innovation and Responsibility at Home and Abroad*. Edited by Frank L. Ellsworth and Joe Lumarda. NJ: John Wiley and Sons, 2003.

Addresses artists on the topic of their estate planning responsibilities and considers the potential ramifications of failing in this duty. Offers observations from the experience of the Sam Francis estate, for which the author served as court-appointed administrator. Notes sales of art required to pay estate taxes and legal fees, which otherwise would have been available to support the artist's foundation and its charitable purposes. Discusses the importance of retaining qualified, expert tax advice early in artists'



careers. Expresses the opinion that artists' business attorneys and accountants don't always have the specialized expertise necessary to serve their clients' best interests as estate planners, executors, or foundation trustees.

# PART C.

## COLLECTED BRIEFING PAPERS

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## 9.1 Foreword to the Collection

### **Broadening the Conversation and Information Context for New Artist-Endowed Foundations**

The aim of the Aspen Institute's National Study of Artist-Endowed Foundations (Study) is to help the next generation of artist-endowed foundations make the most of its donors' generosity in service to a charitable purpose. During the course of research, a variety of issues were identified that bear on the prospects of this emerging field broadly and potentially influence new artist-endowed foundations specifically. Some of these issues are addressed in existing professional literature, although the fact that the artist-endowed foundation field draws on a number of separate, professional realms with respect to its institutional and programmatic activities—philanthropy, private foundation law, trust and estate law, art history, and contemporary art practice—means that the pertinent literature is dispersed. Identifying relevant publications, whatever their origins, is the function of the bibliography featured in **Appendix A.2 The Field** and the annotated listing of references and sources of practical information presented in **Appendix B. Foundation Practice**.

Despite what can be located in the existing literature of related fields, however, a number of issues identified during the Study have not been addressed in publications with respect to how they bear on the unique characteristics of artist-endowed foundations. It is the purpose of the briefing papers collected here to take up these subjects, add to the relevant literature, and seed a process to broaden the conversation and information context for new artist-endowed foundations.

To this end, 14 authors recognized as authorities in their respective fields have been invited to address the particular issues of artist-endowed foundations as highlighted in the Study's research findings. These authors include specialists in cultural policy, cultural philanthropy, trust and estate law, exempt organization law, legal ethics, public interest in cultural property, art education, art history, curatorial practice, art museum management, archival and library management, foundation management, and cultural journalism.

All of the briefing papers were reviewed in draft by the Study Committee, whose comments were provided to authors prior to each paper's finalization. In addition, several papers were discussed during focus group convenings attended by the authors that were organized as an aspect of the Study's research process. The paper addressing laws regulating conflict of interest and their application to artist-endowed foundations benefited from review and commentary by a collegial network of legal practitioners expert in exempt organization law. Not all authors have read every paper, and it should not be assumed that authors agree

with each other in all instances. Terminology is an important factor, particularly for papers dealing with matters of law, and individual authors have chosen to provide preferred definitions within their respective papers.

In all cases, the briefing papers are exclusively informational and educational in purpose. They are not intended as legal advice and cannot take the place of advice from qualified legal counsel. Finally, copyrights to the papers are held by each respective author and publication requires approval of that author. Papers should be cited by author and title as "Briefing paper prepared for *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*. Washington, DC: The Aspen Institute, 2010."

### **Foundation Formation: Information and Effective Practice**

A majority of artist-endowed foundations successfully navigate the complex process of formation, which might be initiated by artists during their lifetimes, posthumously under an estate plan, or as a decision of heirs or beneficiaries. To the extent that some foundations encounter difficulties, contributing factors can be traced in some instances to decisions made without the benefit of information about effective practice in foundation formation. Individuals forming or managing foundations in some cases are hampered by a lack of information about the foundation formation process generally and related decisions specifically. In other cases, individuals may be less knowledgeable about what constitutes best practice in identifying and working with legal counsel in the process of creating and managing artist-endowed foundations.

Stephen K. Urice provides a comprehensive overview of the foundation formation process, outlining key considerations in creating an artist-endowed foundation. Urice discusses choices to be made by artists, their family members, associates, and advisors in light of donors' intent for charitable purpose, the nature and scale of available resources, the potential for a viable business plan, and the appropriate governance capacities required to steward a foundation and its programs.

Stephen Gillers considers one of the primary concerns of individuals who will be creating or managing new artist-endowed foundations to be identifying and working with appropriate legal counsel. Gillers addresses the subject of what clients should know about best practice on the part of the legal advisors they will be selecting to assist in creating and representing artist-endowed foundations. He directs his remarks as well to the responsibilities of foundation creators and managers in selecting and retaining appropriate representation.

### **Governance: Committing Private Assets to Serve a Public Benefit**

Having sought and received tax-exempt status on the basis of educational and charitable missions, artist-endowed foundations embody a basic definition of organized philanthropy—private assets publicly subsidized through tax exemption to serve the public benefit. As with

the foundation universe at large, many individuals who create and manage artist-endowed foundations have minimal experience in foundation administration. Some artist-endowed foundations are closely held, operated by living donors or managed posthumously as family-governed philanthropies. Some trustees, directors, or officers come from the museum field whose institutions, as public charities, are regulated by more liberal rules than the restrictive federal laws for private foundations. Others are art historians, a field whose professional practices are governed by peer association codes of ethics, not regulated by law, as is the case for private foundations.

Marion Fremont-Smith reviews the system of federal and state laws that regulate conflict of interest and how these apply to artist-endowed foundations and their distinctive characteristics and activities. She discusses conflict of interest considerations encountered by some artist-endowed foundations, including those managed by their artist-donors and those whose insiders privately sell and license artworks of which the economic values potentially can be enhanced by a foundation's educational activities.

Frances R. Hill explores the public benefit requirement of private foundations as it derives from tax exemption and considers how planning with a focus on public benefit can assist artists and their family members and advisors in designing an artist-endowed foundation. Hill comments on the dual nature of artworks as both educational and economic resources, including how use for public benefit informs appropriate disposition of art assets.

Joseph L. Sax examines the transformation that takes place when an artist's archive, artworks, and intellectual property transition from private ownership to ownership by a private foundation, in some cases governed by a board comprising the artist's family members or personal associates. Sax explores the question of whether stewardship of an artist's legacy can align with the fundamental public benefit obligations inherent in a private foundation's tax-exempt status.

### **Foundation Programs: Philanthropic and Cultural Resources**

Many artist-endowed foundations employ economic models based on assets that are not typical of most private foundations—artworks and intellectual property. At the same time, they must develop and operate effective charitable and educational programs that make the best use of these unique resources in support of their exempt purposes. The challenge is to determine where and how charitable and educational programs should be focused, consistent with a donor's intent, in order to realize the greatest relevance and impact. In addition, although periodic sales of artworks can play an important role as a dimension of grantmaking in the form of partial grants/partial sales and as an aspect of dissemination efforts to educate the public about artists' creative principles, little information has been available about rulings by regulators that have pertained specifically to art sales.



Alberta Arthurs reviews the cultural philanthropy field in the US, highlighting current issues in the arts, culture, humanities, and art education fields and discussing how these have been addressed by arts grantmakers to date, including artist-endowed foundations. Arthurs focuses on meaningful opportunities where the unique resources and perspectives of artist-endowed foundations could play an important role when deployed through grantmaking or direct charitable activities.

Charles C. Bergman describes the genesis of the Pollock-Krasner Foundation, discussing the rationale for choices made in structuring the foundation's governance and economic model. Bergman reviews the process of designing the foundation's international program of grants to individual artists, details how the program has evolved, and highlights the policies and organizational capacities required to implement the program. He comments on opportunities to increase foundation support for individual artists, including broadening the roles of existing foundations to accommodate the resources of additional artist-donors.

Robert Storr reflects broadly on artist-endowed foundations and their roles as both cultural and charitable resources. While acknowledging the value of grantmaking programs, Storr identifies unmediated access to artists' artworks and archives as the most important factor in fulfilling a foundation's public benefit role, in his view. He cautions against framing the importance of art collections exclusively in educational terms that fail to acknowledge the value of art in its own right, calls for greater diversity among artist-endowed foundations, asks how their perspectives as entities deriving from the artist community can inform more effective efforts on behalf of artists' needs, and suggests that artists of means who choose to create their foundation posthumously could be missing the satisfaction of participating in lifetime philanthropy.

Stephen K. Urice, writing with Valerie Prochazka, provides the first listing to be assembled of the various rulings and determinations that have been made by the Internal Revenue Service (IRS) with respect to the tax consequences of sales of fine art by public charities and private foundations. Urice and Prochazka summarize a diverse group of rulings and determinations, delivered over the past four decades to a wide variety of organizations involved in a range of activities. He brings this information together as a first step to build knowledge about the topic of art sales as a dimension of charitable and educational activities conducted by charitable organizations.

### **Cultural Resources: Professional Practice in Art History**

Whether to utilize an art collection as a resource for scholarship, exhibition, or education, or to optimize the economic value of an art inventory whose purpose is to be sold to fund programs, many artist-endowed foundations contribute to or engage in the practice of art history. This includes art historical scholarship, publication, exhibition, education, archival management, collection documentation, and the like. These activities place artist-endowed

foundations within a network of professional relationships with art museums and archives, curators, archivists, and scholars. In some cases, the prospects of new artist-endowed foundations may be influenced by the ways in which these relationships are navigated. Stewardship of artists' archives owned by artist-endowed foundations is a particular concern.

James T. Demetrion and Lowery Stokes Sims consider the important and sometimes complex relationship of artist-endowed foundations and museums. Demetrion and Sims examine the multiple ways in which artist-endowed foundations contribute to the art historical enterprise. They weigh the pros and cons of the dynamic between artist-endowed foundations and museums, the former stewarding specialized collections and archives and the latter conducting public programs and developing public collections that bring artists' works to broad audiences and recognition.

Joan Marter addresses the interaction of artist-endowed foundations and scholars and how this can inform scholarship, particularly with respect to artists' archives and how they are made available to scholars. Marter comments on the ways in which foundations' accessibility and receptivity to scholars at all stages of their careers can influence understanding over the long-term of artists' position in art history.

Tom McNulty provides a practical overview of decisions that will be made by trustees, directors, and officers of new foundations as they grapple with the question of how an artist's archive and library can be stewarded most effectively as a resource to scholars, artists, educators, and students. He reviews considerations in determining whether to retain and operate an archive or place it with a separate institutional repository, in all cases with optimal access as the overarching goal.

### **Artist-Endowed Foundations in Context**

Artist-endowed foundations are relatively few in number and often don't fit the typical profile of grantmaking philanthropies that dominates the discourse of the greater foundation universe. As such, they might seem to be entities with only a recent history and, in many cases, without much context. In fact, **3.1 Select Chronology** outlines a history that is more extensive than many assume. The field's evolution has taken place as this country's highly heterogeneous cultural philanthropy infrastructure has evolved. It also has taken place as a dimension of the international visual art and design universe where the artist-endowed foundation form has a long tradition and wide recognition. That said, the private foundation is a viable option for a small number of artists, primarily those with sufficient resources by virtue of the market for their artworks or due to non-art resources. Options for other types of artists need to be explored.

Lowery Stokes Sims focuses on those cases in which creation of a private foundation is likely to be problematic due to an artist's circumstance or the nature of an artist's oeuvre. Sims discusses examples in which an artist's works might have historical or cultural value, but hold little economic value or marketable potential in the traditional sense. She notes alternatives that have been used, both for visual artists and creators in other art disciplines.

For a variety of reasons, many artist-endowed foundations have placed little emphasis on communication to the broader public and have not made transparency about their activities a priority. As a result, artist-endowed foundations often are confused with other entities from which they differ substantially, both nonprofit museums and proprietary, noncharitable artists' estates. This confusion is evident among those making public policy, as well as the media, which play a significant role shaping public opinion about the need for greater transparency among foundations and cultural institutions.

András Szántó offers an assessment of the media environment for artist-endowed foundations and the potential to increase visibility for the public benefit that derives from their educational and charitable programs. Szántó considers the ways foundations are perceived, explains how the press develops knowledge about a particular sector, and suggests individual and collective communication opportunities that are available to those artist-endowed foundations whose leaders are committed to greater transparency.

Finally, noting the potential influence of precedents, Christine J. Vincent reviews activities of international counterparts that might be of interest to artists or their family members contemplating creation of an artist-endowed foundation. Vincent summarizes distinctions between US and international artist-endowed foundations, notes the importance of different regulatory systems, and highlights several international foundations whose experiences could be relevant to new foundations in the US.

## **Addendum**

The educational activities of artist-endowed foundations most often focus on their artists' oeuvres. Despite this, artist-endowed foundations have the potential to share knowledge about their specialized philanthropic role and the range of managerial and cultural practices involved in implementing philanthropy based on an artist's artworks and related assets.

In the Addendum, Kavie Barnes, Study research associate, takes up the question of how the academic community and artist-endowed foundation field could benefit mutually from deeper connections rooted in the educational process. In particular, Barnes explores college internship programs operated by artist-endowed foundations and identifies ways these might be developed to deepen interns' educational experience and bolster interest in the field among a future generation of leaders in the arts and philanthropy.

## 9.2 AUTHOR'S AFFILIATIONS

### Briefing Papers

ALBERTA ARTHURS, former director, Arts and Humanities, Rockefeller Foundation; co-editor, *Crossroads: Art and Religion in American Life*, The New Press, 2001.

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STEPHEN GILLERS, Crystal Eastman Professor of Law, New York University School of Law; author, *The Regulation of Lawyers*, Aspen Publishers, 2009.

FRANCES R. HILL, professor of law, University of Miami School of Law; co-editor, *Taxation of Exempt Organizations*, Thomson/RIA, Publishers, 2002–2008.

JOAN MARTER, professor, contemporary painting and sculpture, Rutgers University; editor in chief, *The Grove Encyclopedia of American Art*, Oxford University Press, forthcoming.

TOM MCNULTY, fine arts librarian, Elmer Holmes Bobst Library, New York University; author, *Art Market Research: A Guide to Methods and Resources*, McFarland and Company, Publishers, 2006.

JOSEPH L. SAX, James H. House and Hiram H. Hurd Professor of Environmental Regulation, emeritus, University of California Berkeley School of Law; author, *Playing Darts With a Rembrandt: Public and Private Rights in Cultural Treasures*, University of Michigan Press, 1999.

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### **Addendum**

KAVIE BARNES, Study research associate; curatorial coordinator and assistant to the chief curator, Rubin Museum of Art.

## **9.3 FOUNDATION FORMATION: EFFECTIVE PRACTICE**

- 9.3.1 Creativity and Generosity: Considerations in Establishing an Artist-Endowed Foundation (Stephen K. Urice)
- 9.3.2 Enter the Lawyers: Choosing and Working with Estate and Foundation Counsel to Secure an Artistic and Philanthropic Legacy (Stephen Gillers)



## 9.3.1 Creativity and Generosity: Considerations in Establishing an Artist-Endowed Foundation

STEPHEN K. URICE

### **Part I: Introduction**

This paper provides an introduction to legal and tax considerations in forming an artist-endowed foundation.<sup>1</sup> It operates in concert with related briefing papers and research reports of the Aspen Institute's National Study of Artist-Endowed Foundations (Study).<sup>2</sup> Likewise, it employs the definition of artist-endowed foundation utilized for the purposes of the Study.<sup>3</sup> Part I of this paper describes the paper's intended audiences and notes the nature of legal expertise required for prudent establishment of an artist-endowed foundation. Part II presents some of the many issues an artist-donor will need to consider before creating a foundation. Part III addresses the choice of legal form for a foundation. Part IV introduces the fiduciary duties imposed on individuals who create, govern, or hold key staff positions in a foundation. Finally, Part V introduces several important tax considerations.

### **Audiences**

This paper is written for three audiences: artists considering creation of a foundation; the people who support artists and play critical roles in their lives (such as spouses and domestic partners, other family members, studio and personal assistants, and business managers); and the legal and financial advisors who serve and protect the interests of their artist clients. For the first two audiences, this paper aims to provide information to bolster effective decision making and effective use of legal and financial counsel; for the third, the information presented here will be elementary to attorneys and financial advisors experienced in private foundations. For attorneys or financial advisors new to these issues, this paper may serve as an introduction that must be augmented by reference to the materials cited in the endnotes and to the larger literature contained in those materials' citations.

### **A Note on the Nature of Legal Expertise**

Planning and creating a foundation require a detailed understanding of a specialty within a specialty. Those in a position to undertake this work are tax attorneys who have developed a specialized knowledge of tax-exempt organizations generally and within that broader category, private foundations in particular. Chapter 42 of the Internal Revenue Code



(Code) governs private foundations and includes some of the most complex provisions of the federal tax system.<sup>4</sup> If an estate planner has determined that a foundation is an appropriate component of an artist's estate plan, unless that attorney has expertise in private foundation law, it is better practice for that attorney to consult with, or refer the private foundation representation to, an expert. Often, the attorney closest to an artist and most familiar with his or her legal matters as they pertain to the conduct of the artist's business may not possess expertise in either estate planning or private foundation law. In that case, it would be imprudent, if not reckless, for the attorney not to consult with, or refer this work to, an attorney with expertise in estate planning or private foundations, as the case may be.

## **Part II. Considerations of an Artist-Donor**

Motivations; timing; vision for public benefit; legacy; practical consideration of life, death, and taxes; and personal and professional relationships—all play a role in deciding whether and when to create a foundation.

### **Why a Foundation?**

Individuals create foundations for many reasons: a desire to benefit others or to achieve a specific philanthropic goal, tax savings, or for prestige. Artists whose work has achieved substantial financial success<sup>5</sup> have an additional reason: foundations may be useful in assuring careful stewardship of their artworks and intellectual property if that activity serves a charitable purpose<sup>6</sup> and creates public benefit.<sup>7</sup> In furtherance of a charitable purpose, a foundation can care for, catalogue, exhibit, and oversee the disposition of an artist's work and collections; manage the artist's intellectual property rights;<sup>8</sup> organize and make accessible the artist's archives; and possibly even transform the artist's home or studio into a public museum, study center, or artist residency program, for example.<sup>9</sup>

However, a foundation must be funded with sufficient liquid assets (or with property that can readily generate liquidity) to accomplish any of these tasks. *An artist-endowed foundation is no less in need of a business plan than any other organization:* Its success depends on determining whether the foundation will have adequate income to achieve the artist's vision for it. Put another way, in deciding whether to establish a foundation, an artist and the artists' advisors must realistically assess the kind and amount of assets the artist can commit to the foundation, either as the exclusive beneficiary of the artist's estate or as one among a group of beneficiaries (such as family members, other individuals, or institutions).

A foundation is *not* the appropriate entity for solving certain problems confronting many artists. For example, if an artist is planning for the shared ownership, use, and enjoyment of his or her work among family members or close associates, a private trust (or corporation), which is neither charitable nor tax-exempt (because its benefits and proceeds are distributed to a defined group of private individuals and not members of the general public),

is a more appropriate alternative.<sup>10</sup> Or, if an artist is interested primarily in deflecting personal decision making when approached for charitable gifts, establishing a named fund at a local community foundation is a less expensive alternative. If an artist is primarily concerned with finding a permanent home for his or her work and archives, a gift of those materials to an existing museum, university, or library may prove far more efficient than establishing an independent foundation.<sup>11</sup>

### **When to Create a Foundation?**

Artists—like other philanthropically-minded people—may establish their foundations during lifetime (*inter vivos*) or at death (*testamentary*). Some foundations are created *inter vivos* with limited funding and limited philanthropic goals. The foundation's full philanthropic activity and impact is purposely deferred until *after* the artist's death, when the foundation receives major funding from the artist's estate.<sup>12</sup> Under these circumstances, the artist typically transfers funds (or, for income tax purposes, more likely appreciated securities) to the foundation periodically, and the foundation then makes grants from those assets. The principal reason for this approach is to obtain Internal Revenue Service (Service) recognition of the foundation's charitable, tax-exempt status prior to the artist's death, thereby insuring that testamentary transfers to the foundation will qualify for the estate tax charitable deduction.<sup>13</sup>

Another reason for establishing a foundation during lifetime arises if the artist wants personally to participate in a philanthropic or artistic project (that also has a clear philanthropic purpose).<sup>14</sup> Foundations may also be created following the artist's death, pursuant to directions in the artist's will or other testamentary instrument. Finally, the foundation may be created long after the artist's death. This might be during the lifetime of a surviving spouse,<sup>15</sup> following the death of a surviving spouse or other primary beneficiary,<sup>16</sup> or when the artist's descendants determine that a foundation is the appropriate means to own and administer the artist's artworks and intellectual property to achieve charitable purposes.<sup>17</sup> This paper, however, addresses the more common situation in which the artist participates in discussion about the role of the foundation, whether established during the artist's lifetime or as part of the artist's estate plan.

### **Questions for the Potential Artist-Donor**

Whenever created, choices must be made regarding the foundation's legal form and tax status. Decisions as to those choices should be driven by careful analysis of key concerns.

What philanthropic purposes does the artist want to accomplish?

- Might goals differ during a lifetime and after death?
- Are these purposes limited to activities in the arts or are they broader?
- Will the philanthropic activity focus on a particular community, the US, or be international in scope?

- Will those purposes be accomplished by making grants, by operating programs, or by a combination of grantmaking and program activities?
- Who are the permitted beneficiaries of this charitable activity, as defined by law?

What personal goals does the artist seek to accomplish?

- Tax savings?
- Stewardship of the artist's work and intellectual property?
- Ensuring the long-term involvement of family members or others as trustees or as foundation staff?

Given these philanthropic purposes and personal goals, how can the foundation be certain it will serve a public purpose?

What assets will the artist commit to the foundation?

- Financial assets?
- The artist's own artwork?
- Copyright and other intellectual property in the artist's work?
- The artist's archives?
- Collections of other artists' artworks?
- Other assets (such as securities, royalties, or real estate)?

How will the foundation be governed and staffed?

- What expertise is required to accomplish the artist's vision for the foundation?
- How large a board will the foundation require?
- Who among the artist's personal and professional circle has experience in governing a tax-exempt charitable entity?
- Who, outside of the artist's family and advisors, might be interested and willing to serve on the board?
- Will board members be compensated?
- Will the foundation have professional staff? Will members of the artist's family serve on the staff and, if so, do they have the background and experience to oversee grantmaking activities or other charitable programs?

This paper assumes that well-advised artists will carefully consider these and related issues and will be served by legal counsel that grasp fully the highly technical legal and tax considerations involved. That expertise includes a deep understanding of how to match carefully the kind of foundation (whether *operating* or *nonoperating*, terms that are discussed below) to the foundation's mission and especially to the choice of assets that the foundation will own (such as the artist's work, archives, copyrights, or other intellectual properties).

Likewise, this paper assumes that well-advised artists will be served by legal counsel that grasp fully the importance of foundation governance within the context of other estate planning provisions involving an artist's family. For example, careful planning is required to

ensure that a foundation's activities do not confer an impermissible benefit on individuals who sell and license the artist's works while as members of the foundation's governing body.<sup>18</sup>

Finally, the issue of viability deserves particular emphasis.<sup>19</sup> Creating a foundation tasked with a mission that cannot be supported by available assets, either because the foundation's assets are insufficient or illiquid, is a recipe for failure. Similarly, an estate plan predicated on the transfer of only an artist's artworks to the foundation, and no corresponding financial assets, presents substantial risks and places an undue burden on the foundation's board.<sup>20</sup> Accordingly, careful financial planning and the development of at least a basic business plan for the foundation is an essential component of planning and decision making before the foundation is created.

## **Nomenclature**

Terminology in this field often confuses and is worth a few words of explanation. The word *foundation* standing alone has no legal meaning. *Private foundation* and *private operating foundation*, however, have specific legal definitions in the Code. The governing authority of a foundation may be referred to as a board of *trustees*, *directors*, *overseers*, or *regents*, generally without legal distinction. The staff member who leads the foundation may be referred to as a *president*, *executive director*, *director*, or *chief executive officer*. For simplicity, this paper usually refers to a foundation's governing board as the *board* or *board of trustees*, even if the foundation is established as a nonprofit corporation rather than a charitable trust; the individual members of the board are referred to as *trustees* or *board members*; and the staff member with final responsibility for the activities of the foundation as the *director*.<sup>21</sup>

Finally, in an oddity peculiar to the art world, the term *estate of ARTIST* has attained extralegal meaning. An artist's estate is defined as the property owned by the artist at the time of death.<sup>22</sup> After the decedent's *personal representative*<sup>23</sup> has collected the decedent's assets, paid the decedent's debts (including taxes), and distributed the decedent's property in accordance with the decedent's will (or according to the state's intestacy statutes if the decedent died without a valid will), the estate, for all practical purposes, terminates. Complex estates (for example, those involving will contests or other litigation) may continue for many years.<sup>24</sup> Public policy, however, favors rapid settlement of a decedent's estate, and most are settled expeditiously.<sup>25</sup> How is it, then, that even decades after an artist has died do galleries or dealers state that they *represent the estate of ARTIST*? The answer appears to be that, in many cases, private individuals who are the actual owners of the art (for by then title to the art has been transferred from the artist's estate to the artist's heirs and beneficiaries) would prefer to take shelter behind the terminology to protect their privacy. The practice, although it obfuscates the true owners of the works being exhibited or sold, is common.

## Foundation Basics

Charitable foundations form part of the Third (or Independent or Voluntary) Sector of the economy.<sup>26</sup> A hallmark of Third Sector organizations is that each has a unique purpose.<sup>27</sup> That is why they are said to be *mission driven*, and why virtually all foundations should develop and publish a carefully worded *mission statement*.<sup>28</sup> Thus, the starting point in establishing a foundation is determining its unique mission that will provide a public benefit. Charitable foundations are created under state law in a variety of legal forms (discussed below). To achieve advantageous tax status a foundation must meet precise requirements of federal tax law.

## Applicable Laws

An artist's foundation and its board members and staff are subject to a broad range of state and federal laws.<sup>29</sup> On issues related to the establishment, governance, and activities of a foundation, *state laws* control. Foundations generally are required to report annually to the attorney general in the state in which the foundation is organized and operated and, occasionally, in other states where it conducts significant business.<sup>30</sup> State and local laws also determine whether the foundation will be exempt from state and local income taxes, as well as sales, franchise, and property taxes. *Federal law* determines whether a foundation will qualify for exemption from federal income taxation; be eligible to receive gifts that are deductible by the donor for purposes of the federal income, gift, or estate tax; and the kinds of programs the foundation may conduct. Under rare circumstances, the law of foreign nations may apply (for example, if the artist wishes to undertake certain kinds of philanthropic activity overseas).

As will be discussed more fully below, foundations are subject not only to Internal Revenue Code provisions applicable to all tax-exempt organizations (often referred to as *501(c)(3) organizations*) but also to a special body of law. These *private foundation* rules, contained in Chapter 42 of the Code, regulate the investments, activities, and conduct of foundations, their founders, their founders' family, and the foundations' board members and officers. Transgressions of these provisions can be extremely costly to the foundation and, in some cases, to these individuals personally; serious transgressions, even if unintentional, can lead to the foundation's loss of tax-exempt status.

## Part III: Legal Form

An artist may establish a foundation as a nonprofit corporation, a limited liability corporation, a charitable trust, or an unincorporated association.<sup>31</sup> Although the charitable trust has a longer history in the law,<sup>32</sup> many foundations, including artist-endowed foundations, are now established as nonprofit corporations.

### Charitable Trust<sup>33</sup>

A charitable trust is similar in many respects to a private trust: The person establishing the trust transfers legal title to property to one or more trustees, who then holds the transferred property *in trust*, that is solely for the enjoyment of the trust's beneficiaries, in accordance with the founder's written instructions.<sup>34</sup> As with a private trust, the founder of a charitable trust may serve as the only trustee or as one of several trustees. Charitable trusts, however, have unique characteristics and requirements: The beneficiaries of a charitable trust must be the general public or a segment of the public (for example, artists or art students) and cannot be specifically named individuals; a charitable trust can have unlimited duration; and a charitable trust must be created for a reason more substantial than mere benevolence—it must have a charitable purpose under state law.<sup>35</sup> An artist's foundation established as a charitable trust will typically have the advancement of education as its primary charitable purpose.<sup>36</sup>

The chief advantages of a trust (over a nonprofit corporation) are the simplicity and speed with which it can be created: a trust requires no approval by a state's secretary of state to come into being and usually is subject to fewer record-keeping and filing requirements under state law. The trust form has disadvantages: Trusts generally do not provide board members with the same degree of protection from liability as a nonprofit corporation, and its trustees potentially place at risk *personal* assets if they breach their fiduciary duties; many companies and individuals with whom the trust will conduct business may be unfamiliar with the trust form, which can cause delays transacting trust business; and generally, trustees of charitable trusts cannot delegate their authority to act as broadly as trustees of nonprofit corporations. Additionally, depending on what the charitable trust's founding document says, trustees may be required to seek court approval for changes in the charitable trust's purposes, activities, or administrative provisions—often a costly and uncertain process. Despite these disadvantages, some even very large foundations (such as the J. Paul Getty Trust) operate in trust form.

### Nonprofit Corporation

Several reasons make the nonprofit corporate form the most familiar and popular choice for establishing a foundation today. First, almost every state has specific legislation authorizing the creation of nonprofit corporations.<sup>37</sup> Although these statutes require more paperwork and formalities initially than are required of charitable trusts, compliance is relatively simple. The ubiquitousness of for-profit corporations means that third parties with

whom the foundation will transact business are familiar with the corporate form. State law generally provides corporate board members with a stronger shield from liability. And, unless the documentation establishing the foundation differs from the norm, trustees of nonprofit corporations generally have greater flexibility to adjust the foundation's purposes and activities in light of changing circumstances. As with a charitable trust, a charitable nonprofit corporation must also have a valid charitable purpose under the law of the state in which it is incorporated.

## Part IV: Fiduciary Duties

Under state law, governing boards of foundations are deemed to hold the foundation's assets in trust for the benefit of the public regardless of the foundation's legal form (as a trust or nonprofit corporation). Accordingly, board members serve as fiduciaries.<sup>38</sup> As such, trustees are charged with three primary duties: care, loyalty, and obedience. Although the nature and degree of these duties historically differed, depending on whether the foundation existed as a charitable trust or a nonprofit corporation, the modern trend is to treat the duties as having similar though not identical standards regardless of the foundation's legal form.<sup>39</sup> These duties will be discussed briefly here without distinction as to the foundation's legal form.<sup>40</sup>

The *duty of care*, also referred to as the *duty of prudence*, generally requires trustees to carry out their duties in good faith and with the degree of diligence, care, and skill that ordinarily prudent persons would exercise under similar circumstances in a like position. A more recent formulation of the duty provides that "...prudence requires the exercise of reasonable care and skill and of a degree of caution suitable to the particular foundation's objectives, circumstances, and overall plan of administration."<sup>41</sup> At heart, the duty requires trustees to take an active and careful role in the governance of the foundation and prohibits absentee trusteeship and excessive delegation.

The *duty of loyalty* requires trustees to pursue in financial and all other matters related to the foundation only the interests of the foundation and its charitable beneficiaries. Also referred to as the *duty to avoid self-dealing* or the *duty of fair dealing*, the duty requires trustees to act solely in the best interest of the foundation and its charitable beneficiaries and never in a manner that benefits a trustee personally. At heart, the duty prohibits and seeks to prevent conflicts of interest.<sup>42</sup>

The *duty of obedience*<sup>43</sup> requires trustees to remain true to the foundation's mission. Accordingly, the duty has been described as a *duty to mission*.<sup>44</sup> Some observers do not recognize this third duty, seeing it instead as an integral component of the duties of care and loyalty. Both perspectives, however, emphasize the significance of a foundation's mission, the need for that mission to be clearly stated, and the ongoing responsibility of the governing board to adhere to the mission.

A state's attorney general represents the public beneficiaries of charitable organizations and has authority to enforce these fiduciary duties.<sup>45</sup> The attorney general's enforcement power derives from the common law doctrine of *parens patriae* (literally, *father of the country*, meaning the person representing the public's best interest) or through specific statutory provisions or both.<sup>46</sup> Many attorneys general's offices have special divisions (such as New York's Charities Bureau<sup>47</sup>) charged with oversight of foundations and other charitable entities.

## Part V: Tax Considerations

### Achieving Tax-Exempt Status

Although an artist's foundation is created as a legal entity under state law, to be both recognized as exempt from federal income taxation and eligible to receive contributions that are deductible to donors for federal income, gift, or estate tax purposes—that is, to be recognized as a tax-exempt organization—a foundation must satisfy specific requirements of the Code.<sup>48</sup> Code Section (“§”) 501(c)(3) defines a charitable tax-exempt organization as one that is “organized and operated exclusively for religious, charitable, scientific...literary, or educational purposes...no part of the net earnings of which inures to the benefit of any private...individual....”<sup>49</sup> For purposes of § 501(c)(3), *charitable* is defined “...[in] its generally accepted legal sense...[including] relief of the poor and distressed or of the underprivileged; advancement of religion; *advancement of education* or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare....”<sup>50</sup> Education for purposes of § 501(c)(3) includes “the instruction of the public on subjects useful to the individual and beneficial to the community.”<sup>51</sup> Most artist-endowed foundations will qualify for exemption because they meet the general definition of *charitable* (which includes *advancement of education*) or the definition of *education*.

Section 501(c)(3) includes an organizational and an operational test that must continuously be met to obtain and maintain tax exemption. The *organizational test* prescribes precisely what must be (and what cannot be) stated in a foundation's governing documents, that is, in the articles of incorporation of a nonprofit corporation or in the deed of trust of a charitable trust.<sup>52</sup> The Code permits a foundation to state extremely broad charitable purposes, and many practitioners adopt such broad language (e.g., “This foundation is organized exclusively for religious, charitable, scientific, literary, or educational purposes within the meaning of Code § 501(c)(3)...”). A narrower statement of the foundation's purposes may also satisfy the organizational test and may be appropriate if the artist wishes to limit the foundation's activities. The advantage of a broad statement of purpose is the latitude it gives to the foundation's governing board to adapt to changing circumstances; the disadvantage is the risk that a governing board may someday change the foundation's charitable activities in ways the artist might not approve were the artist then alive to comment. The advantage of a narrow statement of purpose, of course, is the ability to focus



the foundation's activities to those the artist selects; the disadvantage is the inability to provide flexibility for the foundation to adapt to inevitable social, economic, and other changes during the life of the foundation.<sup>53</sup> In general, the organizational test is easily met if the foundation's documents are prepared by an attorney experienced in this area of law.<sup>54</sup>

The *operational test* limits a foundation's activities.<sup>55</sup> A foundation will fail the operational test if any substantial part of its activities does not further its tax-exempt purposes or if any of its activities violates the prohibition on private inurement. Thus, the operational test has two distinct components: (1) a requirement that the organization serve public (rather than private) purposes,<sup>56</sup> and (2) a prohibition on gain or benefit by individuals closely involved with the foundation.<sup>57</sup>

The prohibition on private inurement is violated if any part of the organization's "net earnings inure in whole or in part to the benefit of private...individuals." (The prohibition on private inurement is similar to the prohibition on acts of self-dealing described in Code § 4941, discussed below.) The Service has taken the position, and courts have agreed, that *any* unjust enrichment may constitute inurement and that *net earnings* include more than net profits. Thus, an offending benefit need not be only in the form of a cash dividend.<sup>58</sup> The prohibition on private inurement applies to foundation *insiders* (such as members of the staff and governing board). The public benefit doctrine applies more broadly. Simply stated, "an organization is not organized or operated exclusively for one or more [exempt purposes] unless it serves a public rather than a private interest."<sup>59</sup> The doctrine, thus, would be violated if a foundation is operated primarily to benefit an individual or a small group of individuals rather than the general public or a segment of the general public. A few examples demonstrate how the Service applies these rules.

In an exceptionally brief ruling, the Service found that an organization incorporated for the purpose of making known to the world the contents and meaning of books written by a designated author (who was also one of the organization's incorporators) and whose principal activity consisted of purchasing books of that author and distributing them to libraries, educational institutions, and the public was *not* organized and operated exclusively for educational (or any other exempt) purpose.<sup>60</sup>

The Service revoked the tax-exempt status of a foundation ostensibly formed for educational purposes after finding that the foundation was operated primarily for the private purpose of promoting the work of a textile artist who was a foundation founder, director, and donor, but had retained ownership of the artworks, which the foundation featured prominently in its exhibitions. In this case, the Service found that the foundation violated both the private inurement and the public benefit doctrines.<sup>61</sup>

The Service refused to provide recognition of exempt status under Code § 501(c)(3) to a cooperative art gallery formed and operated by a group of artists for the purpose of

exhibiting and selling their works. Although the Service understood that the gallery may have served a broad educational purpose, the Service determined it primarily served as “a vehicle for advancing [the individual artists’] careers and promoting the sale of their work,” a private, not public benefit.<sup>62</sup>

For an artist-endowed foundation, these rules mean that the paramount concern in creating and operating the foundation is a careful identification of the benefits the foundation will confer on the *public* rather than the ways the foundation will benefit the artist or the artist’s family. Although a foundation may undertake activities to steward, protect, and promote the artist’s artworks, archives, copyrights and other intellectual properties, and reputation, those activities create a *public benefit* only if they serve a charitable purpose (for example, by educating the public through exhibitions, lectures, publications, and scholarly research).

### **Private Foundation Status**

Since 1970, the Code has classified all tax-exempt organizations in two basic categories: public charities and private foundations.<sup>63</sup> *Public charities* include those organizations that are supported by a large segment of the general public (such as museums, universities, some hospitals, and religious institutions); branches of local and state governments are also categorized as public charities. Either by their very nature or by the way they raise funds, public charities attract and receive contributions or revenue from a broad segment of the general public. The activities and finances of public charities are matters of public record or of public interest. The boards of public charities are typically large with individuals representing diverse viewpoints. Accordingly, Congress assumed that public charities are more directly and easily subject to scrutiny and accountability. In comparison to private foundations, public charities are favored by the law<sup>64</sup> with respect to their tax treatment and are less closely regulated than private foundations.

By contrast, *private foundations*<sup>65</sup> are organizations that meet the requirements of § 501(c)(3), but are not broadly supported by the general public. Instead, private foundations typically are created and primarily supported by an individual, family, or corporation. Moreover, private foundations’ governing boards tend, at least initially, to be small and often are controlled by the founder or the founder’s family. Congress perceived that this combination of private support with small governing boards closely aligned to the founder<sup>66</sup> provided greater opportunities for abuse and required imposition of a strict regulatory structure.<sup>67</sup> These private foundation rules affect six critical areas of foundation operations, three of which are of particular concern for artists’ foundations.<sup>68</sup>

Tax on undistributed income (Code § 4942). The Code requires private foundations—other than private operating foundations, which are subject to other rules, discussed below—to spend or distribute annually a minimum amount in furtherance of the foundation’s charitable purposes. At present, that amount is approximately equal to five percent of the net value of the foundation’s assets (*other* than assets held directly for use

in carrying out the foundation's charitable activities). Foundations that exceed the minimum distribution requirements in a given year may carry reduced future distributions in accordance with certain rules. A punitive tax is levied on foundations that fail to comply with the distribution requirements.

Tax on acts of self-dealing (Code § 4941). With an extremely small number of exceptions, the Code imposes a blanket prohibition on transactions between a private foundation and certain individuals called *disqualified persons*. Disqualified persons include the foundation's trustees and officers (including certain staff members), substantial contributors to the foundation (such as the artist who establishes the foundation), and certain family members of these individuals.<sup>69</sup> Prohibited transactions between a foundation and disqualified persons relate to sale, exchange, or lease of property; lending money or extending credit; furnishing goods, services, or facilities; and payment of compensation or reimbursement of expenses.<sup>70</sup> The prohibition applies even to transactions that benefit the foundation and to transactions that would appear to be at *arm's length*. For example, a bargain sale of property from a disqualified person to the foundation constitutes an act of self-dealing,<sup>71</sup> as is the purchase by a disqualified person of a work of art sold by the foundation at public auction.<sup>72</sup> It is easy to transgress Code § 4941. The exceptions are few and must be carefully examined prior to entering the transaction.<sup>73</sup>

Tax on taxable expenditures (Code § 4945). Private foundations are subject to excise taxes on amounts that are treated as *taxable expenditures* under Code § 4945. For example, although public charities may engage in limited lobbying activities, private foundations are absolutely prohibited from political, lobbying, or propagandizing activities, and funds expended for such activities are subject to a punitive excise tax as a taxable expenditure.<sup>74</sup> A private foundation makes a taxable expenditure and incurs an excise tax under § 4945 if it makes certain kinds of grants to individuals without the Service's prior approval of the foundation's grantmaking program.<sup>75</sup>

## **Types of Private Foundations**

Private foundations are of two basic types: nonoperating foundations<sup>76</sup> and operating foundations.<sup>77</sup> A nonoperating foundation generally has an endowment (or receives annual gifts from its primary donor) and pursues its exempt mission by making grants to public charities or, less frequently, to individuals.<sup>78</sup> By contrast, an operating foundation undertakes direct charitable activities.<sup>79</sup> Although these types will be discussed separately here, the Study has found that the usual polarity between nonoperating and operating foundations is moderating, consistent with trends in the greater foundation universe. Some artist-endowed, operating foundations now also engage in grantmaking, and some artist-endowed, nonoperating foundations are undertaking direct charitable activities.<sup>80</sup>

For an artist whose primary philanthropic interest is to be implemented through grantmaking, a nonoperating foundation is the appropriate choice. In this instance, if the artist donates his or her works of art, other collections, and archives to a nonoperating foundation, the foundation will either distribute those works, collections, and archives as gifts to museums, universities, or other public charities, or sell them—or contribute some and sell the remainder. The foundation will then hold the proceeds of sale as an endowment fund; the endowment fund may be augmented by the artist's other property, such as securities, proceeds of life insurance policies, sales of real estate, or other investments. The foundation will then expend endowment income (or, in some circumstances, both income and principal) for its grantmaking programs, which may include support for the arts or any other philanthropic field of interest to the artist.<sup>81</sup> In general, a nonoperating foundation is required to expend approximately five percent of the net, fair market value of its noncharitable-use assets annually for charitable purposes (such as grantmaking and the associated administrative costs).<sup>82</sup>

If, on the other hand, the purpose of the foundation is to use the artist's work, collections, and archives directly for public education (for example, in exhibition programs, in publications, as part of a study center or residency program, as a museum open to the public, and the like), the foundation in many cases will seek to qualify as an operating foundation. To qualify as an operating foundation, the foundation must annually demonstrate that it is actively involved in charitable activities by meeting financial tests set out in the Code: The foundation must meet an income test and one of three additional tests—an assets, endowment, or support test.<sup>83</sup> The purpose of these tests is to allow the Service to determine whether the foundation is directly conducting a sufficient degree of charitable activities to retain its classification as an operating foundation.<sup>84</sup>

Application of the *income* test effectively requires the foundation to demonstrate that it spends a sufficient amount of its annual income for the direct conduct of charitable activities. In most cases, a foundation that directly conducts charitable activities (exhibitions, publications, operating a research center, and the like) will easily satisfy the test by virtue of the cost of those charitable activities.

Of the three options available to demonstrate compliance with the second prong of the test (the assets test, endowment test, and support test), most artist-endowed foundations will probably select the assets test. That test effectively requires the foundation to use the equivalent of 65 percent of its assets directly for the conduct of its charitable activities. Artist-endowed foundations that operate their own charitable programs typically use the artist-founder's own works of art, collections, and archive (and in some cases, real estate such as the artist's studio) to accomplish its charitable purposes through exhibitions, loans of works of art, publication of scholarly catalogs, conduct of educational activities, implementation of residency programs, operations of a museum open to the public, and the

like. Under those circumstances, it should be relatively simple to demonstrate compliance with the assets test.

Although operating foundations may undertake grantmaking activities, the Code requires that operating foundations that make grants, award scholarships, or make other payments to individuals maintain significant involvement with the programs for which the grant, scholarship, or other payment is made.<sup>85</sup>

## Part VI: Conclusion

As the Study has confirmed, an increasing number of artists are establishing foundations. Foundations are relatively easy to create, but, as this paper has tried to indicate, require care, skill, and forethought to create wisely. They are not the answer for every problem and present significant challenges and requirements—sufficient assets, a good business plan, appropriate governance, and effective management. Compliance with the requirements of federal tax and state laws must be rigorous, and transgressions can be extremely costly for the foundation and those closely related to it. Nevertheless, foundations remain a potentially effective way for an artist to pursue philanthropic activities and, as a part of those activities, establish a mechanism to disperse or otherwise manage the artist's artworks and related assets.

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<sup>1</sup> Extensive literature is available to assist artists and their advisors considering the creation of a foundation. See, for example, John A. Edie, *First Steps in Starting a Foundation* (5th ed., 2005) and Victoria Bjorklund and Thanya A. Polonio-Jones, "Artists' Foundations," in *A Visual Artist's Guide to Estate Planning: The 2008 Supplement Update* (Barbara T. Hoffman ed., 2008).

The most comprehensive and regularly updated resource on federal taxation of foundations is Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* (2006, with 2008 Cumulative Supplement). A useful and often-updated, single-volume reference is Bruce R. Hopkins and Jody Blazek, *Private Foundations Tax Law and Compliance* (2nd ed., 2003, with annual cumulative supplements). The best treatment of federal and state law and regulation of nonprofit organizations, including private foundations, is Marion R. Fremont-Smith, *Governing Nonprofit Organizations, Federal and State Law and Regulation* (2004). All of these works are rich in citations. Additionally, the website of the Internal Revenue Service provides helpful information on charitable organizations. <http://www.irs.gov/charities/charitable/index.html>

<sup>2</sup> See Vincent, *supra* note 3.

<sup>3</sup> This paper follows the Study's definition of an artist-endowed foundation as a "tax-exempt private foundation created or endowed by a visual artist, the artist's surviving spouse, or other heirs or beneficiaries, to own the artist's assets for use in furthering exempt charitable and educational activities serving a public benefit." See Christine J. Vincent, *The Artist as Philanthropist: Strengthening the Next Generation of Study of Artist-Endowed Foundations* (2010).

<sup>4</sup> Internal Revenue Code (2002 and Supplement 2007) §§ 4940–4963.

<sup>5</sup> This paper focuses on artists whose work has found a strong secondary market. Artists whose work may have substantial cultural, historical, or other personal significance, but does not generate strong market value, will require other approaches, as discussed in further detail in the Study report; see Vincent, *supra* note 3.

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- <sup>6</sup> Determining whether a foundation has a charitable purpose requires analysis of both state law regarding charitable organizations *and* federal tax law. See Hill and Mancino, *supra* note 1, at ¶¶ 3.02–3.09; Hopkins, *supra* note 1, at § 5.7; Freemont-Smith, *supra* note 1, at 116–133; and the discussion later in this paper.
- <sup>7</sup> The public benefit doctrine is discussed briefly elsewhere in the Study report: see Vincent, *supra* note 3.
- <sup>8</sup> Artists often feel compelled to name an *artistic executor* (or, if the artist is an author, a *literary executor*); however, the general rule is that no such entity exists: “[The t]erm literary executor is a misnomer. If there is an executor of an estate and the will designates another as a literary executor, the literary executor is still not the legal representative of the estate. If he or she acts on behalf of the estate, the executor is deemed to have delegated his or her duties and can be held liable for any [of] the actions of the literary executor.” Robert J. Giordanella, *Intellectual Property: Overview and Selected Issues for the Estate Planner*, 267 PLI/Est 343, 349 (1999). See Matter of Estate of Hellman, 51 N.Y.S. 2d 485 (N.Y. Sur., 1987) (recognizing, under the specific facts presented, a decedent’s appointment of a literary executor and granting limited letters testamentary). Although the terms have achieved currency and attained a loose definition through use, they are misleading and should be avoided. Typically what the artist is expressing when he or she wants to name an “artistic” or “literary” executor is a desire to vest in an individual control over access to the artist’s work and archives and the licensing of the artist’s intellectual property. In many—if not all—situations in which the artist is establishing a foundation, it is preferable to vest those powers in the foundation, rather than an individual, in order to assure collective decision making by the foundation’s governing body, achieve consistency in legacy stewardship, and avoid conflicts.
- <sup>9</sup> For example, in 2004, the daughter of the designers Charles Eames (1907–1978) and Ray Eames (1912–1988) formed the Charles and Ray Eames House Preservation Foundation and contributed the landmark structure designed by her parents to the foundation. The foundation operates the house as a public education center focused on the Eames’s creative principles, <http://www.eamesfoundation.org/> (last visited June 28, 1020).
- <sup>10</sup> Private trusts, unlike charitable trusts, are not required to make financial and other information part of the public record. However, evidence of the existence and activities of these trusts can be gleaned from secondary sources. For example, a February 2005 press release from the Terra Foundation for American Art makes clear that the Thomas Hart and Rita P. Benton Testamentary Trust, a noncharitable trust, has sold works by the artist. [http://www.terraamericanart.org/dynamic/subpages/TerraFoundation\\_221.pdf](http://www.terraamericanart.org/dynamic/subpages/TerraFoundation_221.pdf) (last visited June 28, 2010). Evidence that the Maxfield Parrish Family Trust lends or otherwise supports exhibitions of the artist’s work appears in an announcement noting...“Inquiries, comments and kind words regarding Maxfield Parrish and this exhibit can be made to...representatives of the Maxfield Parrish Family Trust, at [email address]...” <http://www.imageexchange.com/exhibits/parrish/welcome.htm> (last visited June 28, 2010). References to the activities of the Ansel Adams Publishing Rights Trust include this announcement of the Trust’s licensing agreement with Corbis Corp. [http://findarticles.com/p/articles/mi\\_m0EIN/is\\_1996\\_April\\_2/ai\\_18149986](http://findarticles.com/p/articles/mi_m0EIN/is_1996_April_2/ai_18149986) (last visited June 28, 2010).
- <sup>11</sup> For example, prior to his death, Sol LeWitt entered into an agreement regarding a definitive collection of his wall drawings and related archives with Yale University, whose Art Gallery is collaborating with the Williams College Museum of Art and the Massachusetts Museum of Contemporary Art to use these collections to research, exhibit, and teach about the artist’s works. Carol Vogel, “Long-Term LeWitt,” *New York Times*, Jan. 25, 2008 at E34. Another example is Roger Brown’s bequest of his estate (including painting and print collections, studio, archives, and residential properties of architectural importance) to his alma mater, School of the Art Institute of Chicago, which holds it as the Roger Brown Resources and Study Collection.

- <http://www.saic.edu/webspaces/rogerbrown/brown/index.html#> (last visited June 20, 2010). For an example where such a gift led to unfortunate results, purportedly as a result of poor estate planning and institutional mismanagement, see Gail Levin, "Artists' Estates: When Trust is Betrayed," in *Ethics and the Visual Arts* 125–141 (Elaine A. King and Gail Levin eds., 2006) (assessing the Whitney Museum of American Art's handling of the estates of Edward and Josephine Hopper).
- <sup>12</sup> For some artists, however, once the foundation has been established, the foundation can become the principle vehicle for the artist's lifetime philanthropic activities. For example, Ezra Jack Keats actively used his foundation during lifetime to accomplish his charitable activities. See "Foundation—History" at <http://www.ezra-jack-keats.org/foundation/index.html> (last visited June 27, 2010).
- <sup>13</sup> On estate planning issues for artists, see Ralph E. Lerner and Judith Bresler, *Art Law, 1745–1848* (3rd ed., 2005) and John H. Merryman, Albert E. Elsen, and Stephen K. Urice *Law, Ethics and the Visual Arts* 923–960 (5th ed., 2007).
- <sup>14</sup> For example, the textile designer Alexander Girard established the Girard Foundation in 1962 and operated it over a period of 30 years in order to assemble, research, and exhibit an extensive collection of world folk art; prior to his death, the collection was contributed to the Museum of International Folk Art, Santa Fe. <http://www.moifa.org/about/girard.html> (last visited June 26, 2010).
- <sup>15</sup> Annalee Newman created two foundations associated with her husband, Barnett Newman: the first, 10 years after his death, and the second, 27 years after his death (and three years prior to hers). <http://www.barnettnewman.org/> (last visited June 26, 2010).
- <sup>16</sup> The will of Isabel Lachaise established the Lachaise Foundation in 1964, 29 years after the death of her husband, Gaston. <http://www.lachaisefoundation.org/> (last visited June 20, 2010).
- <sup>17</sup> Twenty-one years after the death of William Glackens, the Sansom Foundation, named for the artist's childhood street in Philadelphia, was established under the direction of the artist's son to own and sell the artist's works and make grants to support the arts and bring relief to unwanted pets. (Jorge Santis, *William Glackens*, 1996).
- <sup>18</sup> Economic benefits to a foundation's insiders resulting from the foundation's activities present potentially serious difficulties under the Code § 4941 (pertaining to self-dealing, described later in this paper) and state law conflict of interest statutes. For a discussion, see Freemont-Smith, *supra* note 1.
- <sup>19</sup> See Vincent, *supra* note 3, for a discussion of factors influencing viability of artist-endowed foundations.
- <sup>20</sup> For example, liquidity for a foundation may be created by the use of a life insurance policy on the life of the artist (which may be held in a separate life insurance trust) with the foundation designated as the beneficiary.
- <sup>21</sup> In some foundations, the director also serves on the governing board.
- <sup>22</sup> "Estate includes the property of the decedent...whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration." Unif. Probate Code § 1201(13) (1990); see also *Black's Law Dictionary* 588–589 (8th ed., 2004) (defining a decedent's estate as "[t]he real and personal property that a person possesses at the time of death").
- <sup>23</sup> If the decedent died with a will, the personal representative is referred to as the *executor*. If the decedent died without a will, that is *intestate*, the personal representative is referred to as the *administrator*.
- <sup>24</sup> As a general rule, the decedent's executor or administrator is appointed by and remains subject to state courts of special jurisdiction, which are referred to by various names: probate courts, surrogate courts, orphans' courts, etc. The court will "close out the estate" by approving the executor's or administrator's final accounting in due course.

<sup>25</sup> For federal estate tax purposes the Service will deem an estate to be terminated if the period of administration is unduly prolonged. See Ira Mark Bloom, F. Ladson Boyle, John T. Gaubatz, and Lewis D. Solomon, *Federal Taxation of Estates, Trusts and Gifts* 694–695 (3rd ed., 2003). For income tax purposes, the Service’s regulation for the duration of an estate provides:

The period of administration or settlement [of an estate] is the period actually required by the administrator or executor to perform the ordinary duties of administration, such as the collection of assets and the payment of debts, taxes, legacies, and bequests, whether the period required is longer or shorter than the period specified under the applicable local law for the settlement of estates...However, the period of administration of an estate cannot be unduly prolonged. If the administration of an estate is unreasonably prolonged, the estate is considered terminated for Federal income tax purposes after the expiration of a reasonable period for the performance by the executor of all the duties of administration. Further, an estate will be considered as terminated when all the assets have been distributed except for a reasonable amount which is set aside in good faith for the payment of unascertained or contingent liabilities and expenses.... Treas. Reg. § 1.641(b)-3 (as amended in 2002).

<sup>26</sup> The First Sector consists of government and governmental agencies, the Second Sector consists of for-profit organizations, and the Third Sector consists of charitable *and* noncharitable nonprofit entities. Most museums, performing arts organizations, universities, churches, and foundations are treated at law as charitable nonprofit organizations. Examples of nonprofit organizations that are *not* charitable include trade organizations, business leagues, chambers of commerce, condominium associations, and the like. Charitable (and some noncharitable) nonprofit organizations are often collectively referred to as *exempt organizations*, meaning they qualify for exemption from federal and, usually, local and state income taxation. The literature in the field refers to the purposes that qualify an organization for recognition as a tax-exempt organization as that organization’s *exempt purposes*.

<sup>27</sup> By contrast, all for-profit organizations share a common mission: to return a profit to the organization’s shareholders, partners, or members. For a concise analysis of the distinct characteristics of the Third Sector, see Marie C. Malero, *Museum Governance, Mission, Ethics, Policy* 3–15 (1994).

<sup>28</sup> Foundations created during an artist’s lifetime (*inter vivos*), whose major funding and activities do not occur until after the artist’s death, often will postpone development of a detailed mission statement until the foundation is fully funded. For examples of artist-endowed foundation mission statements, see Andy Warhol Foundation for the Visual Arts, <http://www.warholfoundation.org/> (last visited June 20, 2010), the Pollock-Krasner Foundation, <http://www.pkf.org/foundation.html> (last visited June 20, 2010), Josef and Anni Albers Foundation, <http://www.albersfoundation.org/> (last visited June 20, 2010), the Adolph and Esther Gottlieb Foundation, <http://www.gottliebfoundation.org/> (last visited June 20, 2010), and the Dedalus Foundation, established by Robert Motherwell, <http://www.dedalusfoundation.org/> (last visited June 20, 2010).

<sup>29</sup> Foundations must also consider the impact of local law (that is, city and county law), a level of detail not addressed in this paper.

<sup>30</sup> For a summary of state-level oversight of charitable foundations, see Fremont-Smith, *supra* note 1, at 53–66, 301–376.

<sup>31</sup> Since limited liability corporations are treated for relevant legal purposes as if they were corporations, and given that foundations are rarely, if ever, established as unincorporated associations, those legal forms are not discussed. See Fremont-Smith, *supra* note 1, at 116. For a general discussion on choice of form, see Carolyn C. Clark and Glenn M. Troost, “Forming a Foundation: Trust vs. Corporation,” *Probate and Property* (May–June 1989), and Thomas M. Smith, “Trust vs. Corporate Form,” *Trusts and Estates* (August 1987): 20.

<sup>32</sup> For an insightful and remarkably succinct (given the reach of the topic) history of the law of charitable organizations, see Fremont-Smith, *supra* note 1, at 19–115.



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- <sup>33</sup> For a detailed discussion of the advantages and disadvantages of establishing a foundation as a charitable trust, see Harry G. Henn and Michael George Pfeifer, “Nonprofit Groups: Factors Influencing Choice of Form,” *Wake Forest University Law Review* 11 (1975): 181, 197–206. For discussions of charitable trusts generally, see Austin Wakeman Scott, William Franklin Fratcher, and Mark L. Ascher, *Scott and Ascher on Trusts* §§ 37.1–37.4, (5th ed., 2006), and George Gleason Bogert, George Taylor Bogert, and Amy Morris Hess, *The Law of Trusts & Trustees*, ch. 19–21, (3rd ed., 2000).
- <sup>34</sup> Those instructions are contained in a *deed of trust* or *declaration of trust*. Although the law permits oral trusts under some circumstances, they are inappropriate for these purposes.
- <sup>35</sup> State laws generally limit valid charitable purposes to six categories: the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, the promotion of governmental or municipal purposes, and other purposes the accomplishment of which is beneficial to the community. See Restatement (Second) of *The Law of Trusts* §§ 368–374. In an often-cited case, the Virginia Supreme Court determined that a trust to provide payments to school children in a small town on the last day of school before Christmas and Easter every year did not have a legitimate *charitable* purpose, but was merely *benevolent*. The court concluded: “Payment to the children of their cash bequests on the two occasions specified would bring to them pleasure and happiness and no doubt cause them to remember or think of their benefactor with gratitude and thanksgiving. That was, we think, [the founder’s] intent. Laudable, generous and praiseworthy though it may be, it is not for the relief of the poor or needy, nor does it otherwise so benefit or advance the social interest of the community as to justify its continuance in perpetuity as a charitable trust.” *Shenandoah Valley Nat’l Bank v. Taylor*, 63 S.E.2d 786, 794 (Va. 1951).
- <sup>36</sup> There is some authority for the proposition that a charitable trust formed with works of art of no artistic merit or significance will fail. See Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 Wayne L. Rev. 1341, 1364–1365.
- <sup>37</sup> Most states have adopted in whole or part the American Bar Association’s Model Non-Profit Corporation Act. Kansas and Delaware do not have explicit nonprofit corporation statutes, but permit nonprofit corporations to be established under their general corporate law. Fremont-Smith, *supra* note 1, at 151–152.
- <sup>38</sup> A fiduciary is defined as a “person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor....” *Black’s Law Dictionary* 658 (8th ed., 2004).
- <sup>39</sup> For insightful, brief discussions, see Marie C. Malaro, *A Legal Primer on Managing Museum Collections* (2nd ed., 1998) 10–15, and Malaro, *supra* note 27.
- <sup>40</sup> For a detailed description and discussion, see Fremont-Smith, *supra* note 1, at 187–237.
- <sup>41</sup> Fremont-Smith, *supra* note 1, at 188 (quoting Restatement (Third) of *The Law of Trusts* § 77(1) (Preliminary Draft No. 6, 2003)).
- <sup>42</sup> See Fremont-Smith, *supra* note 1, at 215–225.
- <sup>43</sup> This duty was first described by the former head of the New York Attorney General’s Bureau of Charitable Enforcement, Daniel Kurtz, in 1989. See Daniel Kurtz, *Board Liability: A Guide for Nonprofit Directors* 84 (1989).
- <sup>44</sup> Fremont-Smith, *supra* note 4, at 225.
- <sup>45</sup> Standing to enforce charitable trusts is generally limited to a state’s attorney general, another trustee of the trust, or a person with a *special interest*. What constitutes a *special interest* varies from state to state but generally requires something more than merely being a member of the class that benefits from the charitable trust’s philanthropic mission.
- <sup>46</sup> See Fremont-Smith, *supra* note 1, at 301–376.
- <sup>47</sup> See Charities Bureau of the Attorney General of New York, <http://www.oag.state.ny.us/charities/charities.html> (last visited June 20, 2010).

- <sup>48</sup> Typically, federal recognition of tax-exempt status suffices to qualify a foundation for favorable tax treatment under state and local law. Thus, a foundation will generally be exempt from local and state property, sales, franchise, and other taxes. The foundation will, however, generally be required to file forms with the state attorney general to register the foundation and with state and local tax agencies.
- <sup>49</sup> A large body of literature examines the requirements for recognition as an organization described in Code § 501(c)(3). See, for example, Hill and Mancino, *supra* note 1, at ¶¶ 2.01–2.05; Hopkins, *supra* note 1, at §§ 35.1–36.3; Fremont-Smith, *supra* note 1, ch. 5; Steven D. Simpson, 869 T.M., *Tax-Exempt Organizations: Organizational and Operational Requirements* (2006). To qualify for recognition as a tax-exempt organization, a foundation must complete and submit to the Service a Form 1023. That form and its instructions provide helpful insights into the requirements for obtaining tax-exempt status. See <http://www.irs.gov/pub/irs-pdf/f1023.pdf> (last visited June 20, 2010).
- <sup>50</sup> Treas. Reg. § 1.501(c)(3)-1(d)(2) (emphasis added).
- <sup>51</sup> *Id.* § 1.501(c)(3)-1(d)(3).
- <sup>52</sup> See *id.* § 1.501(c)(3)-1(b) (setting out the organizational test's requirements).
- <sup>53</sup> For a discussion of the organizational test, see Hill and Mancino, *supra* note 1, ¶¶ 2.01–2.05; Hopkins, *supra* note 1, at § 6.01; Fremont-Smith, *supra* note 1, at 246–247, 384, 275.
- <sup>54</sup> The Code provides specific requirements not only for the organization of a foundation but also for its termination. Code § 507.
- <sup>55</sup> *Id.* § 1.501(c)(3)-1(c).
- <sup>56</sup> On the public benefit doctrine, see Hill and Mancino, *supra* note 1, at ¶ 3.02[1] (...to qualify as a charitable organization, the organization's activities must benefit the general public or a segment or the general public large enough to be treated as a charitable class."); and Hopkins, *supra* note 1, at § 6.2.
- <sup>57</sup> Treas. Reg. § 1.501(c)(3)-1(c)(2). On private inurement, see Hill and Mancino, *supra* note 1, at ¶ 4.03[2]; Hopkins, *supra* note 1, at §§ 13.1–13.7; Fremont-Smith, *supra* note 1, at 248–250.
- <sup>58</sup> *People of God Community v. Commissioner*, 75 T.C. 127 (1980) and *Orange County Agricultural Society Inc. v. Commissioner*, 55 T.C.M (CCH) 1602 (1988), *aff'd*, 893 F.2d 529 (2d Cir. 1990).
- <sup>59</sup> Treas. Reg. § 1-501(c)(3)-1(d)(1)(ii) (as amended in 1990). On the requirement of public benefit (or, as it is commonly referred to, the private benefit doctrine), see Hill and Mancino, *supra* note 1, at ¶ 4.02; Hopkins, *supra* note 1, at § 20.11; and Fremont-Smith, *supra* note 1, at 250–252.
- <sup>60</sup> Rev. Rul. 55-231, 1955-1 C.B. 72.
- <sup>61</sup> I.R.S. Priv. Ltr. Rul. 94-08-006 (February 25, 1994).
- <sup>62</sup> Rev. Rul. 71-395, 1971-2 C.B. 228. Public benefit is discussed elsewhere in the Study report. See Vincent, *supra* note 3.
- <sup>63</sup> See Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487.
- <sup>64</sup> For example, public charities are *not* subject to the excise tax on net-investment income applicable to private foundations under Chapter 42 of the Code, and in general, donors making lifetime gifts to public charities are able to deduct a greater portion of their gift for the purposes of income tax calculation.
- <sup>65</sup> The Code provides no definition of a private foundation. Instead, Code § 509(a)(1)–(3) identifies organizations that are *not* private foundations; an exempt charitable organization that is not described in one of those sections of the Code is treated as a private foundation. For the distinction between public charities and private foundations, see Hill and Mancino, *supra* note 1, at ¶ 8.04; Hopkins, *supra* note 1, at §§ 17.01–17.10; and Fremont-Smith, *supra* note 1, at 3–4, 275 (2004).
- <sup>66</sup> It is not uncommon for a foundation's bylaws to provide that, during the lifetime of the founder, the founder may unilaterally appoint or remove members of the board.
- <sup>67</sup> That regulatory structure is set out in Code Chapter 42. See Fremont-Smith, *supra* note 1, at 264–285 (providing an introduction to the provisions of Chapter 42).

- <sup>68</sup> The other three involve the Code's imposition of excise taxes on the foundation's net investment income (Code § 4940), on holding more than a limited percentage of stock in a given business (Code § 4943), and on investments that jeopardize the carrying out of the foundation's exempt purposes (Code § 4944). Under § 1212 of the Pension Protection Act of 2006, the excise taxes on most of these Code provisions increased substantially. See Pension Protection Reform Act of 2006, Pub. L. No. 109-280, 120 Stat. 780.
- <sup>69</sup> Code § 4946(a); see Hill and Mancino, *supra* note 1, ¶ 10.02; Hopkins, *supra* note 1, § 12.2; and Fremont-Smith, *supra* note 1, at 268–269.
- <sup>70</sup> For descriptions of acts of self-dealing, see Hill and Mancino, *supra* note 1, ¶¶ 10.04–10.06; Hopkins, *supra* note 1, §§ 20.2–20.3; and Fremont-Smith, *supra* note 1, at 269–272.
- <sup>71</sup> Treas. Reg. § 53.4941(d)-2(a)(1)
- <sup>72</sup> Rev. Rul. 76-18, 1976-1 C.B. 355.
- <sup>73</sup> The exceptions are discussed at Hill and Mancino, *supra* note 1, ¶¶ 10.04–10.06; and Hopkins, *supra* note 1, §§ 20.2–20.3.
- <sup>74</sup> Private foundations may, however, make “available the results of nonpartisan analysis, study, or research” without incurring a taxable expenditure. Code § 4945(e).
- <sup>75</sup> See Hill and Mancino, *supra* note 1, ¶ 11.03; Hopkins, *supra* note 1, § 24.3; and Fremont-Smith, *supra* note 1, at 281.
- <sup>76</sup> Or, more accurately, “private nonoperating foundations,” for which the Code does not provide a precise definition.
- <sup>77</sup> Or, more accurately, “private operating foundations” defined at Code § 4942(j)(3). For a succinct summary of the general requirements for achieving operating foundation status, see IRM 7.26.6 (*Private Operating Foundations*) May 2002.
- <sup>78</sup> A private foundation awarding grants to individuals for specified purposes (such as travel, study, or similar purposes) must receive advance approval from the Service for such grant programs. For a discussion of Code § 4945(g) and the exceptions to it, see Hill and Mancino, *supra* note 1, ¶ 11.03[4].
- <sup>79</sup> “Unlike most private foundations whose assets consist mainly of investments and whose charitable activities consist mainly of making grants, operating foundations mainly conduct direct charitable operations.” IRM 7.26.6.1 (*Overview*) February 1999.
- <sup>80</sup> These trends among artist-endowed foundations are discussed elsewhere in the Study report. See Vincent, *supra* note 3. See Loren Renz and Rachel Elias, *More than Grantmaking: A First Look at Foundations' Direct Charitable Activities*, Foundation Center (2007) for a discussion of trends in nonoperating foundations' conduct of direct charitable activities; and *Foundation Establishment*, Foundation Center (2006) for a discussion of trends in the growth in numbers of grantmaking operating foundations.
- <sup>81</sup> For example, according to its website, the Keith Haring Foundation “concentrates its giving in two areas: the support of organizations which provide educational opportunities to underprivileged children and the support of organizations which engage in research and care with respect to AIDS and HIV infection.” See the Keith Haring Foundation website, <http://www.haring.com/foundation/about/index.html> (last visited June 20, 2010).
- <sup>82</sup> For discussions of the annual payout requirements, Hill and Mancino, *supra* note 1, ¶ 9.02(b); Hopkins, *supra* note 1, at § 12.1(b); and Fremont-Smith, *supra* note 1, at 272–276.
- <sup>83</sup> The tests may be summarized as follows:
- Income Test. Operating foundations are required to expend for charitable activities no less than 85 percent of the lesser of the foundation's *adjusted net income* (essentially all of the foundation's income less certain deductions) or its *minimum investment return* (essentially, five percent of the value of the foundation's assets, other than assets used directly for charitable purposes).
- Assets, Endowment, and Support Tests. An operating foundation must demonstrate that it meets one of these tests in addition to the income test.

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- For a foundation to meet the *assets test*, no less than 65 percent of the fair market value of its assets must be devoted directly to charitable operations. An asset is devoted directly to exempt functions only if the foundation actually uses the asset in such manner. If an asset is held for the foundation's charitable purposes, then its value is not included in calculating the foundation's minimum investment return.
  - For a foundation to meet the *endowment test*, a foundation must normally make qualifying distributions for exempt functions in an amount that is equivalent to approximately three and one-third percent (or, as the Code puts it, "not less than two-thirds of its minimum investment return") of the foundation's assets that are not used or held for use directly in carrying out the foundation's exempt purposes.
  - For a foundation to satisfy the *support test* it must meet three requirements. First, substantially all of its support, other than gross investment income, must normally be received from the general public and from five or more public charities. Second, not more than 25 percent of its support (other than gross investment income) may normally be received from any one exempt organization. Finally, not more than half of its support may normally be received from gross investment income.

<sup>84</sup> For discussions of the requirements to qualify as a private operating foundation, see Hill and Mancino, *supra* note 1, at ¶¶ 3.02-3.09; Hopkins, *supra* note 1, at § 18.1; and Fremont-Smith, *supra* note 1, at 266–267, 275.

<sup>85</sup> Treas. Reg. § 53.4942(b)-1(b)(2)(i). See Hill and Mancino, *supra* note 1, at ¶ 11.02[3][a].



## 9.3.2 Enter the Lawyers: Choosing and Working with Estate and Foundation Counsel to Secure an Artistic and Philanthropic Legacy

STEPHENS GILLERS

### Introduction: The Setting

This essay, prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study), is about death and revival in a very special setting. It offers advice to artists, their families and advisors, and also to the lawyers they will work with, as they develop the artist's estate plan and lay the groundwork for, and then manage, a foundation to realize the artist's legacy through a philanthropy committed to charitable and educational purposes. Although I hope and expect that my advice will help all readers, the artists are the most important among them and whom I have in mind when I occasionally use the pronoun *you*. The intention throughout is to insure that the artist's wishes are accurately identified and effectively implemented.

Estate planning is complicated even in relatively simple circumstances, but especially in the one discussed here. Think about it. When the estate plan is made, the testator (let's say this is a visual artist) does not generally know when he or she will die. Also, circumstances can change and changes must be foreseen so far as possible, but some cannot be foreseen. Changes can include new family members or new personal relationships. They can include change in the assets the artist owns at death—changes in both value and kind, as a result of sales, productivity, or reputation. Or the changes can be new estate tax or other laws whose possible adoption may not be contemplated.

Then add to this the complications that arise when the estate's property is not liquid and must be appraised, at least for the taxing authorities and perhaps for proper distribution of assets to heirs and beneficiaries or charity. The value and identity of that property might fluctuate, perhaps significantly, and often can be only roughly predicted when the estate plan is created. And some property is much harder to appraise accurately (e.g., paintings or intellectual property rights) than others (homes). Further complexity is introduced if the artist wishes to create an entity that will receive liquid or other assets in order to support a philanthropic purpose after his or her death—or indeed during a lifetime. The entity, let's call it a foundation, must be created, its governing body identified, its method of succession defined, and its governing structure detailed. Who will make decisions about its operation?

How will the artist's intent be protected after death? How will the estate plan allocate distributions as between the artist's family and the foundation (and perhaps others) and what happens after the death of the family members?

These and other questions can make planning appear incredibly complex, and surely it is not simple. Many decisions must be made, some irrevocable, others amenable to change. This essay will try to clarify issues faced by artists, their family, and their advisers as they begin to think about the culmination of a productive life and the values they wish to preserve and perpetuate. Its focus will be those issues that arise in choosing and working with legal counsel. At the end of the essay, I will offer a summary of sorts—a half dozen recommendations to help guide readers through this specialized world.

### **Enter the Lawyers**

Even in comparatively simple estate plans, and certainly in the complex structure described here, lawyers are essential. Nothing can be safely done—or indeed done at all—without them. Safety requires provisions that will insure the testator's purpose—his or her *will*—and minimize tax liability. Lawyers are needed at the creation, and they are needed throughout the implementation of the plan: in probate; in the establishment of the foundation as a functioning entity (with many of the ordinary legal needs of any enterprise (e.g., insurance, office space, employment agreements); to negotiate with taxing authorities and regulators on behalf of the estate and the foundation; and in the ongoing operation of the foundation to insure that it complies with the estate plan, its own charter, and federal and state law.

But not all decisions are legal. Indeed, from the artist's point of view, the most important decisions are not legal at all. The legal work is simply the underpinning, the platform that enables the artist's plan to proceed. The legal work must be done because the law requires it. The artist's wish is that lawyers do it in the way that will most efficiently—measured in money and time—and most safely lay the groundwork to achieve his or her goals. Once the legal edifice is set, the real labor begins, the implementation of the artist's plan through the many discretionary choices best calculated to further that plan. These choices will be made across many years and changing conditions, perhaps long after the artist's death. These are not legal choices and nothing about legal training qualifies lawyers to make them.

So lawyers are an essential ingredient for the success of this enterprise, but far from a sufficient one to achieve the artist's goals. The harder labor, the labor that will determine the degree of success, builds on their work.

### **Beyond the Artist: Other and Derivative Interests**

In addition to the artist, others have interests in the estate plan and its execution. Most obviously, these include the artist's relatives and other beneficiaries in the artist's will (such as personal associates), and the museums, schools, and other charities that may have

benefited from the artist's lifetime generosity. But at least two (possibly three) *juridical entities*, as the law calls them, also have an interest. One is the estate itself. *Estate* as used here is a technical legal term for the legal repository of all the property the artist leaves at death. Think of it as a kind of *holding company* that will eventually dissolve when the will is fully implemented. (The word is also used in other contexts. For example, the use here should not be confused with the casual use of the term to connote ownership by an artist's heirs and beneficiaries, as when paintings are lent temporarily to a museum for exhibition and designated as being "on loan from the estate of the artist.") An estate has legal rights and duties (like paying taxes), which the *head* of the estate, the executor, is charged to protect and fulfill. The executor, in turn, does his or her job with the advice of legal counsel, who may or may not be the same person as the lawyer (or law firm) that prepared the estate plan. In due course, the estate will cease its existence when all of the artist's instructions and all of its other legal obligations are satisfied. The windup can occur months or years after death. The more complicated the estate plan, the greater the estate assets (especially nonliquid assets), the longer will it take to wind up. But sooner or later, the estate will end its existence.

The second juridical entity may have no end, or none that is foreseeable. It is the foundation that the artist may create to carry out his or her wishes, even while living or after the artist's death. The foundation's assets may include cash and property from the estate, and the property may include, in addition to securities and real estate, the artist's own work and intellectual property plus the artwork of others that the artist may have collected. A staff of one or more may run the foundation on a daily basis, but its highest authority will be its board (of one or more), whose structure and perhaps actual composition will have been envisioned in the estate plan. The board will have the legal responsibility to ensure that the foundation does what the artist intended and that the foundation complies with the opaque and esoteric laws, federal and state, governing the operation of private foundations. The board, of course, will need legal and financial advice in fulfilling its obligations, which means more lawyers.

A trust created during the life of the artist, or in his or her will, is a third legal entity that can have rights and duties. It will have a trustee and need legal counsel. Trusts can be created for numerous purposes and for varying lengths of time. They may hold property that will eventually pass to a minor or to others on the occurrence of identified conditions or merely after a specified passage of time, or ultimately to the foundation upon the death of a surviving spouse or other heirs and beneficiaries. They may be created for tax purposes. Trusts are common in all wills as a purely legal device for handling the transition of ownership from the artist to others. Trusts may also be created for charitable purposes. It is not possible to say much more as a general matter. Here, what is important is that this is one more entity that may be part of the legal framework.



## **What Legal Language Can Accomplish and Its Limits**

Here, we can begin to see an issue emerge. We have been talking about the artist's vision in the creation of the estate plan, which might imply that the vision can be captured in language that will provide definitive instructions to those charged to achieve it, as though the range of discretion allowed those who must implement the vision can be channeled and constrained with adequate foresight and the right choice of words. Perhaps that will be possible in some situations, but they will be exceptions. The foundation, remember, can continue indefinitely and the future has a way of surprising us. How will the artist's reputation—scholarly and public interest in his or her work—change in the years and decades following death? How will the value of the artworks, the artist's own or those of others in the artist's estate, fluctuate in this time? How will changes in the world—including the art world, across years or decades, changes that could not have been foreseen at the creation—affect choices about how best to implement the artist's vision?

Foresight and precision in the use of language are essential, but they can get us only so far. Indeed, given future uncertainties, in creating the foundation it will make some sense to keep the language about purpose and governance more general, less specific, even where greater precision is possible. This is not to say that there cannot be certain limitations on, or mandates for, the foundation board, in order best to insure specific, focused preferences the artist may have. *In no event may the board do such-and-such or fail to do something else.* But the effort to control the future can go too far. It can prevent the board from making choices that it believes would have been the artist's choices, but which are now foreclosed by language in the estate plan that was not meant to operate in the particular way in an unforeseen circumstance; yet the language literally (and therefore legally) does operate to foreclose those choices.

## **The Right People, the Right Qualities**

It should be obvious, then, that achieving the artist's goals will demand the help of many people, people from the art world, the legal world, the foundation world, the financial world. What qualities should they have? The answer is easy to say, hard to implement. Let me list them and focus on the lawyers, although the same qualities are surely desirable for others. The qualities are experience, good judgment, and professionalism (which includes personal integrity). And one more: sympathy. I'll explain that last quality presently. But a few generalizations first.

Each of these qualities exists in degrees. For example, the world is not divided into those who are either wholly experienced or wholly inexperienced. Furthermore, judgment is a product of experience, but experience is not sufficient to ensure good judgment. Many experienced people lack good judgment. Last, experience and judgment are to some extent transferable from one area of work to a related area of work. A lawyer with experience with private foundations in one field may be quite able to counsel a private foundation in

another field. What he or she lacks about the particulars of the second field may be supplied by others or research. The mix of people can be as important as the identity of each person. Law clients often err by defining their needs so specifically that the pool of eligible people is narrow and excludes otherwise (possibly better) qualified lawyers.

At the same time, a lawyer should not overreach by encouraging a client to give him or her work for which other lawyers are far more qualified. Clients don't want to pay to educate their lawyers in an entirely new field. Even more important, they don't want to run the risk of suffering the consequences of rookie mistakes. Obviously, lawyers are in the first instance better able to know whether a different expert would more ably serve the client's needs. If true, professionalism requires saying so. The lawyer's interest in getting business, or retaining a client's business as it evolves and changes, is never an excuse to remain silent.

In interviewing lawyers, clients should ask about the degree of *fit* between their legal needs and the lawyer's experience. The fit certainly does not have to be exact. Many skills are transferable from one kind of matter to another. But the degree of fit should be evaluated along with the other considerations that go into choosing counsel. A trusts and estates lawyer, for example, may have limited experience in the law of exempt organizations, or more specifically, the law of private foundations, even though an estate plan might contemplate creation of a foundation. Likewise, an attorney expert in art law and intellectual property may not be qualified to prepare an estate plan or advise the operation of a foundation beyond matters pertaining specifically to those two topics. It is perfectly appropriate to ask a lawyer for details about his professional experience and to be politely skeptical whether that experience is a close enough fit for the client's needs. Sometimes another lawyer in an attorney's firm can appropriately fill any gap in a lawyer's experience, and sometimes that will not be feasible, in which case you will need to identify another attorney.

Professionalism varies greatly among lawyers. I do not mean behavior that complies with the lawyer ethics codes. That's the minimum we should expect, but it is not enough. I mean something more, captured by words like devotion, service, responsiveness, pride in work. Fees are important, of course. Law is a business, and lawyers are business people. But the fee should not be most important. Professionalism means that client satisfaction is more important. Professionalism requires the ability to listen and to explain. Professionalism means the lawyer understands that he or she is there to serve the client and advance the client's vision, not to dictate to or preempt the client's decisions; and that, as a rule, the work is not well done unless it achieves the client's purpose, as the client understands it, and not what the lawyer thinks that purpose should be.

## A Sympathetic Lawyer

Is there such a thing? Yes, and it's worth searching for.

I add sympathy to my list of qualities of counsel on the assumption that an artist will feel more comfortable if counsel appreciates the importance of art, the artist's work, and the artist's vision for his or her legacy. I don't say that sympathy is an essential quality, only a desirable one. Nor is it the most important. Professionalism, rooted in personal integrity, along with experience and judgment (and therefore competence) are the most important qualities. But sympathy is worth the reach if possible, and it should often be possible.

By sympathy, as suggested above, I mean personal engagement—not only professional, but also intellectual and emotional engagement—with the artist's work and purpose. Other words might be *resonance* or *commitment*. Lawyers, like all professionals, are cautioned against becoming emotionally invested in their clients or their clients' matters. This is good advice as a general matter. Distance fosters objectivity. Passion can undermine judgment. Clients may and often should be passionate; lawyers have to be cool.

But that is true only to a point. A level of commitment to the client and his goals can improve the lawyer's work. Law is a business. Art is a business as well, but artists may have other concerns that transcend mere business considerations. At the least, the right lawyer for a client's estate plan or foundation will intuitively understand the difference and recognize that the *bottom line* may not be the predominant consideration for many of the decisions that an artist will make.

Think of the civil rights lawyers working in the American south in the middle third of the twentieth century. Or the lawyers who laid the groundwork for the constitutional right to privacy. The commitment to the cause as something the lawyers personally believed in, as something important to them, made them more effective advocates. While implementing the purposes of an artist's foundation may not be a *cause* in the same sense, that work will also benefit if lawyers are devoted to the artist's goals above and beyond the professional dedication that lawyers should always bring to their assignments.

Sympathy should not be confused with comfort and familiarity. Friendship alone is not a sufficient reason to choose counsel, no matter how devoted the lawyer may be to the artist's reputation or how deep and long may be the friendship between the two. As a client, your responsibility is solely to yourself, your family, your reputation, your work.

Nor does sympathy mean that the lawyer's job is to follow your instructions whatever they may be. You've heard the expression "a lawyer who represents himself has a fool for a client?" Do you know why that is true? It is because no matter what the nature of the legal work, clients, even lawyer-clients, cannot be entirely dispassionate and objective about their own legal matters, even if they are the model of rationality in other parts of their lives.

Objectivity is necessary in order to avoid the pitfalls to which unchecked passion or unguided vision can sometimes lead. That's one essential service your lawyer will perform for you, often with questions that begin "Have you given any thought to what might happen if...?" or "Can we discuss that decision again after we've both had a chance to think about it?" Lawyers can save clients from impulsive choices, however well-intentioned the choices may be. And aside from bringing a cautionary perspective to your plan when appropriate, don't forget that your lawyer knows many things you do not know. Legal things. That's why you retained him or her in the first place.

All of which means to say: Don't equate a lawyer's pushback with a lack of sympathy for your vision. Quite the opposite usually is so. It will be a reflection of the lawyer's concern that a particular decision may frustrate your vision. Nor is the lawyer, by questioning a decision, proposing to overrule you. The big decisions about your estate plan will be yours in the final analysis, in consultation with family and other advisers. The lawyer's job is to make sure you see angles you may have missed—and believe me, you will miss some angles—and which you in fact had no reason to recognize. You don't want a lawyer who's a puppy dog, who just rolls over. You want a lawyer who can listen well, who has and expresses his or her independent perspective as needed, and who will in this way help you get your plan just right.

### **Conflicts and Confidentiality**

Because lawyers are needed throughout the process of creating and implementing the artist's estate plan, including the creation and operation of the envisioned foundation, and because of the multiple interests encompassed by this work, the confidentiality and conflict rules in legal ethics codes governing lawyers become central. I say *ethics codes* in the plural because each American jurisdiction has a different one. Lawyers are licensed and regulated mainly by the states in which they practice (which include the District of Columbia and US territories). Each jurisdiction has a code of legal ethics adopted by the jurisdiction's courts. To varying degrees, they are based (or draw) on a *model* document promulgated by the American Bar Association (ABA). The codes are in many ways (nearly) uniform nationally, although some differences are significant from place to place. For our purposes, the rules for lawyers governing confidentiality and conflicts of interest are sufficiently similar that we can speak generally.

### **About Conflicts of Interest**

Lawyers have fiduciary duties to their clients. This means, very simply, that the lawyer has to put the client's interests ahead of all other interests, including the lawyer's own interests, and the lawyer must deal openly and fairly with the client. Lawyers are not the only people who have fiduciary duties (for example, board members of a company or a foundation have fiduciary duties to their organization). In the case of lawyers, fiduciary duties include the

requirement that the lawyer avoid conflicts of interest that have the potential to compromise his or her work.

Since the possibility of conflicts of interest will be very much present in the legal work discussed here, it will be useful to recall the several interests implicated in that work and which may conflict. As stated, they are the interests of persons or entities specifically named or identified by category (e.g., “my grandchildren”) to receive a bequest under the terms of the artist’s will or trust documents (or in the case of a spouse, legally entitled to elect a statutory share of the estate in lieu of a bequest); and the interests of the two or three juridical entities—the estate itself along with the executor, who owes the estate a fiduciary duty in discharging the instructions in the will; the contemplated foundation with its board and governing structure; and possibly a trust working through a trustee.

The conflict of interest rules generally forbid lawyers to represent multiple clients whose interests do or could conflict. The rules are in some ways very technical, but in other ways intuitively obvious. Let’s say a lawyer represents two individuals in a planned business venture. No problem arises if their interests are identical. But assume that there are two ways to structure the venture. Because of circumstances, one of the two clients might benefit if the venture is structured one way, while the other would be better off if it were structured the other way. A single lawyer could hardly pursue the best interests of both clients since these interests clash. Anything the lawyer did would disserve at least one client.

The American Bar Association’s definition of what constitutes a conflict of interest neatly captures the basic concern here. The ABA’s Model Rules of Professional Conduct say that a conflict exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” The key words are *significant risk* and *materially limited*. In the example of the two individuals with a business venture, there would be a significant risk of a material limitation on the lawyer’s responsibilities to one of the two clients. That is so because the same lawyer could not advocate one structure for the venture over another structure without thereby favoring one client over the other.

Now, the two clients may get along famously. They don’t think of themselves as having a conflict, not as they may use the word. But that’s not the question. To say there is a legal conflict is not to imply the presence of hostility or ill feelings (although neither does it exclude these). A conflict means that a lawyer’s duties to one client cannot be fully and unqualifiedly pursued without, in some significant way, denying another client the same level of professional commitment. Or to put it another way: when a lawyer has to choose between the interests of two or more clients, that lawyer has a conflict.

Lawyers doing the kind of work we are discussing must be alert to the presence of possible conflicts not only when the lawyers commence their work but at any time while they are doing it. Policing for conflicts is the ethical duty of the lawyer. It is not the client's obligation to do so. Nevertheless, a client should be sensitive to the possibility of a conflict of interest and raise the issue if one appears. Clients can do this by keeping two simple and common sense questions in mind: Might the lawyer's several clients have different objectives or strategies for the work the lawyer is doing? Might the lawyer personally have an interest that is in some tension with the interest of one or more of the clients? It is not necessarily true that a yes answer to either question will mean that the lawyer has a conflict under the ethics codes for lawyers. Those codes are a bit more complex than the simple questions imply. But a yes answer to either question at least means that the issue deserves a follow-up inquiry by the client.

Questions about whether a lawyer has a conflict of interest require careful parsing of the facts of the particular situation. Generalizations are difficult. Some examples are possible, however. A lawyer representing the surviving spouse or heir of an artist and also the foundation that the artist's estate plan created could find divergence of interests between the two clients over the meaning of an ambiguous clause in the will. Or, if the lawyer and the client-spouse or client-heir are both on the board of the foundation with fiduciary obligations to it, they may be at odds over a crucial decision, which means as a board member the lawyer will be working against his own client's goals. If the lawyer is counsel to or executor of the estate (or of a trust) and is also representing the surviving spouse or heir, or the foundation (or both), he or she must be attuned to the possibility that the spouse or heir, estate, trust, and foundation may have adverse interests on a particular question arising under the controlling estate documents.

One could go on. Because conflicts are highly fact specific, they are also not always foreseeable. Some planning is possible, but life will have surprises. The point that needs stressing is this: By working as a lawyer or as a fiduciary (which an executor or board member is) for multiple interests, the risk of conflict is constant. None may ever transpire. But the risks are there, and the more *hats* the lawyer wears, and the longer she or he wears them, the greater the risk.

### **About Confidentiality**

The question of conflicts is closely tied to another concept in the law and ethics governing lawyers. This is confidentiality. One problem that can arise when a lawyer has multiple clients for the same or overlapping work is that the lawyer will learn information that is confidential to one client, but is not known to the other clients. At times, the first client will not want his or her confidences to become known, but it will be information that another client would need or want to know—information that will be important to the other client in making decisions. That puts the lawyer in a conflicted position. Or it may happen that one

client will ask to confide in the lawyer on condition that what he or she says will go no further, not even to the other clients with interests in the same underlying matter. Obviously, then, too, the lawyer is in a conflicted position. Lawyers have a duty to keep their clients informed of information relevant to the work they are doing. If they can't because the information belongs to a different client, the lawyer confronts inconsistent duties—on the one hand to inform, and other hand, to keep secret.

As with conflicts of interest, it is the lawyer's duty in the first instance to insure that confidences are protected, but the client should be aware and raise this issue if it appears.

### **Lawyers and Law Firms**

I have been talking about the *lawyer*. A client may choose, after reflection and perhaps independent advice and consideration of alternatives, to hire the partner of his lawyer for work within that partner's specialty. So now there are two lawyers in the same firm working for the client. That will not, however, eliminate a conflict problem if one otherwise exists. If two lawyers are affiliated (e.g., partners) in the same firm, the conflicts of each are *imputed* to the other. Imputation means that lawyers in the same firm are treated as though they are one lawyer for these purposes. If any of them has a client conflict, they all do. To remove a conflict of interest by hiring a second lawyer requires that the second lawyer work in a different firm, free of imputation of the first lawyer's conflict.

### **Consent to Potential Conflicts and Independent Advice**

We need to say a word here about client consent to conflicts. The headline is that properly informed clients can agree to be represented by a lawyer who has a *potential* conflict. The consent gives the lawyer the right to act for the clients despite the potential conflict. In effect, the lawyer is promising the clients that the conflict will not interfere with the duties he owes them. If and when the client's interests do blossom into an *actual* conflict—that is, not merely a potential for one—the lawyer may have to remove himself or herself from handling the matter. Other lawyers would then take over, at least in the area of conflict. This may be disruptive to the pursuit of the client's goals. At the very least, the client will then have to search for new counsel using the same strategies described throughout this essay in making an initial choice of counsel. The conflicted lawyer may offer references, but the client should also conduct his or her own search.

Before a lawyer accepts a client's consent to a potential conflict, he or she must explain to the client the advantages and the disadvantages of consenting. The lawyer should also give the client a chance to get the advice of a disinterested lawyer on whether a consent is advisable. In some states, the lawyer is required to recommend that the client get independent advice and any consent must appear in writing.

The factual situations before us will often be so ripe for conflicts, and serious ones, if not at the outset then later, that in my view the presumption should be in favor of *independent* advice if any one of the clients we have identified—the artist, the estate, the surviving spouse, other heirs and beneficiaries, the foundation—is inclined to share the same lawyer as any or all of the other clients. I say this should be the presumption because I am not inclined to support an ironclad rule. The greater the value of the property in the estate, the more detailed the estate plan, the greater the number of discrete interests a single lawyer (or his or her office colleagues) are proposing to represent, the greater the need for disinterested advice on whether consent to conflicts is advisable. And often it will not be advisable. Often, the best protection will be separate counsel.

At the very least, though, the same lawyer who is seeking the consent to the multiple representations should probably not be the sole source of advice on whether the conflict should be waived in order that he or she (or his or her firm) can get all the work. Especially when much is at stake, there should be independent counsel on the wisdom of waiving a conflict. Everyone may be operating with the best of intentions, but often, we know, when a person's own interests are implicated in a decision, he or she may not be the most objective advisor for another, and that is as true for lawyers as for anyone else.

### **Your Duty as a Client**

Much of this essay addresses the responsibilities of lawyers and only incidentally those of clients. But clients have responsibilities, too. I don't mean to pay the bill and be prompt for appointments. That goes without saying. Clients have responsibilities to the lawyer so the lawyer can do the best job for the client.

You have to listen to what your lawyer says with an open mind. You have to approach his or her advice with the understanding that the lawyer's sole solicitude and concern is you. That does not mean you must accept the advice. It does mean that you have to treat it with respect and give it serious consideration. It also means that you have to explain any doubts you may have about the advice—have a conversation—so the two of you can work it through. Perhaps you misunderstand something. Perhaps the lawyer does.

Your second responsibility to the lawyer, and therefore to yourself, is to be forthcoming with information. You should not talk to your lawyer on a *need-to-know* basis. You don't know what your lawyer needs to know. He or she will tell you. You should be entirely candid about what you are thinking. While your lawyer will put your vision into legal language, he or she first needs to know what the vision is. Maybe you're not exactly sure. I predict that will often be so. This is not, after all, something you do monthly. A vision can be inchoate at first and become focused only over time and in honest discussion. Speak up, even if your thoughts are not fully formed. An experienced lawyer will be able to help develop and clarify them.



## Six Lessons

What lessons can we draw from this description of the legal landscape? Here are six.

**First.** Before even talking with lawyers, talk to relatives, friends, and other persons who are knowledgeable about the art world—including, if possible, artists who have been through this process. If those others include lawyers, that should merely be a fortuity. The goal is a freewheeling conversation about objectives and aspirations. Why are you doing this? What do you want to accomplish? What will make the plan a success? Goals get clarified in conversation. And not one conversation either, but several across weeks or months. Take notes. Take your time. When you do finally interview lawyers, they will want to know your answers to precisely these questions, so you might as well plan ahead and think it through. True, many decisions can be changed later and testamentary decisions (what is in your will) can usually be altered in your lifetime. But putting in the effort to clarify your priorities at the outset may avoid the expenditure of time and money to correct for a change of mind. And some decisions may be hard or impossible to undo.

**Second.** Do not favor, much less commit to, a lawyer or firm simply because this happens to be the lawyer or firm with which you are familiar. The lawyers who wrote your will or trust agreement years ago, or those who now handle your real estate, tax, art business, and licensing work, are not necessarily the lawyers to whom you should turn for complicated estate planning or for the creation or the ongoing operation of your foundation. (The same is true of the lawyer for your gallery or art dealer, who may in addition have conflicts of interest that exclude him or her.) Some of these may be the right lawyers (or firm). But don't assume so. Do not get confused by some misguided sense of loyalty, friendship, or gratitude. Familiarity with you and your artistic practice is valuable, of course, but it is not enough. Your obligation is to yourself and family, not to any particular lawyer, no matter how good the relationship or grateful you are for his or her work.

**Third.** Shop around. It is a big-ticket item you are buying, not merely financially but also psychologically. Give it at least as much attention as (and preferably more than) the purchase of a home. Meet with at least three different lawyers. Bring along others who know your mind. Interview the lawyers closely. If other lawyers in their firm, not they alone, will do the work, meet the other lawyers. Ask for references and check them. Do not make quick decisions about whom to retain. Do not sign any document, whether a will or trust document, a retainer agreement, or anything else, until it has been explained to you in a way you can understand and you have had a chance to reflect on it. (P.S. It's fine to ask what you think are foolish questions.)

**Fourth.** Do not judge lawyers solely by resumé credentials, website narratives, or experience alone, however impressive these are (and one rarely sees an *understated* website biography). Experience is important, to be sure, but look for more. I earlier emphasized

sympathy (i.e., resonance, commitment). Look for that. Is the lawyer interested in you. It should make a difference to the lawyers you hire that you are an artist and your foundation is about art, not something else, however important in its own right. Beyond interest, check your comfort level. You will be depending on these people for a lot. They will help guide you through unknown and sometimes foreboding legal territory. Do you like the person you are interviewing? Do you click? Check your impressions with friends and family, who may also have to work with the lawyers.

**Fifth.** Do not assume that the same lawyer or firm will represent all interests. The lawyer who (or firm that) does the estate planning (wills, trusts) is not necessarily the right lawyer (or firm) to represent the estate, to be the executor of the estate (who need not even be a lawyer), or to represent the foundation once it is established and operating. Ask the lawyers you interview to talk to you about conflicts among the various interests you might ask them to represent. What conflicts, if any, do they anticipate? How will they deal with them?

In the corporate world, a strong body of opinion holds that it is presumptively a bad idea for the company's lawyer also to serve on its board. This is because it puts the lawyer in the position of being both a lawyer for the client and (by virtue of board membership) the client's alter ego, dual roles that can create conflict issues and threaten the attorney-client privilege. These dangers lurk in the foundation world, too.

Furthermore, when a foundation's lawyer is also a member of the board, a decision to change lawyers can be awkward and uncomfortable at best. Even if the lawyer is discharged, he or she will continue to serve as a board member. Feelings may be hurt. Board collegiality may suffer. Nor need a board have the foundation's lawyer among its members in order to get the legal advice it needs. Lawyers can always be called upon for advice or asked to attend board meetings if issues requiring the advice of counsel are on the agenda. I am not saying that a foundation should never have its lawyer on its board. Some corporations do so. I am saying that it should not be done reflexively. The advantages and dangers must be assessed.

The dangers are especially great if the foundation's lawyer is the sole member of its board. He or she is then counsel to the client and the only representative of the client being counseled. This is highly imprudent. Whatever may be the advantages of having a one person board—and there is good reason to believe that decisions suffer in that circumstance—the disadvantages are greatest when that one person is also the foundation's lawyer. This is another topic about which you can question possible counsel.

**Sixth.** Seriously consider, especially if the estate is large (in value or kind), getting independent legal advice before hiring the same firm to wear multiple hats and before signing any document that contains the words *conflict of interest*, and *consent* or *waive*. Waivers of conflicts have become quite common of late because they free law firms to

accept representations (of you and others) that might otherwise be prohibited. Law firm retainer agreements routinely include conflict waiver provisions as purportedly standard language. There is no standard. Everything can and should be negotiated. Big clients do so routinely. So should you. Law firms have a legitimate interest in conflict waivers because they are businesses and do not want to have to turn away clients. But what is good for the firm is not necessarily good for the client, nor is it necessarily bad. A client needs advice on whether to accept a conflict waiver provision at the outset, and how to respond if a conflict thereafter emerges and the lawyer then seeks a waiver. It is preferable for this advice to come from a lawyer who is not asking for the consent.

## In Conclusion

I used the word *legacy* a good deal in this essay. We need to understand more about the word. A legacy is something handed down from a previous generation to future ones. You are making a gift to the world. You are taking steps to insure that the material and immaterial wealth that you created and earned across a productive life—artworks, money, artistic vision—continues to live on, in the most efficient and effective way possible, for the benefit of others. A gift to the future, perhaps the very distant future. That you have been able to accomplish this should make you, your family, and your friends proud and happy.

But you and they must also realize that none of us can exercise tight control over the future, not while living and certainly not thereafter. We can only seek to influence the future in various ways. One way is through the creation of a foundation, as discussed here. If we cut through all the legal language, we can see that a foundation is really a vehicle, a repository that can carry our hopes and plans beyond our lives, which, unlike us, *can* live in perpetuity. But a foundation is not merely the alter ego of its creator in a corporate form. There is a tradeoff. In exchange for getting the future benefits of this repository of our hopes and plans, we must cede some control to others.

Death will do that anyway, of course, sooner or later, whether or not we have a foundation. What the foundation does is let us cheat death just a bit. You and your heirs and beneficiaries must recognize that the foundation is a legal entity, with a governing body that is empowered to make binding decisions about its operation. It would be great if all of its decisions turned out to be precisely the ones that you or your heirs and beneficiaries would have made. But that won't happen. We know that for certain. You and your heirs and beneficiaries must accept that.

As time passes, as we get further and further away from the present, it will be impossible for the foundation board to pretend to be able to anchor each of its decisions in terms of the likely wishes of you or your heirs and beneficiaries. One hopes, and with good counsel can expect, that the foundation's choices will always remain true to your grand vision. There is often, however, more than one truth, and people of good will—your best

insurance by far—will not always choose the same truth that you or your heirs and beneficiaries might have chosen. It may not even be possible for them to know. From the moment it is created, the foundation will have a life of its own, a legal life, different from yours. As it matures it will develop a recognizable mind of its own, too, which will resemble but be independent of yours. Rather like a child.

So that's one more lesson to draw from this discussion. I want to emphasize two others. First, you are the boss. And second, after your family, your paramount obligation is to yourself, your art, and your vision for a philanthropic legacy. You and only you know what you want, how to define your goals. There is no single model for what you're doing. This is personal. Everyone else who participates in the decisions you make are there only to insure that your vision is clearly identified, expressed, and protected. By all means, seek and listen to advice. Do not assume you know everything. You don't. Learn from the experience of others. Ask lots of questions. Never accept the answer "don't worry about it." Do worry about it (especially if you get that answer). Accept no course of action unless all of your questions have been answered to your satisfaction. Make no important decisions without reflection and discussion with those whom you trust and who care about you. When you need professional help, shop broadly. Ask tough questions. Check references. Remember that you're the principal. Everyone else is an agent, there to help you. You've earned it.

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### **Bibliographical References**

There are thousands of academic sources and cases that bear directly or indirectly on the questions and issues in this essay. Answers are further complicated by the fact that they may vary (though not by much) from state to state. In the world of lawyer regulation and conflicts of interest, much depends on factual details and, obviously, at the level of generality that I must write, factual detail is unavailable. Nevertheless, the rules described here, and certainly the essay's advice on the best practices for both lawyers and clients, should be highly useful anywhere in the country. Among books that one might consult—and they are technical—if one wishes further to pursue any of these questions are the following: G. Hazard & W. Hodes, *The Law of Lawyering* (Aspen Law & Business, updated yearly); ABA/BNA, *Manual on Professional Conduct* (a multivolume loose-leaf set updated biweekly); and the *Restatement of Law Governing Lawyers* (Third), two volumes published by the American Law Institute in 2000 and updated yearly. These volumes will not only be helpful in themselves. They will also enable readers to find other primary and secondary sources of authority.



## **9.4 GOVERNANCE: COMMITTING PRIVATE ASSETS TO SERVE A PUBLIC BENEFIT**

- 9.4.1 Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations (Marion R. Fremont-Smith)
- 9.4.2 Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations (Frances R. Hill)
- 9.4.3 Public Benefit Obligations and Legacy Stewardship Activities of Artist-Endowed Foundations: Are They In Conflict? (Joseph L. Sax)



## 9.4.1 Federal and State Laws Regulating Conflicts of Interest and Their Application to Artist-Endowed Foundations

MARION R. FREMONT-SMITH

Foundations, including artist-endowed foundations, are subject to state and federal laws that prescribe the duties of their directors, trustees, and officers—known commonly as fiduciaries—and the sanctions that can be applied when these duties are breached. This paper, which has been prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study), considers these state and federal laws, specifically those regulating conflict of interest, and describes how the rules apply to artist-endowed foundations.

In the states, these laws are enforced by the state attorneys general, while the Internal Revenue Service (IRS) monitors the organization and operation of tax-exempt entities nationally. This includes foundations and other organizations described in Section 501(c)(3) of the Internal Revenue Code (Code), all of which are not only tax-exempt, but by virtue of exemption are eligible to receive tax-deductible contributions from individuals and corporations.

State laws governing conflicts of interest are found in the law of trusts for those foundations organized as trusts, and in the laws governing nonprofit corporations for foundations established as corporations. The Code provisions governing self-dealing are found in Section 501(c)(3), which contains the qualifications for tax exemption and prohibits private inurement and private benefit. For private foundations, there are additional rules detailed in Section 4941 of the Code that prohibit self-dealing between the foundation and related parties. For all other organizations described in Section 501(c)(3), denominated public charities, Section 4958 prohibits the provision of excess benefits to directors, trustees, and officers, and any others persons considered in positions to influence the operation of the public charity.

As described below, since 1969 private foundations have not been entitled to tax exemption unless they conform to the federal rules for private foundations. Accordingly, federal law has superseded state law as to the definition of prohibited self-dealing with respect to private foundations, but not the procedural rules that must be followed in dealing with conflicts of interest under state law.



These state laws impose on fiduciaries of charitable organizations a duty of loyalty that serves to prohibit or limit self-dealing. Their purpose is to protect from diversion for private benefit funds held for general public benefit (as is the case with all tax-exempt foundations and other charities). The concept is not hard to understand; however, the rules that have been enacted to ensure compliance are complicated and often hard to apply to specific situations.

Although this paper describes the rules and provides some examples of their application to artist-endowed foundations, it does not, nor cannot, provide a road map governing the legal ramifications of all transactions. In addition, laws are frequently amended by Congress and the state legislatures, so it is important to keep informed of changes. In cases of uncertainty, foundations will need advice of legal counsel familiar with the applicable federal and state laws, using these descriptions as an introduction.

The first section of this paper contains definitions under federal and state laws. The second section provides a brief accounting of how state and federal laws regulating conflict of interest have evolved in relation to each other. The third section describes the laws, both federal and state, governing conflicts of interest; cites several examples potentially relevant to artist-endowed foundations where regulations have been applied; and contains an example of the application of the rules to a hypothetical artist-endowed foundation. This third section suggests means by which foundations can deal with actual conflicts of interest, as well as with situations in which there may be the appearance of a conflict but no actual breach of duty or violation of Internal Revenue Code provisions, and includes the author's recommendations as to how to address situations as to which the law is not explicit.<sup>1</sup>

## **I. Definitions**

*Artist-Endowed Foundations*—For the purpose of this discussion, an artist-endowed foundation is defined as a tax-exempt private foundation created by a visual artist, the artist's surviving spouse, or other heirs or beneficiaries, to own the artist's assets for use in furthering tax-exempt charitable and educational activities serving a public benefit. An artist's assets may derive from art-related activities as well as other sources, and include financial assets, artworks, archives, copyrights and other intellectual properties, as well as real property, such as land and buildings.

*Charitable Organizations*—Charitable organizations are trusts or corporations created for a broad range of purposes considered of benefit to the public, most commonly including those listed in the Internal Revenue Code—namely religious, charitable (relief of the poor and needy), scientific, testing for public safety, literary or educational, or for the prevention of cruelty to children or animals, as well as medical research organizations and amateur athletic associations. The regulations add to this list advancing education or science, lessening the burdens of government, and promoting social welfare. Museums

and other institutions promoting the arts are entitled to exemption because they are considered to be advancing education.

*Charitable Trusts*—Charitable trusts are legal entities established by a deed or declaration of trust, under which persons or corporations, acting as trustees, undertake to administer assets for charitable purposes and not for the benefit of specified individual beneficiaries.

*Nonprofit Corporations*—Nonprofit corporations are legal entities created under charters or articles of organization granted by a state agency under laws requiring that they do not have shareholders entitled to any distribution of profits. Nonprofit charitable corporations are those organized for one or more charitable purposes.

*Estates*—Upon the death of a person, the local court will appoint an executor or administrator to manage and distribute the decedent's assets according to the terms of his or her will or, if he or she had no will, according to state law. During the time these duties are being carried out, the assets comprise the estate of the decedent. These duties must be concluded within a reasonable time period: An estate cannot exist in perpetuity. The executor or administrator of the estate is subject to the same fiduciary duties as trustees of a trust and, if there are charitable bequests or devises, the estate is treated to a certain extent as if it were a charitable organization.

*Private Foundations*—In common parlance, private foundations are charitable trusts or nonprofit corporations that hold assets—typically provided by a single donor, family, or business—and make distributions either in the form of grants for their charitable purposes or as direct charitable activities. Private foundations are described in Internal Revenue Code Section 509 as any charitable organization described in Section 501(c)(3) other than churches and other religious organizations, schools, educational organizations, health care organizations, governmental units, and organizations that receive a substantial part of their support from any of the organizations described above or from contributions or fees for services from the general public. The Code severely limits dealings between private foundations and their directors, trustees, and officers, as well as the families of these individuals and organizations they control, and substantial contributors.

*Private Operating Foundations*—Private operating foundations, a subcategory of private foundations, conduct a substantial amount of their charitable activities directly rather than through making grants and either hold substantial assets, such as works of art, or endowments devoted to their charitable purposes. They are subject to the same rules limiting dealings with related parties as other foundations.

*Family Foundations*—The term *family foundation* is used popularly to denote a private foundation that has been created and funded by one family and a majority of whose trustees are members of the family or professionals closely associated with them.

*Public Charities*—Public charities are organizations that are tax-exempt under Section 501(c)(3) and that do not meet the definition of private foundations described above. This includes religious organizations, schools, colleges and universities, social welfare organizations and most museums, as well as other organizations receiving a substantial part of their support from the general public. Historically, due to their dependence on broad public support, public charities have been considered more responsive to the public and therefore the limits on their activities are not as restrictive as those applicable to private foundations.

*Fiduciaries*—Fiduciaries are persons who have legal responsibility for the administration of a charitable corporation or trust and, as such, have an affirmative duty to carry out the charitable purposes of the organization. As defined in state law, under the duty of loyalty, a fiduciary may not profit at the expense of the organization, and under the duty of care, a fiduciary will not be reckless in its administration. Fiduciaries of charitable organizations include all trustees, directors, and officers, or other persons in positions to influence the organization.

*Conflict of Interest*—A conflict of interest arises when fiduciaries, as well as certain parties related to them, have a direct or indirect financial interest in a decision or transaction by the charitable organization. Generally, related parties include members of the fiduciary's family and entities in which the fiduciary alone or together with family members possesses more than a 35 percent ownership interest in common. Fiduciaries are prohibited from participating in decisions in which they have a conflict of interest. Under state law, the transaction itself is not necessarily prohibited so long as there is no disadvantage to the charitable organization, but fiduciaries must follow certain procedural rules to validate a transaction involving a conflict of interest in order for the transaction to be legal.

*Disqualified Persons*—For private foundations, disqualified persons are defined in Section 4941 of the Internal Revenue Code to include a foundation's managers, substantial contributors, owners of more than 20 percent of the voting power of a corporation or other entity that is a substantial contributor, family members of these persons, business entities in which disqualified persons have more than a 35 percent interest, and government officials. Foundation managers include officers, directors, and trustees, or persons with such powers, as well as employees with authority to act in regard to certain transactions that may be subject to tax for breach of the Code rules. A substantial contributor is any person, or other entity, who has contributed more than

\$5,000 to the foundation if the total of his or her contributions exceeded two percent of the total contributions received by the foundation from its date of creation to the end of the year in which the \$5,000 limit was met. Family members are defined as a spouse, ancestors, children, grandchildren, great grandchildren, and their spouses. For public charities, the definition of disqualified persons is similar, but includes all persons in a position to exercise substantial influence over the affairs of the organization, adds siblings and their spouses to the definition of family members, and does not include substantial contributors.

*Self-dealing*—The term *self-dealing* is used generally to describe a transaction in which there is a conflict of interest. Self-dealing is specifically defined in Section 4941 of the Internal Revenue Code as any transaction between a private foundation and a disqualified person in which the person has a direct or indirect financial interest; such transactions are prohibited, with few exceptions. The term is also used to describe a transaction between a public charity and a disqualified person who receives an excess benefit, defined in Internal Revenue Code Section 4958 as any benefit—including compensation, goods, and services—that is greater than fair market value or what is paid by similar organizations in similar circumstances.

*Private Inurement*—Prohibition of private inurement is one of the requirements for tax exemption for an organization described in Section 501(c)(3) of the Internal Revenue Code. The private inurement test, found in this section of the Code, states in part that to qualify for exemption, “no part of the net earnings of the organization inures to the benefit of any private...individual....” The prohibition applies only to persons who have an interest in the organization (such as directors, officers, or employees who receive benefits that are not commensurate with the services such a person provides to the charity). It is not an absolute ban on self-dealing; rather, it is a standard based on reasonableness that can be substantiated by reference to the terms of an arm’s length transaction. The sanction for private inurement is loss of exemption for the organization.

*Private Benefit*—Proscription of private benefit is one of the requirements for tax exemption under Section 501(c)(3) of the Code, found in Treasury Regulations adopted in 1958. The private benefit test is separate from the private inurement test. To qualify for exemption, an organization must establish that it is not organized or operated for the private benefit of any persons, including those who have a direct interest in the organization (such as designated individuals, the creator or his or her family, and persons controlled directly or indirectly by such private interests), as well as persons who do not have a direct interest in the organization (such as any private individual). The sanction for private benefit is loss of exemption. However, proscription does not apply to incidental benefits so that, unlike the inurement test, loss of exemption will occur only if the benefit conferred is found to be more than incidental.

## II. The Evolution of Laws Regulating Conflict of Interest

The title of this paper is “Federal and State Laws Regulating Conflicts of Interest and Their Application to Artist-Endowed Foundations,” yet it is devoted largely to a discussion of rules prohibiting self-dealing, a term used in the federal laws governing tax-exempt organizations that is employed widely to describe transactions that involve abuse of their positions by foundation insiders for their private purposes.<sup>2</sup> Both state law and federal law in this area have evolved over time, not always in ways that are clearly congruous. Thus, it is easy to confuse the two terms—*conflict of interest* and *self-dealing*—and this has led to misunderstanding among private foundation fiduciaries, some regulators, the press, and the general public.

In general parlance, a conflict of interest arises in any situation in which an individual who has fiduciary duties toward a charitable organization—a category that includes both private foundations and public charities—also has a private interest in the organization's decisions and activities. Similarly, the term *self-dealing* is used generally to describe a transaction between an insider and a charitable organization, directly or indirectly, in which there is a conflict of interest.

Under state laws governing nonprofit corporations and charitable trusts, which are administered and enforced by the state attorneys general, a conflict of interest arises when a fiduciary has a financial interest in a charitable organization's decisions and activities, whether direct or indirect. The existence of a conflict of interest is not inherently bad. In fact, state laws recognize that, in some instances, a charitable organization may obtain great benefit from a transaction with an individual who has a conflict of interest.

Accordingly, state laws contain procedural rules designed to ensure that the organization's fiduciaries are aware of the existence of a conflict, that the person with the conflict will not attempt to influence a vote in his or her favor, and most important, that if a transaction involving a conflict is approved, the person with the conflict will not receive a benefit at the expense of the organization.

In contrast, the federal rules governing self-dealing are found in the Internal Revenue Code and enforced by the IRS. Those that apply to private foundations are far stricter than state laws. When these rules were enacted in 1969, Congress was concerned as to whether the IRS could effectively determine that an individual transaction would or would not benefit a foundation, and thus adopted rules prohibiting any transactions between foundations and their disqualified persons, although it did include a few narrow exceptions. The legislation adopted in 1969 also stipulated that to be eligible for tax exemption, private foundations must contain provisions in their governing documents requiring that they conform to these federal foundation rules.

Accordingly, federal rules that apply to private foundations are much more restrictive than the state laws. In addition, federal rules prohibiting self-dealing for private foundations apply directly to a far larger universe of individuals than do the state conflict of interest rules, extending as they do to substantial contributors who are not fiduciaries, as well as to the families of all disqualified persons—individuals who would not be directly subject to the state rules.

Subsequently, when Congress decided in 1996 to extend restrictions on self-dealing transactions to public charities, its members did not believe it was appropriate to apply the private foundation rules prohibiting self-dealing to the entire universe of tax-exempt charitable, educational, and religious organizations. Rather, Congress adopted an approach that was closer to state law, prohibiting public charities from providing “excess benefits” to disqualified persons. To define disqualified persons for public charities, Congress used the private foundation rules as a starting point, but extended the category of family members to include siblings and their families.

As a result, the federal rules governing self-dealing transactions for public charities are similar to the conflict of interest rules applicable under state law to all charitable organizations—private foundations and public charities alike. In addition, under federal law, public charities may rebut IRS charges that they have provided excess benefits if they have followed certain procedural rules when approving transactions with disqualified persons. These are similar to procedures approved under state law to deal with conflicts of interest, bringing the federal and state rules into conformity with respect to public charities.

To summarize, conflicts of interest and self-dealing transactions are regulated under both state and federal laws. When they arise in the administration of all charitable organizations under state law and the administration of public charities under federal law, they are permitted so long as procedural rules have been followed and disqualified persons do not benefit at the expense of the charitable entity. When they arise in the administration of private foundations, however, they are, with a few defined exceptions, prohibited by federal law; as noted, federal law takes precedence in these matters by virtue of the fact that, since 1969, private foundations' eligibility for tax exemption requires that they conform to the federal foundation rules.

Within this broader construct, the specific provisions of federal laws and state laws regulating conflicts of interest are discussed in the following two chapters, respectively.

### **III. The Laws Governing Conflicts of Interest**

#### **A. Federal Laws Governing Both Private Foundations and Public Charities**

As noted above, the Internal Revenue Code governs the organization and operation of tax-exempt organizations, including private foundations, private operating foundations, and public charities. Exemption from taxation is granted only to organizations that are organized and operated exclusively for charitable purposes in the broadest sense, and that “no part of the net earnings...inures to the benefit of any private...individual”. Accordingly, three tests must be met in order to qualify for exemption: (1) the organization's purposes must be “exclusively” those that qualify as charitable in the broad sense of the word and do not substantially further private interests, (2) the organization's assets must not inure to the benefit of the fiduciaries of the organization, and (3) the organization may not confer other than an insubstantial private benefit on any persons.

The first test is exemplified in Revenue Ruling 55-231, issued in 1955, where exemption was denied to an organization whose primary purpose was making known to the world the contents and meaning of certain books written by a designated author, one of the incorporators of the organization, and whose activities consisted of purchasing these works and making them available for public use by dissemination in reading rooms, lecture halls, centers, and camps. The Service held that both the purposes and the activities were inconsistent with the requirement that the organization be organized and operated exclusively for exempt purposes.

In Private Letter Ruling 200912038, issued in 2009, the IRS reached a similar result in connection with a request for exemption from an organization formed to further the teachings of a certain group, to be carried out almost exclusively by a husband and wife who had formulated the teachings, owned the copyrights to the books and materials, and planned to disseminate them as employees of the organization, while at the same time conducting substantially similar activities for which they would also be compensated by a private corporation they owned.

In 2005, the IRS issued proposed regulations defining and contrasting the prohibitions in the Internal Revenue Code against private benefit with those prohibiting private inurement or interest. Among the examples of prohibited private benefit was that of an educational organization established to study the history of immigration that focused its studies on the genealogy of one family whose descendants were the present members of the organization. The organization solicited support only from family members and distributed its publications only among them. This direct benefit to family members was held to be private benefit and contrary to the requirements for exemption.

Another example of private benefit described an art museum whose sole activity was exhibiting art of a group of unknown but promising local artists. The trustees of the organization were all independent; all works of art that were exhibited were offered for sale at prices set by the artists, with the museum retaining 10 percent to cover its costs. This direct benefit to the artists—providing a market for the sales of their works—was held to be prohibited private benefit.

In a third example, also demonstrating private benefit, an educational organization was established to train individuals in a program developed by the organization's president. A company owned by him held the rights to the program and licensed it to the charity in exchange for royalty payments. Under the terms of the royalty agreement, the company was entitled to the assignment of any new course material developed by the charity without consideration. This benefit was held to be impermissible private benefit to the charity's president.

More recently, in Private Letter Ruling 200114040, issued in 2001, the Service ruled that prohibited private benefit would occur, and exempt status would be jeopardized, if a foundation that controlled an archive of an important individual's papers were to provide preferential, exclusive access to that archive for an author who sought to conduct research on the archive's material in order to write a book for her private benefit.

With respect to private inurement, Technical Advice Memorandum 9408006, issued in 1992, dealt with an artist-endowed foundation and is more fully described in a subsequent section of the paper, below. In this case, the IRS concluded that there was private inurement when the organization incurred expenses, some of which were not reimbursed, on behalf of its treasurer and president, and also exhibited textile art from its collection and from the private collection of a substantial contributor, incurring all of the expenses related to the exhibitions on behalf of that person, who was the artist. Exemption was revoked retroactively to the date of the organization's creation.

In Private Letter Ruling 200913067, issued in 2009, exemption was denied to an organization on the basis that it would be providing both private benefit and private inurement, but would also be operating for a substantial nonexempt private purpose. The organization was formed for educational purposes. It planned to carry out its purposes through "speaking engagements, novels, theatrical plays and films," including, specifically, promotion of a novel written by one of the director/officers of the organization and a play based on that novel. It stated in its application for exemption that it hoped the novel would become required reading in all public schools. The author of the novel had retained certain copyright interests in the book, as well as the rights from possible future exploitation of it as a film. In addition, the former spouse of that director/officer was entitled to receive a percentage of the royalties from the sale of the book, as well as from the distribution or printing of materials associated with it.



In the Ruling, the IRS held that the proposed activities were similar to commercial operations involving royalties generated from the sale of the novel and its derivative works and concluded that this constituted operation for the benefit of private individuals, not operation for exempt purposes. In addition, it held that payment of royalties to the former spouse of one of the fiduciaries constituted impermissible private benefit, and the potential for royalty payments to that director/officer and his retention of the residual copyright ownership constituted inurement of net earnings to an insider.

In regard to incidental or tenuous private benefits, the IRS held in Revenue Ruling 75-42, 1975, that a grant by a private foundation to a public charity would not be self-dealing even though two individuals, one of whom was a substantial contributor and the other of whom was a manager of the foundation, were also members of the board of the grantee public charity. The Ruling held that any benefit to disqualified persons was either incidental or tenuous. A similar result was reached in Revenue Ruling 82-136, 1982, that dealt with a grant by one private foundation to another where a bank was the sole trustee of each of the foundations and thus a disqualified person in regard to both.

These federal rulings on permissible incidental benefit are of particular importance in that the positions taken by several state attorneys general, most notably that of the Massachusetts attorney general in the case of the Yawkey Foundation, described in a subsequent section, below, appear to be contrary to the federal rulings.

The Internal Revenue Code does not constrain the composition of the board of a foundation or any other tax-exempt entity, so that it may be composed of related parties only, such as the donor and his or her spouse or their children. However, as discussed below, the laws in several states do contain such limitations.

With respect to private foundations, the federal sanctions apply to both fiduciaries and donors who are substantial contributors, their families, and organizations they control. For public charities, the sanctions apply to the organization's fiduciaries and those who are in positions to influence the organization's affairs, as well as their families and organizations they control. In both instances, the Code requires correction and the amount of interest and taxes can in some instances be considerable. Accordingly, the federal rules play a major role in deterrence and, in some states, will be the only rules that are effectively enforced.

### ***1. Federal Laws Governing Private Foundations***

With laws adopted in 1950, Congress amended the Internal Revenue Code in order to prohibit self-dealing transactions, including sales to fiduciaries and substantial donors at other than fair market value and payment of excessive compensation by organizations not dependent on public contributions (meaning private foundations), the sanction being loss of exemption. In 1969, following revelations that these provisions had not been effective to

prevent use of private foundations for the benefit of their donors and fiduciaries, Congress responded by adding a definition of private foundations to the Internal Revenue Code and, in Chapter 42, applying to them a new set of limits on their operations.

The 1969 Tax Act included an absolute prohibition on direct or indirect self-dealing transactions between a foundation and its disqualified persons. Self-dealing transactions include the following transactions between a private foundation and a disqualified person: sale or exchange or leasing of property; lending of money or other extension of credit; furnishing of goods, services, or facilities; the payment of compensation; and the transfer to or use by or for the benefit of the disqualified person of the income or assets of the foundation.

There are important, narrow exceptions to the prohibition against self-dealing: Permitted exceptions include a lease to the foundation without charge; extension of credit to the foundation without interest so long as the amount is used exclusively for charitable purposes; and furnishing of goods, services, or facilities to the foundation at no charge and for exclusive charitable use. Conversely, a private foundation may furnish goods, services, or facilities to a disqualified person if made on a basis no more favorable than that made to the general public, and, probably most significant, compensation to a disqualified person other than a government official for providing services that are reasonable and necessary to carrying out the foundation's charitable purposes so long as the amount involved is not excessive. Incidental or tenuous private benefit to a disqualified person also is excepted; this includes naming a fund or building for a foundation's donor or making a grant to a public charity on whose board a foundation's donor serves.

The self-dealing provisions apply to both direct and indirect self-dealing so that payments to third parties that in effect benefit a disqualified person come within the prohibitions. In addition, transactions that involve a third person who is not a disqualified person may constitute indirect self-dealing. For example, in Technical Advice Memorandum 8719004, issued in 1987, the IRS held that a loan by a foundation to an individual who had substantial dealings with the foundation manager's law firm was an indirect act of self-dealing.

The sanctions for violating the prohibitions against self-dealing are imposed on the disqualified person involved in the self-dealing and on those foundation managers who approved of the transaction knowing that it was an act of self-dealing, unless their action was not willful and was due to reasonable cause. There is a first level excise tax on the self-dealer equal to 10 percent of the amount involved, defined as the greater of the amount of money and the fair market value of any property given or received, although in the case of rent it is the difference between the rent paid and a fair market rental. For managers, the tax is equal to five percent of the amount involved, with a cap of \$20,000.

These excise taxes are imposed every year from the first year of the transaction to the year in which it was corrected or the organization received notice from the IRS of deficiency or additional tax due. Correction requires undoing the transaction to the extent possible and ensuring in any event that the foundation is in no worse financial position than if the transaction had been subject to the highest fiduciary standards. The second level tax on the self-dealer is equal to 200 percent of the amount involved, and on a manager who refuses to agree to part or all of the correction it is 50 percent of the amount involved, with a cap of \$10,000.

Finally, there is what amounts to a confiscatory tax if there have been willful, repeated violations of the self-dealing rules or other private foundation limitations. This tax is equal to all tax benefits received by the foundation since its inception.

As noted in the section on state law, below, the governing instruments of private foundations are required as a condition of tax exemption to include, or state law must impose on them, mandates that they comply with the private foundation rules, including the self-dealing prohibitions. The result is that the federal definition of proscribed self-dealing has in effect superseded state law, forcing the state courts to apply federal standards as a minimum in matters involving private foundations and self-dealing.

**(a) Decisions and rulings potentially relevant to artist-endowed foundations.**

There is one important Tax Court decision and several Private Letter Rulings issued to individuals or organizations by the IRS that either apply directly to artist-endowed foundations or apply to private operating foundations that hold art collections. These rulings provide examples of the manner in which the IRS has dealt with situations similar to those that may be relevant to artist-endowed foundations. Court decisions do provide legal precedent and may be relied upon by others in similar situations. However, Private Letter Rulings may not be relied on as legal precedent, although they do afford guidance as to the manner in which the IRS has interpreted the self-dealing prohibitions in Internal Revenue Code Section 4941.

The Tax Court decision, *Estate of Reis v. Commissioner*, 87 T.C. 1016 (1986), upheld the Internal Revenue Service's imposition of approximately \$21 million dollars in taxes and additions to tax on one of the executors of the estate of artist Mark Rothko for violation of the self-dealing provisions. The executor was a director of the Rothko Foundation, as well as a director and employee of an art gallery that held a contract with the artist's estate under which his paintings were to be sold exclusively by the gallery for 12 years, with the gallery receiving commissions equal to 50 percent of the proceeds from each sale. The executor's fees paid directly by the estate were held to be excessive, and the contract with the gallery was ruled to provide prohibited indirect benefit to him.

In an IRS ruling that also applied to an artist-endowed foundation, Technical Advice Memorandum 9408006, issued in 1992, the national office of the IRS upheld the action of an IRS agent revoking the tax exemption of an artist-endowed foundation retroactively and imposing excise taxes for self-dealing on one of the foundation's disqualified persons, an artist who was both a substantial contributor of her works of art and a director of the organization, as well as on the other foundation managers. The Memorandum dealt with an audit of two years of the organization's operations during which it had arranged for display at public exhibitions of textile art created and personally owned by the artist, with the costs paid from the organization's funds.

The IRS ruled that each payment made by the foundation relieved the artist of the burden to make the payments personally, thereby constituting a direct economic benefit to her. It was thus the transfer to, or use by or for her benefit of, the assets of the foundation, and not incidental or tenuous benefits.

There are also two Private Letter Rulings that dealt with operating foundations that held art but would not be considered artist-endowed foundations. Private Letter Ruling 8842045, issued in 1988 to a foundation created by a collector to operate as a museum, dealt with the care and exhibition of works of art held jointly by the foundation and the collector's widow. These artworks had been held as community property by the collector and his wife during his life.<sup>3</sup> At his death, the collector bequeathed his one-half interest in each item to the foundation, thereby—under the laws of the state governing the foundation—transforming title to the property to a tenancy in common with the foundation and the widow each owning an undivided one-half interest in the property. All of the artworks owned jointly were on display at the museum. The widow also owned some artworks separately as her private property, and almost all of these were displayed at the museum without charge to the foundation other than the expense for transportation, maintenance, and insurance.

The Ruling addressed a proposed agreement between the widow and the foundation concerning the maintenance of insurance on the artworks in the collection. The proposed agreement provided that the museum would have the duty to insure, maintain, and provide for all of the artworks owned by the foundation and widow as tenants in common, as well as the widow's separate property artworks as long as they were in the possession of the museum. The widow on her part agreed to bear the costs of the separate property artworks in her possession. The most economical way to carry out this agreement was for the museum to obtain a single policy covering all artworks that might be displayed from time to time in the museum, with the widow paying the portion attributable to her private use and enjoyment of her separate property artworks. The foundation would pay the annual insurance premium on all of the artworks, with the widow "reimbursing" it for that portion of the premium attributable to her personal use of the separate property artworks during

the year. The submission of facts to the IRS stated that at no time during a year would the widow retain possession of more than three percent of the total works and asserted that while the widow might receive benefits from the foundation being the policy holder, they were incidental or tenuous, thereby meeting the exception described in the Regulations.

The IRS ruled that, under the circumstances described, neither the joint ownership of the works of art nor the proposed rotating loan of substantially all of the widow's separate property artworks to the foundation without charge would constitute self-dealing in violation of the provisions of IRC Section 4941. The ruling also held that expenditures made by the foundation to insure and maintain the widow's separate property artworks and the artworks owned by both as tenants in common would not constitute self-dealing under that Section so long as such artworks were actually or constructively in the foundation's possession.

In considering the relevance of this ruling to artist-endowed foundations, it is important to understand that the scope of the ruling is narrow, being limited to an unusual situation where there was joint equal ownership of substantially all of the works of art, the widow's separate property artworks constituted an insubstantial part of the entire collection, and she paid maintenance expenses attributable to her use of her separate property.

The fact of joint ownership under the specific circumstances described in this ruling was held not in and of itself to be self-dealing, and in fact it has not been uncommon for donors to make gifts to museums of fractional interests in works of art. However, the Pension Protection Act of 2006 contained new and severe restrictions on the manner in which donees may hold such interests, as well as limits on the deductibility of these gifts.

When a private foundation owns a fractional interest in works of art, it must avoid activities involving the jointly owned property that would directly or indirectly benefit a joint owner in a manner that would constitute indirect self-dealing. An example of such activity would be the foundation exhibiting the artworks in such a manner that the value of the property increased substantially.

The most recent of the rulings dealing with private operating foundations that owned works of art, Private Letter Ruling 200014040, issued in 2000, dealt with a proposed loan of works of art by two collectors to a private operating foundation they had previously established. The owners were a husband and wife who were substantial contributors and disqualified persons with respect to the foundation (hereafter the "donors" or "A and B"). According to the facts set forth in the ruling, as originally established the foundation received donations to acquire, display, and exhibit works of art and to make gifts of art to governmental and charitable organizations for public display and appreciation. The foundation subsequently established and, at the time of the ruling request, was operating a gallery primarily devoted to the study of art by graduate level students, qualified public

museum groups, and individual artists. The gallery's major resources were works of art loaned by collectors and artists, including the donors. More recently, the gallery had been open to the general public on not less than two and usually four days per week and otherwise by appointment, and it had been publicizing this availability to the general public.

Among other issues in the ruling request, the IRS was asked whether loans from the donors' extensive personal art collection to the gallery "for study" would constitute prohibited self-dealing. In its ruling, the IRS held that, under the circumstances described in its ruling, as the loans were to be without charge and the works would be used exclusively for exempt purposes, there would be no violation of the self-dealing rules. "Any possible benefit derived by A and B from...lending their artworks to the foundation...is merely incidental to the accomplishment of an exempt purpose...." Of note is the fact that the loans of artworks to the foundation were "for study in the gallery."

Again, it is important to note the specificity of this ruling, and in particular that it did not directly address the question of whether there would be more than incidental benefit to the donors if the works of art were to be included in public exhibitions conducted by the foundation, such as those presented at museums, or featured in publications produced by the foundation, such as those that might accompany museum exhibitions, thereby potentially enhancing their value to the donors.

Finally, Technical Advice Memorandum 8310002, issued in 1983, sets forth the rules the IRS applied in a case in which there were instances of indirect self-dealing and also outlines the method by which excise taxes and penalties will be applied under those circumstances. In this case, a private foundation, at the recommendation of a disqualified person who was the foundation's creator and also its substantial contributor, made grants to two public charities, which in turn used some of the grant funds to purchase art objects owned by another disqualified person and by a corporation controlled by that disqualified person, making the corporation a disqualified person to the foundation as well. The facts are unique in that the sales were determined by an unnamed state agency to have been made without adequate disclosure to the grantee organizations of the possible conflicts of interest on the parts of the disqualified persons. Prior to the issuance of the memorandum, the disqualified persons reimbursed the foundation for the amount of the purchases and the administrative costs in resolving the matter. Accordingly, the IRS determined that the self-dealing acts had been corrected.

**(b) Summary of IRS rules applied to private foundations.** In summary, for artist-endowed foundations that are classified as private foundations and private operating foundations, the Internal Revenue Code rules effectively prohibit sales, exchanges, loans, leases of property, and payments for services by the foundation to any of its managers, principal donors, their extended families, business entities they control, and trusts and other

entities of which they are primary beneficiaries. These individuals and parties related to them may only loan money to the foundation if the rate of interest is zero. These individuals also may not receive rent for the foundation's use of property regardless of the fact that the terms provide for payment of less than the going rate.

However, the foundation may pay disqualified persons—such as the foundation's board members who are its attorney, accountant, or investment advisor—for legal, accounting, and investment services so long as the payments are at fair market value. Likewise, the foundation also may pay reasonable compensation to its trustees and directors for serving in those positions. As noted above, the foundation's managers will be subject to penalties if they approved of any of the prohibited activities while knowing they were prohibited and their actions were willful. However, if the managers seek and obtain an opinion of counsel to the effect that a projected self-dealing transaction is permitted, they will not incur liability even if the opinion was later found to be wrong.

## **2. Federal Laws Governing Public Charities**

The term *public charity* is commonly used to characterize organizations exempt from tax under Section 501(c)(3) of the Internal Revenue Code that are considered dependent on the public for support. By virtue of this fact, public charities do not warrant being subject to the stricter regulations imposed on private foundations that typically are dependent on one donor or a few related donors. Accordingly, the prohibitions on self-dealing applicable to public charities are not as rigid as those imposed on private foundations and private operating foundations. In fact, until 1996, there were no federal sanctions on the fiduciaries of public charities for self-dealing. Now, Section 4958 of the Code prohibits the provision of excess benefits by public charities to disqualified persons. These are defined in a manner similar to their counterparts applicable to private foundations, with three distinctions: managers include all persons in a position to exercise substantial influence over the organization; family members include siblings and their spouses; and substantial contributors are not treated as disqualified persons, as they are for private foundations.

Unlike the absolute limit on self-dealing for private foundations, the limitation on public charities is on the provision of *excess benefits* to disqualified persons. This includes transactions in which the charity pays more than fair market value for transactions with disqualified persons or pays them compensation that exceeds the amount that would be paid ordinarily for services by similar organizations under similar circumstances as of the date the compensation arrangement is made.

The first level of excise taxes is equal to 25 percent of the amount involved on the self-dealer, and 10 percent on the managers, with a limit of \$20,000; the second level on the disqualified persons is 200 percent. The amount involved is the excess of the amount paid or received over its market value, unlike the provisions applicable to private foundations

under which the tax base is the entire amount of the self-dealing transaction. There is no termination tax applicable to public charities for repeated or willful violations, as there is a confiscatory tax for private foundations in such cases.

An important component of the excess benefit rules is a procedural method that, if followed, permits fiduciaries to transfer the burden of proving the impropriety of the transaction from the disqualified persons to the IRS. A *rebuttable presumption* of reasonableness will apply if the public charity's board or a committee thereof has taken steps to inquire into and assure itself that the compensation it is providing or the amount involved in a transaction with a disqualified person is not excessive, and that it has documented this procedure. Private foundations do not have the benefit of this provision.

### **3. Distinguishing Among Private Foundations, Private Operating Foundations, and Public Charities**

The majority of artist-endowed foundations are classified as private foundations or private operating foundations. The difference between these two categories is twofold. First, a substantial portion (85 percent) of the private operating foundation's adjusted net income must be expended for programs carried on directly by its employees, rather than through making grants to other exempt or nonexempt organizations or individuals. Second, a private operating foundation must meet one of three tests applicable to its assets or support: (1) at least 65 percent of the value of its assets are devoted directly to the active conduct of its exempt purpose, such as an art collection used in an educational program; (2) it expends directly for its exempt purposes at least an amount not less than two-thirds of its *minimum investment return*, which is equivalent approximately to three and one-third percent of the foundation's net noncharitable-use assets; or (3) it meets a public support test similar to that for public charities, but less stringent.<sup>4</sup>

The advantage of operating foundation status is that the limits on income tax deductibility for a donor are the same as for gifts to public charities, rather than the smaller limits on gifts to private foundations. For this reason, it is an appealing category for foundations receiving collections of artworks or other art-related property as gifts from living donors, such as an artist's surviving spouse or other heirs or beneficiaries. The fact that the rate for required distributions is lower than that applicable to private foundations is also attractive to certain donors. (However, in all cases an artist's income tax deduction for charitable contribution of his or her own artworks is limited to the cost of materials.)

With respect to public charities, a small portion of artist-endowed entities are classified as public charities, including those that have converted from private foundation to public charity status. In order to do this, they must attract and sustain broad public support. Alternatively, they may establish a close connection with another public charity, serving as a *supporting organization* of that charity, which must have effective control over the converting



foundation. Disqualified persons, including substantial donors and their family members, cannot control supporting organizations directly or indirectly.

Public charity status confers more generous income tax deductions for donors than are available for gifts to private foundations that are not operating foundations, a circumstance that for some makes this classification desirable. As noted in the instructions for Form 1023, Application for Exemption, classification as a private foundation has nothing to do with the name of an organization. There are many organizations that include the word "foundation" in their names that are not private foundations for tax purposes, just as there are many private foundations that do not use the term "foundation" in their title.

## **B. State Laws Governing Conflicts of Interest**

Each state has laws imposing a duty of loyalty on fiduciaries of charitable trusts and nonprofit corporations similar to the Internal Revenue Code limits on self-dealing by disqualified persons. These state laws were first developed to govern trustees of trusts, both private and charitable, and when the legal form of a corporation was first devised, the trust rules were applied to corporate directors. Over time these rules were relaxed in regard to directors of business corporations and, in recent years, they have supplanted the trust rules for directors of charitable corporations in many states. The trust rule, as noted, was absolute: There could be no self-dealing between a charitable organization and its trustees, although professional trustees such as banks were allowed to charge fees for their services according to a schedule approved by the state courts. For corporations, including today's charitable corporations, self-dealing transactions are permitted under state law if certain procedural rules are followed and if the transaction is *fair* to the charity.

As noted above, the term *conflict of interest* is applied to situations in which a fiduciary has a direct or indirect financial interest in a charitable organization's decision or action. A conflict of interest involves potential violations of the fiduciary's duty of loyalty. Statutes in all but three of the states govern the method by which a charitable organization may enter into a transaction that involves a conflict of interest. Some of these statutes apply specifically to nonprofit corporations, while the remainder cover for-profit entities and the state courts have applied them to nonprofit corporations. Both sets of laws have two aspects: rules that govern the board's handling of transactions where a conflict is involved, and rules that look to the fairness of the transaction to the charity.

### **I. Procedural Rules**

The procedural rules in a majority of the states permit a board to validate a transaction in which a director or executive has a financial interest if there has been full disclosure of the conflict and the interested director has not participated in the vote. In seven states, there is a further requirement that the disinterested directors' votes have been made in good faith. If these conditions cannot be met, in 46 states a court may subsequently approve the

transaction if it finds that it was fair to the charitable organization. In nine states, prior validation may be obtained by the attorney general or a court. Finally, if the charitable organization is the type of corporation formed with members, the members may validate a transaction involving a conflict of interest.

There are also separate laws in 37 states dealing with loans to fiduciaries, with 28 prohibiting the making of any loans, and nine permitting loans under a variety of circumstances (such as their being made in the usual course of the corporation's affairs, or that they can reasonably be expected to benefit the corporations, or that they are being made to finance the purchase of a director's residence).

## **2. Requirement of Fairness**

The second aspect of the conflict of interest rules is the requirement of fairness. In some states *fairness* is determined at the time of commitment; in others, the transaction must be *just and reasonable* at all times. If this standard and the procedural rules have been followed, the charitable organization may not later void the contract whether or not the transaction is later found to have not been fair or reasonable. In addition, the laws in a few states permit application of a business judgment rule. Under this rule, directors are protected from liability for approving a conflict of interest transaction that subsequently was found to be in violation of the duty of loyalty if the court finds that they were exercising sound business judgment and acting in good faith in voting to approve the transaction. In the majority of states, the business judgment rule will be applicable only in connection with violations of the duty of care, not in situations involving violation of the duty of loyalty, although it is rare that a legal action will be brought that does not include allegations of violation of both duties.

The sanctions for violation of the conflict of interest rules are applied by the state courts, exercising a broad set of powers that permit them to require restitution, impose penalties, and remove fiduciaries. However, imposition of personal liability is extremely rare, and so long as there was no finding of bad faith, the law permits charitable corporations—both public charities and private foundations—to indemnify fiduciaries, meaning to compensate them for costs incurred in defending themselves for decisions made in their role as fiduciaries. The law in almost all states also permits the corporation to obtain directors and officers indemnification insurance to cover this type of liability.

Enforcement of these rules is within the jurisdiction of the state attorney general, whose duty it is to bring violations by charities operating in his or her state to the attention of the courts. Co-directors have standing to enforce the rules, but members of the public are precluded from doing so.

Under what is described as the *internal affairs doctrine*, recognized in almost all jurisdictions, the laws of the state in which a corporation is organized will govern the formal operation of that corporation, regardless of where it is conducting its affairs. Thus, a charitable foundation incorporated in a state such as Delaware, but conducting its affairs from Massachusetts, will be subject to the laws of its state of incorporation, and the courts in the state in which it is conducting its affairs will apply the laws of the originating state in any suit involving violation of those laws. This includes violations of the rules governing conflict of interest, as well as the procedural rules that apply when a board is dealing with a transaction involving a conflict.

The laws governing conflict of interest transactions in California, which are among the strictest of any state, provide an example of the manner in which conflict of interest transactions are regulated at the state level. The law provides that an interested director of a charitable corporation organized in that state may be liable for engaging in a conflict of interest transaction unless: (1) the attorney general has approved the transaction either before or after it was consummated; or (2) the corporation entered into the transaction for its own benefit, the transaction was *fair and reasonable* to the corporation at the time of the transaction, the transaction was approved in good faith by a fully informed majority vote of the directors then in office (without counting the vote of the interested director), and the board determined in good faith after reasonable investigation that the corporation could not have obtained a more advantageous arrangement with reasonable effort. Interested directors, although they may not vote to approve the transaction, may be counted towards a quorum to determine whether there are a sufficient number of board members present to permit a vote on the matter.

There are three important exceptions to this stringent rule, namely that it does not apply to decisions fixing the compensation of directors, any transaction that is part of the organization's public or charitable program, or any agreement of which the interested director has no personal knowledge and that does not exceed the lesser of one percent of the gross receipts of the corporation for the preceding fiscal year or \$100,000.

However, Section 5227 of the California Corporations Code also requires that at least 51 percent of the board of a corporation organized under its laws be individuals who are not interested persons, with interested persons defined as those currently being compensated by the organization, other than a reasonable amount paid to a director for services as a director, or any relatives of compensated persons. In practical application, this restricts a board that has a majority of related persons, such as family members and their employees, from hiring and compensating members of the family, except as directors.

In New York, in contrast to California, the general rule is that a transaction involving a conflict of interest is valid if the material facts of the conflict are disclosed in good faith or

known to the board of directors and the transaction is approved by *sufficient* vote of the board without counting the votes of the interested directors, although interested directors may count towards a quorum. If these conditions are not met, the transaction may still be valid if the interested director can prove that the transaction was *fair and reasonable* to the corporation at the time it was approved.

New York does not require that there be independent directors. However, the statute governing the circumstances under which the board of a charitable corporation organized in that state may vote to indemnify one of its directors (Section 723(b) of the New York Not-for-Profit Corporation Law) requires that interested directors, including those who are party to the action and related others, may not be counted as part of a quorum at a meeting to vote on the issue. In practical application, this restricts a board composed exclusively of family members and their employees from indemnifying its members and officers. There does remain, in New York, the alternative of obtaining an opinion from independent legal counsel or, as in many other states, approval from the attorney general, so that the limit on interested directors is far less stringent than that in California.

The case of the Yawkey Foundation in Massachusetts illustrates the extent of the power of an attorney general to intercede in a situation in which he believed there was improper conduct on the part of trustees who had conflicts of interest. The foundation held, together with some of its fiduciaries, controlling interest in the Boston Red Sox baseball team, which the owners wanted to sell. The Massachusetts attorney general objected to the terms of the sale, saying it was unfavorable to the foundation, benefiting the other owners who included the foundation trustees.

After proposing to seek a court order blocking the sale of the team, the attorney general agreed to a settlement under which the foundation received \$10 million more from the proceeds of the sale than under the original proposal, the new owners agreed to pay an additional \$20 million to establish their own foundation, and the trustees of the Yawkey Foundation entered into a governance agreement with the attorney general.

Under the terms of the settlement agreement with the attorney general, the number of trustees of the foundation was to be increased from the four originally designated by the donors to nine; each of the five new trustees were to be persons familiar with the charitable purposes of the original donors, with the attorney general to determine whether this condition had been met; the new board was to elect a chair to serve no longer than one year; the new board was to draft bylaws and policies and procedures for dealing with conflict of interest issues, these policies and procedures to be subject to review by the attorney general; and the foundation agreed to submit a written status report to the attorney general on two specified dates.

In subsequent dealings with the foundation trustees, the attorney general announced that he regarded there to be a conflict of interest when foundation grants were made to public charities of which one of the foundation trustees served as a member of the board, thus requiring compliance with recusal procedures and fairness standards in situations in which the trustee had no financial interest in the transaction.

These examples notwithstanding, for the most part the state rules governing conflict of interest for charitable organizations are far more lenient than the private foundation rules in the Internal Revenue Code that prohibit self-dealing, except when it arises in a small number of transactions including, as noted, payment of reasonable compensation to trustees and directors for serving in those positions, and professional fees paid to attorneys, accountants, and investment advisors who also are trustees and directors.

Another important distinction is that the state laws apply to trustees, officers, and directors, but do not extend to donors who do not hold fiduciary positions. Fiduciaries may be violating the laws if they provide unfair benefits to donors, but the state laws themselves do not attempt to control the actions of donors who are not fiduciaries.

However, because of a federal requirement for tax-exemption of private foundations, the provisions of the Internal Revenue Code effectively have been incorporated into state laws governing conflict of interest transactions for private foundations. This provision was enacted as part of the 1969 Tax Reform Act and, although to a certain extent it has complicated the application of state law to private foundations, it has created uniformity among the states in regard to the rules dealing with conflicts of interest as they pertain to private foundations. Section 508(e) of the Code provides that the governing instrument of any foundation seeking tax exemption must contain provisions requiring it to comply with the Code restrictions on foundations, including specifically the prohibition against self-dealing in Section 4941.

In 1972, Treasury Regulations were adopted that provided that if a valid state law imposes the federal requirements on all private foundations, foundations within its jurisdiction will be considered to have met the governing instrument provisions of Section 508 even if their governing instruments themselves do not include the required language of the federal requirement. By 1975, 48 states and the District of Columbia had passed such legislation and the IRS in a Revenue Ruling confirmed that these state laws met its requirements.

This means that if a state attorney general prosecutes a private foundation for violation of conflict of interest rules, the definition of prohibited activity will be the definition of self-dealing in the Internal Revenue Code, rather than the state rule on conflicts of interest. The foundation will not, however, be excused from following state procedural rules in dealing with the conflict.

In all but a minority of states (such as California, Illinois, Massachusetts, and New York, for example), the office of the attorney general has limited funds and personnel to pursue all but the most egregious cases of improper self-dealing. The disclosure rules under which charities report to the IRS, however, require information under oath regarding self-dealing transactions, and the IRS has the ability to handle many cases within the scope of its administrative procedures without resort to the courts. Thus for practical purposes, throughout the country the rules applicable to conflict of interest transactions will be the federal rules.

### **C. Enforcement of Conflict of Interest Policies: Expansion of Internal Revenue Service Oversight to Promote Better Governance Practices**

One of the methods by which a charitable organization can deal with state law requirements governing conflicts of interest has been to adopt a conflict of interest policy that contains procedures to be followed to ensure compliance with the law. This is accomplished by requiring fiduciaries to disclose in advance, usually annually, any financial relationships they or parties related to them (as defined in state law) have with the charitable organization. In addition, individuals who develop relationships that might involve a conflict are required to disclose such relationships as they arise. A board may establish a committee to oversee conflicts and potential conflicts. Some policies may define conflicts of interest to include nonfinancial interests.

Adoption of a conflict of interest policy was a requirement for tax exemption for hospitals imposed by the Internal Revenue Service in the 1980s in response to concerns that hospital fiduciaries were receiving excess benefits from dealings with the organizations. Within the charitable sector, it has been common, notably since the late 1990s, for consultants to nonprofit organizations and organizations supporting the sector to recommend that charitable organizations adopt a conflict of interest policy as a basic component of proper governance practice. It was one of the principal recommendations of the Panel on the Nonprofit Sector in its 2007 report on self-regulation by the charitable sector.<sup>5</sup>

In January 2007, the IRS released an internal document in which it proposed expanding its oversight of charitable organizations to promote good governance as a means of improving compliance with the tax laws. The first step appeared in the Form 1023, Application for Exemption, issued for 2006 and following years, which contained a question asking whether the organization had adopted a conflict of interest policy and, if not, what procedures it had adopted to handle conflicts.

The instructions to Form 1023 included a conflict of interest policy that the IRS had previously approved for hospitals, typically organized as public charities. As written for public charities, this sample conflict of interest policy fails to reflect the duty to comply with the private foundation rules. It also does not comply with the laws in those states that

prohibit or limit the type of loans a charitable organization can make to its fiduciaries. The instructions to Form 1023 do, however, include a disclaimer, noting that, although a conflict of interest policy is recommended, it is not required to obtain exemption.

A glossary included in the instructions to Form 1023 defines a conflict of interest policy as follows:

A conflict of interest arises when a person in a position of authority over an organization, such as a director, officer, or manager, may benefit personally from a decision he or she could make. A conflict of interest policy consists of a set of procedures to follow to avoid the possibility that those in positions of authority over an organization may receive an inappropriate benefit.

In June 2007, the IRS published, with a request for comments, a draft revised Form 990 (the annual information return required of public charities) that reflected the Internal Revenue Service's belief that "a well-governed charity is more likely to obey the tax laws...than one with poor or lax governance." In its summary of recommended policies and practices, the IRS noted that they were generally directed to public charities, but suggested that private foundations and other tax-exempt organizations should also consider these topics.

One of the major topics that were addressed in this document under the heading "Governance and Management Policies" was conflicts of interest, in which the IRS encourages public charities to adopt and regularly evaluate a written conflict of interest policy that "requires directors and staff to act solely in the interests of the public charity without regard for personal interests." The policy should include written procedures for determining whether a relationship, financial interest, or a business affiliation results in a conflict of interest, and prescribes a course of action in the event one is identified. Public charities were also encouraged to require fiduciaries periodically to disclose any known financial interests they or parties related to them have with any business entity that does business with the public charity. Public charities should regularly and consistently monitor and enforce compliance with the policy.

The Council on Foundations has published on its website (<http://www.cof.org/>) a copy of the IRS Sample Policy with comments that provide background for each section and suggestions for modification to achieve compliance with the private foundation rules. Samples of other conflict of interest policies and codes of ethics may be found on the website of Independent Sector (<http://www.independentsector.org/>).

Other recommendations from the IRS contained in its publications relating to governance are pertinent to artist-endowed foundations.

1. A charity should establish and review regularly its mission.
2. A charity's organizational documents should define a mission and provide a framework for its governance and management.
3. There should be an active and engaged board composed of persons informed about and active in overseeing a charity's operations and finances and selected with the organization's needs in mind, such as expertise in accounting, finance, compensation, and ethics. Noting that very small or very large boards may not adequately serve the needs of an organization, the IRS recommends that irrespective of size a board should include independent members and not be dominated by employees or others who are not independent because of family or business relationship.
4. A procedure should be in place to determine the amount of compensation paid to fiduciaries, key employees, and other persons able to influence the organization to ensure that the compensation is reasonable.
5. If a charity is investing in certain new complicated and sophisticated financial investments that require financial and investment expertise, including outside investment policies, it should adopt written policies and procedures by which it evaluates the investments in order to safeguard itself and should also monitor compensation arrangements with investment advisors.
6. A charity should ensure that minutes of meetings of the board and committees, as well as actions authorized outside of meetings, be documented contemporaneously.
7. A charity should adopt a written policy establishing standards for document integrity, retention, and destruction.
8. A charity should adopt and regularly evaluate a code of ethics containing standards it will follow.
9. A charity should adopt an effective policy for handling employee complaints and establish procedures for employees to report suspected financial impropriety or misuse of the charity's funds, noting that the IRS will review an organization to determine whether there has been material diversion of the organization's assets.

Implicit but not stated specifically in the third recommendation concerning size and makeup of a charitable organization's board and the importance of independent directors is the matter of alignment between a board's composition and what is required to implement its conflict of interest policy. This would be the case, for example, where a conflict of interest policy requires that transactions involving a conflict of interest be approved by a majority of independent directors, making it necessary that there be independent directors sufficient in number to implement the policy.



The new IRS regulatory policy is directly applicable to public charities, the organizations that are required to file the new annual information return (Form 990). Private foundations, in contrast, are required to file a Form 990-PF, which seeks information regarding compliance with the more restrictive laws applicable to this separate universe of tax-exempt organizations. However, the Internal Revenue Service's focus on improving governance is not limited to public charities, and when Form 990-PF for private foundations is revised (a process that is pending), it is expected to reflect the change in approach.

#### **IV. Applying Conflict of Interest Rules to Transactions Involving Artist-Endowed Foundations, Their Fiduciaries and Donors, and Parties Related to Them**

##### **A. Summary of Prohibitions for Private Foundations**

A conflict of interest arises when fiduciaries and donors, as well as certain parties related to them, have a direct or indirect financial interest in a decision or transaction by the private foundation. The transactions below are described here as *related party transactions*, as they involve a foundation, its fiduciaries, and its donors—all of whom are *related* to the foundation—as well as family members and other entities related to these persons or entities.

Federal and state laws *absolutely* prohibit certain related party transactions involving foundations, their fiduciaries and donors, and parties related to them.

Federal and state laws *may* prohibit certain related party transactions unless prescribed procedural rules are followed before the transaction is finalized.

Under the laws in some states, otherwise prohibited related party transactions *may* nonetheless be legal if the state attorney general or a state court approves the transaction.

Some related party transactions prohibited under federal tax law *may* be permitted under applicable state laws.

Conversely, some related party transactions prohibited under state law *may* be permissible under federal tax law.

There is a difference between a conflict of interest and the appearance of a conflict of interest, and, under some circumstances, it will be prudent to avoid a transaction that has the appearance of a conflict even though there is no legal constraint involved.

## **B. Transactions Prohibited for Artist-Endowed Private Foundations**

If the artist-endowed foundation is classified under the Internal Revenue Code as a private foundation or a private operating foundation, the following Regulations and Rulings apply.

The foundation may not sell, exchange, lease, or loan its artworks or any other asset to a disqualified person, and the foundation may not buy, exchange, lease, or borrow artworks or any other asset from a disqualified person.

The foundation may not rent property from a disqualified person except if the lease is at no charge, and the foundation may not rent property to a disqualified person.

The foundation may not make a loan to a disqualified person, and the foundation may not receive a loan from a disqualified person except at no interest and for a purpose that is exclusively charitable.

The foundation may not compensate a disqualified person except for reasonable services necessary to carrying out the foundation's charitable purposes, so long as the amount involved is not excessive.

The foundation may not furnish goods, services, or facilities to a disqualified person except if made on a basis no more favorable than that made to the general public, and the foundation may not acquire goods, services, or facilities from a disqualified person except at no charge and for exclusive charitable use.

The foundation may not transfer its income or assets to a disqualified person, and it may not use its income or assets or make them available for use for the benefit of a disqualified person.

## **C. Transactions Prohibited for Artist-Endowed Public Charities**

If the artist-endowed entity is classified under the Internal Revenue Code as a publicly supported organization (meaning as a public charity), under the Code, the following Regulations and Rulings apply.

The public charity may sell, exchange, lease, or loan art or any other asset to a disqualified person if the price is equal to or more than fair market value at the time of the transaction, and the foundation may buy, exchange, lease, or borrow artworks or any other property from a disqualified person if the price does not exceed fair market value at the time of the transaction.

The public charity may rent property from a disqualified person if the price is equal to or less than fair market value, and the foundation may rent property to a disqualified person if the rental price equals or exceeds fair market value.

The public charity may make a loan to a disqualified person if the interest is equal to or greater than fair market value, and the foundation may borrow from a disqualified person if the interest is no more than fair market value.

The public charity may compensate a disqualified person if the payment does not exceed the amount that would be paid ordinarily for the same services by similar organizations under similar circumstances.

The public charity may furnish goods, services, or facilities to a disqualified person if payment is equal to or above fair market value, and the foundation may acquire goods, services, or facilities from a disqualified person if it pays no more than fair market value.

#### **D. The Parker Art Foundation: Applying Federal and State Laws Governing Conflicts of Interest to a Hypothetical Artist-Endowed Foundation**

In considering the following example, it should be noted that while in some instances the federal tax law and the laws of individual states contain rules that are clear, in other instances they are unclear or uncertain, either because the laws are not sufficiently explicit or because the courts or the governing administrative agencies have not ruled on their application to a particular transaction or situation. In those latter instances, the recommended actions reflect an approach designed to protect the foundation as much as possible from inadvertent violation of the rules. These recommended actions are directed to the artist-endowed foundation, not to private individuals.

Lionel Parker, an internationally renowned artist who died in 2008, established the Parker Art Foundation during his lifetime. His wife, Margot, a distinguished poet, and the couple's attorney served as trustees with Lionel. The attorney was knowledgeable about the numerous IRS rulings, described above, finding that an organization would not be entitled to tax exemption if it was created and operated to further the career of one of its founders during his or her life. Consequently, in its founding documents, the Foundation's purposes were described as advancing art education and increasing public knowledge about and appreciation of the fine arts, including, after his death, the works of Lionel Parker.

It was Lionel Parker's intention that his artworks be a resource for the Foundation's charitable purpose. However, in accordance with these limitations in its founding documents, Lionel made no gifts of his own works of art to the Foundation during his life, nor did the Foundation accept any of his works as gifts from other individuals during his lifetime.

Under Lionel's estate plan, if his wife had predeceased him, his entire estate, including his works of art, would have gone to the Foundation upon his death. His wife did survive him, however, and, as planned, all of his works of art, his copyrights and

intellectual properties, his archive, and \$3 million were left to the Foundation. The rest of his estate was placed in a trust for the benefit of his wife for her lifetime. On her death, the trust's assets are to go to the Foundation.

Lionel and his wife had two children, Jacqueline and Erica. At the point in Lionel's career when demand for his works began to provide a substantial income, he and his wife had established trusts for the benefit of each daughter. Over the years, they contributed to these trusts in amounts equal to the annual gift tax exclusions. Jacqueline and Erica are interested in the preservation and continued exhibition of their father's artworks, and they share a commitment to the Foundation's mission. They were named as successor trustees to take office following their father's death and now look forward to serving. In addition to Lionel's two daughters, four other individuals are to become successor trustees. One of them is an art historian employed by the fine arts museum in the state capital. None of these other trustees is related to Lionel or his family or has any financial connections with any of them.

Under the federal tax laws governing private foundations, Lionel was a *disqualified person* with regard to the Foundation, as were (and continue to be so) his wife, his family, and corporations and trusts that he controlled, as well as all other trustees of the Foundation. On Lionel's death, his legal estate and any trusts he created of which the Foundation is a beneficiary also became disqualified persons. In the examples that follow, the term *related persons* means persons who are disqualified by reason of their relationship to Lionel or to the Foundation.

### ***1. Direct Relationships Between Foundations and Related Parties***

During his lifetime, Lionel and Margot made modest cash contributions to the Foundation, which in turn made grants to various charitable organizations conducting art education programs they wished to support. As noted, on the advice of their attorney, neither of them transferred works of Lionel's art to the Foundation during his lifetime. Nor, under federal law prohibiting transactions with disqualified persons, could the Foundation purchase any works of art from Lionel and his wife, or their children or other related persons, before or after Lionel's death.

Over a number of years, Lionel had given each of his daughters several of his paintings. After his death, one of Lionel's daughters sold one of her father's works of art to an art dealer who operated independently of the Foundation. Under the terms of a private letter ruling from the IRS, it would not be an act of self-dealing if the Foundation subsequently were to purchase the painting from the art dealer, on the basis that the art dealer was not a disqualified person with respect to the Foundation or any organization that it controlled and if, at the time of purchase, the art dealer was acting independently as a principal and the sale to the Foundation was not pre-arranged.

If in fact the sale to the Foundation was prearranged by the Foundation, Lionel's daughter, and the art dealer, this would be indirect self-dealing. Lionel's daughter would be subject to the excise taxes by virtue of the sale, as might any of the Foundation trustees who approved the purchase if they knew at the time it constituted self-dealing and their action was willful and not due to reasonable cause.

In addition, as also described in an IRS private letter ruling, Lionel's daughter, as a disqualified person, could not purchase at an open auction works of art owned and offered for sale by the Foundation, as the auctioneer is considered an agent of the Foundation and thus functioning as its controlled intermediary.

Lionel and Margot owned a building with space suitable for the Foundation to occupy. The Foundation may not rent that property, either from Lionel during his lifetime or subsequently from his wife or any other related person, unless the arrangement is rent-free. The Foundation may share space in a unit in the building with Lionel's wife or family or with any other related party, so long as each pays its own share of the expenses directly, or the Foundation's expenses are paid for by any related parties as a gift to the Foundation.

In one ruling, the IRS held that storage rent-free of works of art owned by a foundation in one room in the home of the donor where the foundation maintained its office (also rent-free) was permissible as an incidental benefit to the donor. Note that the gift of rent will not be deductible by the donor. However, there is a difference between storage and display. In another ruling, the IRS found that a foundation, having placed three of its paintings in the residence of a disqualified person, had made its assets available for use that constituted self-dealing.

Lionel's wife does not want to be compensated for serving as a trustee of the Foundation, although it would not be illegal for her to be paid as long as the amount was reasonable. However, Lionel's daughters would like to be paid for serving as trustees, and again, the Foundation can pay them or any other related parties compensation so long as the compensation is *reasonable*. This means that it is comparable to amounts paid as compensation by similar organizations under similar circumstances to similarly qualified individuals. The Foundation may also hire Lionel's children, or any other related parties, to serve on its staff so long as they are qualified and their compensation is reasonable.

The Foundation may pay the family's attorney, who serves as a trustee and so is a disqualified person, for legal services he provides to the Foundation so long as the services are necessary and the amount he is paid is appropriate for the services rendered. If the Foundation's accountant or investment adviser become related parties by virtue of serving as trustees or otherwise, they would also be eligible to receive compensation for reasonable services provided to the Foundation. Again, reasonable

means that the compensation is comparable to amounts paid by similar organizations in similar situations.

Lionel's art dealer was a trusted advisor and friend, having represented the artist for many years and subsequently representing the Foundation after Lionel's death. Under the terms of a private letter ruling by the IRS that confirmed an art dealer acting as a broker was a personal service provider—comparable to attorneys, accountants, and investment advisors—and could be compensated as such, the Foundation's art dealer could be compensated for reasonable services provided to the Foundation were she to become a related party by virtue of serving as a trustee, but only if she were acting as a broker for the Foundation, not as a principal buying and selling for her own benefit. Nevertheless, on the advice of the Foundation's attorney, who counseled that the appearance of a conflict of interest was a potential detriment to the Foundation even if no actual violation of Internal Revenue Code provisions or state law existed, the Foundation's trustees determined it was in the Foundation's best interest that its art dealer not serve as a trustee.

Note, however, that with respect to the Foundation's compensation of any disqualified person, including family members or other related persons, the conflict of interest laws in a number of states would not permit them to receive compensation, either because this is specifically prohibited or because it would not be possible to obtain a sufficient number of affirmative votes from independent trustees to approve the decision.

Lionel's granddaughter is studying art history. She would like to apply to the Foundation for a grant to study artists that influenced Lionel. The Foundation may not make any grants to members of Lionel's family nor to any related parties, whether or not they are trustees of the Foundation.

## **2. Indirect Relationships Between Foundations and Related Parties**

The examples above involve direct arrangements between a foundation and its related parties. The Internal Revenue Code also prohibits indirect arrangements between a foundation and its related parties. While Treasury Regulations and IRS Revenue Rulings permit *incidental* or *tenuous* benefits (for example, public recognition that an individual who is a related party may receive as a result of the foundation's activities, such as naming of a building), these rules prohibit indirect arrangements that result in more than incidental or tenuous benefits.

Given this, the Parker Art Foundation should not expend funds that will directly or indirectly provide a monetary benefit to any of Lionel's family or any other related party. For example, the Foundation may organize a public exhibition of Lionel's art that it owns, but should not include works of art owned by Lionel's wife or daughters or any other related party.

The Foundation has an obligation to see to the security and conservation of works of art it owns. It may not, however, store, manage, repair, or insure works of art owned by Lionel's wife or daughters, or by any other related party.

The Foundation may arrange for publication of a catalogue of Lionel's works of art that it owns or that are owned by other foundations, museums, or collectors. However, the Foundation may not include in the catalogue those works of art owned by Lionel's wife and daughters or other related parties, nor should it make a grant to another institution to publish such a catalogue if the grant is conditioned on its doing so. There would be no constraints, however, if a museum acting independently of the Foundation and its related parties published a complete catalogue of Lionel's works.

Similarly, the Foundation, drawing on its archive and the expertise of its scholarly advisors, may inspect and offer an informed opinion on the authenticity of works of art purported to be created by Lionel that are owned by other foundations, museums, or collectors; however, it may not endorse or provide an opinion as to the authenticity of artworks owned by related parties, including Lionel's wife and daughters.

Lionel's copyrights were left at his death to his foundation. If, however, they had been inherited by a disqualified person, such as Lionel's wife or other family member, and not by the foundation, the foundation could not administer the copyrights, nor could it undertake educational activities promoting Lionel and his works, such as exhibitions, publications, and films. Each of these activities would generate copyright revenues to private individuals, thereby jeopardizing the foundations' tax exemption, as well as providing impermissible private benefit. Furthermore, if any of the copyright holders were foundation trustees or officers, there would also be private inurement, which would be grounds for denial of exemption. The situation would be further compounded by virtue of the fact that if the foundation wanted to save its tax-exempt status by purchasing the copyrights from Lionel's spouse or family or any other disqualified persons, the transaction would be a prohibited self-dealing transaction, subjecting the parties to potential excise taxes and a requirement to undo the transaction. The foundation could, however, acquire the copyrights from a disqualified person as a gift.

Lionel's wife owns several works of art by Lionel that she acquired before they were married. She wishes to pledge them to the Foundation and has signed a binding agreement, enforceable under state law, that they are to become the Foundation's property on her death, unless she has given them to the Foundation before then. The Foundation may share the cost of conservation of these works of art with Lionel's wife based on their respective interests. It could, with proper identification, include those works of art in a catalogue it publishes before her death or in an exhibition of Lionel's works that it organizes during her lifetime. However, if the pledge is not binding, the

Foundation would not be able to pay for any part of the restoration of these works of art, nor include them in its publication or exhibition.

The Foundation may consign Lionel's works of art that it owns to galleries for exhibition and sale as an appropriate means of producing funds to support its charitable programs; however, the artworks it owns should not be exhibited with and made available for sale with artworks owned by related parties, such as Lionel's wife and daughters. Similarly, in undertaking sales of works of art it owns in order to support its charitable programs, the Foundation should not share gallery representation with related parties.

The Foundation's website may feature links to galleries promoting sales of Lionel's work that it owns, but not links to galleries promoting the sale of artworks owned by related parties.

The museum in the state capitol wishes to obtain a grant from the Foundation for a program that will involve its curator of contemporary art, who is a trustee of the Foundation. The Foundation may make the grant, even though one of its trustees is an employee of the museum, so long as the curator's compensation is not directly dependent on the grant. However, the Foundation cannot make any grant to a museum or other public charity that is conditioned on the grantee purchasing Lionel's art from, or otherwise providing benefits to, any of the Foundation's related parties.

The examples above are illustrative of the range of restrictions that apply to private foundations and their related parties and of the nature of the constraints on the activities of artist-endowed foundations and the dealings between the foundation, its founder, and his or her family. Whenever a restriction applies to an *indirect* relationship or involves an incidental or tenuous benefit to insiders, the rules will not be clear-cut and may be breached unintentionally.

It is possible in these instances to obtain formal advice from the IRS as to whether a proposed transaction will not give rise to tax liability. This is done by requesting a private letter ruling (PLR). Foundation managers may also, in some instances, rely on advice of counsel in the form of a reasoned opinion that a transaction will not violate applicable Internal Revenue Code provisions. This is particularly important whenever a foundation is exhibiting or otherwise promoting or selling the works of its artist-founder that the foundation owns, while the artist-founder's family members and heirs or beneficiaries, or any related parties, are also promoting and selling works of art by the artist that they own.



## V. Conclusion

Although the rules governing conflicts of interest and self-dealing may appear in the abstract clear-cut and easy to follow, when applied to specific fact situations their exact scope or specific application may be difficult to ascertain. This is particularly the case regarding private foundation transactions that may involve indirect self-dealing or the provision of incidental or tenuous benefits to disqualified persons.

When there is a question about a transaction, the IRS and charity bureaus in the offices of attorneys general in almost all of the states can provide guidance. The cost of seeking a private ruling from the IRS can be considerable, but it also may save costs in the long run. Attorneys who specialize in advising nonprofit charitable organizations, specifically private foundations, are available to provide legal counsel to ensure compliance with the laws and to assist in avoiding both actual conflicts as well as the appearance of conflicts, something which may be undesirable, even if not unlawful. In many instances, a reasoned opinion of counsel will protect a disqualified person who is a fiduciary from paying excise taxes for breach of the Internal Revenue Code rules, however unintentional.

Where these exceptions may be applicable, advice from an attorney is an important first step. Another step that will permit a foundation's board to protect itself to a large degree is to frame and implement a conflict of interest policy that requires advance disclosure of potential conflicts and sets forth for the governing members of the organization the procedural rules they must follow before approving any transactions involving conflicts.

In adopting such a policy, it is well to recognize that the rules governing conflicts of interest have been formulated to preserve the integrity of the charitable organizations for which their trustees and directors serve, as well as the larger charitable sector of which they and the charitable organizations they steward are a part. Without compliance, they put themselves and the sector at risk.

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<sup>1</sup> The information provided here is educational and informational in purpose and cannot be used in place of advice by qualified professional counsel.

<sup>2</sup> For a broader treatment of the history of the law of charities and government regulation of the nonprofit sector, see the author's treatise, *Governing Nonprofit Organizations, Federal and State Law and Regulation* (Cambridge and London: Belknap Press, Harvard University, 2004).

<sup>3</sup> Community property is a form of legal ownership recognized in a number of states, including California, but not New York and other eastern states, under which a husband and wife automatically become equal owners of certain property held during their marriage. On the death of one of them, the testator may dispose freely of his or her one-half ownership of the community property, including leaving it to the surviving spouse, who would then become the sole owner. If the property is left to another person or organization, the legatee and the spouse then own the property as tenants in common.

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- <sup>4</sup> There is also a subcategory of private operating foundations, called exempt private operating foundations, which are very rare. The designation applies to operating foundations that have had a 10-year past history in which they received substantial contributions from the general public and met certain requirements relating to independent directors. These foundations are exempt from the excise tax on investment income applicable to other private and private operating foundations under an amendment to the Internal Revenue Code adopted by Congress in 1984 to grant relief to certain preexisting foundations that could not qualify for public charity status. The subcategory was not intended to have wide application and would rarely, if ever, be a designation appropriate for artist-endowed foundations.
- <sup>5</sup> Panel on the Nonprofit Sector, “Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations” (Washington, DC: Independent Sector, 2007).  
[http://www.nonprofitpanel.org/Report/principles/Principles\\_Guide.pdf](http://www.nonprofitpanel.org/Report/principles/Principles_Guide.pdf)



## 9.4.2 Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations

FRANCES R. HILL

Exemption from taxation is based on the premise that the exempt entity will provide a benefit to the public. This seemingly innocuous statement is a meaningful and sometimes controversial element in the organization and operation of Section 501(c)(3) organizations.<sup>1</sup> This paper, prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study), discusses the public benefit concept as both the public policy rationale for exemption and an essential guide to operating an artist-endowed foundation.

In an era of ever-increasing public disclosure by exempt organizations, taking account of the public benefit concept in defining a mission, implementing that mission, and communicating the mission to the public and to regulatory authorities is not simply desirable but has become essential. Rather than imposing an undue burden or impediment, the public benefit concept should be seen as a useful guide and practical aid to organizing and operating an artist-endowed foundation, as well as an essential rationale for the public policy choices represented by exemption. The public benefit requirement applies to private foundations as well as public charities.

The absence of a public benefit rarely if ever makes newspaper headlines of the type that have been all too common in recent years when a distressing number of well-known organizations have become embroiled in scandals centered on the misuse of funds for the personal use and private benefit of their leaders. These scandals ranged from the petty to the sordid. All of them bespoke a lack of judgment and a sense of entitlement that were clearly inconsistent with the operation of a publicly subsidized Section 501(c)(3) organization. These violations of the numerous private benefit prohibitions in the Internal Revenue Code (Code) made compelling reading in the newspapers and dispiriting testimony before Congressional oversight committees. They have raised important questions about inattentive or complicit boards.

For the past two decades, the Internal Revenue Service (IRS) has devoted considerable resources to issues relating to compliance with the prohibitions and limitations on the various private benefit requirements applicable to Section 501(c)(3) organizations.<sup>2</sup> This

effort is certainly important in its own right. A leading theory of exempt status makes the avoidance of private benefit central to exemption by developing the concept of a *distribution constraint* as the basis of contributors' willingness to support tax-exempt organizations precisely because the organizations do not use contributions for private benefit.<sup>3</sup>

But even if private benefit problems could be completely eliminated, this would not mean that organizations would be exempt from income taxation. The absence of private benefit does not in itself establish the presence of a public benefit of the type required to support exemption from taxation. Most organizations that claim tax exemption engage in multiple types of activities, only some of which are exempt activities that are appropriately related to providing a public benefit to public beneficiaries. This reality is at odds with the conventional assumption that an exempt organization can be presumed to devote itself entirely to exempt activities. Public benefit is not undermined solely by private benefit involving impermissible distributions, but also by impermissible diversion within the organization to nonexempt activities conducted by the organization itself.<sup>4</sup>

The IRS is now focusing on the absence of a public benefit in its rulings revoking or denying exempt status for Section 501(c)(3) organizations. This focus is apparent from policy statements, enforcement actions, and the information required on the redesigned Form 990, the Annual Information Return filed by those Section 501(c)(3) organizations classified as public charities. In recent years, the IRS officials in charge of exempt organization work have made several speeches and public statements on the importance of public benefit, transparency, accountability, and good governance.<sup>5</sup> The IRS has been putting words into action by making the absence of a public benefit an independent ground for denying or revoking exempt status.<sup>6</sup>

This paper will explore the public benefit concept as the public policy rationale for tax exemption and as a fundamental requirement for organizing and operating an artist-endowed foundation. The first section examines the public benefit concept as the public policy rationale for the tax subsidies represented by both the entity-level tax exemption and the charitable contribution deduction. The second section examines the elements of the public benefit concept. The following two sections examine the role of the public benefit concept in organizing and operating an artist-endowed foundation. The fifth section discusses the role of the public benefit concept in the public narrative of an artist-endowed foundation.

## **I. Public Benefit and Taxpayer Subsidies: The Public Policy Rationale for Exemption**

Like all other foundations, artist-endowed foundations are funded with both private contributions and public subsidies. The private contributions are the transfers to the organization by the artist or the artist's estate or members of the artist's family or other heirs and beneficiaries of various property rights in the art and related assets. The charitable contribution subsidy is a one-time subsidy in the form of a tax deduction for the contributor. Contributors will qualify for the Section 170 charitable contribution deduction for income tax purposes and the Section 2522 gift tax exclusion or the Section 2055 deduction for purposes of the estate tax if the recipient organization qualifies for tax exemption as an organization described in Section 501(c)(3).<sup>7</sup> The entity-level exemption from income tax is an ongoing subsidy that continues throughout the life of the exempt entity. The public subsidies are the entity-level tax exemption and the charitable contribution deduction for the contributors.

Both the entity-level tax exemption and the charitable contribution deduction are subsidies because they represent tax revenue that is foregone. This preferential tax treatment means that those who are taxed, the American public, must make up the difference between the government's revenue needs and tax collected. Government deficits represent future taxpayer liabilities, which defers the issue to taxpayers who are not yet working or perhaps even born.

The taxpayer subsidies to exempt entities and to contributors to Section 501(c)(3) organizations are far from negligible. Contributions to Section 501(c)(3) organizations are the only gifts that are deductible by the contributor.<sup>8</sup> Section 501(c)(3) organizations, like other recipients of gifts, are not taxed on the receipt of gifts. But, unlike other recipients of gifts, tax-exempt entities are not taxable on the income they earn subsequently from investing the amounts given to them by contributors. The unrelated business income tax (UBIT) provisions apply only in the case of trade or business activities that are regularly carried on and are not substantially related to an organization's exempt purpose.<sup>9</sup> Investment income is not taxed.<sup>10</sup> Gains from the sale of property are not taxed.<sup>11</sup> Royalty income from licenses with respect to all types of property, including art, is not taxed.<sup>12</sup> While private foundations are subject to certain excise taxes on investment income, these excise taxes are not comparable in amount to the income tax that would be due on investment income in the absence of the entity-level exemption from income taxation.<sup>13</sup>

Both the entity-level tax exemption and the charitable contribution deduction for contributors are deliberate policy choices. Nothing about the inherent nature of the activities of Section 501(c)(3) organizations compels favorable tax treatment. There is nothing distinctive about the activities of most entities that choose to operate as exempt entities described in Section 501(c)(3). Indeed, one of the themes in the study of exempt

entities in recent decades has been the convergence in types of activities between taxable and exempt entities.<sup>14</sup> No one is required to operate as an exempt entity. Nothing in the Code compels this choice of tax status. A university or a hospital may choose to operate as either a taxable or as a tax-exempt entity. The same is true of artist-endowed foundations or any other entity that may qualify for recognition of exempt status if it chooses to operate as an exempt entity.

Because the charitable contribution deduction and the entity-level exemption are policy choices, both require a rationale for using public money (in the form of foregone tax revenue) for this purpose rather than for some other worthy purpose. Public benefit provides the rationale. The concept of a public benefit is at the core of the law applicable to exempt entities. The public benefit is, in the first instance, a benefit to the public rather than to the contributors or to the exempt organizations themselves. Both the contributors and the exempt entities are means to the end of providing a public benefit to appropriate recipients who have no other relationships with either the contributors or the exempt entities.

The regulations under Section 501(c)(3) state that an organization will not be treated as operating exclusively for an exempt purpose “unless it serves a public rather than a private benefit.”<sup>15</sup> The Supreme Court has taken the same position, stating that “[c]haritable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues.”<sup>16</sup>

Congress has full authority to make these policy choices. The Supreme Court has held that Congress is not required to subsidize any particular activity and that Congress is free to impose lawful conditions on those who benefit from favorable tax treatment, even when it limits otherwise permissible activities. The leading case is *Regan v. Taxation with Representation*, in which the Court held that Congress could impose limits on the legislative lobbying permissible for a Section 501(c)(3) organization even though Congress imposed no limits on legislative lobbying by Section 501(c)(4) social welfare organizations.<sup>17</sup>

To the extent that the activities of an exempt entity do not produce a public benefit, the incentives are not properly targeted and thus are economically inefficient.<sup>18</sup> The core problem in targeting the exemption for charitable efficiency is the presumption that all the activities of exempt entities contribute to achieving a public benefit. In light of such factors as the convergence of activities between taxable and tax-exempt entities, the involvement of tax-exempt entities in a variety of joint ventures with taxable entities, and the increasing breadth of the activities of exempt entities, this organizational presumption is no longer tenable, if it ever was.

## II. Public Benefit: Elements of the Concept

The concept of public benefit encompasses three elements which taken together address what constitutes a benefit and what makes a benefit a public benefit for purposes of Section 501(c)(3). The three elements are purposes and activities, permissible beneficiaries, and the scope of the benefit.

### Purposes and Activities

Section 501(c)(3) lists a broad range of exempt purposes, stating that an organization will be exempt if it is “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals,” provided that the organization satisfies other requirements as well, including those applicable to private benefits. An artist-endowed foundation will be organized for educational purposes, and in many cases for charitable purposes as well. These purposes overlap in both law and in the practical operation of tax-exempt entities. But articulating one or more exempt purposes is only the beginning. The exempt purpose must be translated into activities that actually produce a benefit to the public.

The translation of an educational purpose into activities that provide a benefit to the public poses distinctive challenges in the case of an artist-endowed foundation because the art which may be at the core of the organization’s mission and the central focus of its exempt activities is also likely to be the core financial asset of the organization. This is not the case in the same way and to the same extent if an organization receives cash or stock or real property and uses the assets to fund its educational activities. The complex patterns of ownership rights in art—some of which are contributed to the foundation and some of which may in some cases be retained, either in perpetuity or provisionally—by the artist’s family or by other persons add to the complexity.<sup>19</sup> Stewarding the legacy of an artist is to a great extent an educational activity that among other results may increase the market value of the art.<sup>20</sup> The benefits of these educational activities related to stewarding an artist’s legacy cannot be compartmentalized to correspond to the various ownership interests and property rights either contributed to the foundation or retained by private persons. The benefits of legacy stewardship by the foundation cannot be targeted to the interests in the art held exclusively by the foundation. The foundation’s educational activities relating to legacy stewardship will benefit all of the holders of the various interests in the art, and it will also benefit many other persons who have commercial dealings with the holders of these interests. This poses a unique challenge in defining the exempt purposes, translating these purposes into activities, and ensuring that the tax-exempt foundation provides public benefits.



As discussed in the preceding section, tax-exempt organizations are not the only entities that provide a public benefit. Taxable entities also engage in educational activities that benefit the public. Public benefits are not defined by some inherent characteristic or by the tax status of the organizations that engage in the activities that provide the public benefit. For example, a commercial art gallery certainly displays art and often provides useful educational information about the art and the artist even to those persons who do not buy the art. How does a commercial art gallery differ from a tax-exempt museum? Why is a gallery taxable but a museum is tax-exempt? The puzzle becomes more perplexing if one hypothesizes that entrance to the gallery is free but a museum may, consistent with its exempt status, charge a fee for admission.

The most difficult issue is whether or under what circumstances sales of art are consistent or inconsistent with exempt status. As discussed more fully below in Part IV, the relation between exemption and sales of art rests on both the relation of the art to the organization's exempt purposes and activities and on the use of the proceeds from any sales. The use of proceeds from any sales for activities that are not substantially related to the organization's exempt purposes will be inconsistent with exemption. At the same time, the use of the proceeds for the organization's exempt purposes does not in itself resolve all the potential tensions between exemption and sales of art.

The art contributed to the organization can have one of at least three relationships to the exempt purposes and activities of the organization: (1) solely as a source of financing for the exempt purposes and activities, whether the exempt purposes are related in any way to the art or not; (2) the focal point of the exempt organization's exempt purposes and activities; or (3) a mixed case where some of the art or rights in the art are sold to finance exempt activities related to the mission, which is based on the remaining art. In sum, a sale is not in itself either consistent or inconsistent with exemption. What matters is the context defined by the presence of a public benefit, the absence of a private benefit, and the role of the art in relation to the exempt purposes and activities of the organization.

### **Permissible Beneficiaries**

The public benefit requirement does not mean that everyone must benefit. It means that the organization must provide public benefits to persons who have no private relationship with the organization or with the organization's insiders. Simply avoiding private benefit is insufficient.

While the concept of permissible beneficiaries raises numerous questions, one issue has been decisively resolved, namely, the issue of whether or not it is permissible to use a Section 501(c)(3) organization to provide a benefit to one or more pre-selected individuals. It is not permissible. The usual fact pattern involves an individual who has suffered a hardship or trauma requiring costly continuing care. The cases raise very sympathetic facts

because there is no question that the individual in question does require the costly care and because there is no question that the condition arose from factors outside the designated beneficiary's control. In some cases, contributions are provided by persons who have no relationship to the beneficiary, but have heard of the person's need and genuinely want to do what they can to help the designated beneficiary. One of these cases involved a child who needed an organ transplant and a Section 501(c)(3) organization established by the child's father.<sup>21</sup> The IRS ruled, and the Tax Court upheld the ruling, that the organization did not qualify for tax-exempt status because it was established to benefit a pre-selected beneficiary. The IRS has stated that the fact pattern violates the concept of a public benefit because the pre-selected beneficiary is not the public. Citing a standard work on charitable trust law, the IRS explained that:

A basic principle of the law of charity is that the community rather than designated individuals is served. Thus, any organization seeking exempt status must show it benefits a charitable class that is sufficiently large or indefinite so the community as a whole is benefited.<sup>22</sup>

The IRS had previously taken the same position with respect to exempt status for Section 501(c)(3) organizations in a way that makes clear that the concept of a charitable class as an element of the public benefit concept extends to organizations engaged in any of the exempt purposes enumerated in Section 501(c)(3) and is not limited to those organizations that list only *charity* as their exempt purpose. The IRS reasoned that:

A basic principle of the law of charity is that a trust must be formed for the benefit of the community, rather than an individual. Where a trust is created for the benefit of designated individuals, it will fail if the class of persons to be benefited is so narrow that the community has no interest in the performance of the trust. The rule that a charitable organization must not serve private interests excessively is a long-established one and is based on an essential ingredient of charity law, that the organization be organized to serve the public interest.<sup>23</sup>

This analysis has been followed by the courts. The Supreme Court said of the concept of indefiniteness of the charitable class that charitable trusts "may, and indeed, must be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity."<sup>24</sup> The Tax Court has held that "charity begins where certainty in beneficiaries ends, for it is the uncertainty of the objects and not the mode of relieving them which forms the essential element of charity."<sup>25</sup>

The IRS identified additional factors that "are important in evaluating the presence of a charitable class,"<sup>26</sup> including the size of the class, whether the class is open or closed, and the impetus for the organization's formation. The IRS treated the size of the class as a

factor in determining whether the ultimate beneficiaries are pre-selected, reasoning that “[t]he number of eligible beneficiaries necessary to constitute a charitable class is usually less a matter of the actual number, than a matter of all the facts and circumstances that demonstrate whether beneficiaries are pre-selected.”<sup>27</sup> An open class is distinguished from a closed class by including future beneficiaries, provided that the future beneficiaries are not simply a “theoretical class.”<sup>28</sup> Again the issue is whether the beneficiaries are pre-selected. Similarly, the IRS will look at the “catalyst for the formation of an organization.”<sup>29</sup> The IRS also suggested that publicity about operations,<sup>30</sup> broad community involvement,<sup>31</sup> and the duration of the organization<sup>32</sup> might also provide information relating to whether the beneficiaries are a charitable class.

As noted, artist-endowed foundations are educational and sometimes charitable as well. An educational purpose is not achieved without dissemination of knowledge. Artist-endowed foundations are often engaged in preserving and exhibiting, or arranging for others to preserve and exhibit, an artist’s works and records relating to the artist’s work and life. The public beneficiaries can and most likely will include a number of distinct categories of person, three of which merit particularly note.

One category of public beneficiaries will be scholars whose work involves the artist and the oeuvre, or the period or the technique used. This is likely to be a fairly small group. But, particularly because it is a small group, the concept of a public benefit means that access to artists’ works and archives should be open fully to scholars and those pursuing scholarly purposes. Access should not be limited to those scholars whose work is likely to be exclusively favorable to the artist or to those scholars who were friends of the artist or friends of the artist’s heirs and beneficiaries or family members or who will in some way serve the purposes of foundation insiders. Such limitations undermine a claim to public benefit. Indeed, the IRS ruled in one instance that in allowing a scholar access to an archive closed to all other persons, including other scholars, a foundation was providing an impermissible private benefit to that scholar.<sup>33</sup>

Another category of public beneficiaries is directors and curators of museums that themselves are open to the public and as such are an important means of dissemination in furthering a foundation’s public benefit. Museum exhibitions, scholarly catalogues, gallery talks, symposia, classroom resources used by educators—all provide a public benefit. At the same time, questions about the claim to public benefit can arise based on preferential terms given by the foundation for particular museums if these terms are linked to private benefits provided by the museums’ activities to the foundation’s board members or to the artist’s heirs and beneficiaries.

An artist's work owned by an artist-endowed foundation should continue to be displayed in places where the public can see it and so derive a public benefit. What work to make available to museums and other settings open to the public and what work to be sold to private collectors willing or even eager to pay top prices will be decisions for the board of the foundation. But selling all of the work to private collectors is likely to raise questions about the public benefit provided by the foundation unless the purpose of the foundation, in whole or in part, is to sell the art or rights in the art in order to fund the educational activities or the charitable mission, which might center on making grants to scholars or to other artists or to any exempt organization engaged in an educational or charitable purpose intended by the foundation's creator to receive its support.

A further category of public beneficiaries includes broader elements of the public who are less likely to have their own private interests and less likely to pose possibilities of improper dealings with foundation insiders. Educators who use teaching materials prepared and made available by the foundation are elements of this broader general public. Aspiring artists studying art, doctoral candidates researching dissertations, students at all levels taking art classes, ordinary people who love and wish to experience art, and ordinary people who would like to know more about art or about a particular artist are all part of this broader public. Dissemination includes exhibitions in settings open to the public, publications, websites with educational and historical content, television productions, and articles in newspapers or magazines, all of which serve this segment of the broader public.

Planning how the foundation will interact with these elements of the public that comprise permissible beneficiaries is part of defining the mission and the operating priorities of an artist-endowed foundation. It is not necessary to engage in any activity that could be described as charity, but some element of charity might be part of the mission. For example, arranging speakers to visit schools in a particular city where the artist worked or providing free teaching materials to schools in areas far removed from the likely locations of gallery or museum exhibitions would be charitable activities as well as educational activities and would constitute public benefits provided to public beneficiaries.

Grantmaking is a charitable activity. Both private foundations and public charities may engage in grantmaking provided that the grants are open to an appropriate public and not made to foundation insiders or those related to them. Many artist-endowed foundations engage in grantmaking, either to individuals or to organizations or both, and pursue this as their primary activity or as one aspect of their larger program. Grants to organizations may comprise solely financial support or may be made with artworks if that is the intention of a foundation's creator.<sup>34</sup> Grantmaking is one of the simplest, clearest, and most readily recognized forms of public benefit, provided that it is conducted according to the procedures set forth in tax law to avoid private benefit and conflicts of interest and to ensure that the grantmaking is based on engagement with a relevant sector of the public.<sup>35</sup>

## Scope of the Public Benefit

A peppercorn of public benefit is not sufficient.<sup>36</sup> How much is required and how the extent of the public benefit provided to permissible beneficiaries is determined remain unresolved. Yet, they are at the heart of the tax law applicable to exempt status. Section 501(c)(3) requires that organizations be “organized and operated exclusively” for one or more of the enumerated purposes. The regulations state that an organization will qualify for tax exemption as an organization described in Section 501(c)(3) “only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in Section 501(c)(3).”<sup>37</sup> The idea that the term *primarily* can be interpreted to allow a broad scope of nonexempt activities (with some claiming that *primarily* should be interpreted as permitting up to 49 percent of all activities) fails on at least two grounds. One is that the regulations go on to provide that even one nonexempt purpose that is more than insubstantial will be inconsistent with the requirements of Section 501(c)(3).<sup>38</sup> The Supreme Court in *Better Business Bureau v. United States*, 326 U.S. 279, held that even one activity producing a private benefit that is more than insubstantial supports revocation of the tax-exempt status of an organization that also engaged in several activities that were charitable.<sup>39</sup> The other reason the term *primarily* does not support an expansive interpretation of permissible nonexempt activities is that there is no reliable method of determining what proportion of activities are, in fact, providing a public benefit. Efforts to sustain specific calculations may well fail to persuade the IRS or the courts.

In 1964, the IRS ruled that exempt activity providing a public benefit must be “commensurate in scope” with the entity’s resources.<sup>40</sup> Determining whether the *commensurate in scope* test has been satisfied has raised substantial controversy in itself. Indeed, it is far from clear that there is any satisfactory method for making this determination. The idea of engaging in exempt activities *commensurate in scope* with an organization’s resources is perhaps most usefully viewed as a way of restating the fundamental requirement that an organization must engage primarily in exempt activities and that any other activities must be insubstantial.

In April 2008, then-Commissioner Steven T. Miller announced that the Exempt Organizations Division of the IRS would develop a program for determining whether organizations are conducting exempt activities commensurate in scope with their financial resources, stating, “I believe it’s time for the Service to be more aggressive in this area.”<sup>41</sup> Miller explained the IRS approach to this project as follows:

That’s not to say we should necessarily devise inflexible rules about spending; no one wants the Service dictating how a charity should do its job. But every charity should make responsible and appropriate use of its resources to achieve its charitable purposes.<sup>42</sup>

What can be said at this point is that the issue of scope of the public benefit will, over some period of time, be developed as part of the larger focus on public benefit.

While artist-endowed foundations are subject to spending requirements based in whole or in part on the value of their noncharitable-use assets, as are all private foundations, many hold highly valued charitable-use assets in the form of artwork and rights<sup>43</sup> that are not subject to spending requirements due to their use in direct educational activities. In light of the evolving focus on public benefit commensurate in scope with resources, artist-endowed foundations are well advised to consider the scope of public benefit they intend to provide in deploying their charitable use assets.

### **III. Public Benefit Considerations in Organizing an Artist-Endowed Foundation**

The public benefit requirement must be satisfied in both the organization and the operation of an artist-endowed foundation. The organizational test relates to drafting the organizational documents and filing the application for recognition of exemption, Form 1023.<sup>44</sup> The organization's articles of incorporation and bylaws must be drafted to comply with both state laws and federal tax law.<sup>45</sup>

Clarifying the public benefit that will be provided is important in drafting the purposes clause of the articles of incorporation. Failure to state an exempt purpose in terms that indicate that the exempt purpose will result in a public benefit can result in rejection of the organization's application for recognition of exempt status.

An artist-endowed foundation will be organized for educational purposes or for educational and charitable purposes. The purposes clause should state one or both of these exempt purposes. In addition, it should give some indication of how these exempt purposes are to be achieved. Drafting a purposes clause calls for careful balancing of generality and specificity. The danger of excess generality is that a restructured board could divert the resources of the organization to purposes and activities never intended by the artist. In short, the organization could be hijacked. The danger of excess specificity is that the organization cannot operate efficiently in the interest of its core mission. In short, the organization could be paralyzed, unable to adjust its mission to changing circumstances. Both of these dangers can, of course, be alleviated by amending the purposes clauses in the articles of incorporation. Board conflict may make any such amendment problematic. Including the public benefit element in the purposes clause may help forestall some board conflicts.

As discussed more fully in the next section, stating that the purpose of an artist-endowed foundation is education incorporates a concept of a public benefit because education does not simply mean enhancement of the value of the artist's work by promoting the artist's

reputation. A specific reference to education of the public should be included to establish that education encompasses dissemination to the public. As a threshold matter, a public benefit is not consistent with simply burnishing and perpetuating the reputation of an artist and enhancing the value of the art. This is particularly true if the foundation does not own the art or if the artist's heirs or beneficiaries or some other private interest retains an ownership interest, broadly defined, in some or all of the art or rights in the art. It is at this point that estate planning and planning for the operating of the foundation diverge. The heirs and beneficiaries are not the public in their capacity as heirs and beneficiaries, and providing for the heirs and beneficiaries is not a public benefit. The heirs and beneficiaries receive the benefit of the charitable contribution deduction enjoyed either by the artist or the artist's estate. The foundation is a separate entity subject to its own requirements. Thinking carefully about the public benefit requirement helps clarify this distinction.

#### **IV. Operating for a Public Benefit**

The public benefit requirement applies to the operation of artist-endowed foundations, whether organized as private foundations or public charities. The activities through which the organization pursues its exempt purposes must result in a public benefit, not simply a benefit to the contributors or the managers or even to persons outside the organization who do not constitute a permissible class of beneficiaries. Given that most artist-endowed foundations will be organized for educational purposes, either in combination with a charitable purpose or as the exclusive purpose, the critical question is whether management and enhancement of the artist's reputation and therefore of the value of the art is a sufficient public benefit. If so, what constitutes the public benefit? If not, what activities should an artist-endowed foundation consider to ensure that it is operating for a public benefit?

Because they are organized for educational purposes, artist-endowed foundations must be engaged in activities that include dissemination of information to the public. Activities that embrace the concept of dissemination to the public are particularly important to artist-endowed foundations because activities that enhance the artist's reputation and therefore increase the value of the art contain a significant element of private benefit—in many cases enjoyed by individuals who control the foundation—as well as the public benefit of adding to human knowledge.

In addition, many activities of artist-endowed foundations operate at the intersection of education and commercial activity.<sup>46</sup> The IRS has long been concerned about finding the appropriate balance in the case of arts organizations. The two leading cases are *Goldsboro Art League*<sup>47</sup> and *Plumstead Theatre Society*.<sup>48</sup> Both cases involved organizations that promoted the arts in ways that seemed to embrace commercial methods and to provide private as well as public benefits. In both cases the IRS denied the organizations' application for recognition of exempt status as organizations described in Section 501(c)(3). Both

organizations sought declaratory judgment relief under Section 7428, and the Tax Court overruled the IRS and held that both organizations qualified as Section 501(c)(3) organizations.

Despite the judicial determinations in these two cases, the IRS continues to raise questions about the intersection of public benefit, private benefit, and commerciality in determinations relating to arts organizations. In formulating its rulings, the IRS begins with the applicable regulations, a series of revenue rulings, and private letter rulings relating to arts organizations, and also the decisions in *Goldsboro Art League* and *Plumstead Theatre*. The results vary based on the facts and circumstances of each case, including public benefits involving the dissemination of knowledge and outreach to the public.

Section 501(c)(3) includes education among the enumerated exempt purposes. The applicable regulations state that “[t]he term educational, as used in section 501(c)(3), relates to: (a) the instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) the instruction of the public on subjects useful to the individual and beneficial to the community.”<sup>49</sup> This definition is based on the dissemination of knowledge. The knowledge disseminated is useful to the public, but neither the knowledge nor the dissemination of it is primarily useful to the contributors or to the organization itself or to some persons with a private interest in the organization’s educational activities.

The importance of disseminating knowledge to the public is underscored in the four examples provided in the regulations, each of which identifies different forms of dissemination.<sup>50</sup> Example one addresses schools and colleges, which is not a form likely to be most applicable to artist-endowed foundations.<sup>51</sup> The next three examples make it clear that educational organizations may take many other forms. Example two describes “[a]n organization whose activities consist of presenting public discussion groups, forums, panels, lectures, or other similar programs.” This kind of educational outreach may be conducted on radio or television, and presumably over the Internet as well. This example is potentially relevant to the educational programs of an artist-endowed foundation. Example three refers to “courses of instruction” by correspondence or through radio or television. Example four references “[m]useums, zoos, planetariums, symphony orchestras, and other similar organizations.” This example also is potentially relevant to the educational programs of an artist-endowed foundation involving public exhibitions and programs. For example, an exhibit presented by an artist-endowed foundation that is open to the public would be educational.

The regulations also make it clear that the enumerated exempt purposes overlap and are not mutually exclusive.<sup>52</sup> The exempt purpose of charity is implicit in most of the other exempt purposes. For example, an exempt university that provides scholarships on the basis



of both academic performance in secondary school and financial need is pursuing both educational and charitable purposes. Similarly, an artist-endowed foundation that arranged for students from low-income areas to visit exhibits without cost or that paid for the transportation of the students to the exhibit would be serving both educational and charitable purposes. In both cases, the artist-endowed foundation would be providing a public benefit to a permissible public. These examples do not mean that the public benefit must be directed toward low-income persons. It does mean that doing so is consistent with serving an educational purpose if an artist-endowed foundation chooses to do so.

An artist-endowed foundation that collects and catalogues the artist's work is educational. One of the questions is whether this activity is sufficient to satisfy the public benefit requirement. The issue is not that the IRS will interfere in matters of how an artist's work is interpreted. Likewise, the issue is not whether the activity is undertaken in a manner that simply avoids providing a benefit to the artist or his or her heirs and beneficiaries, which is a private benefit or even an inurement problem. Rather, the issue is whether the activity is undertaken in a manner that will produce a public benefit.

In considering this question, it is not necessary to provide the kind of instruction that a school provides to establish that the organization is engaged in educational activities. Lending artworks to exhibitions, supporting exhibitions or publications, or making the art or the artists' archive and records relating to the creative process available to scholars and educators are educational activities. Preparing these materials for public dissemination on the Internet is an educational activity. Education is not limited to schools or classrooms, but whatever the setting, there must be some activity related to the production or dissemination of information and knowledge. These general principles are illustrated in particular cases in revenue rulings and private letter rulings.<sup>53</sup> Among various examples are those concerning a research institute, a library, and an organization studying the science and history of a public park.<sup>54</sup>

As noted above in Part II, sales of art have raised difficult issues for all types of organizations that deal with art and artists. The easiest cases are those in which the organization is authorized to sell the art to finance an exempt activity unrelated to the specific art being sold (for example, to make grants for animal welfare or environmental conservation programs, as well as for art-related programs that are not connected to the art being sold). The hardest cases are those in which activities related to the specific types of art or the work of a particular artist form the exempt purpose of the organization. In these cases, sales of the art appear to be inconsistent with the organization's exempt mission. Of course, some sales may well be necessary to fund the mission relating to the art. But the sales cannot undermine the exempt mission and the ability to provide a public benefit, as could be true, for example, if the sales were extensive or involved the major pieces of the artist's works.

Much of the guidance issued by the IRS has involved sales of art to some extent. One relatively straightforward case involved an organization that exhibited the work of unknown artists, but did not sell the art that was exhibited. This organization qualified for exemption.<sup>55</sup> In contrast, an organization that exhibited and sold the work of its member artists did not qualify for exempt status.<sup>56</sup> Similarly, an organization that sought to educate the community about modern trends in art by exhibiting and selling the more avant-garde work of local artists did not qualify for exempt status.<sup>57</sup>

These rulings were issued before the Tax Court held that the Goldsboro Art League qualified for exempt status as an organization described in Section 501(c)(3). The Goldsboro Art League conducted a broad range of outreach activities, including: operating an art center in cooperation with a local college; offering art classes that enrolled some 250 students per year; owning a permanent collection of 52 pieces of art and loaning some of these pieces for display in the college, the local hospital, government building, and the public library; conducting guided tours for school groups and civic groups; providing speakers on art in local schools; and conducting art workshops for teachers. The IRS readily agreed that these activities were educational activities. The controversy centered on the organization's art market and art gallery, each of which sold artworks selected for exhibition by a jury of artists. The organization retained a commission of approximately 20 percent of the sale price. The IRS took the position that the organization's operations were primarily commercial activities that could not be distinguished from the operation of a commercial art gallery. The Tax Court held that the art sales were incidental to the organization's exempt activities.<sup>58</sup> The Tax Court noted that there were no other art museums or art galleries in the area and that the works exhibited and made available for sale were chosen by a jury not for their commercial value but for their representation of modern trends in art.<sup>59</sup> The Tax Court held that:

...petitioner's activities with respect to the Art Market and Art Gallery must be viewed in connection with petitioner's other activities. The clear impression that we get from the record is one of petitioner's dedication to teach the public, through a variety of means, to appreciate art. We find that petitioner's sales activities are incidental to its other activities and serve the same overall objective of art education. This is not a case where the other activities are adjunct to petitioner's sales, but, rather, where petitioner's sales activities are secondary and incidental to furthering its exempt purpose.<sup>60</sup>

The IRS lost a similar case five years later.<sup>61</sup> Since then, the IRS has focused in distinguishing the facts of particular cases from the facts in *Goldsboro*, thereby resisting a broad application of the judicial precedents. For example, the IRS has taken the position that an organization did not devote enough time to programs that benefited the entire community.<sup>62</sup> The IRS compared the organization in this ruling to the organization in Rev. Rul. 71-395, where the members served as members of juries selecting each others' work for exhibition with the

possibility of sale.<sup>63</sup> In 2007, the IRS retroactively revoked the exempt status of an organization that sold what it claimed were culturally significant items on the grounds that the organization did not engage in outreach providing a public benefit.<sup>64</sup> The IRS denied exempt status to an organization organized to run an annual art show, which the IRS described as a “selling mart for artists.”<sup>65</sup> The most interesting feature of this ruling was the detailed analysis distinguishing the facts in *Goldsboro Art League* from the facts in this case. In 2008, the IRS revoked an organization’s exempt status on grounds that displaying and selling the work of its members was a substantial nonexempt purpose inconsistent with exemption as an organization described in Section 501(c)(3).<sup>66</sup> The IRS revoked the organization’s exempt status even though it conceded that the organization engaged in certain other educational activities involving community outreach.

Arts and cultural organizations do not exist in a legal vacuum separate and distinct from other Section 501(c)(3) organizations. One of the more interesting recent developments has involved attempts by credit counseling organizations to rely on *Goldsboro Art League* even as the IRS has denied or revoked the exempt status of credit counseling organizations on the grounds that they do not provide a public benefit.<sup>67</sup> The IRS has revoked the exempt status of a considerable share of all of the once exempt credit counseling organizations. Concern about the widespread abuses by these organizations may well cause the IRS to take a more careful look at the public benefit provided by other types of exempt organizations, including artist-endowed foundations.

## **V. Public Benefit and the Public Narrative of an Artist-Endowed Foundation**

Every Section 501(c)(3) organization has a public narrative, the story it tells the public and the IRS about itself. Attentiveness to the public narrative is essential for the effective operation of an artist-endowed foundation. An effective public narrative is necessarily based on the organization’s activities providing public benefits to appropriate public beneficiaries.

The public narrative is a means of communicating with both the public and government regulators, including tax officials and state charity law regulators. The public narrative exists not only in the messages in the organization’s own publications and websites, but also in its corporate documents and its annual filings with government officials. In this era of disclosure and transparency and accountability, all of these statements of the public narrative can be readily checked. The public can access the Form 990, the annual information return of Section 501(c)(3) organizations classified as public charities filed with the IRS, as well as its counterpart for 501(c)(3) organizations classified as private foundations, the Form 990-PF. Likewise, the IRS can, and does, access websites should questions arise with respect to information provided in these annual returns.<sup>68</sup> Tax compliance is an integral part of the public narrative. The emergence of GuideStar (<http://www.guidestar.org/>), the online searchable database of IRS-recognized nonprofit

organizations, as a widely used access point to the Forms 990 and 990-PF means that anyone can readily access these forms.

The redesign of the Form 990 to provide more accessible information about the organization's public benefit means that organizations will necessarily have to provide a public benefit and will have to learn how to communicate the public benefit to the IRS and to the public. Although Form 990 is filed only by those Section 501(c)(3) organizations that are public charities, the IRS is now embarking on a similar effort to redesign the Form 990-PF, which is filed by private foundations. The revised Form 990 is a good indicator of the kinds of changes that will be made to the Form 990-PF. In addition, while most artist-endowed foundations operate as private foundations, several have chosen to convert their status and now operate as public charities that file the Form 990.

The new Form 990, which has been in use beginning with the 2008 taxable year, puts a premium on the public narrative. Because this is an information return filed for the express purpose of determining whether an organization is operating in a manner consistent with its exempt status, this is necessarily a public narrative with numbers. The heartwarming stories must track with confirming financial records of expenditures for activities through which the public benefit is provided.

The redesigned Form 990 begins with the item “[b]riefly describe the organization’s mission or most significant activities.” Separately, the Instructions to the Form 990 advise the organization to “[d]escribe the organization’s mission or its most significant activities for the year, whichever the organization wishes to highlight, on the summary page.”<sup>69</sup> These instructions invite the organization to begin its Form 990 with a statement of its own choosing regarding its mission or its activities. This is, not surprisingly, only the beginning of the organization’s reporting obligations with respect to its exempt activities providing a public benefit.

The public benefit statement is a detailed narrative with numbers. Part III of the new Form 990, Statement of Program Service Accomplishments, requires an organization to describe “the exempt purpose achievements for each of the organization’s three largest program services by expenses” and also to report any grants received and the revenue produced.<sup>70</sup> The instructions describe a “program service activity” as “an activity of an organization that accomplishes its exempt purpose.”<sup>71</sup> The instructions make it clear that the three program service activities to which the organization devoted the largest total expenditures are to be described in Part III.<sup>72</sup>

The instructions emphasize the importance of basing these descriptions on “specific measurements such as clients served, days of care provided, number of sessions or events held, or publications issued.”<sup>73</sup> The organization may use “reasonable estimates...if exact figures are not readily available,” but estimates must be identified as such.<sup>74</sup> In addition to

the numerical information, Part III requires that each program service activity be described in terms of its objective. The objective is to be defined for the year of the information return, as well as for the longer term. Providing a longer-term objective is invited “if the output is intangible, as in a research activity.”<sup>75</sup> Other program service activities that the organization wishes to report, even though these activities involved lesser expenditures, may be reported on Schedule O of Form 990. The organization is also required to provide a computation of total program service expenses, which must match the computation provided on Part IX, the statement of functional expenses.<sup>76</sup> This requirement focuses on the total amount of an organization’s expenditures that it can link to public benefit activities. In addition to this detailed numerical profile of the organization’s public benefit narrative, the new Form 990 requires information regarding changes in program service activities, both new activities not previously listed on a prior Form 990 and activities that are no longer conducted or that have seen significant changes in the manner in which they are conducted.

Documenting the public benefits provided by an artist-endowed foundation is the best way for the organization to present itself to both the public and to the IRS. Most importantly, focusing on the public benefit requirement is an essential element in defining a realistic mission and making concrete plans for achieving that mission. Any artist or artist’s surviving spouse or heirs and beneficiaries contemplating establishing a foundation to be endowed with the artist’s assets or take as its focus the artist’s oeuvre should consider his or her priorities for providing a public benefit through the foundation and communicating that narrative to the public.

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<sup>1</sup> Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. This paper does not constitute legal advice or provide a comprehensive analysis of all of the technical requirements for exemption.

<sup>2</sup> The private benefit doctrines are discussed by Marion R. Freemont-Smith in the accompanying briefing paper, “Federal and State Laws Regulating Conflicts of Interest and Their Application to Artist-Endowed Foundations.”

<sup>3</sup> Henry B. Hansmann, “The Role of Nonprofit Enterprise,” *Yale Law Journal* 89 (1980): 835; Henry B. Hansmann, “The Rationale for Exempting Nonprofit Organizations from the Corporate Income Tax,” *Yale Law Journal* 91 (1981): 54; Henry B. Hansmann, “Reforming Nonprofit Corporation Law,” *University of Pennsylvania Law Review* 129 (1981): 497; Henry B. Hansmann, “The Evolving Law of Nonprofit Organizations: Do Current Trends Make Good Policy?” *Case Western Reserve Law Review* 39 (1989): 807. Hansmann located his nondistribution constraint primarily in state nonprofit law rather than in tax law.

<sup>4</sup> Frances R. Hill, “Targeting Exemption for Charitable Efficiency: Designing a Nondiversion Constraint,” *SMU Law Review* 56 (2003): 675.

<sup>5</sup> The two most recent Commissioners of Tax-Exempt and Government Entities, Steven T. Miller and Sarah Hall Ingram, both have taken strong stands on the importance of good governance for tax compliance. Steven T. Miller, Commissioner, Tax-Exempt and Government Entities, Internal Revenue Service, Remarks at Georgetown Seminar Exempt Organizations Panel on Nonprofit Governance (April 23, 2008); Remarks at Georgetown University Law Center Conference on Exempt Organizations, *Current IRS Priorities in the EO Area, and Projections for the Year* (April 26,

- 2007); Remarks at the Philanthropy Roundtable Conference, *The IRS's Role in an Evolving Charitable Sector* (November 10, 2007). Remarks of Sarah Hall Ingram, Commissioner, Tax-Exempt and Government Entities, Internal Revenue Service, Before the Georgetown University Law Center Continuing Legal Education, *Nonprofit Governance: The View from the IRS* (June 23, 2009). All of these remarks are available on the IRS website, <http://www.irs.gov/>.
- <sup>6</sup> For a discussion of this trend in the revocation of exemption in the areas of credit counseling and down payment assistance organizations, see Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* ¶ S 3.03 (Warren, Gorham & Lamont, 2002, with semi-annual cumulative supplements).
- <sup>7</sup> This paper does not treat the technical issues relating to the estate tax in detail, just as it does not treat the technical issues relating to income tax deductions and exemption in the detail that would be provided in a treatise. The paper does not discuss the limitation on the Section 170 deduction available to the artist with respect to contributions of the artist's own works compared to the deduction potentially available to other contributors of the artist's works. These issues are important for planning, but less important for understanding the role of the public benefit concept in planning.
- <sup>8</sup> The Section 170 charitable contribution deduction distinguishes gifts to Section 501(c)(3) organizations from gifts to other recipients. If a person makes a gift to a person other than a Section 501(c)(3) organization, the recipient is not taxed on the receipt of the gift under Section 102(a), but the person making the gift is not permitted to deduct any part of the gift.
- <sup>9</sup> IRC §§ 511-14. For a detailed discussion of the technical requirements and policy controversies applicable to unrelated business income, see Hill and Mancino, *supra* note 6 at Chapters 21-23. The Form 990-T, which is an income tax return on which unrelated business income is reported, is now for the first time subject to public disclosure like the Form 990, which is an information return and which has been publicly disclosed in prior years.
- <sup>10</sup> IRC § 512(b)(1) applies to dividends and interest.
- <sup>11</sup> IRC § 512(b)(5).
- <sup>12</sup> IRC § 512(b)(2).
- <sup>13</sup> IRC § 4940. For a discussion of the excise tax on private foundation net investment income, see Hill and Mancino, *supra* note 6 at ¶ 12.02.
- <sup>14</sup> Burton A. Weisbrod, *The Voluntary Nonprofit Sector: An Economic Analysis* (1978); Burton A. Weisbrod, *The Nonprofit Economy* (1988); Burton A. Weisbrod, *To Profit or Not To Profit: The Commercial Transformation of the Nonprofit Sector* (1998).
- <sup>15</sup> Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii).
- <sup>16</sup> *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983) (footnotes omitted).
- <sup>17</sup> *Regan v. Taxation with Representation*, 461 U.S. 540 (1983).
- <sup>18</sup> For a discussion of targeting exemption and the idea of charitable efficiency, see Hill *supra* note 4.
- <sup>19</sup> These patterns are explored by Christine Vincent in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).
- <sup>20</sup> See the accompanying briefing paper by Joseph L. Sax, "Public Benefit Obligations and Legacy Stewardship Activities of Artist-Endowed Foundations: Are They in Conflict?"
- <sup>21</sup> *W. L. (Wendy) Parker Rehabilitation Foundation v. Commissioner*, 52 T.C.M. 51 (1986).
- <sup>22</sup> IRS Exempt Organization Continuing Professional Education Text for FY 2003, Disaster Relief—Current Developments (2002).
- <sup>23</sup> IRS Exempt Organization Continuing Professional Education Text for FY 1999, Disaster Relief and Emergency Hardship Programs (1998), citing Scott, IV-A, section 375, which the IRS also quoted directly as follows: "A charitable trust may fail because the class of persons who are to benefit is so narrow that the community has no interest in the performance of the trust. It is a question of degree when the class is large enough to make the performance of the trust of sufficient benefit to the community so that it will be upheld as a charitable trust. If the purpose of the trust is to relieve poverty, promote education, advance religion, or protect health, the class need not be as

broad as it must be when the benefits to be conferred have no relation to any of these purposes. On the other hand, the class of persons to be benefitted may be so limited that the trust is not charitable even though the purpose of the trust is to relieve their poverty, educate them, or to save their souls, or to promote their health.”

<sup>24</sup> *Russell v. Allen*, 107 U.S. 163, 167 (1882).

<sup>25</sup> *Thomason v. Commissioner*, 2 T.C. 441, 443 (1943).

<sup>26</sup> CPE (1999), *supra* note 19.

<sup>27</sup> *Id.* at Part D.2.a.

<sup>28</sup> *Id.* at Part D.2.b.

<sup>29</sup> *Id.* at Part D.2.c.

<sup>30</sup> *Id.* at Part D.2.f.

<sup>31</sup> *Id.* at Part D.2.g.

<sup>32</sup> *Id.* at Part D.2.h.

<sup>33</sup> PLR 200114040 (January 10, 2001).

<sup>34</sup> The grantmaking practices of artist-endowed foundations are discussed by Christine Vincent in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).

<sup>35</sup> For a detailed technical analysis of the procedural requirements for grantmaking by private foundations, see Hill and Mancino, *supra* note 6, at Chapter 11.

<sup>36</sup> Stephen T. Miller, Commissioner, Tax-Exempt and Government Entities, Internal Revenue Service, Remarks at the Philanthropy Roundtable Conference, *The IRS's Role in an Evolving Charitable Sector* (November 10, 2007). Available on the IRS website, <http://www.irs.gov/>.

<sup>37</sup> Treas. Reg. § 1.501(c)(3)-1(c)(1).

<sup>38</sup> Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii).

<sup>39</sup> *Better Business Bureau of Washington, D.C., Inc. v. United States*, 326 U.S. 279 (1945).

<sup>40</sup> Rev. Rul. 64-182, 1964-1 C.B. 186.

<sup>41</sup> Comments of Steven T. Miller, Commissioner of the Tax-Exempt and Government Entities Division of the IRS, comments at the Georgetown University Law Center's Conference on Representing and Managing Exempt Organizations (April 24, 2008), reported in *Tax Notes Today*, IRS EO Division to Develop Commensurate-in-Scope Program on Charities, *Tax Notes Today*, April 25, 2008 (2008 TNT 81-3).

<sup>42</sup> *Ibid.*

<sup>43</sup> Trends in asset classification by artist-endowed foundations are discussed by Christine Vincent in the *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations* (Washington, DC: Aspen Institute, 2010).

<sup>44</sup> For a more detailed discussion of the organizational requirement, see the accompanying briefing paper by Stephen Urice, "Creativity and Generosity: Considerations in Establishing an Artist-Endowed Foundation."

<sup>45</sup> The instructions to the Form 1023 provide very practical, useful guidance for drafting these documents, including suggested language. Using this language, which is familiar to the IRS, has the practical benefit that the initial scan of the documents will proceed smoothly because the language is familiar. Form 1023 and the instructions are available on the IRS website, <http://www.irs.gov/>. For a discussion of each of the clauses required by federal tax law, see Hill and Mancino, *supra* note 6, Chapter 2.

<sup>46</sup> In its 1982 Continuing Professional Education Text, the IRS began its discussion of Promotion of Fine Arts and the Performing Arts with the observation that "[c]ommerciality and exempt activity intersect in the area of promotion of art and theater."

<sup>47</sup> *Goldsboro Art League v. Commissioner*, 75 T.C. 337 (1980).

<sup>48</sup> *Plumstead Theatre Society Inc. v. Commissioner*, 74 T.C. 1324 (1980), *aff'd*, 675 F.2d 244 (9th Cir. 1982).

<sup>49</sup> Treas. Reg. § 1.501(c)(3)-1(d)(3)(i).

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- <sup>50</sup> Treas. Reg. § 1.501(c)(3)–1(d)(3)(ii).
- <sup>51</sup> Treas. Reg. § 1.501(c)(3)–1(d)(3)(ii), Example 1 identifies as an educational organization “[a]n organization, such as a primary or secondary school, a college, or a professional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.”
- <sup>52</sup> Treas. Reg. § 1.501(c)(3)–1(d)(2) states that “[t]he term charitable is used in section 501(c)(3) in the generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of charity as developed by judicial decisions. Such term includes...advancement of education or science....”
- <sup>53</sup> Revenue rulings can be relied upon by any taxpayer. They bind the IRS, but taxpayers may take positions inconsistent with revenue rulings. Private letter rulings may be relied upon only by the taxpayer that requested the ruling and then only if the taxpayer provided all relevant facts to the IRS in its ruling request. Although other taxpayers may not rely on private letter rulings, they are made public in redacted form and widely consulted for information on the IRS’ analysis of particular cases.
- <sup>54</sup> Rev. Rul. 65-60, 1965-1 C.B. 231, Rev. Rul. 75-196, 1975-1 C.B. 155, and Rev. Rul. 68-307, 1968-1 C.B.258.
- <sup>55</sup> Rev. Rul. 66-178, 1966-1 C.B. 138.
- <sup>56</sup> Rev. Rul. 71-395, 1971-2 C.B. 228.
- <sup>57</sup> Rev. Rul. 76-152, 1976-1 C.B. 151.
- <sup>58</sup> *Goldsboro Art League v. Commissioner*, 75 T.C. 337, 344 (1980).
- <sup>59</sup> *Id.*
- <sup>60</sup> *Id.* at 344–345.
- <sup>61</sup> *Cleveland Creative Arts Guild v. Commissioner*, 50 T.C. 272 (1985).
- <sup>62</sup> Administrative Ruling 20044014E (March 16, 2004).
- <sup>63</sup> *Id.*, citing Rev. Rul. 71-395, 1971-2 C.B. 151.
- <sup>64</sup> PLR 200743038 (May 16, 2007).
- <sup>65</sup> Administrative Ruling 20044037E (January 9, 2004).
- <sup>66</sup> PLR 200829046 (April 17, 2008).
- <sup>67</sup> See, e.g., PLLR 200642010 (July 27, 2006).
- <sup>68</sup> For example, in a recent ruling denying exempt status to an organization established to promote the arts by operating an art gallery and providing art education, the IRS noted that the organization did not provide enough activities that benefit the community. See Administrative Ruling 20044014E (March 16, 2004). The IRS informed the organization that “[w]e printed pages from your website and asked that you review the information and sign the pages you agreed with the material that was presented from your website.”
- <sup>69</sup> Page 9.
- <sup>70</sup> Form 990, Part III, Item 4.
- <sup>71</sup> Page 10.
- <sup>72</sup> *Id.*
- <sup>73</sup> *Id.*
- <sup>74</sup> *Id.*
- <sup>75</sup> *Id.*
- <sup>76</sup> Form 990, Part III, Line 4e, which cross-references Part IX, Line 25, column (B).





## 9.4.3 Public Benefit Obligations and Legacy Stewardship Activities of Artist-Endowed Foundations: Are They In Conflict?

JOSEPH L. SAX

### Introduction

The law requires that tax-exempt foundations be administered solely for educational and charitable purposes. The detailed demands of that mandate are not the subject of this paper, which has been prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study). Rather, the question is whether anything that conscientious stewards of an artist's legacy would feel obliged to do, or even desire to do, with the material that has been left to them, is likely to be at odds with the general principles of responsible stewardship, and to be unworthy of continued public support in the form of tax-exempt subsidization. This inquiry, at a minimum, embraces the Internal Revenue Code's command that such foundation's resources be devoted solely to public educational and charitable uses, as well as laws governing philanthropic foundations enforced by state attorneys general. But there is a broader question as well: What is the responsibility of those who have come into control of material that is important enough—aesthetically, historically, or scientifically—to be considered elements of the larger community's cultural heritage?

Artist-endowed foundations can present some distinctly perplexing situations. They ordinarily hold assets that are both aesthetically and economically valuable. While to some extent these two values imply congruent missions (for example, conserving the objects and protecting them from harm), matters are not always so clear. Unlike the trustees of a public museum, those who manage a foundation may have a responsibility to maximize the economic return on the foundation's assets. For example, where it was the donor's intent to provide money grants to aspiring artists, and where the foundation's assets consist of valuable art, the trustees are duty-bound to obtain the maximum return from sale of the art in order to fund the grant program.

However, foundations often also own materials that have important educational and scholarly importance, and exacting market-driven returns for their use or to access them (whether under the aegis of copyright, licensing, or physical possession) can impair the dissemination of knowledge to the detriment of the public.

Moreover, where those who manage the foundation are the same people as the artist's heirs and beneficiaries, and both the foundation and the heirs and beneficiaries own valuable artworks, using foundation assets for value-maximizing activity (such as funding of exhibitions calculated to enhance the market value of the artist's work) poses a conflict-of-interest situation insofar as it also increases the value of the heirs and beneficiaries' privately owned work. In an ideal world, such potential conflicts would not exist, but since the real world frequently does not allow pristine separation of roles, the discussion here assumes that those who manage artist-endowed foundations may be the artist's heirs and beneficiaries, or be associated with the heirs and beneficiaries, and could therefore benefit personally from actions that increase the market value of the artist's work.

For these and similar reasons, both ethical and role issues may be presented for artist-endowed foundations, over and above questions of strict legal obligation. These additional questions are not what one must do, but what one in such a position should do, or, even more importantly, should want to do as a steward of things that the larger community considers worthy of its support. Important works of art, like historic documents or great architectural works, have a special status. Though they are legally just pieces of property, and are commonly privately owned, the public sees itself as having a stake in their fate and offers support in various ways to their owners, whom it perceives as providing benefits to the community's cultural life. No outsiders would care particularly about the conduct of those who were left with a deceased's old clothes or even with valuable stocks and bonds. It is critical to the issues to be discussed here that the subject matter is not simply such ordinary property.

## **A Brief Historical Reflection on Stewardship<sup>1</sup>**

The proposition that foundation administrators ought to be concerned about their ethical responsibilities over and above what the law requires should not be controversial. Nonetheless, a brief reminder as to why the general public continues to be supportive of those who own and control important works of art, or other elements of *high culture* that play a very limited role in the day-to-day life of most people, may be helpful.

Some two centuries ago, at a time when England had virtually no public art museums, vast collections of great masterpieces were owned by aristocrats and newly successful industrialists. While the rest of Europe was seething with revolutionary turmoil, England avoided such upheaval, and the patrician classes made their peace with the rising tide of democracy and the egalitarian spirit. One significant element of this phenomenon was what has been called the *Victorian compromise*.<sup>2</sup> Those who were privileged to own great art demonstrated that they were useful to the new society, with its interest in public education and what was then called *refinement* of the working classes, by opening their estates and their fabulous collections to public exhibitions and to the spread of knowledge, as well as by other philanthropic activities. The extraordinary Art Treasures Exhibition of 1867, held in

the smoky industrial city of Manchester, showed publicly for the first time to the mass public thousands of the greatest works of art in the world. In opening the Exhibition, Prince Albert called it “a banquet offered by the rich to the poor—a proof of harmony among the classes.”

Why should the ordinary taxpayer support institutions that control important works of art, whose value is far beyond the means of ordinary people, and that are mostly owned by people who live in a world they can only imagine? Those who effected the Victorian compromise knew something important: Individuals who are privileged to have possession of cultural treasures owe a responsibility to see that those objects provide public benefits through means such as access, preservation, education, and the dissemination of knowledge.

### **Public Benefit: The Purpose of an Artist-Endowed Foundation**

An artist-endowed foundation, as a publicly subsidized entity, exists to provide public benefits. The first, and most fundamental question, then, is how to understand the concept of *public benefit* as it relates to the variety of activities in which those who manage an artist-endowed foundation might wish to engage.

In the realm of cultural activities, public benefit is not narrowly confined to activities that are carried on by governmental institutions, or that directly benefit the general public. *Public* in the cultural realm is not sharply contrasted with *private*, as it is in the realm of proprietary matters. For example, private institutions, such as the Morgan Library and Museum or the Frick Collection, are considered to be providing public benefits. Similarly a private university, through the knowledge it produces and disseminates, is everywhere understood to be providing public benefits, though its facilities are not open to the general public.

It is not difficult to make the case that institutions like universities, museums, and libraries, even when private, are worthy of the public subsidies they get in the form of tax benefits, research grants, and the like, because of a sort of cultural osmosis process. Obviously scientists, who study little-read abstruse books and run basic research laboratories that are publicly funded, lay the groundwork for products and services that ultimately benefit everyone. The same is true, though perhaps less obviously so, of art and literature. Who can count the public benefits that ultimately flow from the work of a Shakespeare, a Masaccio, or a Plutarch? Great artists inspire others, and their ideas not only generate pleasure and appreciation in themselves, but eventually show up in popular culture as novels and plays and movies, as textiles and household goods, and in everything from wallpaper to greeting cards, book covers, and clothing.

The fact that a writer or an artist may be working to produce private benefits does not make the process or the product less worthy of public support. Samuel Johnson famously

wrote that only a blockhead would write without pay, and even if he really believed that, it doesn't make his work any less valuable to the rest of us. Had Shakespeare written only to become rich or famous, he would still have been entitled to a generous grant from some national endowment for the arts. So, too, someone may produce a catalogue raisonné of a famous artist in order to advance his or her own academic career, but that does not make the product less a contribution to scholarship and to the advancement of public knowledge about art.

Whether an activity is producing a public benefit, therefore, does not turn on the motivation (however self-interested) of the actor, or on formal proprietorship of the product, or on the number of people who are immediately benefited by it or who use it. It turns rather on the question, is the activity promoting the larger society's cultural goals? While there can be no official list of such goals, they are for the most part evident and well accepted. In a book I wrote some years ago, I suggested the following way of looking at the relation between art, whether privately or publicly owned, and public benefit.<sup>3</sup>

The fate of most things is of interest only to its owner. Some objects, however, regardless of who owns them, are important to a larger community: a fossil of great scientific importance, historic documents, the papers of a renowned writer, or a work of artistic genius...Why do we feel diminished when [such an object] that does not belong to us is destroyed or taken away?...[A]n opportunity has been lost...In addition, to destroy a work of art is an act of vandalism, a triumph of ignorance over genius, so there is the rending of a value that is important to the community...Perhaps most importantly, destruction of a major work of art or science is felt as a loss to the community because it undermines pursuit of a common agenda [such as] scientific endeavor or artistic and scholarly achievement.

Sir Kenneth Clark, speaking of Caravaggio, said "neither Rubens, nor Velázquez nor Rembrandt would have been the same without him...a masterpiece is not one man thick, but many men thick..." Newton's famous epigram, "If I have seen further, it is by standing on the shoulders of genius", is the classic expression of the point.

## **Sorting Out the Specific Activities of Artist-Endowed Foundations**

The ultimate goal must always be the production of a *public* benefit. Most of the activities in which artist-endowed foundations engage seem easily to meet that test: Grants for art education or to support the work of young artists are clearly appropriate, as is the support of scholarly work (such as an inventory, a website, a catalogue raisonné, or a biography of the artist). Similarly, grants for conservation or to subsidize exhibitions of the artist's work, or gifts and loans of work to exhibitions, all comfortably comply with the public benefit standard.

In the art marketplace, the more expensive and rare things are, the more they are *appreciated* and the more they continue to appreciate in dollar value. But these differing forms of appreciation are not the same thing, and they need to be carefully distinguished. Simply to generate dollar value is not to produce a public benefit. Where the foundation is charged with making grants for artistic purposes, it should generally sell works it holds for the greatest market return in order to maximize such grants, since the more money it has to distribute, the greater the public benefit it can produce. However, appreciation in dollar value is not the only appropriate goal. Certainly one appropriate function of an artist-endowed foundation is to promote appreciation in the form of understanding and experience of the artist's work. Some diminution of dollar return is appropriate where the goal is to promote appreciation in that sense, as by gifts or below-market sales to schools or museums with limited acquisition abilities.

Though no mechanical line can be drawn to separate appropriate from dubious activities, some benefit to the public should always be a primary (though not necessarily the sole) result of the activity.

## **The Transfer from Personal to Foundation Ownership**

When works of art are private property, an owner has the prerogative to deal with them at his or her personal discretion. When title to such objects is transferred to a foundation, they are no longer ordinary private property. Those who govern the foundation become trustees bearing obligations to the public. A foundation official no longer has a proprietor's freedom of action. While an owner can ask, what pleases me, or how would I personally like to see the foundation assets utilized, a trustee is obliged to ask, what advances the public purposes set out in the foundation charter? A trustee is a custodian of objects that now belong to the public benefit goals for which the foundation has been established, and which justify its favored legal status. Public support for the foundation depends on adherence to that trust obligation.

To ensure that foundation assets are utilized for the public benefit, a foundation official is obliged to act as a careful custodian. Among the basic obligations of such a custodian is the affirmative duty to protect and preserve the objects in his or her custody, to ensure their safeguarding in storage and transportation, to see to their conservation, and to ensure that they are utilized for educational, charitable, and similar purposes.

## **The Conflict of Interest Problem**

*Conflict of interest* is defined as a situation where an individual may be pulled in two different directions—one where some public or trust obligation is involved, and the other where some personal benefit may be enhanced. It has been defined as a set of conditions in which professional judgment concerning a primary interest (such as a patient's welfare or the validity of research) tends to be unduly influenced by a secondary interest (such as financial

gain). Thus, for example, where a physician is both prescribing drugs for patients and receiving research money from a drug company, a conflict situation is presented. The presence of a conflict does not mean that there will be wrongful behavior, only that the temptation is present. And in most situations where there is some obligation to the public, the law or ordinary prudence suggests that such arrangements should be avoided. As the US Supreme Court has pointed out, even “our Constitution contains a conflict-of-interest provision in Article I, section 6, clause 2, which prohibits any Congressman from simultaneously holding office” as an official of the executive branch. *United States v. Brown*, 381 U.S. 437, 467–68 (1965).

Some artist-endowed foundations have a significant overlap between those who manage the foundation and those who privately own a significant number of the artist’s works. Insofar as foundation activities can affect the market value of such works, there is a potential for conflict of interest. In such circumstances, it is preferable to seek foundation officials who have no personal stake in the outcome of the foundation’s decisions. Whether it is feasible to do so, particularly in the setting of smaller foundations, and whether it is desirable to exclude from management individuals like heirs and beneficiaries who may have unique knowledge about the artist and his or her life and work, are matters beyond the scope of this paper.<sup>4</sup>

On the assumption that some individuals who own works privately will continue to be active in the management of foundations—and that most foundation activities have some potential to affect the value of the artist’s oeuvre—the question arises of how to think about the various activities such foundations take on and how to minimize the reality and the perception of possible conflicts of interest. As noted above, activities like grants to aspiring artists or for arts education, providing access to archives for biographical or other scholarly research, or opening a studio for visitation are so obviously promotive of public education and understanding that they fit comfortably within the area of permissible activity, though they may well increase the market value of the artist’s work.

## **Financing Exhibitions**

Promoting and subsidizing exhibitions of the artist’s work may be much more sensitive. Certainly generating interest in the work, and making it accessible to a wider public, is consistent with public benefit and with the educational mission of foundations. However, if such exhibitions include work that is owned by heirs and beneficiaries that is, or will be, offered for sale, a red warning flag should go up. The preferable approach would be a severance of direct links between foundation activity and activity that has as a prominent effect appreciation in the value of for-sale, privately held work.

## Gallery Representation

It has been reported that the Leo Castelli Gallery gave up representation of the Roy Lichtenstein Foundation on the ground that “it would not be appropriate...to represent the Lichtenstein estate and foundation.”<sup>5</sup> That seems the correct conclusion in those cases where those who control the foundation are also in their private capacity owners of artwork that the gallery holds for sale. In such circumstances, the foundation may be in competition with those private owners, who are its own officials or managers, as sellers of the artists’ work. Or the gallery may be tempted to offer special benefits or opportunities to foundation officials in selling their private holdings, if those officials, for example, make available certain works the foundation holds that a favored client of the gallery wants to buy. As noted above, the problem where conflict of interest is involved is not simply the fact of improper behavior, but the presence of the potential for such behavior. It is important to remove both the temptation and the appearance of conflicting motives.

To avoid conflict of interest issues, separate gallery representation for the foundation and for private owners of the artist’s work who also are trustees or managers of the foundation is distinctly the preferable arrangement. Where that may not be feasible or desirable for artistic or economic reasons, private owners of art who are also foundation officials should not be involved in any foundation decisions regarding galleries who handle both art they own and the foundation’s art. This concerns both the initial decision about gallery representation itself and the business terms of that representation, as well as any decisions about which artworks to consign to the gallery and how the gallery is to deal with the art entrusted to it. To make this separation possible, the foundation must have independent trustees (individuals who themselves have no private interest in the artist’s work, nor are closely related to or employed by trustees who do have a private interest) holding sufficient authority to make all decisions regarding a gallery that will represent both the foundation and art-owning foundation officials, including the initial decision of whether or not to allow the foundation to be represented in such a way.

## Authentication

Foundations will often have material such as notebooks, correspondence, invoices, sketches, and the like that are important to authentication of the artist’s work. In effect, these materials are repositories of knowledge about the artist, and from the perspective presented here, public benefit requires that such knowledge be accessible on reasonable terms to others, unless legitimate concerns such as privacy or fragility of material counsel restrictions on access or use. Of course, reasonable administrative restrictions are always appropriate, such as limits to business days and hours, consistency with the foundation’s programs, existing use by others, safety of objects, and compensation for actual costs of providing services. The larger point is that so long as such materials are reposed in a publicly subsidized foundation, the foundation cannot legitimately be used to promote exclusive authoritative control over authentication material, to the detriment of outside experts who could use it.



The risk here is monopolization of knowledge about a subject of public importance. There are cautionary tales that should serve as a stern warning signal to foundation officials. Perhaps the most egregious case is that of the Dead Sea Scrolls,<sup>6</sup> which were kept for nearly half a century for the exclusive use of a small, self-selected coterie of biblical historians, and to the exclusion of every other world expert on Christian Origins and Early Judaism, some of whom passed their entire professional lives without being able to see the most important unpublished material in their field. The monopoly was finally broken by a journalist and amateur archaeologist, who brought the situation to public attention. That case has been called the “academic scandal par excellence”, described by one writer as “the self-aggrandizement of a small group of learned academics who appeared to be hoarding [the scrolls], parceling them out in tightfisted fashion to their own students, and seemingly deliberately holding back the unrestricted availability of that stunning treasure.”

May the economic value of such material be amenable to capture by the foundation as marketplace profits? Some may claim that marketing is acceptable so long as the proceeds are used for some public benefit, such as grants for education. The difficulty is that while that approach would produce some public benefits, if the result is to price some experts out of the market, the monopolization problem, or at least loss of open access, occurs, and that harm will almost certainly outweigh whatever public benefit the foundation would gain by garnering some extra dollars to give away.

In addition, monopolizing or dominating the authentication process creates the risk, if not the certainty, of impermissible conflicting interests. Insofar as foundation officials are also private owners of the artist's work, and can powerfully influence authentication, they hold a key to the value of their own holdings. Unlike some of the foundation activities discussed here, where appropriate foundation activities inescapably aid private owners, restricting access is not necessary to the foundation's basic functions with respect to authentication. Indeed, the foundation can play an important role in authentication, while reasonably allowing others full access to data held by it. The operative principle is parallel to the justification for free speech, that truth benefits by letting all contending voices be heard.

As a matter of clarification, nothing said here is meant to suggest that a foundation will necessarily hold a monopoly position in regard to authenticating the artist's work, or that its responsibilities depend on it holding a monopoly. There will doubtless often be valuable expertise that does not rely on material held by the foundation. That fact, however, should not immunize the foundation against the claim that whatever valuable material it holds should be made reasonably available to others.

In dealing with authentication issues, as in the setting of gallery representation, foundation officials who privately own the artist's work need to be alert to avoiding conflict of interest situations.

## Licensing

Where a foundation holds proprietary rights such as copyright, the public benefit principle should provide clear direction. It is reasonable to refuse a license for objects that the artist reasonably disdained, such as t-shirts or coffee mugs, or that foundation officials reasonably determine is demeaning to the art. But such restrictions should be exercised sparingly, as control over the uses made of an artist's work can evolve all too easily into an effort to control (protect) the artist's reputation against criticism thought unjust. An example would be denying reproduction rights to a biographer deemed unfriendly to the artist's reputation. Trusteeship can in this way descend into censorship, as discussed more fully in the following section.

Where licensing is deemed appropriate to for-profit institutions, however, there is no reason to charge less than the market rate, and to devote the proceeds to the foundation's educational and charitable purposes. Where licensing is for educational institutions, scholarly works, biographies, and the like, public benefit—rather than maximization of return—should be the test, and dissemination of information and wide public access to the material should be the goal. Even though the foundation will use the proceeds for a legitimate foundation purpose, reduced rates for scholarly and educational purposes and free licensing for student projects will likely produce the maximum public benefit.

## Three Concerns about Access

Frequently, a foundation holds an artist's archives, consisting of correspondence, journals, preliminary drawings, and the like. At least three troublesome issues can arise regarding the accessibility of such material: family privacy, the desire for exclusive access by a biographer or a scholar, and the desire of family and friends to protect the deceased artist's reputation. These issues raise similar, but distinct, concerns.

### I. Privacy

Family privacy interests are entirely legitimate, but there is also a legitimate public interest in knowing about the life and career of an individual whose work constitutes a significant contribution to the nation's (or the world's) culture. Art historians and biographers contribute to our understanding of important works of art or literature by exploring the influences that lay behind such works. And such secondary works, when they are consequential, themselves become a part of our culture because they enrich our capacity to understand and to appreciate the art that gave rise to them. Obviously, not all such work is of great public importance, but it is hardly disputable that major biographical and scholarly works about art and artists provide notable public benefits. For that reason, a foundation devoted to the public benefit bears an obligation to promote, and perhaps even more importantly, not unreasonably to impede such work.

In a recent book, I explored these issues, looking at the way in which the papers of various famous people (including Sigmund Freud, James Joyce, Sylvia Plath, and Bernard Malamud) had been handled.<sup>7</sup> A particularly instructive case was spelled out in a volume entitled *Private Matters*, written by Malamud's daughter, Janna Malamud Smith. Smith's book is particularly striking because she writes from the perspective of a family member concerned about the privacy of her aging mother, the widow of the author. Acknowledging that the deceased no longer has a personal right of privacy, Smith engages the painful position of family and friends who are legitimately troubled by the prospect of exploitative biographers and voyeuristic readers, those who revel in a "public ritual of nakedness and sacrifice." She is ultimately persuaded in favor of openness by her admiration for Leon Edel's magisterial biography of Henry James, and the public service biography at its best performs for the reputation of an artist and for public knowledge and understanding. Her ultimate conclusion is that we must take our chances with posterity, and that time will soften the pain of intrusions into the private lives of famous people.

Some material (such as love letters, or material that would be personally hurtful to family, friends, or colleagues of the artist) can legitimately be withheld for a time. Usually the lifetime of the subject's contemporaries is thought a reasonable maximum. While no precise number of years can be set out, there are various useful precedents, such as the Presidential Records Act, which grew out of the scandal over the withholding of the Nixon papers, and which sets out an affirmative duty to make such materials accessible within a reasonable period of time, with some exceptions for confidential communications and medical and personnel records.<sup>8</sup>

## **2. Exclusive Access: The Authorized Biographer**

The temptation for a famous person, or for heirs and beneficiaries, to vest exclusive access to papers in an authorized biographer is great. Usually, the hope is that the chosen person will be admiring, or at least discreet. The problem, as one writer put it, is that too often the official biographer is "a natural courtier, which means he is perfectly happy with the implied contract usual in 'official' biographies, by which the widow permits access to private papers in return for biographical discretion and a requisite, though not embarrassing, degree of adulation."<sup>9</sup> Even with the best of intentions, however, exclusive access over any extended period of time cannot meet the public benefit standard. It offends openness, violates the principles of free discourse, and has the taint of monopoly.

Moreover, such exclusive arrangements sometimes do not even produce the expected work, while shutting others out of access to relevant material. In one notorious instance, the poet Langston Hughes designated his closest friend, Arna Bontemps, as his literary executor, authorized biographer, and the curator of his papers. Bontemps denied access to others while he was preparing to write a biography of Hughes, but he died leaving no biography, while continuing restrictions on the papers that were embargoed at a university

library. Study of Hughes' life and work was relegated to writers who had access only to secondary sources. There are, unfortunately, too many such instances, generated sometimes by the artist himself, as in the Hughes case, sometimes by a self-aggrandizing but non-producing scholar, as in the notorious case of a D.H. Lawrence manuscript secreted in a University of California library for decades so that one scholar, who had found it, would alone be able to write about it. Nonetheless, after many years, he produced virtually nothing.<sup>10</sup>

Monopolization has no more place in the field of biography, or history, or art scholarship, than it does in the marketplace. The very notion of an informed and independent public implies the need to allow a variety of perspectives and interpretations to have their day, and to let the judgment of posterity, fully informed, prevail.

### **3. Protecting Reputations<sup>11</sup>**

One of the least discussed and most sensitive issues relating to access is the understandable, but troubled, desire of family, friends, and followers to protect the reputation of a deceased public figure against those who they fear will blemish it. There are both famous and obscure cases. Perhaps the best known is that of Sigmund Freud, whose reputation was zealously insulated from critics by Freud's daughter Anna and his follower, the analyst Kurt Eissler, who embargoed access to some of his papers under the terms of their gift to the Library of Congress. The collection, established in 1951, contained one folder known as Series Z, sealed until the year 2113, more than a century from now, and a number of other items restricted to 2053 and 2057. Most of the restricted material consists of transcripts of interviews with patients of Freud (he died in 1939), all of whom are now presumably long dead.

Unfortunately, such examples are common and range across the spectrum of fears and sensitivities. At one level we have James Joyce's nephew's destroying letters from Joyce's daughter, aggressively adopting the role of a self-appointed guardian of all matters Joycean, and using copyright ownership as his weapon. At another, there is the case of the family of the psychoanalyst C.G. Jung withholding access to his papers from a prizewinning biographer because he had suggested that Jung may have falsified some data. Another notorious case involved President Harding's widow, who burned boxes of documents and letters, saying, "We must be loyal to Warren and preserve his memory."

Other efforts to conceal uncomfortable truths have been given new meaning by the passage of time. Little was so zealously hidden half a century ago as was evidence of homosexuality by prominent persons, helping to reinforce the familiar assumption that only *freaks* were homosexuals. One exemplary case was the so-called Ten Box Affair at the Minnesota Historical Society, which held ten boxes of papers of the former Episcopal bishop of Minnesota, one of which contained lesbian love letters between his wife and the sister of

President Grover Cleveland. The Society's records officially listed the papers as consisting of only nine boxes, and only when an anonymous letter to a historian revealed that there was a tenth box did the facts become public. There are other more famous cases, such as the efforts of the philosopher Ludwig Wittgenstein's executors to control access to his papers in order to cover up public notice of his sexual orientation. Only in retrospect can we understand just how broadly damaging such secrecy has been to public understanding of sexuality and sexual orientation.

There is no ultimate justification in an open society for secrecy or for destruction of material in which there is a public interest. And that interest can ultimately only be determined by time's unvarnished judgment.

## Conclusion

In distinguishing appropriate from inappropriate conduct, the question is always whether the activity is primarily generating a public benefit, and public benefit in the cultural context means enhancement of access and knowledge, furthering artistic work, and conservation, broadly and not narrowly conceived. Only such activities deserve, and can ultimately sustain, the public's support. Insofar as such appropriate activities have as a collateral result enhancement of the market value of an artist's work, that result will always be a welcome benefit to heirs and beneficiaries and other private owners, but it can never be the engine of a foundation's work.

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<sup>1</sup> Joseph L. Sax, "Imaginatively Public: The English Experience of Heritage Property," *Vanderbilt Journal of Transnational Law* 38, no. 4 (October, 2005): 1097–1140.

<sup>2</sup> Mandler, Peter. *The Fall and Rise of the Stately Home* (Guildford, UK: Biddles, 1997).

<sup>3</sup> Joseph L. Sax, *Playing Darts With A Rembrandt: Public And Private Rights In Cultural Treasures* (1999), at 1–2.

<sup>4</sup> Various alternative arrangements for foundations with inadequate resources to hire professional management are mentioned in Magda Salvesen and Diane Cousineau, *Artists' Estates, Reputations in Trust* (2005), among them a foundation of foundations; sharing facilities for storage, curation, etc.; selling or giving archival materials to institutions like the Getty; and the use of the Archives of American Art. I express no opinion on any of these arrangements.

<sup>5</sup> Salvesen and Coustineau, *supra* 4, at p. 343.

<sup>6</sup> *Id.*, ch. 10.

<sup>7</sup> *Playing Darts With A Rembrandt, supra* 3, ch. 9.

<sup>8</sup> *Id.*, ch. 6.

<sup>9</sup> *Id.*, ch. 9, p. 143 (quoting Robert Skidelsky).

<sup>10</sup> *Id.*, p. 123.

<sup>11</sup> *Id.* Examples are taken from ch. 8.

## **9.5 FOUNDATION PROGRAMS: PHILANTHROPIC AND CULTURAL RESOURCES**

- 9.5.1 Artist-Endowed Foundations: Meaningful Philanthropic Opportunities in the Arts and Culture (Alberta Arthurs)
- 9.5.2 A Commitment to Support Individual Artists Worldwide: Reflections on the Experience of One Artist-Endowed Foundation (Charles C. Bergman)
- 9.5.3 Toward a Public Library of American Culture: Reflections on the Centrality of Art and Importance of Access in Artist-Endowed Foundations (Robert Storr)
- 9.5.4 Art Sales by Charitable Organizations: A Summary of Rulings and Determinations (Stephen K. Urice and Valerie Prochazka)



## 9.5.1 Artist-Endowed Foundations: Opportunities for Philanthropic Impact in the Arts and Culture

ALBERTA ARTHURS

This paper, prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study), is intended "...to survey the broader terrain of the nonprofit arts, culture, humanities, and related education fields, noting trends and opportunities where the unique assets held by artist-endowed foundations could be deployed through grantmaking as well as direct charitable activities to achieve a meaningful philanthropic impact." This is one of a set of papers commissioned by the Study intended for an audience of individuals considering or involved in creating new foundations. These papers range in subject matter from the precision of tax law as it pertains to private foundations to the panoply of program interests around support for individual artist. Within that wide range of writing, this paper makes a particularly speculative attempt, first by daring to describe *trends and opportunities* in the arts and culture at all, and then—in an equally speculative effort—daring to suggest potentials to enhance the role played by the special assets and interests shared among the interesting, emerging philanthropic instruments known as artist-endowed foundations.

This discussion builds on the overview of foundations' program activities presented in the Study report, evidencing a diversity of interests that embrace not only arts and culture but also topics such as HIV/AIDs research, conservation of the environment, social services, animal welfare, and needs in local communities. Within that reach, however, there is a clear pattern of focus in the arts and culture fields. This paper will assume a similar frame based on the view that while many types of donors can and do engage these broader topics, it is in the arts and culture realms that artist-endowed foundations have the most distinctive position and role to play.

Finally, we assume an expansive definition of the assets held by artist-endowed foundations, counting not only financial instruments (as well as artworks, archives, intellectual properties, and, in many instances, related facilities), but also the less quantifiable perspectives, relationships, and expertise rooted in the lives of the associated artists, heirs and beneficiaries, and individuals chosen as foundation trustees, directors, and officers.

To list the basic questions inherent in the paper's charge is, surely, to suggest the level of good guesswork required. This paper asks: What are some notable ideas in the nonprofit



cultural sector in the US today? How are artist-endowed foundations situated within that cultural environment? What are the inherent, natural, defensible cultural funding and program imperatives of these foundations, and how do they match needs in the broader cultural community? How might they do so? Should they do so? In short, and in its most speculative form, the question is: Can artist-endowed foundations make a difference where it counts?

## **Funding in Culture: Kinds and Categories**

Funding in the arts and humanities is an embedded, essential, and respected domain of donor activity in the United States. Annually measured by various agencies and researchers, cultural funding is always a mainstay of donor interest. Amounts vary from year to year, sometimes because of an exceptionally large grant or two made for an endowment or a building at a major cultural institution. But whether such extraordinary gifts are in the mix or not, annual contributions to arts and culture account for about 13 percent of the total giving by private foundations in the US, as measured by the most recent annual snapshot of foundation arts funding issued by the Foundation Center in collaboration with Grantmakers in the Arts. Cultural giving in recent years is reported to be fairly constant, although donors do change, and they do shift priorities. In recent years, for instance, funding from corporate sources has shifted to a sponsorship, market-oriented approach. In the visual arts, more donors seem to be designing their programs and spaces, giving their own interests and priorities precedence over those of grantee organizations. Such shifts and changes come and go; the important fact is that culture, and certainly the visual arts, is a constant commitment for funders.

Within the donor base, some distinct categories provide useful guides to the field. Foundations, although they actually represent a fraction of the overall giving in the country, fill a favored category; they provide significant activity, help establish industry standards and goals over time, and often make themselves responsible for inquiries, convenings, publications, and providing findings and direction for the field. Though ranging greatly in size and assets, they separate into several subcategories: private foundations, corporate foundations, family foundations, and operating foundations. In general, these foundations operate competitive funding programs through professional staffs. In a somewhat different category are community foundations, donor-advised funds, and trust instruments; they are more often driven by the dictates of donors than by the decisions of boards or staff.

There is much overlap in ideals and purposes in this universe, but these categories are sufficiently distinct to lead to professional groupings; family foundations, for instance, share processes and ideas. So do corporate foundations. Similarly, the cultural agencies of state governments share their work and maintain a national association, as do other public funding agencies, local or regional. Associations built on funding priorities also exist; grantmakers with interests in the arts, and in film and media, meet separately (as do

grantmakers in environment, or ethnic or health or gender interests). In short, philanthropy is a complicated field in which functionality, sources, interests, size, and location can all count in defining roles and responsibilities, and in achieving influence, visibility, and scale.

In this environment of foundations and funders, artist-endowed foundations are under-acknowledged players. Well-known and well-established artist-endowed foundations like the Andy Warhol Foundation for the Visual Arts and the Pollock-Krasner Foundation are well documented, but they are not recognized or singled out as a particular type of foundation. As with the Rockefeller or Wallace or Harris Foundations, their names are simply seen as honoring their original donors. Given the broad philanthropic mandates that these established artist-endowed foundations have developed, this way of dealing with them works well enough. Looking at emergent artist-endowed foundations, however, a specific categorizing of them may well be justified, as more and more of them come into being, as their nature and opportunities come more widely into discussion, as their missions are examined. So far, such particular positioning within the greater foundation universe has simply not happened.

The Foundation Center, the chief repository of information about foundations, has no formal category of artist-endowed foundations in its listings, although some may fall into its category of foundations associated with celebrities, and provides no knowledge of a set or emergent set of such entities. There is no affinity grouping of artist-endowed foundations associated with the large, industry-wide Council on Foundations or within the lively professional association, Grantmakers in the Arts, whose members convene around themes of mutual interest, such as art education. There has been no serious coverage of these entities in the newspaper of record, *The Chronicle of Philanthropy*. Grantees that benefit from the work of these foundations know about them, select professionals in the visual arts know about them, some of the established artist-endowed foundations meet collegially several times a year under the auspices of the informal discussion group, Council of Artists' Foundations. But, in general, and within philanthropy as a field, there is little awareness of the special nature or the growing number of artist-endowed foundations.

For the people who are creating and running artist-endowed foundations—and for artists, their heirs and beneficiaries, and their advisors who are thinking about foundations—this is a time of promise and excitement. It may be a particularly promising and exciting time precisely because of this lack of acknowledgement. There already exists a sizable and sturdy number of these foundations; many more are in the planning stages. There is a growing history, an array of cases, a set of accomplishments. Because all of this is surprisingly under-discovered and under-documented, the field of artist-endowed foundations has a rare opportunity for self-definition. As a special subset or subfield within the philanthropic sector, artist-endowed foundations can think now about their own best practices and best protocols. More excitingly, they can think about best priorities—about the philanthropic

activities that would best mirror their proclivities and their patron base. The rest of this paper will attempt to identify a few such possible areas of activity.

## **A Scan of Needs and Opportunities**

Culture requires constant nurturing and support in every manifestation—from architecture to audience building, from training to travel, from creativity to conservation, from capital accumulation to community engagement, from large to small. For the purposes of this paper, though, the sample of current-day needs and opportunities in the broader arts and culture fields are meant to be those most clearly consistent with the origins and interests of artist-endowed foundations themselves. As noted in the Study report, even given a broad array of interests, the consistent focus of these foundations is clearly on the visual arts. The focus is on values and needs of our society today, in keeping with the generation of donors responsible for these new entities. The focus should be on creativity broadly—its manifestation, encouragement, conservation, interpretation, and dissemination—since the donors themselves are creators, as well as on reach, since many artist-donors succeeded in highly public ways. To a remarkable extent, these inherent characteristics of artist-endowed foundations seem to resonate with some of the most compelling cultural challenges of the day. Four of these cultural challenges are support of creative individuals, research, education and access, and for-profit/nonprofit relationships.

## **Support of Individuals**

Recent studies show the fragility of support for individual artists during the last three decades (notably *Investing in Creativity*, Jackson et al., Urban Institute, 2006; *Artists in the Workforce: 1990–2005*, National Endowment for the Arts, 2008). Since the Congressional decision to eliminate the funding of individual artists by the National Endowment for the Arts in the 1990s, other public agencies have found it difficult to justify direct support for individuals. Foundations, only now beginning to turn to the topic more than a decade after the fact, have been slow to respond. This stricture may be most seriously felt by visual artists, since their work is so highly individual, so private, and so often achieved in isolation outside an institutional support structure. Short of working within schools or community settings or in other structured situations, the serious visual artist finds few opportunities for funding. There are also limited opportunities for paid work in the visual arts, yielding below average annual earnings for artists compared with earnings in other professions. Direct funding for individual artists is not the only problem: There are shortfalls in studio and living space, supplies, management, and media services for individuals as well. In the disciplines of the humanities, including art history and criticism, support for the projects of individual scholars, critics, and writers is also restricted. Scholars and curators rely largely on their institutional bases for time and resources to achieve their work.

There are worthy efforts, of course, to address this need for individual support. Service organizations, acting as intermediaries, have regranteeing mechanisms that funders can use.

Notable amongst these, though largely in the performing and media arts, have been programs at Meet the Composer, ReNew Media (now Tribeca Film Institute), Creative Capital Foundation (initiated by the Andy Warhol Foundation for the Visual Arts), New York Foundation for the Arts, and other arts organizations. Some of the Guggenheim Fellowships and some of the Fulbright Fellowships go to individual visual artists and to humanists, as do some of the MacArthur Foundation's fellowships. Members of the national network Alliance of Artist Communities make residency awards to visual artists, as well as to scholars of the visual arts.

There are some regranteeing programs for humanists, including art historians. The National Endowment for the Humanities and the Andrew W. Mellon Foundation have been steady contributors in this area. In a recent recognition of the need for individual support, the Ford Foundation and other funders have created United States Artists, an organization that has as its mission the provision of \$50,000 grants annually to individual artists, some of whom are visual artists. But, as studies and experience make clear, this kind of support falls far short of the need. Artist-endowed foundations can make much-needed, well-justified contributions in this area.<sup>1</sup>

Those foundations making awards to individual artists and scholars—including the Pollock-Krasner Foundation, Adolph and Esther Gottlieb Foundation, Joan Mitchell Foundation, Jerome Foundation, and Graham Foundation for Advanced Studies in the Fine Arts—give concrete substance to their founders' legacies, provide programmatic coherence, and meet an outstanding national need. The widespread need for individual support provides a clear opportunity for artist-endowed foundations that wish to match programs to their origins. Recent research, the example of programs in place, and the demonstrated willingness of artists and other professionals to assist in building such programs all add to the opportunity.

It is imaginable that a group of artist-endowed foundations might undertake a study of the support available to visual artists and to visual arts scholars to assess the magnitude of the need in the field. It would be valuable, as part of such a study, to calculate support for specific art forms—for sculpture and painting, craft, media, public art—and to see how support divides for recently trained artists, emerging artists, established artists. Calibrating need more exactly would benefit the field as a whole. Collaborating across the field might make it possible to match specific needs to the missions and interests of particular artist-endowed foundations.

## Research

In cultural discussion today, the importance of information and the need for reliable research is an active subject. This has always been the case, of course, in academic and curatorial circles. It is possible that the need for data collecting and research in contemporary scholarship is growing, as more contemporary artists earn recognition in the

academy and exhibition in museums. It is possible that opportunities in scholarship are growing, as visual arts study becomes more eclectic and far-reaching, covering more genres, more diversity, more communities of viewers.

What is certainly true is that the need for knowledge is now much more widely recognized across other cultural institutions. The League of American Orchestras has created a Research and Development office, mandated by its strategic plan and approved by its board, to provide orchestras with data important to their individual plans and to the orchestral field. The largest campus-based arts presenters have collaboratively commissioned a study of the inherent importance of the arts and ways to measure that importance. The Andrew W. Mellon Foundation has made grants to graduate students to analyze and reuse that data. The Ford Foundation funded a convening of social scientists and other specialists at Vanderbilt University to consider methodologies for studying the contributions of the arts to higher education. Major museums are exploring the use of oral histories. The Pew Charitable Trusts has created a new research instrument for collecting consistent data from cultural organizations. These and other examples suggest a growing interest—in the arts, as well as in the academy—in richer, deeper uses of serious research to inform and influence cultural policy and practice.

As this interest develops, the role of funders is critical. The Henry Luce Foundation and Andrew W. Mellon Foundation have long perceived the importance of support for research and scholarship, but there are not many such foundations. Artist-endowed foundations have an inherent responsibility for information and knowledge that keys directly into this growing research interest in arts and culture. Many artist-endowed foundations are invested in collections, in research, in data capture, in archiving and in cataloguing as fundamental responsibilities. They search and collect primary source materials and background documents; support publications; work with scholars and invest in research, scholarship, and oral histories; and use archival materials to examine the artistic processes of individual artists over a lifetime or analyze the technical and material considerations of conserving artists' oeuvres. The connections between these commitments of artist-endowed foundations and the growing research mentality in cultural organizations broadly are not yet drawn. But the potential to draw those connections is real and appealing. More than other funders, artist-endowed foundations understand research and its importance.

As the examples above illustrate, very little of the research incentive in the cultural field is driven as yet by the visual arts. Very little of it relates to fundamental research on the nature of creativity. Very little of it so far aims at understanding the contributions of individual artists to education, to society, to cosmopolitan values. In many such areas of study, the archival and biographical and collection-based mandates of artist-endowed foundations could begin to have field-wide impact.

It is imaginable that artist-endowed foundations could begin to work together to create a database of their entire holdings for the benefit of scholars, and that they could begin to work with scholars of creativity to identify research topics of importance in the visual arts. It is imaginable that they could underwrite research on timely and significant issues concerning the visual arts in society, fortifying serious work in arts education, artist benefits, museum practices, art history, and interpretation. Utilizing both their own collections and archives, and their basic commitment to knowledge building, artist-endowed foundations—especially if they collaborate—could become a force in cultural research and in cultural policy formation.

## Education and Access

Arts education and access to the visual arts have been of special interest to cultural professionals and activists for the last twenty years. Research into education and access, experimentation and model programming, support for schools and teachers, the mounting and touring of public exhibitions, and the encouragement of participation in the arts have been sponsored by a number of foundations and other donors during that time. The J. Paul Getty Trust and the Ford and Rockefeller Foundations have had visual arts education and exhibition programs in the recent past. The Charles A. Dana, Surdna, and Wallace Foundations, among others, are funding arts education today, as are smaller and regionally based foundations. Grantmakers in the Arts, reflecting the interest of its national membership, has given arts education and audience-building special attention. The Wallace Foundation has been particularly interested in arts participation. Much of the donor support provided to museums for exhibitions and catalogues is meant to increase public access to artworks. The Luce, Broad, and AG Foundations, and the Getty Trust are especially notable in providing support of this kind.

From these central foci on arts education in the schools and museum programming, interest in education and in access has expanded. Today there is growing concern with adult education, citizen engagement in the arts, and community development through the arts. Often expressed in terms like *culture and community*, or *cultural vitality*, in treatises like those of Richard Florida, and in the work of organizations like Partners for Livable Communities and the Urban Institute, this newer interest is inclusive and outreaching. It is focused on the importance to the society of creative incentives and creative citizens. It locates itself in cultural buildings and also in streetscapes, urban art corridors, and public art. It includes vendors and volunteers. It reaches minority, new, and immigrant participants of all ages and in all neighborhoods. Foundations and other funders are trying to reach and diversify audiences in arts and culture by providing cultural offerings to more citizens, by encouraging relationships between cultural institutions and their communities, even by broadening the definition of visual arts to include crafts, design, architecture, and media product.

This interest in education and access may seem somewhat removed at first consideration from the experience of artist-endowed foundations. It may seem less natural than their interest in individual artists or research. But, in fact, existing artist-endowed foundations exhibit substantial interest in the education of schoolchildren in many of their programs. Beyond that, some have made distinctive contributions to citizen education through their support of museums and other art venues. Some artist-endowed foundations have supported the sharing of artwork through loans, tours, traveling exhibitions, catalogues, and websites. With their traditions of creating appreciation, advocating for art, and engaging with the markets for visual work, artist-endowed foundations have been actively engaged in outreach both to arts professionals and to the public. They are poised to meet needs and opportunities in school and citizen education and in community enrichment through the visual arts.

Furthermore, as evidenced by the variety of internships and other such activities underway among many artist-endowed foundations, these philanthropies themselves afford unique educational settings, enabling students and specialists from university-level studio, art history, and art management programs to participate directly in research, documentation, and grantmaking activities. Sharing information on these programs and exploring ways to fully integrate them into the foundations' larger educational missions could yield more and newer productive efforts.

There is fresh opportunity for the distribution and appreciation of the visual arts, for access to the visual arts, through digitization. The Andrew W. Mellon Foundation's ARTStor project is providing a major demonstration of the power of the Internet to extend the reach of the visual arts. For artist-endowed foundations, as for Mellon and other experimenting institutions, the web provides whole new areas of challenge. Not the least of those challenges are questions about intellectual property, the rights and restrictions surrounding ownership of art. In an age of extensive, immediate, and seemingly unfettered duplication, the rights of artists and their estates can seem to run counter to the needs of audiences, scholars and students, and art lovers. Art will be digitized and offered on the Internet, but questions of permission, of payment, of public and private rights are at issue and largely unresolved. The Internet provides unlimited opportunity for education and access; it also reopens definitions of copyright, licensing, and public domain. The balance between private ownership and the public good requires recalibration in a new age of distribution. For artist-endowed foundations, built on the legacies of individual artists, these issues of intellectual property are demanding and immediate.

This is one of many issues in education and access, perhaps the most pressing, which artist-endowed foundations should productively examine. It is certainly imaginable that together these foundations could scrutinize actions already being taken in the area of intellectual property, and survey and identify best practices. Working together, with the interests of

both artists and audiences in mind, these foundations could bring their particular needs and objectives to bear on the examination of intellectual property in these changing times.

Artist-endowed foundations could also share information about their educational efforts, design measurements of the results of their programs, and build combined efforts to give citizens access to cultural content. They could work together to gather materials—art, information, speakers, print, and film—that could travel to community centers, small museums, schools, and other venues. These are only a few of many serious, inspiring ideas for education and access that artist-endowed foundations could spearhead together.

## **For-Profit/Nonprofit Relationships**

In discussions of the arts today, the nexus between for-profit and nonprofit enterprise comes up repeatedly. The role of *venture philanthropy* in the arts, a kind of giving that borrows enterprise activities, is an example. The crossover of talents and audiences between commercial and *mission-driven* performing arts institutions becomes more common. Dance companies commission popular composers; orchestras program jazz; talent moves from off-Broadway to Broadway, from festivals and community stages to movies and commercials. Independent films find commercial distributors. Most dramatically, the Internet blurs the professional and the amateur and creates whole new sources and forms of art. New technologies raise unforeseen questions about control, property, access, and business models. In almost every dimension, every discipline, new ways of linking for-profit and nonprofit creative industries are in discussion. New boundaries and arenas, new structures, new forms of entrepreneurship are under scrutiny.

Opportunities and needs result from these developments. There is a need for study of the traditional for-profit/nonprofit relationship, and a great need for study of new forms and structures that might meet contemporary circumstances. There is much to be learned from experiments in new for-profit/nonprofit arrangements. There is a need to examine meaningful mediations between for-profit and nonprofit entities. There are very large questions about intellectual property, about appropriation, about access. The new technologies raise questions about rights to both musical and visual product.

There have been some efforts to comprehend emerging forms that combine features of the for-profit and the nonprofit, or that respect and draw on the constituencies and experiences of both. The subject has been extremely interesting in the area of micro-enterprise and micro-lending, for instance. There has been some for-profit/nonprofit crossover in housing, job training, and community development initiatives. But there has been only a mostly muted conversation on this subject in the arts and culture sector. The American Assembly did hold an early meeting and produced a relevant report (1999). The *Journal of Arts Management, Law and Society* has published an issue related to the subject (Summer 2002). Several scholars and writers—including Tyler Cowan, Richard Caves, John



Howkins, and Bill Ivey—have advanced discussion on the subject. There is a set (even an organization) of cultural economists who spend some of their intellectual capital on this issue. Talk of for-profit/nonprofit arrangements in the arts circulates most naturally and usually informally in theater and, to some extent, in film. There have been some recent experiments in the presenting field. But generally in arts and culture the subject begs for further models and further examination.

There have also been some foundation-based experiments at the intersection of the for-profit and the nonprofit, mostly in the form of program-related investments (PRIs), which are loans and investments made to advance a foundation's charitable purpose. Other occasionally employed mechanisms have been returnable grants, loan programs, and venture philanthropy investments. Very few of these instruments have been used in the arts, however. The Rockefeller Foundation did make some investments in nonprofit cultural enterprises in an officer-guided experiment some years ago. Results of those investments in the arts, and their results compared with those in other sectors, have not been calibrated. The original premise of the Creative Capital program was that successful grantees would return a percentage of profits to the program, but that idea has not really been tested, largely because of the highly experimental, noncommercial nature of the artist work that has been funded in the program. The James Irvine Foundation briefly explored the idea of a freestanding investment fund for the arts. But, broadly conceived, culture's readiness for crossover activities or crossover investment has barely been imagined.

In this domain, as in others, artist-endowed foundations have unusual experience and a long history. Visual artists are the artists most likely to have commercial connections, to use dealers, vendors, auction houses, online sales, to create and then cross a very light line between mission and market. Artist-endowed foundations have to face the questions raised by the nearness of art and business all the time. They are in a position to know a great deal about the in-between places where creativity often lives. This depth of experience suggests that artist-endowed foundations, unlike their more conventional foundation peers, can play a leadership role in the missing conversation about new forms, new philosophies, new ventures in those in-between places.

What have these successful artists and the foundations endowed with their bequests learned about art and commerce that other players, other disciplines, need to know? Are there lessons from the law, from the marketplace, from sales and management, from investment and reinvestment that other artists and other disciplines should hear? What are the concerns in ethics, in investment and in ownership, in intellectual property, in promotion and marketing, in conflict of interest that can be opened up to discussion by these experienced professionals? And are there philanthropic opportunities in the for-profit/nonprofit intersection that should be explored much more intensively than has been the case?

It is imaginable that artist-endowed foundations could make the twining of commerce and creativity less of a mystery. Through analysis of relationships and ways of doing business in the visual arts, artist-endowed foundations could help to provide understanding, useful models, ethical guidelines, and goals in this area. Working together, they could provide a profound service by defining the importance of both public and private interests in the arts and in demonstrating the ways in which they should combine and should compete. Also, artist-endowed foundations could undertake some PRI or loan guarantee or returnable grant experiments that might not only support visual artists, but might also set a platform for experimentation in other arts and cultural disciplines as well. This is imaginable.

## Conclusion

These pages attempt, as originally outlined, to track some *trends and opportunities* in fields of culture that match some of the *unique assets* of artist-endowed foundations. Four challenges in cultural philanthropy have been highlighted here, but it is obvious that there are other *trends and opportunities* that could just as justifiably be identified. The multiple ways in which these new philanthropic entities might operate—and the ways in which existing ones are already operating—could provide more and more pages, more and more speculation.

The four areas for action featured here—support of creative individuals, research, education and access, and for-profit/nonprofit relationships—are chosen because they reflect concerns that cultural practitioners are voicing seriously and consistently, and they are concerns that traditional funders can only partially meet. For both these reasons—the timeliness of these concerns and the challenges they present to funders—they seem inspiring areas to highlight for new philanthropic entities. As the paper argues, the appropriateness of these areas for artist-endowed foundations is also significant. For artists, their foundation trustees, and the professionals who work with them, these four areas of concern seem right for consideration. Artists and the professionals around them have always been concerned with artists' income and resources, with documentation and discovery, with the nexus between commerce and culture, and with public outreach. More than most cultural professionals, they have experience, passion, and ideas to contribute in all four of these areas. As funders, they can provide support as well.

The paper makes only passing comments on what programming might actually look like. At existing foundations, some programs in these areas already provide models for further action. In other areas, there are information and models to be studied within the cultural field more broadly, and within philanthropy more broadly. There is little question, though, that fresh programs, new responses, new lines of work and action, are called for. The platform for constructive work in each of these areas exists. Exploration is called for.

If there is one single message on programming to be taken from this paper, it is that artist-endowed foundations would benefit by working together to think through and address

these *trends and opportunities*. Combining intelligences, undertaking joint studies, devising collaborations could have larger results, larger impact, than any single foundation could achieve. And, in and of themselves, such actions would be contributions. So often, funders compete when they might collaborate on issues. Too often, funders learn less from each other than they could as they face the challenges in cultural support. Artist-endowed foundations, starting from a new place in philanthropy, could set an example of collaboration and shared concern for the visual arts, its practitioners, and its publics. They could bring from each of their special places in the arts troves of experience and understanding that could enrich the whole.

It is imaginable that artist-endowed foundations could become a new center for action and advocacy in culture and a force for affiliation in philanthropy.

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<sup>1</sup> Several artist-endowed foundations provide the proven example. Dedicated to addressing the needs of established individual visual artists with financial need, the Pollock-Krasner Foundation, created by Lee Krasner, makes almost 150 grants a year for that purpose. With a similar theme, and an additional focus on emergency needs, the Adolph and Esther Gottlieb Foundation makes 50 grants per year. Both foundations fund internationally. With more than 70 grants per year to individual artists, the Joan Mitchell Foundation takes a career-cycle approach to its support for painters and sculptors, sponsoring artist-led community art classes for young people, and awarding grants to launch new MFA graduates on professional careers, assist established artists with financial need, and respond to artists' career opportunities in special initiatives. The Jerome Foundation, created by artist and philanthropist Jerome Hill and focused in Minnesota and New York City, uses multiple strategies as well. While the bulk of its grants go to arts organizations to support emerging artists undertaking new works, the Jerome Foundation makes a dozen production grants per year directly to film and video artists, and three dozen travel and study grants to emerging artists in all disciplines, the latter with co-funding from two other donors. With more than 90 grants to individuals in a year, the Graham Foundation for Advanced Study in the Fine Arts, created by Chicago architect Ernest R. Graham, pursues one part of its program to foster diverse and challenging ideas about architecture and its role in the arts, culture, and society by making grants to individual architects, scholars, filmmakers, and other professionals undertaking research and producing projects.

## 9.5.2 A Commitment to Support Individual Artists Worldwide: Reflections on the Experience of One Artist-Endowed Foundation

A CONVERSATION WITH  
CHARLES C. BERGMAN

For the Aspen Institute's National Study of Artist-Endowed Foundations (Study), Charles C. Bergman, chairman and chief executive officer of the Pollock-Krasner Foundation, discussed with Christine J. Vincent, Study director, the topic of support to individual artists by artist-endowed foundations as reflected in the formation and experience of the Pollock-Krasner Foundation, the largest private foundation exclusively making grants to individual visual artists worldwide. The Study's aim is to help the next generation of artist-endowed foundations make the most of its donors' generosity in service to a charitable purpose.

VINCENT: What was the genesis of the Pollock-Krasner Foundation?

BERGMAN: Gerald Dickler was the lawyer to Lee Krasner, as well as Georgia O'Keeffe and an extraordinary roster of talented, creative people. In 1982, Gerry said to his client, Lee Krasner, "Lee, you do not have a will, you have resisted my preparing a will for you. You ought to leave this money for a worthy purpose, perhaps setting up a foundation to aid worthy and needy artists. Lee, if you had not been married to Jackson, you might have needed a resource of this kind for your own career and your own well-being."

So, with some reluctance and little enthusiasm, she agreed that perhaps they could do that. And then Gerry asked her what they might call the foundation, and she replied, "I want it to be called the Pollock Foundation." Gerry protested, "with all due respect, your late husband would not have been interested in such a philanthropy." And she said, "I want it called the Pollock Foundation." Continuing his resistance, he said, "Suppose that name is registered and you can't have it." She said, "We'll cross that bridge when we come to it."

He went back to her a few weeks later to say that the name indeed was registered and therefore not available. He suggested to Lee that the foundation be called the Pollock-Krasner Foundation, and she agreed.

VINCENT: He prepared a will that included provisions for the creation of the Pollock-Krasner Foundation, and she signed that will?

BERGMAN: Yes. And unknown to me, he had in mind that I should be brought in as a consultant to the estate when Lee died to create this foundation. At that time, I was running the Institutes of Religion and Health, which was the largest psychotherapy treatment training program in the United States. It consisted of two foundations that I merged together, the Academy of Religion and Mental Health and the American Foundation of Religion and Psychiatry. The latter was founded by Norman Vincent Peale. Gerry Dickler was the lawyer for Dr. Peale and secretary of the Board of the Institutes, and I was chief operating officer. We became fast friends in the context of the reconciliation of religion and psychiatry.

VINCENT: Gerry had his eye on who might be available with the necessary skills to organize an artist-endowed foundation when the time came. And Lee Krasner passed away in 1984.

BERGMAN: Exactly. In September of 1984, Gerry Dickler invited me to lunch and said, "I was Lee Krasner's lawyer, she left a large estate, and I've got to set up a foundation." I was very intrigued. Then he said, "I want to hire you as a consultant to the estate of Lee Krasner to create the foundation. If you do a good job, as I know you will, I'll fire you the day we get the tax ruling and make you the operating head of the foundation." Then he said, "I haven't told you what it is, have I?" And I said, "You certainly haven't, I'm intrigued as hell." He said, "It's going to be the largest private foundation ever created to aid worthy and needy visual artists internationally." A week or two later Gerry asked me to meet with him and Gene Thaw, Lee Krasner's art advisor and co-executor with Gerry of her estate. I spent a half hour with these two gentlemen and left; by the time I got home there was a message on my answering machine, which said something like this, "Gene Thaw is as bad a judge of character as I am, and we want you very much to set up this foundation and we would be pleased if you will accept." That's the story of how I got involved in running the Pollock-Krasner Foundation.

VINCENT: That was the fall of 1984?

BERGMAN: Yes, on April 1 of 1985, we got the tax ruling, and I was summarily fired that day and then made executive vice president of the Foundation, the position that my colleague Kerrie Buitrago now holds.

VINCENT: You and the trustees were faced with a set of assets, as well as this mission that Lee Krasner had affirmed. But there are many choices you could have made as to how to use those assets. What considerations led to your decisions?

BERGMAN: On April 1 of 1985, I was given three things by Gene Thaw and Gerry Dickler, co-executors of the estate of Lee Krasner: their blessing, about \$10 million in a conservative investment portfolio, and about \$10 million worth of art. The art inventory consisted of early paintings, a few larger paintings, and some prints by Jackson, as well as a very valuable inventory of Lee's work, including some large pictures. The archival material would be given to the Archives of American Art at the Smithsonian Institution in Washington, DC, a repository designed specifically to handle artists' archives and make them available to scholars. Some archival material also would be given to the Pollock-Krasner House and Study Center, which at the time was our property in East Hampton. All of these distributions were done separately by the estate and subsequently by the Foundation.

VINCENT: Which helped clarify things for the Foundation—clear the way for its specific focus on grantmaking.

BERGMAN: That is right. The house and studio where Jackson and Lee had lived in East Hampton were given to the Stony Brook Foundation of the State University of New York at Stony Brook, which committed to operate the property as a study center and a public museum, including the famous studio. The property is now a national landmark.

VINCENT: Was there an assumption that there would be a special relationship between the Foundation and the study center?

BERGMAN: Yes, and as a matter of fact, the negotiations to make this transfer possible were complicated because Lee did not want to have the Foundation totally support the house. She even had speculated that if it couldn't be transferred to a museum or appropriate organization, it should be sold and the proceeds placed at the disposal of the Foundation.

VINCENT: Why do you imagine that was her point of view?

BERGMAN: We don't really know, but it is my own interpretation that her ambivalent feelings about the house, based on the sad events of her life there with Jackson, were such that it had little sentimental value to her. That may have had something to do with it.

VINCENT: She didn't want it retained as part of the Foundation, but she was willing to have it placed with another institution to be operated separately?

BERGMAN: Jack Marburger, then president of Stony Brook, was a friend of Lee's, as was Terry Netter, a former Jesuit priest and an artist who was on the faculty at Stony Brook in the Art Department. It was Terry Netter and Jack Marburger who negotiated with

Gerry Dickler the transfer of the house to the Stony Brook Foundation, which is a private foundation set up by the University to receive money and to fundraise. Helen Harrison, executive director, has been instrumental in developing the house and studio as an educational resource. We are grateful for the way she has conducted the symposia, seminars, conferences, and their outstanding exhibits. We have given them a substantial amount of money, around \$750,000 to date.

VINCENT: In many cases, donors or managers of artist-endowed foundations focused specifically on grantmaking decide the artist's studio or archive or even exhibition facility should be set up separately; these types of things require a different organizational capacity, but there is an ongoing interaction with the foundation.

BERGMAN: Related to your point, aside from placing the East Hampton property where it could serve a public and educational purpose, we really created two entities. The Pollock-Krasner Foundation, the international grantmaking vehicle, and the Pollock-Krasner Authentication Board, a separate corporation, which would be available to authenticate Pollock and Krasner artworks. That Board consisted of Gene Thaw and Francis O'Connor, the co-authors of the Pollock catalogue raisonné and acknowledged to be the two leading authorities on Pollock. The two other people who were on that Board were the art historian Ellen Landau, author of the Krasner catalogue raisonné, and the late Bill Lieberman, former curator of twentieth-century art at the Metropolitan Museum of Art.

VINCENT: As executive vice president of the Foundation, you did not have a role in the Authentication Board?

BERGMAN: No, I did not. Nor did Gerry Dickler, chairman of the Foundation. The Authentication Board was intentionally separate from the Foundation.

VINCENT: Was the Authentication Board created at the same time as the Foundation?

BERGMAN: No. There was an authentication committee that existed to assist Lee during her lifetime. Donald McKinney, then head of Marlborough Gallery, along with Gene Thaw and Francis O'Connor comprised that committee. Subsequently, the Pollock-Krasner Authentication Board was established in 1990 and was active until 1995, when the supplement to the Pollock catalogue raisonné was published.

VINCENT: Was there authentication for Lee Krasner's work?

BERGMAN: I don't recall activity regarding Krasner artworks being conducted by this group, though the capability was there. More recently, however, Lee Krasner has come into her own place in the sun and Krasners are now selling for over a million dollars.

The credit for that, by the way, goes to the skillful way that Betsy Miller and the Robert Miller Gallery have handled our Krasner inventory.

VINCENT: The Pollock-Krasner Authentication Board worked diligently for a number of years and then...?

BERGMAN: We closed it down in 1995 because we had completed the supplement to the Pollock catalogue raisonné. This includes the four original volumes done in 1978 by Francis O'Connor and Gene Thaw, published by Yale University Press, and the fifth volume, the so-called supplement, done by Francis O'Connor in 1995, published by the Foundation. We felt that we had done our due diligence for the legacy of Jackson Pollock, and we did not need to continue to be in the authentication business.

VINCENT: Going back to the Foundation's art assets, both works by Krasner and by Pollock, this also included the copyrights to both artists' oeuvres?

BERGMAN: Yes, which are handled for us by Artist Rights Society.

VINCENT: Clearly Lee Krasner intended that the art, both hers and Pollock's, be sold to fund the Foundation. Did this inform the Foundation's design?

BERGMAN: Absolutely. Under the will, the Articles of Incorporation, and all the instruments that created the Foundation, the governance is as follows: The chairman, who was Gerry Dickler and is now myself, is in charge of matters relating to the Foundation's program, staffing, lawyers, accountants, investments—in sum, everything required to do its grantmaking. The responsibility for disposition of the remaining art of Jackson Pollock and Lee Krasner owned by the Foundation (such matters, for example, as who should be the dealers, what arrangements should be made, what commission paid, what type of conservation might be required, etc.) is under the authority of the Foundation's president, who was Gene Thaw until he retired and now is Sam Sachs, a distinguished former museum director (including the Frick Collection and the Detroit Institute of Arts), with a lifetime devotion to art and artists. The president and the chairman in a collaborative way make the decisions about grants. I might add, and this is a real tribute to Gene, Gerry, and to Sam, we have worked very congenially together.

VINCENT: Any judgment call with respect to the disposition of the artworks is in the court of the Foundation president?

BERGMAN: Yes. And this raises another interesting point. From the very start, the Robert Miller Gallery, and prior to them other galleries, such as Marlborough Gallery, handled Lee's work. But in the case of Jackson, Gene Thaw, as president, had a commitment, which he made to Lee, that if at all possible, when Jackson's work was sold, it should be



sold to museums or to individuals who would see that the work was shown and exhibited so that the public could be enriched by exposure to Pollock's work, and he would see to that. To this day, when Joan Washburn of the Washburn Gallery, which handles our Pollocks, sells a Pollock, Sam Sachs as Foundation president signs off on that sale.

VINCENT: Did Lee Krasner stipulate that for her own work as well?

BERGMAN: I don't honestly know. But given Gene's connoisseurship and scholarly respect for one of the great artists of the twentieth century, this is the kind of strategic way Gene was offering to shepherd Jackson's works. Not just the money part, but more important, where this painting will or will not be exhibited.

VINCENT: Now, the art assets that remain today in the Foundation are predominantly Krasner's works?

BERGMAN: Yes, they are. Let me summarize where we stand today. We have early works, paintings, and prints of Jackson's, and we continue to have some valuable paintings and prints of Lee's.

VINCENT: And all of these are available for sale to support the Foundation's work?

BERGMAN: Absolutely—and, until sold, can be available for loan to museum exhibitions.

VINCENT: In terms of the Foundation's design, at the point of its creation, there was a significant market already for Pollock with a strong presence in public collections. So at least with respect to him, there wasn't a need to create a foundation with an operational capacity to promote the under-recognized legacy of an artist.

BERGMAN: No. When Lee came back from Europe following Jackson's death, she turned to her lawyer, Gerry Dickler, for advice about her affairs. She trusted Gene Thaw and Gerry Dickler to an extraordinary degree and continued to do so throughout her life. The Foundation reflects their counsel as to how it should be structured to accomplish its particular charitable purpose and, at the same time, fulfill the commitment to Lee to look after the art as she wished.

VINCENT: Was there any consideration of family members participating in the Foundation?

BERGMAN: Yes, there was.

VINCENT: And a family governance model didn't seem appropriate, based on the expertise that was required for the Foundation to fulfill its charitable mandate?

BERGMAN: That is correct.

VINCENT: Also in terms of governance, the Foundation has two trustees, a president and a chairman, and together these two comprise the Board of Trustees. Was there discussion about a larger Board?

BERGMAN: No. As I said, Lee trusted these two people. The combination of Gerry and Gene was a brilliant arrangement. Think of this, the world's leading authority on her husband's work, a major philanthropist in his own right, and a lawyer of international acclaim, also a talented businessman.

VINCENT: In addition to program expertise, there is a cluster of proficiencies necessary for any artist-endowed foundation (legal expertise and the expertise in the art world, both scholarly and in the art market), but also basic business expertise is crucial. This was available to Lee Krasner packaged in two people, as opposed to four or five.

BERGMAN: What Wally Nielson wrote about the Foundation in his book, *Inside American Philanthropy: The Dramas of Donorship*, was a tribute to our arrangement. Gerry and Gene had immense respect for each other. They recognized each other's expertise, integrity, and the capacity to render service and honor obligations to Lee.

VINCENT: There are many things I would suggest people draw from the Foundation's experience, but I would not necessarily recommend the same governance structure. This format worked because of the caliber of the particular individuals, not because of who they were categorically—a lawyer and an art dealer, in this case serving as an art advisor.

BERGMAN: I would concur. I would not necessarily recommend this arrangement as a model unless I knew intimately over a long period of time the way the individuals involved would interact.

VINCENT: The real measure of this plan is what the Foundation has accomplished to date with the assets entrusted to it by Lee Krasner. Where do things stand?

BERGMAN: As of the end of 2008, we have given away close to \$50 million to individual visual artists in 70 countries in the form of over three thousand grants. We are very proud of this record and that brings me to the investments. We began 25 years ago with approximately \$10 million in an investment portfolio and \$10 million in an art inventory. Today, even with a dramatic decline in the stock market, we have approximately \$45 million in total assets, all of this after having made the \$50 million in grants.

VINCENT: A terrific accomplishment—hats off. And you are being circumspect. Lee Krasner bequeathed to the Foundation all copyrights to her oeuvre and that of Jackson Pollock. These rights are a fiduciary responsibility, underlying the value of the Foundation's assets committed to support its charitable program.

BERGMAN: Yes, we take very seriously our stewardship of the copyrights.

VINCENT: That is a likely perspective for many artist-endowed foundations. Given the Foundation was a start-up, you were responsible for putting it together operationally, as well as defining the charitable program. Where did you start?

BERGMAN: The will had four touchstone words in it—"worthy and needy artists." The word *and* is the most important word in those four words. Because it is really a delicate balance of artistic merit coupled with documentable, legitimate personal or professional financial need that characterizes what we are seeking in our applicants.

VINCENT: How did you figure out what to do with that mandate?

BERGMAN: First of all, I had a very real sense of the struggle and dilemma of individual artists who have never been given recognition in terms of philanthropic undergirding of their careers. And if artists were given an opportunity, it was always project related, not for the day-to-day needs of being an artist. Daily needs means time to paint, money to buy a truck to move your sculpture, money to get a babysitter so you, perhaps a single-parent, can have more time in your studio, money for art supplies, casting materials, money to take advantage of a residency program, etc. These are very real needs of artists.

VINCENT: Were there precedents that inspired you?

BERGMAN: The one foundation that existed at the time of our creation of any consequence helping individual artists in the manner that we believed was relevant was the Adolph and Esther Gottlieb Foundation, under the outstanding leadership of its executive director, Sanford Hirsch. The Gottlieb Foundation was doing exactly what we decided we would do in terms of giving grants to individuals in the manner that they did. Our special opportunity was to do so with greater resources.

VINCENT: So you conferred with Sandy Hirsch, and you looked around and saw there remained an unmet need, even beyond their good effort.

BERGMAN: Yes, for basic assistance as well as for emergency grants, which I'll explain.

VINCENT: When you conceptualized this charitable program initially, you then submitted the Foundation's plan to the Internal Revenue Service for approval to make grants to individuals as you proposed?

BERGMAN: Yes, we had to get a special ruling in that regard. We have now modified our bylaws so that we can give a grant to an organization or an institution that is directly helping individual artists. Although this is a small, discretionary program, we have to date made grants of over \$1.3 million.

VINCENT: And was *worldwide* in the scope from the Foundation's inception?

BERGMAN: Yes. And we are in business for perpetuity.

VINCENT: Had you had experience making grants to individuals before setting up the Foundation?

BERGMAN: As vice president of the Inter-American Foundation for the Arts, my post prior to the Institutes, I had made honoraria grants to people such as Lillian Hellman and Edward Albee through a program sending outstanding arts and cultural leaders from North America to Latin America and back. My most relevant experience there was in running an international arts organization. I also consulted with foundations helping them develop their grant operations. At the time the Pollock-Krasner Foundation began, most arts foundations did not give grants to individuals, and this continues to be the case today.

VINCENT: And did you set up in a full-blown facility right from the start?

BERGMAN: We began in a broom closet office in Gerry Dickler's law firm. When we were operative after the tax ruling, we moved to the Asia Society and were tenants there for about 12 years. Ultimately, the Asia Society itself needed the space. We searched all over and finally purchased office space at 863 Park Avenue in 1997. It is set up perfectly for our activities.

VINCENT: Where did you determine the Foundation's grants should focus?

BERGMAN: The Foundation funds artists working in the media of painting, sculpture, and works on paper, including printmaking. We initially included fine art photography as a funding category; however, we made a decision in 2001 to suspend this program. We do not fund craft, video, film, or photography, although we do support photography as it is incorporated within painting, print making, and sculpture.

VINCENT: And within these media, you respond to artists' needs on their terms?

BERGMAN: Yes. We have emergency grants, we have priority grants, and we have regular grants. And we make the determination what is an emergency and what is a priority. I'll give you a good example. An emergency is your studio burns down or you're diagnosed with cancer and need treatment immediately. A priority is that you are about to lose the studio or have some kind of real dilemma as to how you can produce work for a show that has been scheduled, and you need funds to buy materials or you won't be able to discharge your obligation to your gallery. A regular grant is for the normal "slings and arrows of outrageous fortune" that beset the life of an artist.

VINCENT: Is there a requirement that artists be full-time professionals?

BERGMAN: Yes. Here is how we define this requirement. We do not support students, nor do we typically accept an artist immediately out of academia. On the other hand, if an artist decides in their 40s to seek a master's or a doctoral degree of some kind, we don't penalize them. Artists must have an exhibition record as validation of their work as a professional artist. And, of course, we have certain specifications. We will not support the purchase of real estate. We will, however, subsidize the restoration or renovation of a studio. We do not want artists to use our money to pay past bills. However, our rules are flexible, which is the spirit that I wanted the Foundation to have since its inception.

VINCENT: So the commitment to assist artists adjusts to the need.

BERGMAN: For example, we've made emergency grants in 48 hours, from getting the application in to sending a check. In the case of September 11th and Katrina, we were giving away money within days of the disaster. We waived our guidelines for both crises. We usually require tax returns for the current year and the previous years, so we can make a comparison of income and expenses in all categories. These were tragedies in which people lost their homes, lost their papers—they lost everything. We trusted the artists to give us truthful documentation in their application. And we are absolutely convinced on the basis of how these things were handled that these applicants behaved honorably.

VINCENT: What does it mean to respond to hundreds of individual applicants a year?

BERGMAN: We were determined from our inception to be a very personal philanthropy, respecting the sensitivity of artists we turned down as much as the artists to whom we have awarded grants. We know what stress artists experience in applying for support and the anxiety about possible rejection. For example, we have a reputation for answering mail and phone calls with courtesy and promptness.

VINCENT: That raises the point of capacity. When it started out, how many staff did the Foundation employ?

BERGMAN: There were two, Gerry Dickler's secretary's niece was one and Lee's studio assistant was another. That was the original configuration. And then we added program people over time, so now we are eight, counting me. That includes our staff—Caroline Black, Beth Cochems, Nell Graefe, Glynnis Dolbee, and Sara McCarty, and the officers—Charlie Bergman, Sam Sachs, and Kerrie Buitrago. Gene Thaw remains our president emeritus.

VINCENT: So, if I may check—and I'm averaging the Foundation's five-year statistics here—this is the program staff that processes 1,000 applications from individual artists in several grant cycles each year, awards 150 grants, and delivers \$2.5 million in financial assistance to artists worldwide annually?

BERGMAN: Yes it is. I am proud of this talented staff under the extraordinary leadership of our executive vice president, Kerrie Buitrago, and deeply appreciative of their dedication to the Foundation's mission. We have never in 23 years been accused of being unfair or not giving artists an opportunity. We use a very clear specified process, codified in a well-written brochure, and our application materials are posted on our website.

VINCENT: Ethics are crucial to being viewed by grantees as fair-handed.

BERGMAN: Yes. None of us on the staff or the Board can take a gift of a work of art from an artist grantee. Many artists in their gratitude ask us to take a painting, to take a drawing, to take a print in appreciation for the grant. We don't refuse cookies, brownies, or flowers offered in gratitude. But you cannot give us a work of art because it can be thought of as a payment for a grant received. Our rule is that we cannot even buy the works of our grantees because it might be misconstrued that we had gotten a special price.

VINCENT: What procedures are used to sort through the dual criteria, "worthy and needy?"

BERGMAN: The first cut is the four-member committee of selection, which is composed of noted experts in contemporary art. They may be artists, critics, museums directors, etc. The committee members look at the images and a brief précis of your career, maybe a paragraph that deals with your individual and group exhibition record, any prizes and awards that you've won. If and when you survive the scrutiny of the committee, then you go on to be investigated by our program staff to determine your financial need and verify your exhibition record.

VINCENT: Do the committee members conduct this selection review as a group?

BERGMAN: We do something that has been refined in a very creative way. Each member of the committee has a preview session with a member of our program staff where they go over all the images of those artists that will be presented later in the full committee meeting. In this preview, committee members designate whether they select or don't select the artist. Each of the four committee members' preview selections are assembled in a book and presented to the full committee when it convenes in a session. If an artist is not selected in preview by any one of the four committee members, that artist does not go before the full committee, so we do an elimination that way.

VINCENT: Applicants are first vetted on the basis of quality by the selection committee, and then their materials are taken up by the staff, which makes a dollar recommendation based on need?

BERGMAN: The program staff works with the artist on his or her budget, prepares a summary report, which I review with Kerrie Buitrago and the program staff, and then those recommendations are made to me and Sam Sachs, our president, when we meet as a Board.

VINCENT: What is the pace of the Foundation's grantmaking?

BERGMAN: We have no deadlines. As I said when the Foundation began, life has no deadlines, and we cannot either.

VINCENT: Does that mean that you make grants immediately, or you batch the grants so you can make them at points over the year?

BERGMAN: We review them as a group, with the committee meeting four or five times a year, unless it's an emergency, in which case we drop everything and process it immediately. In such a situation, we get the images as quickly as possible to a member of the committee wherever they are in the world. We will pass the emergency application through one committee member to permit us to quickly investigate the applicant to see that this request is legitimate.

VINCENT: Your committee members make a commitment to be available as needed?

BERGMAN: Absolutely. By the way, if we turn you down under regular circumstances, we say you must wait a year from the time you were turned down before you can reapply unless your situation takes a dramatic turn for the worse, in which case you can reapply to us the very next day. For example, you may have applied to us for a grant just to have some money to buy artist supplies and we turn you down, then a week later you have a fire and your studio burns down, you can reapply to us immediately for consideration.

VINCENT: How do you deal with countries outside the U.S. in terms of artists' tax records?

BERGMAN: If you come from a country that has income taxes, we ask you for your tax return for the current year and the previous year as we do for U.S. artists. If you come from a country that does not have tax returns for whatever reason, we ask you to get us a bank statement or documentation from the gallery that represents you. And we have done this all over the world, including in Russia, the former Soviet Republics and Eastern Europe, and in Africa and parts of the Middle East.

VINCENT: So you haven't shied away from areas of the globe where instability or political circumstances may raise difficulties?

BERGMAN: No. We were one of the first foundations to give support to artists in Russia and Eastern Europe early on. One of the challenges at times has been to get the money to artists. I'm proud to say that when we want to give you money, we will go to any effort to get it to you. The Soros Foundation was very helpful to us years ago in our efforts in Eastern Europe. We used their offices to receive money, and they in turn got it to the artists.

VINCENT: You've increased international activity and, at some point, you also added a special award for the older artists—the Lee Krasner Awards.

BERGMAN: Yes, this is an initiative to help older artists and to recognize lifetime achievement. The Lee Krasner Awards were conceived of as a special token of respect based on the same dual criteria as our normal grants (merit and need), but by nomination only. The nominations come from a network of prominent artists, art historians, museum directors, curators, and patrons. At the moment, the Lee Krasner Award is \$90,000 payable over three years. We feel strongly this is something Lee Krasner would have valued.

VINCENT: The Foundation's grants have become a badge of achievement.

BERGMAN: From the beginning, we had distinguished people serving on our committee of selection. This included people such as Bill Lieberman, Kirk Varnedoe, Andre Emmerich, and George Segal, some of the really key figures in the art world of our times.

VINCENT: The grant is valued for the money, which is greatly needed, but also because it comes with the affirmation of your distinguished committee of selection.

BERGMAN: And our committee members, though serving anonymously to protect their privacy, help spread the word about the Foundation, so we had many applications right from the start.



VINCENT: Have you observed particular trends?

BERGMAN: AIDS was a major health reason artists applied to us in the early years. Nowadays, however, we get very few applicants citing HIV/AIDS as a factor in their financial need.

VINCENT: Are there other predominant factors in artists' needs you observe now, comparable to HIV/AIDS?

BERGMAN: There have been the tragedies of September 11th and Katrina, and health care remains a profound concern for artists, as for our society as a whole. Overall, the struggle of talented artists to stabilize their careers and have time and resources to do their work continues to be a never-ending challenge.

VINCENT: Is there a balance struck for grantees between the fact that the grant responds to need, and there may be a desire for privacy, but it is affirming professionally to receive this prestigious grant?

BERGMAN: We ask artists when we give the grants whether they will permit us to put their names in an annual report or in a press release or catalogue or on our website. In the years we've been in business, there have not been a dozen artists who would not want us to mention their names as grantees. We have recently modified our website to include a collection of four images from every grantee since our inception, two from their grant period and two from their recent work. This image collection, which also includes biographical materials, gives our grantees invaluable exposure.

VINCENT: Artists post word about receipt of the grant on their websites. Everybody understands individual artists need money, and the grant is seen now as a mark of achievement.

BERGMAN: We are absolutely convinced, based on anecdotal evidence, that as important as the millions of dollars we've given to artists has been, the validation and boost to their self-esteem is a bulwark against isolation or frustration that is as valuable as the money itself. I have the privilege of calling the artists wherever they are in the world (even if they don't have a telephone, I find a way to reach them), so that I can personally give them the message that they have just received a grant from the Foundation. I have made thousands of these calls over the years. In most cases, the men or women who receive the call are deeply moved. I hear people say things like, "you've changed my life," and "you have no idea what this means" and "this couldn't come at a more critical time." These calls are my greatest reward.

VINCENT: The personal side of grantmaking.

BERGMAN: Obviously, we have an official letter that goes out as well, and we have a legal agreement that you must sign before you get your money. The grant agreement includes the question of how we may use their names, etc. It also outlines the final report required of our grantees when the grant is completed, including a narrative report on activities and financial accounting for all funds.

VINCENT: To recap, the Foundation has operated for 25 years. You've taken the idea of responsive grants to worthy and needy visual artists and brought it to a greater scale globally. The Foundation is closing in on a record \$50 million in grants made to artists in more than 70 countries. You've added the Lee Krasner Award recognizing lifetime achievement for older artists, as well as grants to organizations directly assisting artists. And a new website features works of the Foundation's grantees—a visibility boost to go with the financial grants. Are there other ways you've developed what you are doing over these decades?

BERGMAN: Well, the one thing that I will say is that I have spent hundreds of hours over the years providing information to wealthy artists and helping other types of donors frame programs focused on individual artists. In this regard, I have been privileged to serve as a senior advisor to the Aspen Institute's National Study of Artist-Endowed Foundations, which will be an important resource to artists and their families contemplating setting up foundations.

VINCENT: There is a continuing need, clearly, for what the Foundation is doing along with its peers. When you survey the field, is there something in particular you think potential donors might attend to?

BERGMAN: Yes. Giving support to individual artists is of great importance. But I note with sadness that the concept of aiding an individual artist, not for a particular brilliant commission or wonderful project, but as an individual creator on his or her own terms, is still not a solid concept. There remain very few foundations working in this way. Beyond those I've mentioned, the Joan Mitchell Foundation has several programs for individual artists. The Creative Capital Foundation, established by the Andy Warhol Foundation for the Visual Arts, supports artists by focusing on their career development. The studio programs of the Elizabeth Foundation and the Marie Walsh Sharpe Art Foundation serve an important need. The Ford Foundation and its donor consortium have established the United States Artists award program. But all in all, more potential philanthropists should recognize that it is the individual artist who creates the work that graces our museums and enriches our country's diverse culture.

VINCENT: So let's make a scan. Apart from support to projects, as you've noted, there are a range of strategies donors use to help individual artists. Here's a running list from the Study's research. Some donors believe the best way to help artists is to buy their art—

that is our society's system, after all. The Richard A. Florsheim Art Fund made grants to museums to buy and exhibit artists' work, though regrettably it has closed, which is a real loss. Other donors increase the artist's visibility through an award for excellence or a fellowship, which is the United States Artists' angle. Some donors provide emergency aid to artists in a bind, which is one of the Gottlieb Foundation's strong interests. Still others provide artists with time to focus on creating art, which is the Pollock-Krasner Foundation's brief and the value of the Louis Comfort Tiffany Foundation biennial grants, for example. A related strategy is to enable established artists to take creative risks, as does the Nancy Graves Foundation. Along the same lines, there are donors that provide residencies for creative work, such as Jerome Hill's Comargo Foundation in France or the foundation established together in Maine by John Heliker and Robert La Hotan, among others.

BERGMAN: And for that reason, our new grants to organizations specifically include residency programs, such as the MacDowell Colony, Fine Arts Work Center in Provincetown, the Woodstock Byrdcliffe Guild Artists in Residence Program, and American Academy in Rome.

VINCENT: Yes, and as you have noted, there is the Creative Capital Foundation's strategy, with support from the Warhol Foundation and others, to help artists be stronger in the creative business of their art. Other donors assist young artists making the transition from graduate art education to professional practice, one of the things the Joan Mitchell Foundation does. And helping older artists document and organize their oeuvre is a new area of interest. Some donors are working on systemic issues—artists' live/work space, health insurance, all the fundamental things, not to mention tuition support for university art education. That's of concern to a number of artist-endowed foundations, such as the Albert K. Murray Fine Arts Educational Fund.

BERGMAN: An excellent list, which should include programs of the locally-focused institutional donors, such as the Pew Fellowships in the Arts in greater Philadelphia and Bush Artist Fellowships in the greater Minnesota region.

VINCENT: Yes. Is there something missing from this list, or is it more a matter that there needs to be greater activity around all of these strategies?

BERGMAN: I think it's simply that there needs to be more emphasis placed on the fundamental necessity to support individual artists in all aspects of their lives and careers.

VINCENT: It seems important, then, to say to artists and their family members considering foundations, "find the charitable purpose that compels you." Artists have different views based on their own life experiences. Not all of them want to help other artists, but

many do, that is clear. Of these, some may not be comfortable giving grants to less-successful contemporaries, but they collect art and would be inclined to support purchase of artists' works as gifts to museums. Some understand the need for growth, providing a creative space for established artists to step outside the familiar. Others respond to helping younger artists just starting out, possibly the way they themselves were helped. Every artist has a different perspective—all of these are welcome. But turning to the broader view, how might the current generation of artist-endowed foundations have a greater impact in their support for artists?

BERGMAN: One way is by example, by sharing, as we will be doing under the auspices of the Aspen Institute's Study, the kind of data, insight, and expertise that we are mobilizing in this national research project. And by example, showing wealthy artists and art patrons what joy and satisfaction can be experienced by this kind of philanthropic initiative.

VINCENT: To share their examples, artist-endowed foundations will need to chart a strategy that can raise the profile of this sector and shine a light on its admirable programs.

BERGMAN: This may be an idea stimulated by the Aspen Institute's Study.

VINCENT: Another way may be through sharing capacity. There is a great deal of discussion now about the community foundation model for artist-endowed foundations, in particular the idea of enabling new artist-donors to tap established foundations that know how to do this work. As a closing thought, how do you view this idea?

BERGMAN: From the perspective of the Pollock-Krasner Foundation, we have learned a lot over the past 25 years about creative philanthropy to individual artists. We know what is needed and what works well, and we are prepared to share this knowledge and experience with others who may be contemplating a grant program similar to our own. We welcome their inquiries and, when appropriate, want to be of assistance. We consider such an expansion of our service to the individual artist community an important development in our Foundation's mission and outreach and an essential part of our leadership responsibility.

VINCENT: And that would be a terrific way forward in the next 25 years. Thanks to you, Charlie, and to your colleagues for this commendable body of work and for the opportunity to summarize the experience of the Pollock-Krasner Foundation as it has helped define an important dimension of cultural philanthropy and contemporary art stewardship.



## 9.5.3 Toward a Public Library of American Culture: Reflections on the Centrality of Art and Importance of Access in Artist-Endowed Foundations

A CONVERSATION WITH  
ROBERT STORR

For the Aspen Institute's National Study of Artist-Endowed Foundations (Study), Robert Storr, dean of Yale University School of Art, discussed with Christine J. Vincent, Study director, artist-endowed foundations, their importance, and the stake held by the public and by artists in these entities.

VINCENT: You wear many hats—artist, writer, art historian, curator, critic, art consultant, and art educator. In addition to your current post as dean of the Yale University School of Art, you are president of the Greenwich Collection, Ltd., which is Robert Ryman's foundation, and have served for a number of years on the boards of the Andy Warhol Foundation for the Visual Arts and the Louis Comfort Tiffany Foundation. You are also a current or former member of the boards of a number of other artists-focused foundations, including Yaddo, the McDowell Colony, and the Marie Walsh Sharpe Art Foundation. Given these multiple perspectives, what are your thoughts about artist-endowed foundations, their existing and potential aspects, both in their grantmaking focus and their roles as cultural resources?

STORR: The importance of artist-endowed foundations as cultural entities worthy of tax exemption and support for their educational, cultural, and charitable activities frequently has been discussed in legal and administrative terms but less often in terms of art itself and what, in terms of art, constitutes the public good, what benefits artists, and what nurtures the arts at large in our culture. At issue for both the public and artists in artist-endowed foundations is a range of endeavors that may include charitable grantmaking programs; establishing and administering study centers, archives, exhibition programs, collections, and other resources for the purposes of educational and scholarly activity, as well as for the enlightenment and enjoyment of artists and non-artists alike; and creating broad-based accessibility for the arts. Having participated in the process of setting up and sitting on the boards of artist-endowed foundations, I have had exchanges with artists prior to and after the establishment of foundations, which would incline me

to suggest, first of all, that before asking what the artist's stake in the foundation is, one might want to ask what is the artist's motivation, which is not quite the same thing.

A stake in something develops once an entity exists. It has to do with observing it and measuring its effects, and having to deal with the repercussions of institutionalizing what is essentially the private life of a creative person up until that point—all of these being very vexed sets of possibilities. Why artists are inclined to set up foundations varies a great deal, and that is perhaps the most useful place to start.

VINCENT: What factors do you see motivating artists to create foundations?

STORR: The tax burdens that artists may face or anticipate their heirs will have to address, or that their heirs do face or themselves look forward to facing—whether children, spouses, partners, lovers, associates, or sometimes combinations of these—potentially are enormous if the artist's career is substantial. That is probably the simplest lever, if you will, that gets people to think about this because, like anything having to do with being dead, people do not like to think about it if they do not have to.

But there are certainly numerous artists who have basic philanthropic intentions that precede the kinds of foundations that will come at their deaths, and others that do not. Warhol being an exception, of course, because his foundation was based on a very small statement of intent out of which something much larger grew that is more or less organically connected to it; in any case, it was not a situation where the artist left a clear set of instructions.

A notable example of explicit philanthropic intentions is Robert Rauschenberg who, together with James Rosenquist and others, founded Change Inc., around 1970. It is one of the foundations—in fact, technically it is not a private foundation, but it functions in the charitable spirit of a foundation—that has been the most discussed among artists and the most appreciated by artists. It is also the foundation that historically has traveled the lightest—by which I mean that it has very little superstructure—and that is part of the reason it is so popular on all sides. It is about immediate need and immediate response. The amounts of money given are small, in hundreds of dollars, as used to be the case at least. But an artist would get these grants practically overnight if he or she sent a note either to Rauschenberg or his accountant saying: This is who I am, and this is the predicament I find myself in. It could be medical, it could be the loss of an apartment or a lease or whatever, it could be a whole host of things.

VINCENT: Why was Rauschenberg's example important?

STORR: Because long before his death in 2008 he acted on an idea that was floating around at the end of the 1960s at the point where, for the first time really, American artists, living American artists, younger American artists, in any case, had money to play with.

It seems to me significant that even now, as you look at the list of artists who have privately endowed foundations, virtually none of the art stars of the 1970s and 1980s appear. They may show up later, but most of the existing foundations have to do with the generations of artists active in the 1950s or 1960s. The present study has confirmed that statistically, the average year of foundation formation by living artists, if they form them when they are alive as opposed to posthumously, is seventy years old. But Change Inc., was formed in 1970 when Rauschenberg was about forty-five years old, which by any standard is remarkable.

And it was done with far less money than you see today. But the early efforts were founded in a different environment altogether, where the community of artists really was a community, and where people, even if they loathed each other cordially over drinks, nonetheless understood that they belonged to an embattled part of the society, both in terms of understanding their work and in terms of economic situation. Those who had prospered, relatively speaking, saw it, in some ways, as a part of their prosperity to give back.

This is not currently the case, although—and I would qualify it by noting this, which is important—in terms of giving to specific charities, some artists have been very generous (for example, on the auction side, in response to the AIDS crisis, in response to Hurricane Katrina, and so on). You have had people give things (such as their art) of real value to those projects. But you have not seen anyone set up something that exists independently for the public good or for the good of some part of their surrounding younger generations.

This is not to denigrate anyone at all; it is just meant to cite Rauschenberg as an example of somebody who, early on, understood that giving back was important. And, after all, Rauschenberg was the one who first challenged someone cashing in on his work for private gain—Robert C. Scull's auction of his work, which Scull and his wife Ethel had bought for very little. So at the very point that Rauschenberg became aware that he was becoming rich or that his work was becoming valuable, whether or not he still possessed it, he began to move in the direction of trying to tend to the needs of other people. And I should say that in addition to Change Inc., Rauschenberg also created a private foundation in 1992, one intended to play a role after his death in terms of his work, but it also is a grantmaking foundation.

VINCENT: Aren't there other examples from these years?



STORR: There is the Foundation for Contemporary Arts, originally the Foundation for Contemporary Performance Arts, which Rauschenberg and Jasper Johns started, but that was a different kind of entity, although an interesting one. It was different in the sense that it was very much keyed initially to the relationship between Johns and Merce Cunningham and John Cage, but particularly Cunningham. It too gave small grants, and in truth—and this is no criticism of Johns—a lot of the money came from other people, because they would organize auctions of work donated by artists that would raise the money. How much Johns actually put in himself I do not know, nor would he want me to know, although he has continued to serve as its president for all these years. And here also I should mention that around 2004, Johns himself set up a private foundation.

So, if you take Rauschenberg as an early beacon for a certain kind of activism within the community, a lot of the other things that we are seeing now are much more about how to handle an estate than they are about how to handle wealth accumulated early that has grown to some considerable proportion beyond the needs of the artist in question. And I think it is important to consider that, because foundations created during an artist's lifetime do not necessarily tie into estate taxes or to what the families will do or what others close to the artist will do in terms of inheritance and such after an artist's death.

During an artist's lifetime, it really is about the amount of money the artist has and the amount of money that must be dealt with from an income tax point of view that is the trigger—plus, of course, the degree of engagement with some particular cause. Rauschenberg, very early on, indicated that he was going to give back to his own community, and also accrued an enormous amount of respect and love as a result of having done that, not least because he did not decide what kind of an artist would get this support; those who probably did not like his work or whose work he did not like would get it nonetheless.

VINCENT: Posthumous foundations with the same sort of spirit also were created by artists from this period.

STORR: Yes, the Pollock-Krasner Foundation has had some of the same kinds of effects, on a greater scale of course. Although Lee Krasner was not a sweetheart to many people, not the kind of person that you would think of as particularly affectionate or supportive, in fact, the foundation she created has given an enormous amount to all kinds of artists that she probably would not have associated with under any other circumstances. There is also the Adolph and Esther Gottlieb Foundation, another artist-endowed foundation that assists artists, established, much in the same spirit, by people who were very generous during their lifetimes—and were sweethearts. And, actually, in the same vein, although more recent, is the Joan Mitchell Foundation, which also makes grants to artists.

VINCENT: Taxes are always a factor, but a charitable motivation can be key in many cases.

STORR: There are just some artists who think philanthropically or, at least, think in terms of giving back—a better term, because their foundations, as their primary goal, provide either residencies or stipends or relief aid to artists. Of course, there are foundations that give to other specific causes, and because of the AIDS crisis and other things, we have seen that grow. But a primary motivation for some artists is to spare other artists the difficulties that they may have faced or that they have seen their friends face.

Now, there are other artists who, oddly enough, do not feel any inclination to help other artists. They came up the hard way, and they want to make a point about that. They are often at a loss as to how to give because the natural thing would be to give to other artists, but they do not really want, in some ways, to soften the hard world that they came through. They are, therefore, sometimes inclined to give to artists who have had hard late careers, but they are not inclined to give to younger artists.

So, there is an alternative ethos, counter to that espoused by Rauschenberg and others, which also comes out of the 1950s in most cases and creates odd tensions when you are talking to a person who wants to do the right thing but is disinclined to do that thing. Then what do you do? What are the alternatives? Do you give money to artists' spaces, or to journals, or to museums? What do you give money to if you do not want to give money to young artists whom you think should come up by their own boot straps?

VINCENT: But there are other considerations in addition to a charitable impulse.

STORR: Yes, there are people who think that way, and there are others who basically are motivated to set up foundations devoted to the care, preservation, or simply stewardship of their own work. Frankly, I think that is the dominant motive for most artists, period. I think it is actually a fair motive. In the philanthropic community, however, the fact that good is being done with money inclines the people who are administering foundations to think that artists somehow should be motivated by charitable concerns beyond providing for the care of their own work.

But I think many artists feel, and I feel, that artists should do, first of all, what they wish. And, second of all, that the artist's responsibility, socially speaking, if you want to call it that, is to make good art. Everything else is gravy. It is really important to understand that at the point where the philanthropic community begins to see artists as a new income stream for their projects and see artists having a moral obligation to support good deeds above and beyond what maybe would be expected of other people, it is making a fundamental mistake about who artists are.

That perspective is very likely to alienate artists because that is not the language most artists speak. In writing about these foundations and in looking at how the foundation world has changed, and particularly trying to chart how one might combine foundations to cut costs and pool resources, and so on, it is critical to stay away from the discourse of philanthropy administration per se, which is really outside of the primary concern of artists in most cases.

The discourse, if it is to involve artists, should not be about maximizing assets, efficiency in doing good, and the assumption that artists exist to do good. Art is not, in and of itself, good for people. And an artist's responsibility is not, in and of itself, to do good for people. Art is art. And I strongly believe that if you begin to put a moral obligation on artists, above and beyond what one would expect of other people, you go back to this idea that artists are inherently exemplary figures within a moral universe, and they are not.

It also, in a sense, creates the impression that while art is good, artists need to do something more. A lot of artists have been through situations where either their families or the world around them expected them to justify their engagement with a non-practical activity by doing something that was practical that would somehow redeem it. And this has had many, many forms. It is artists who are essentially expected to do political work in the service of good causes, artists who are expected to do a whole host of things that sort of even up the scales and make them citizens in the world like other citizens.

This brings to mind a famous line popularized by the left-leaning Christian poet W. H. Auden: "We are all here on earth to help others; what on earth the others are here for, I don't know." What he was trying to say is that there is this argument that comes at people who are engaged in activities that are not self-evidently beneficial in some concrete, material, practical way, and if you are supposed to justify that activity by doing something extra, you are implicitly degrading that activity, even though you may not intend to do it.

This is a precarious zone in terms of the context of artist-endowed foundations, as well as art in general. One has to tread very, very lightly, lest some of the people with the resources and the general inclination to use them in this direction back away and say, now wait a second, I gave at the office, so to speak, or I gave at the studio.

VINCENT: So, beyond whatever charitable concerns might motivate artists, maintenance of art collections or archives will be the primary motivation for artists' foundations?

STORR: Yes, and I think it should be, in some ways, the fundamental motivation for artists' foundations. I do not look askance on foundations that essentially spend their entire resources on that, on the condition that it is well done, and that it is not done as simply a hoarding activity or the creation of a cult, but that it is actually motivated to do a proper archive, to sort papers intelligently. Preserving artwork and documentation intelligently and properly is enormously expensive, as everybody knows, although relatively few people know just how expensive.

So, yes—the maintenance of collections and archives is a legitimate fundamental motivation for artists to create foundations. The choices in doing this include keeping a core group of paintings or works in whatever medium they may be that actually represents the trajectory of the artist's career so that even absent a museum that collects these things or shows them, there will always be a place to learn about it. And the focus of study is not so much, as it is in some cases, the studio, the effects of the artist, or documentation, but the actual works. That is not the same thing as creating a personal museum—a much larger proposition. But it is about retaining samples of the basic DNA of the artistic career.

That can be a very important role for artist-endowed foundations. Few if any museums are in a position to embed prime works by an artist in the texture of preparatory studies and all the related materials that went into their production or that document their presentation and reception.

VINCENT: This may not be an easy role for a foundation, even if it is intended.

STORR: That is true. In the case of the Willem de Kooning Foundation, for example, the challenge was that the artist saved relatively little of his early work and that a lot of his best work in his later years was sold off. As a result, there was a complex set of choices to make between holding back important work for the sake of creating a core collection that could be placed in the Foundation and selling things in order to benefit both the Foundation and the artist's heirs. And, in the end, I think too many things have been sold that probably should have been kept for the Foundation's collection. What remains is still very interesting, but it is not what one would have hoped to have in a foundation created as a study collection for such a significant artist, which would be pivotal works throughout at least the final stages of de Kooning's life.

Of course in some cases it is possible for a foundation to reacquire, in later years, pieces by an artist precisely so that a collection meets its highest potential. But while that is an interesting option, it is prohibitively expensive for many of the artists in question.

VINCENT: How do you see these decisions being made for artist-endowed foundations?

STORR: This is a very big concern. When an artist dies, generally speaking, there is a small core of loyal friends, an accountant, a lawyer, a surviving partner or partners, maybe some children. Rarely, if ever, in that combination is there a person who is a curator or an art historian. And if there is, even more rarely is that person disinterested. And obviously, that also may be the concern with respect to the artist's dealer. There may also be a studio manager who appears in the equation and who often knows a great deal and is among the most devoted people, but may not necessarily be best qualified to make judgments about the work.

The question of who can counsel the people who must do this before decisions are made about the dimensions of it is a key issue, because rarely do you have this kind of in-house expertise to inform decisions about the work. And, again, rarely is it disinterested.

Often, at the death of an artist, you may have one or two critics, a curator or two, or maybe three in some strange triangulated relationship, fighting for, in a sense, the right to be the priest of the cult or the right to supervise the work and therefore guarantee the career of the person involved. This is almost always a recipe for unhappiness and sometimes a recipe for less reputable things.

But artists who are planning their estates should know, practically speaking, that if they want somebody who can do the numbers (an accountant) and if they want somebody who can do the contracting (who is the lawyer), they should also have somebody who can actually talk about how to assess what exists and shape it in some way for a series of contingencies. This could be everything from no core collection all the way up to a substantial one, everything from no archive that is retained to a very substantial one, and so on. In the case of the Roy Lichtenstein Foundation, Jack Cowart, the curator who is executive director of the Foundation, is available to do this, and he is very good at it. But it is a rare occurrence when that kind of accommodation exists and works.

VINCENT: These choices are important for archives, as well as art collections.

STORR: I will put on my art historical hat—having just put on my curatorial hat—and say that establishing an archive, sorting out and maintaining an archive, and so on, is a major, major task, and very few people know how to do this. It takes detective work and specific archival training and expertise.

You need to know the milieu of the artist intimately. You need to know how to read handwriting when something exists on paper but there is no immediate identification. You need to retain envelopes from letters because postmarks can be your key to dates. You need to know how to deal with photographic materials and read who is in a group. There is an enormous amount of this work.

I am not referring to studying the material, or even the scholarship that comes out of this. I mean simply establishing the body of material so that then scholars can study it. So let us add one more person beyond the curator, somebody who is, in fact, capable of doing that. Because if the ultimate destination is the Archives of American Art of the Smithsonian Institution, the Harry Ransom Center of the University of Texas at Austin, or some other place, that is fine, but what gets there is not going to be material of the artist's choosing, by and large, unless it is specified beforehand.

Chances are that family members will want to pull out things for keepsakes that should not be pulled out. Or family members will want to throw away the photograph of this person or that person, or letters from the artist to this person or that person, and so on, which should not be done. The list of contingencies goes on and on, but once things are gone, they are gone for good. And when it comes to writing biographies of the kind, for example, that Michael Brenson is doing on David Smith or that Mark Stevens and Annalyn Swan did for Willem de Kooning, among others, that kind of material is irreplaceable.

Now, in the case of Louise Bourgeois, with whom I have worked for nearly thirty years, a lot of that type of material has been retained, but some of it is gone. And there is a further dimension to this: during the lifetime of the artist, part of the process with these things can sometimes be like a game of hide-and-seek. Bourgeois occasionally destroys things that she should not have destroyed. So if you are working in an archival situation, actually the archivist sometimes has to step in and make sure that the artist does not get a chance to rewrite his or her history.

It is very often in this area that the most disastrous things tend to happen. Ultimately, I believe that artists should have the choice of editing their work. And in the moral sense, ultimately, they should do the same thing with their papers. But it is a certain kind of impulse editing that worries me, not so much the considered one.

There is the case of Franz Kafka's letters, which were supposed to have been destroyed but were not destroyed. There are many instances like that, and the question is whether history is better off because they were not destroyed: unquestionably that is the case. There are other ways in which maybe that was not so correct, and there might have been sincere reasons that the artist had for not wanting certain things to survive. Intervening in situations like that unilaterally is a question of some real consequence.

But what I am referring to also is just what happens during the day-to-day sorting through and tidying up. Often artists live in very small spaces, and cannot, in fact, manage the amount of stuff that accumulates around them. Only Warhol had a cardboard box system where everything that came in (taxicab receipts, gallery mailings, and so on) he dropped into a box; all those boxes are in Pittsburgh at the Warhol

Museum, and they are fascinating. But who is there to counsel the artist about what not to throw away, and who counsels the artist about what not to destroy, even though they have saved it for thirty or forty years and suddenly decide it is time for spring cleaning?

These kinds of things happen all the time. If the histories of art are to be textured and interesting and not simply the rote writing of ideological theses on top of textual analysis, or pictorial analysis, this stuff has to be held together before it is dispersed or deposited wherever it might go. The truth of the matter, also, is that the quantity of accumulated material is far more than a lot of places are willing to take.

But one of the reasons for study collections, and one of the reasons for having them exist over long periods of time and not short ones, is that no one else wants the stuff, but nobody knows when somebody is going to have some really good use for it. And inasmuch as the history of American art or any art, for that matter, is constantly being rewritten, the person who is hopelessly out of fashion this year is going to be of great interest to somebody twenty years from now. But once the records are gone and once the little sketches are gone, and so on, it cannot be done.

VINCENT: Decisions about disposition of art collections, and even archives, often have to do with estate taxes.

STORR: Of course. As one example, study materials (the studies that artists make, the test shots they make, the sketches they make, and so on), which are not meant to be finished works, may become a tax burden if they are included posthumously in batches of things that somebody, like an Internal Revenue Service agent, decides are actually salable and so have economic value.

I worked for a long time with members of the Marie Walsh Sharpe Art Foundation on a handbook for artists' estates—*A Visual Artist's Guide to Estate Planning*—and this particular issue came up repeatedly. Therefore, one of the reasons for having curatorial intervention combined with family advice on these things is to have an authoritative voice that can say, for example, this particular material is in batch A, however, this other material is in batch B, and we will, for the sake of the foundation, keep everything in batch B, not just part of it. And because everything in batch B is in the foundation, none of it will ever go on the market to benefit the artist's heirs.

Attorneys have their different points of view, but there are many who work with artists who feel strongly that the artist should establish the foundation during his or her lifetime, so that it is better prepared to do what needs to be done when it is called upon to do so. In other words, it is preferable for a foundation to begin its work after material has been assembled during an artist's lifetime, rather than do the work of assembling it posthumously.

VINCENT: What is the role of the attorney in decisions about disposition of art collections and archives?

STORR: Strictly speaking, attorneys have the right to give advice from the legal perspective on these types of decisions, meaning choices about the optimal placement, or sale, of the work and study material given its economic value or lack of it. But they are not the proper persons to take on such a role from the perspective of the work and legacy. This touches, of course, not only on their areas of expertise, but also on the fact that they may have conflicts of interest, too. That attorneys are responsible for telling you what are the legal liabilities and advantages is a given. Ditto accountants. But the stewardship of the legacy of the artist, or whatever you want to call it, is another matter.

The very first sentence of the Marie Walsh Sharpe Art Foundation publication points out that when artists die they leave two bodies. This is literally true, and what is done with the body of art and other materials is perhaps the most crucial question for both artists and their families. And there is little doubt it is a question informed in part by legal considerations, but it is not exclusively a legal question, and it shouldn't be decided exclusively, or even primarily, by attorneys. Unfortunately, in some cases it is.

This has not been discussed nearly enough, and in fact, most of the artists that I have talked to in the actual process of trying to formulate what they plan to do with their estates are generally unaware of what their choices are. They usually have not considered the question of the kinds of people that they might need to deal with in making their choices. Sometimes they fall lucky and sometimes they do not. But when they are unlucky, the price to the public good can be significant (for example, that you lose immensely valuable art historical material that may, commercially speaking, not be very valuable at all).

VINCENT: In lieu of commercial viability, these materials have educational value if held by a foundation.

STORR: I am somewhat uncomfortable with that proposition. Bearing in mind that the language used in setting up foundations technically employs the terms *education* and *scholarship*, and so on, I am uncomfortable with translating artistic value into educational value. I believe the value of art to the public is that it is art, and that it is rich and complicated and there is a lot to know in it. To immediately hand it to the educators or to the educational institutions or to a pedagogical function is to jump over what is most important to artists.

Most artists do not make art in order to educate the public. They make art in order to make art. And they make it available to the public in order that the public will have an experience of the things that they have experienced in the process. The educational step



is now very important institutionally, but it is equally important to maintain the distinction between art, which is in and of itself a fundamental value, and the field of education. If you consider artists who are planning foundations, I would say that very few of them would get up in the morning with the idea that they wanted to form an educational institution. They will tolerate it, but that is not what they are after.

Having worked in the museum world, I have repeatedly run up against an argument that basically says, unless art is willing to do good, be interpretable, explain itself, art is actually suspect and has to prove that it is not elitist or frivolous. These are very profound attitudes. They are everywhere. And they are deeply, deeply troubling to me. They create bad precedents in the way that people act on these things. And maybe this is a time when, if one is going to reexamine all these issues, that point can be made really strongly in the interests of our best artists. Jasper Johns does not want to be taught. He wants his mysteries to stay mysterious, and whatever the reasons for it, they can be personality traits or whatever, one should not, then, in the process of protecting his work, and of using the enormous financial resource that will be engendered by it posthumously, introduce elements that are alien to his conception.

This is something that comes up frequently in public policy. A thing is called educational to cite proof that it is worthwhile. It is good because it is educational. And I understand that it is in the law and that it is, indeed, one of the functions for which tax exemption is conferred, but it has to be used appropriately. We should not use it every place where we are trying to talk about a public good. That is a mistake, because then it transforms art into a raw material for pedagogy, and that is not what art is. You can say that among the purposes of artist-endowed foundations are education centers, and so on, but it is among the purposes, not the sole purpose, and it is a secondary or tertiary purpose, not the primary purpose.

To support the culture of this complex society by virtue of the things that people make is intrinsically a good thing, not because it can be filtered through education, but because the culture in its own form and with no other purpose is important. It depends upon who you are, and it depends upon what it is, but people do not go to museums to get educated, although unfortunately they are educated at the drop of a hat these days by wall labels and audio phones, and so on. No. People go to museums to experience things. Some of them go to experience things with which they are familiar and from which they have gotten sustenance or experiences of a special order. Other people go precisely to experience what they do not know, things they have not experienced. But they are going, in a sense, without an ancillary positive purpose. They are going just to get that experience. After that you can educate them about how it came into being, about what some of its ramifications are, and so on.

There is certainly a public good for this country in allowing tax benefits for foundations created and endowed by artists. The public good is that this country has produced a culture, and that it is a rich and varied and complicated and challenging and argumentative culture. Watching what this culture does and what the producers of this culture produce, together and also sometimes at odds with one another, is one way of figuring out what this country is all about and what these times are all about. And doing that is, in itself, important: it is serving a public good.

Likewise, the maintenance of the integrity of a body of work and of those things surrounding that body of work that inform us about how it came into being and what was done with it is intrinsically a good thing. We do not ask that *Moby Dick* be taught, although it is taught. We ask for the opportunity to read it, and we are interested in anything we can find that Herman Melville left behind about how it got written. You can then talk about the circumstances in which you can extend that information, in which you can renew it. But *Moby Dick* is a book, and there are things that exist on paper surrounding it—or Walt Whitman, who is heavily annotated. Those things exist because they are there. We do not ask any questions about whether they should be there or whether they should be there to be supporting some other purpose. And we should not ask this of art.

In formulating policies around artist-endowed foundations, and so on, we have to be very careful how we phrase these things so that we do not, in fact, build in another version of this discounting of culture into the language and into the way in which we think about what we are doing. I am all for the charitable side of this, but I am now addressing the core activity for most artist-endowed foundations, which is, in fact, the maintenance, preservation, or cataloguing of the body of work, either directly or by making it possible for others to do it.

VINCENT: How does this core activity mesh with a foundation's public benefit requirement?

STORR: In maintaining, preserving, or cataloguing the body of work, or the artist's archives, these things should be available to the public. This does not mean available to the public conditionally or on any particular set of terms or in order to accomplish some other purpose. It means that people who wish to know what an artist made should be able to come and find out for themselves what it is or means. Thus, artists' archives held by artist-endowed foundations should be as open as is humanly possible, with as few restrictions to access them as is humanly possible.

And by humanly possible, I merely mean that artists will probably put some restrictions on things, as is often the case with personal papers involving living people, and there should be cutoff times after which things finally are open totally. But, in any case,

anybody who wants to know more about X should be able to come and see or have access to the X archives, works, studies, drawings, the studio, if it is preserved, or whatever it is that has been placed in an artist-endowed foundation. That is a fair exchange, if you will, for tax exemption having been extended to the foundation, as well as estate taxes waived on the economic value of the work and materials given to it.

If the focus is on a stand-alone foundation around an artist, the only requirement should be that what it holds is accessible. If the family is willing to pay for the cost, or the estate or survivors are willing to pay to maintain the materials together in a foundation, intact in a responsible way, and will commit not to play games with what they have, it is enough that that be the case, period. Everything else, again, is gravy. Now, I am actually interested in the gravy, and I think it is important that there be educational things involved and, in most cases, there will be. But it should not be the first criterion, but a secondary opportunity.

These concerns are not simply theoretical. In any endeavor of this type, one has to think very hard about who the artist is and what the limitations of intervention should be with respect to the nature of the art. Especially with artist-endowed foundations that evolve into museums, the question is how they evolve. A perfect example germane to this can be seen in the Greenwich Collection Ltd., which as I mentioned is Robert Ryman's foundation. Ryman never has wall labels on his shows. I was the curator of his retrospective at the Museum of Modern Art, and we had a broadside that people walked around with. It was up to them to pick it up, stick it in their pockets, read it there, or take it home; but there were no labels on the walls.

Ryman's preference is that you say absolutely nothing. You put the work up, you put it in a situation that is totally public, a museum or whatever it is, anybody can walk in, and that's it, period. And he is the most amenable, nice, non-elitist guy in the world, just plain folks. That is partly why he does this: he has the idea that people will get it if you let them.

Now it is not too far-fetched to think there will come a time when a foundation will have to essentially ban pedagogical materials in those kinds of exhibitions if they are to respect the aesthetic of the artist. But if banning educational materials is interpreted as being hostile to the intent of a foundation that is supposed to be educational, you get into a bind. So, where you do that and how you do that becomes crucial.

This is an important public policy issue to address because the average administrative politics of the foundation world move it ever more in the direction of saying that foundations based on the work of modern artists exist or are justified by virtue of secondary and tertiary functions rather than exist by virtue of a primary function, which is seen by some people as exclusive. If, in fact, the foundation's function is focused on

the art, but the access to the art is nonexclusive, it seems to me you satisfy the public benefit requirement. And this is a very important formulation in protecting the integrity of artist-endowed foundations.

The range of grays, if you will, in terms of how much instruction or framing is accommodated, can be as broad as artists wish to make it. But it should be able to go down to practically zero—no pedagogy, no contextualization—on the condition that what is there can be seen or accessed by virtually anybody—nonexclusive access.

VINCENT: But materials such as those held in artists' archives might reasonably have some practical restrictions on access.

STORR: Yes, for a host of practical and appropriate reasons related to fragility of materials, privacy of living persons, and such, but it should be within professional limits, the standard operating procedure limits recognized in the world of archives, and not something that, in fact, does sequester things that are important.

Unfortunately, things do get sequestered, often in foundations run by family members or artist's personal associates or other people who are loyal and have the idea that the artist has to be protected or defended. Then there is the game of scholarship, too, where one interpretive group takes possession of an artist's estate, even in some cases sanctioned by the artist, and in my view that then is not a public purpose. That means the artist is controlling interpretations posthumously. In some sense, a foundation has been created to achieve that control and exists within a narrowly legal construct, but not one actually consistent with a public purpose.

It is one thing, however, to say anybody should be able to gain access to the material, to see it and study it, but another thing to say that you will help them do the next stage, make use of that access in some way. This distinction is not understood, in some cases I think, by those who would hinder access. If you say that at the artist's death and the creation of a foundation the following papers will be available for study, the following images will be available for study, the following works will be available for study, then they should be available without restraint, without restriction. Reproduction rights are a secondary issue, not a primary issue. To be able to look at something, to study it, to think about it, to arrive at a conclusion should not be restricted.

VINCENT: Some foundations restrict access based on their judgment of a scholar's endeavor.

STORR: There is no way that it is not essentially an infringement on free speech or free thought for a foundation to demand to know, in advance, what somebody will make of something as a condition for permitting access. If you are going to exclude somebody

from access on that basis, it is because of the presumption about what they are going to think rather than any certainty about what they might think or write. So you can say, at the point that somebody commits his or her thoughts to paper, no we will not give you permission to reproduce the images. But once these things have been deposited in a foundation, there are no grounds for saying that this one can see it, but no, that one cannot.

I know this does happen, but that would be a case where I would write tougher laws. I would say the public interest is nonexclusive access. This was, of course, the problem of the Barnes Foundation in Merion, outside Philadelphia. Dr. Barnes basically allowed anybody to see the work, by appointment, as long as they would listen to his indoctrination. But he did not allow people to come in if they had an independent scholarly identity because the presumption was that they were past converting. This was prejudicial, based on what he anticipated someone might think or write. It continued long after Barnes died and ultimately, in 1958, the Foundation was sued by the state's attorney general for its admission practices.

You cannot have artist-endowed foundations that operate on the same principle. So the public benefit is that these foundations are stewards of extraordinary resources and the public stake is the existence of these resources, first of all, and then, secondarily, that they are accessible. They are, if you will, accessible treasures. They are, in a sense, branches of the public library of American culture.

Under some circumstances, I would argue that if you had a cache of letters that documented a bitter marriage or an illicit love affair that survivors didn't know about or some criminal act that was never known in public, or any such thing, you could stipulate a period of time during which those who might be harmed by it can be protected from that knowledge. Such is the standard of professional practice in the archival field. And if such documents are not yet in the foundation, the artist or the family does have the right to destroy them, and in fact, may destroy them. But if they are sitting on secrets that they are never going to reveal anyway, you haven't lost anything. However, the public stake is, in fact, our society's culture, broadly speaking. And the presumption is that these things are extraordinarily important elements of that culture, and should be preserved and should be accessible.

VINCENT: Are there other public policy concerns for artist-endowed foundations?

STORR: Yes. Just what determines when something is extraordinarily valuable is always an open question. There is a great deal at stake for us all in being sure that no judgment is passed on artists' rights to create a foundation (for example, on the grounds that they do not have a major museum retrospective to their credit, they have not been written about enough, and so on). In other words, their status of importance in art at the

moment of their death or at the moment of the founding of the foundation is no yardstick for judging whether or not the opportunity to create a foundation should be available to them.

The assumption must be that anybody who goes to great lengths to create a foundation and also is able to sustain the undertaking economically is important enough that we should not allow their work to be plowed under, or dispersed, or what have you. If, in the fullness of time, it turns out that they were lousy artists and nobody studies them, that is just how the grim reaper does his job. In other words, you do not want to have review boards of experts that essentially pass on whether an artist is an important artist or not and therefore may or may not be allowed to create a foundation.

And there is the potential for that kind of thinking out there. Under Internal Revenue Service tax policies and procedures, donations of art are reviewed by a committee of art experts that very often downgrades the monetary value of works that are donated to museums or foundations. There are numerous examples in which the committee's judgments have really missed the mark, as proven in hindsight. We cannot have that sort of process determining which artist may or may not create a foundation.

VINCENT: At the same time, foundations are economic entities and are not going to be possible for many artists.

STORR: A lot of thinking should be put forward on that front. With respect to this problem, an example of another option for an artist would be to associate an estate with an existing institution, rather than attempting to maintain a self-sufficient foundation.

A good example was Roger Brown, a Chicago Imagist, who left his entire estate to his alma mater, the School of the Art Institute of Chicago—his studio, several of his homes, as well as properties in Florida and California, a collection of folk material and popular culture, a great collection of works by other artists, as well as his own works and source material. The fundamental idea is that Brown's studio and his source collection can exist for students, artists, and other people to see, and the home can be used as a faculty retreat or for an artist's residency. They have parsed through the collection, designated some of it as a permanent study collection and identified some of it, as he intended, to be salable in order to support costs of this whole thing. In fact, he would have had an economic option to structure a foundation, but he chose to work with an institution he knew and cared about.

VINCENT: Apart from policy matters, fulfillment of artists' intentions for their foundations often rests with the individuals who survive the artist.

STORR: You are speaking about artists' anthropology and sociology, that is, the question of how many heirs an artist leaves and what the status of these different individuals is in relation to one another and in relation to a proposed foundation. Many times, artists are unaware of the politics that go on around them or, alternatively, actually quite enjoy it in a way that may be all right so long as they are presiding at court, but does not work once they quit the scene.

And then you have the situation, often I think, in which an artist dies and there are at least one or two competing strong-willed people who claim, essentially, the role of arbiter of the artist's intentions. Sometimes it is a studio manager in relationship to a surviving partner. Sometimes it is two surviving partners. Sometimes it is an art historian. And not deciding these issues well and not deciding them at all, above all, is disastrous and has consequences. There have been so many cases where it has not been handled carefully.

Sometimes artists do not take a realistic enough look at what their responsibilities are for those who do survive. They do not understand how much work it is and how difficult it is to do, and should not presume on friendships, or on family ties, to the degree that they do. Some artists are genuinely naïve, and some tend to be a little bit more narcissistic than the rest, and may actually relish the thought that they will be the subject of conversation posthumously for as long as at least the next generation survives.

VINCENT: Artists' beneficiaries in some cases include persons other than family members or life partners.

STORR: A trend of concern is artists who leave their estates to their dealers, making the dealer the beneficiary under their will. There might be a situation where an artist's closest relationship is with a dealer—where that relationship may, in fact, be genuinely intimate and close because, contrary to the sort of general view that all dealers are simply business people with unlimited demands, some dealers are deeply committed to their artists, have fought for their artists, and are quite naturally their artists' first choice and strongest advocate, or at least among the strongest advocates. That said, conflicts of interest are conflicts of interest, and if you have them, there is no choice that is unaffected. No matter how conscientious one may be, it will inevitably be the case that you will be split between your two roles, and whether you average the difference, or whatever it is, it is still not a clear-cut choice relative to the particular merits of a particular case.

The estate being left to the dealer is difficult, but even more problematic is when the dealer creates a foundation, acting as the artist's beneficiary, and at the same time continues to represent the estate. This creates enormous problems because, separating

out any issues of good or bad faith, it is fraught with conflicts that cannot be resolved consistently in the artist's favor if there is always the vested interest of the dealer operating under the rubric of the foundation.

VINCENT: How can artists know if their intentions potentially are problematic?

STORR: There should be a way to provide guidelines to artists who are struggling to do the right thing and do not know totally how to do this with respect to how to set things up effectively for their foundations. And very often the viability of a foundation is determined by decisions made in the estate planning process. But in terms of foundations, as opposed to estates, it should be possible to formulate a way to get people to actually clearly articulate what it is that they want, and to ask them not only in specific ways what they want immediately, but what kind of ground rules for making decisions when new circumstances arise they would like to have built into the statement of their foundation, because new circumstances will arise.

In the case of Warhol, for example, the actual financial resource vastly outstripped what Warhol could have possibly imagined, which meant that the amounts that needed to be spent in order to meet the Foundation's annual payout requirement by law meant that you could not do the very simple kinds of things he probably anticipated, if he anticipated much at all, which is really a good question by itself. So that, on the one hand, you want to know what people intend if the resource diminishes to a certain point. You also want to know what, of all the things they would like to do, is the one that is most important. And, on the other hand, what would they be willing to have their name associated with if, in fact, it grows, and what would they prefer not to be associated with.

Without questioning the motives of people who get involved in these things in later stages, you may still have someone who ends up becoming the steward of an artist-endowed foundation who understands very little about the artist who is the source of that money, and they are likely to lay their own interpretations onto what is being done in light of what they may have done in other situations. Whether or not that is really appropriate is something that needs to be looked at. I think that stewardship involves actually stepping outside your own skin and your own habits and really inquiring as to what is appropriate in a particular case if you are called upon to do this. But it is an awful lot to ask some people to do this past a certain point.

Therefore, artists cannot afford to be vague. If you say in all indentures and all of these kinds of statements that you want to leave room for interpretation, at least the rules of interpretation or the spirit of a gift has to be quite clear, or else mistakes will happen and people will be unhappy. Among the many sources of dispute in estates is where two people who are close to an artist accuse each other of not having heeded the intention



of the artist. If that intention is otherwise unknown, there is no way that it can be settled, and the people who should be collaborating on the project end up being at loggerheads.

Of course, the classic case of that is the ongoing conversation that Mark Rothko reportedly had with himself, where he ruminated on the role of his foundation, his work and how it was to be handled, and so on. But he had not resolved these questions, and was probably not encouraged to be specific. And so there were people who could legitimately say, well, he told me he wanted this, and there were other people who legitimately could say, well, he told me he wanted that. Never mind the fact that there were people who sinned in terms of taking advantage of their power to interpret what they wanted to have happen for their own benefit. And what it left was a great big hole for some people to step through who wanted to do things that were not helpful. And, of course, those same people had probably helped him make the situation ambiguous because it was to their benefit.

Considering artists' intentions can occasionally have a somewhat amusing aspect. Recently, Irving Sandler convened a meeting of some people for a discussion of what the situation for critics now is, and particularly in the new economics where you see some magazines fold or at least shrink to the point where there is very little written in them that one could call criticism. And one of the first things that came up—and this has happened in many contexts before—was which of the artist-endowed foundations could possibly be persuaded to give grants to critics as they give grants to individual artists. Actually, among artist-endowed foundations, the Warhol Foundation has a program for this, as does the Jerome Foundation. But it did amuse me because a great many artists dislike critics. The idea that artists' foundations might be steered in the direction of funding the activity that most distressed them is one of those little ironies.

VINCENT: Considering artists' intentions brings us back to the issue of helping young artists or even not-so-young artists.

STORR: In terms of the second group, there is, interestingly enough, a feeling on the part of some artists of great discomfort when presented with the question of how they might help people who actually are their peers, especially those they have far outstripped in terms of financial success. It is very difficult for some living artists to envision setting up a foundation or doing something charitable that is aimed at their peers aside from helping on emergency things.

Then there is another part of this, which is not, in fact, the responsibility of artists' foundations. There are a great many artists who never do very well and who have no safety net. But the idea that artist-endowed foundations shall, in a sense, make up for what is missing in our Social Security system or mend the holes in the social safety net is

crazy—and offensive. So one of the big issues is the use—and this is what the Marie Walsh Sharpe Foundation did with its publication on estate planning for visual artists—of foundation monies to explore and document the social circumstances of artists in ways that enable one to develop the appropriate public policies or at least encourage creation of larger funding programs that do not exist now.

The Sharpe Foundation was created with a kind of open mandate, but we who are on the board very quickly identified our function as being there to launch pilot projects and convene people to talk about artists' needs. The discussions at that point really were centered on the fact that so many of these programs coming from artist-endowed foundations, or from larger philanthropies with other kinds of resources, address artists' needs as they conceive them. If they are right or wrong, on the mark, or far from the mark is not really the point. They do not ask often enough what it is that artists think they may need. And since artists' conditions and circumstances change over time, it should be a prime function to always be studying the target, and always go to the target to ask the target what it wants or needs.

There does seem to be a basic reality of American philanthropy, which is that it often is about what the giver thinks needs to be done, and not what the receiver thinks needs to be done. This is the right of the donors to define the issue that they want to respond to, although the one they want to respond to may not be the issue that is relevant. That seems to be inherent in the current setup that we have. But, since there are now artist-endowed foundations that share information and resources, one of the things one could address is building a regular structure for doing that. The Sharpe Foundation did it on a very small amount of money, and with the assistance of funds from other donors (the Judith Rothschild Foundation, in this case), and probably cannot sustain that project any longer.

But it needs to be done on a regular basis. So if you want to go for the proposition of what is the public interest in this, as opposed to what is the artist's interest, one of the public interests would be to have this kind of work and research done on an ongoing basis. Perhaps it could be supported by participation fees or something like that, paid by foundations so that this could go on regularly. People could really find out how the sociology, how the economics, and how the political and legal situations of artists have evolved over time.

Granted, this would be a productive thing to do, and perhaps more appropriate in terms of philanthropic activity by artists, emerging from artist-endowed foundations, and by the resources that they create and put into the universe philanthropically. At least, one can safely assume that, whatever their take on it may be, artists know their own circumstances and those of their peers better than other kinds of philanthropic entities.

Within artist-endowed foundations, one hopes there is the opportunity to tailor those parts of charities that go back into the artist community with a better fit than is likely to be the case with a large foundation that has multiple purposes and where the sources of information and the orientation of the officers will be very, very different.

There are people on the right or on the left in the art community. There are people who are bootstrappers, and there are people who are much more generous and open. But, willy-nilly, they arrive at those positions from firsthand knowledge of what artists' circumstances are. And, at the very least, one can have a different order of conversation with them than you would have with even the best informed officer of a large multipurpose foundation whose purview will also be medicine in Africa and education in Texas.

VINCENT: Have artists' perspectives shaped grant program policy, not just selection of recipients?

STORR: There is an interesting example of an artist-endowed foundation that is administered by a single artist, the Barnett and Annalee Newman Foundation, founded by the artist's widow, Annalee, and now run by Frank Stella as the sole trustee. It is Stella's show all by himself, but he is doing things that other people have not done. You do have foundations that are making grant awards to artists, but the biggest those grants usually get is, maybe, \$50,000. The prevailing view is that there are so many of these artists in need we have to spread the money out. But there is another way of thinking, exemplified by what the Newman Foundation is doing, which is giving a smaller number of bigger grant awards—I think four at a time of \$150,000.

The grant awards are made to artists to recognize their contributions by creating, researching, teaching, or writing about the visual and related arts. Stella has defined this program policy, and that is totally within his right as the trustee. It is very interesting that somebody—an artist—arrived at that point of view, one that should be present in the activity of artist-endowed foundations, which is that there is another way to do it.

This goes back to the question of the MacArthur Fellowships awarded annually by the John D. and Catherine T. MacArthur Foundation for excellence in a variety of fields, including the arts. They have made an absolutely categorical difference to many of the people who receive them because they are so large—in some cases, half a million dollars. Perhaps you could do it for slightly less, but it can mean a lot to a mid- or late-career person to be able to settle some part of an economic situation—buy a house or pay off a mortgage or do something on the life side, or else launch the one expensive project that has never been possible to do out of pocket. It is a transformative gift if you give it to serious people. So I think Stella's decisions are good in this respect—it is one foundation that was founded by an artist's heir (his widow) and is now controlled by an artist, although not the same one, of course.

VINCENT: What roles do artists play on the boards of other artists' foundations?

STORR: Artists are more likely to be on the boards of grantmaking foundations than they are on the boards of foundations that are exclusively study centers—which is, generally speaking, probably a good thing, with the possible exception of artists who were close to the artist who has died and who may, in fact, have a real understanding that could contribute to it. You do, of course, get the conflict of interest situations where an artist who was, in a sense, the sidekick of the artist who died can assume a disproportionate importance in this posthumous role.

You also have the envy factor, which means that they may not always, out of self-interest, act in the interest of the artist who they still, somewhat subtly or not so subtly, resent or envy. There are all those kinds of complications. So the role of artists on the boards of foundations for the primary study collection side may be problematic sometimes, but I think on the grantmaking side, it is almost inevitably a good idea to have a large proportion of artists participate, particularly if the programmatic activity pertains to art.

And it also helps if there is a conscious effort to make an artistically pluralist peer review panel where you do not necessarily pick people who are in line aesthetically with the person involved. This gives you diverse points of view, the lack of which is actually one of the situations where there have been criticisms about the Foundation for Contemporary Arts: it may be too much about the aesthetic of a particular circle.

VINCENT: Returning to the public stake and the artist's stake in artist-endowed foundations, you've touched on a number of recommendations. Perhaps we could recap.

STORR: First of all, artists' families need to be counseled that while their initial instinct is to keep it close and to think that they can only trust those people who were, in a sense, already part of the milieu, in talking about the creation of an institution, basically, they should consider the possibility that the best advocates that they will have for the things that the artist believed in and that they believe in may be people who were at some remove from the immediate situation of that artist either aesthetically or in family relationships or generationally. The degree to which they will get what they want may be influenced by the degree to which they step outside the immediate circles in which people are inclined to look to for support and personnel.

This is true, for example, on the scholarly side. If you have only those people who have already written about a certain artist involved in setting up an apparatus for the preservation of archives, the chances that it will become a fiefdom, and a contested fiefdom, of those people is greater than if you open up the door a little wider and have people of various perspectives engaged in that process and have them negotiate

solutions. In terms of the spending of assets, if you have only friends of the artist on the panel, their studio assistants, or whomever it is, you are much more likely to have a contentious situation than if you get people who respected the artist in question but may never have known him or her in person—and have no personal stake.

VINCENT: What does it mean to ask people outside the artists' family or personal circle to serve in this way?

STORR: That has to do with what people get out of these involvements. To do foundation work in this area conscientiously is very time consuming. I serve on a couple of foundations unpaid or virtually so. But there is a limit to how long any one person can do that, particularly if things become very contentious or if you are in situations that may be bound up in potential legal liabilities. Warhol does not pay a lot, but it pays enough that when you are beginning to wonder about the depth of commitment, you have an added incentive that urges you on—a game changer. For example, in my case, income is sufficient to buy a small work of art from time to time, a print or drawing. You can only ask people to do the right thing for so long, particularly when everybody else around them is making money. So you need to respect their labor properly. So another recommendation is that built into the equations for all of this should be adequate compensation for the people who take it most seriously.

VINCENT: You've also emphasized the types of expertise required for artist-endowed foundations.

STORR: The key ingredients are a good lawyer, a good accountant, a good art historian, a good archivist, and a good conservation person, since conservation is a major factor involved in this as well. Many times, the works owned by foundations, particularly smaller foundations with fewer resources, are put in storage that is unsafe, inventories are not properly made, there is no real registrar short of the person conducting the initial inventory when valuations are done, and so on. That needs to be considered part of the best practice of foundations where there are works being preserved, or objects, studies, drawings, and photographs being held.

VINCENT: More centrally, you spoke about information to help artists know if their intentions for their foundations might be problematic and helping them articulate what it is they want.

STORR: It would be an important and immensely useful thing to have a checklist of questions about how to proceed, a working checklist for artists of the kinds of questions they should be asking themselves. Of course, each artist will answer differently in regard to the kind of work they do and the circumstance in which they find themselves. The first question would be: What is the primary purpose of the

foundation? What goals does the artist wish the foundation to accomplish? This is the simplest question and the hardest answer.

VINCENT: Archives—how they are cared for and made accessible—have emerged as a major point of concern for many involved in the Study.

STORR: One of the key recommendations is that a group of scholars and artists should be convened to come up with best practices for artists' archives held by artist-endowed foundations. It should be a given that there are scholars present, that there are separations of roles that are clear-cut and have a firewall. If one says that among the ways of guaranteeing the public interest is to establish best practices in specific areas so that it is spelled out and considered with detail according to each different type of foundation and function, this in itself would be a big step forward.

I urgently believe one has to make a claim and assertion regarding the public dimension—about how at the outset you execute the question of access to works and archives held by artist-endowed foundations. It should be axiomatic that culture, in and of itself, needs no other justification, and that in doing this, one is protecting the legacy and the culture of this country. And that is a public good by itself. Perhaps there should be a strong position paper done on this point alone—the centrality of the art and the importance of access. Not everybody believes in this, but I think there are quite a lot of people who do, and it does not get said very often. Part of the reason is that one of the things that is contested in contemporary art is the status of art itself.

Another thing that is contested in contemporary art is the status of *culture* as distinct from artwork—that is to say, the inherent value of culture. Furthermore, it is contested because we are discussing what it means to talk about American art given that these foundations are operating under American law. The always-disputed definition of *American-ness* cannot be a criterion for recognition of art or of a foundation's legitimacy. It is therefore important to speak of American art without chauvinism, without the shadow of the political uses of nationalism in relation to our culture, as in recent years, and to be aware as well that our culture is enormously diverse, and when talking about our culture, we are also talking about diversity—and difference—and embracing it.

VINCENT: Only a small number of artist-endowed foundations to date are associated with women or with artists of color.

STORR: Let me just cite one example in recent art: Jean-Michel Basquiat, whose family controls his estate. Unfortunately, that body of work has been picked over so completely by dealers that the core work is unreachable half the time because it is squirreled away in Switzerland or somewhere, locked up as an investment. So you have a case where a major African American artist—African Caribbean artist—left an

extraordinary oeuvre, but there is little to show for it in terms of a benefit to the public. It is mostly in private hands, which of course is not unlawful, but it is sad given this artist's significance to our culture.

So this is another important point to be made in highlighting the idea of the public good—the importance of encouraging diversity in the artists and cultures among artist-endowed foundations. It applies equally to other underrepresented segments of the population, including Asian Americans, Hispanic Americans, women, gays, lesbians, transgendered persons.

VINCENT: You've suggested artist-endowed foundations might have a particular capacity to work effectively in the artist community.

STORR: There is this idea that in their charitable activities, artist-endowed foundations, philanthropies emanating from artists themselves, should be able to develop a potential fit with the artist community that isn't likely for general interest foundations. That doesn't mean everybody does the same thing. It means we can ask and listen and learn in a different way, given relationships and experiences. How to make that possible—how could artist-endowed foundations work together to be informed about artists' changing circumstances—from the perspectives of the artists themselves? This really has to be considered now that there are more of these foundations and they could have an influence on policy and on larger funding sources.

VINCENT: What is your sense of this moment for artist-endowed foundations and for artists as philanthropists?

STORR: This is an important moment in this country, in our culture and in our politics, and in our evolving understanding of our own history. There is actually a tremendous opportunity now to open things up in the foundation field, especially in terms of artist-endowed foundations, once these issues are addressed head-on. There are people who hang back from setting up foundations because they are bothered by the idea that when they enter into this arena they are essentially becoming involved in art for something, not art for art. There are many disincentives for artists to face this set of issues, but I think this may be one of them. Artists just do not want to speak that language and be subsumed by it. So even if they do it eventually, artists may do it haphazardly and late, and they may miss out on many dimensions of what can be done because they do not want to get into a conversation about what they should be doing other than what they are doing, which, I cannot repeat often enough, is making art.

This may be an ideal time to influence artist-endowed foundation practice, both culturally and politically. It is striking that many artists who emerged in the 1980s and after have become unprecedentedly wealthy and have, in some cases, adopted publicly

lavish lifestyles. Some of them, as well as others who have had less conspicuous success but still have made a great deal of money, have donated generously to causes, particularly HIV/AIDs, and have been personally generous to their friends who have been less fortunate. But to my knowledge, very few have established foundations to carry on with these projects or to open up new avenues of giving.

I appreciate that the current financial crises may not be the best moment to pose this challenge. But isn't it time that some of these artists begin actively to explore more systematic and enduring philanthropy? Despite all the good that has been done by foundations created by artists who came to the fore in the 1950s and 1960s, the controversies and complications that developed around so many of these efforts at their births (Rothko, Warhol) argue that artists should not wait so long as their elders did to frame their ideas and set their priorities for philanthropy.

The ethos of community among artists has been somewhat eroded during the course of the last three decades of the art world's vast expansion and overall prosperity. Such a feeling of community was powerfully influential on artists who had a very long art slog from the 1930s through the 1970s. Increasingly, artists work as independent entrepreneurs within a larger market system, and they are not to be blamed for adapting to new circumstances. But the hard times ahead may teach people how necessary it is to maintain a safety net for the arts community that is produced or provided for by the arts community.

Thinking of this kind is increasingly common with young people today (for example, with my daughters' generation and a growing number of my newer students). This gives me hope that there is an increasingly good chance for change in the way the arts and culture are seen and in the ethos surrounding them. There is a potential for greater awareness of the idea that the intersection of the artist's stake and the public stake in our culture centers on this point about access, and with that access, also on respect for art as the primary mission of artists.





## 9.5.4 Art Sales by Charitable Organizations: A Summary of Rulings and Determinations

STEPHEN K. URICE AND VALERIE PROCHAZKA

This briefing paper, prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study), gathers in one place and summarizes the Internal Revenue Services' various rulings and determinations on the tax consequences of a charitable organization's sales of art. The purpose of this paper is not to analyze those rulings and determinations, but rather to provide a consolidated reference for individuals governing and leading artist-endowed foundations and those advising the foundations' activities. It must be stressed that circumstances in each of the rulings and determinations are unique and cannot be relied on as precedent by an artist-endowed foundation considering or planning possible sales of art.<sup>1</sup> However, these do provide examples of the manner in which the Internal Revenue Service (IRS) has dealt with art sales by private foundations and public charities to date, sometimes in response to organizations' requests for clarification in the form of a private letter ruling (PLR) and at other times resulting from internal procedures at the IRS. The tax consequences of each foundation's situation are unique. No artist-endowed foundation should consider embarking on art sales without the advice of a legal counselor proficient in the law of tax-exempt organizations in general and private foundations in particular.

To support their charitable activities and exempt purposes, many artist-endowed foundations sell works of art. These sales of art are reported by foundations on the annual information return (Form 990-PF) filed with the IRS. Review of annual information returns indicates that the majority of the artist-endowed foundations identified in the Study as having assets in excess of \$1 million including art assets make art sales periodically.<sup>2</sup>

The purpose of art sales varies, as evidenced by activities reported in foundations' information returns. Some sales are one-time activities to liquidate the foundation's art assets. This might be due to a change in purpose, as was the case for the Louis Comfort Tiffany Foundation in the early 1940s; termination, as for the Alice Baber Art Fund in 2005; or to generate an endowment fund, as for the Judd Foundation, Renee and Chaim Gross Foundation, and most recently the Richard Avedon Foundation. Some artist-endowed foundations make periodic sales of art over time to generate an endowment to fund the foundation's charitable activities, whether those activities are related to the works of art being sold or are not related. Sales by the Dedalus Foundation (Robert Motherwell) and Josef and Anni Albers Foundation are examples of the former and those by the Pollock-Krasner Foundation and Andy Warhol Foundation for the Visual Arts of the latter.

Also as evidenced by the information returns, other foundations sell art periodically to fund charitable activities. In some cases these are grantmaking activities, such as for the Charles E. Burchfield Foundation, Sansom Foundation (William Glackens), and Renate, Hans and Maria Hofmann Trust. In other cases these sales fund direct charitable activities conducted by the foundation, such for the Saul Steinberg Foundation, Frederick and Frances Sommer Foundation, and Niki (de Saint Phalle) Charitable Art Foundation. In some cases, sales fund both grantmaking and direct charitable activities, such as for the Adolph and Esther Gottlieb Foundation, among others. Some foundations sell posthumous prints or posthumous casts of an artist's work periodically, as does the Robert Mapplethorpe Foundation, (Gaston) Lachaise Foundation, and George and Helen Segal Foundation, and some license the intellectual property they hold in the artist's works, whether for publications, such as the Edward Gorey Charitable Trust and Ezra Jack Keats Foundation, or for new applications as do the Charles and Tee Addams Foundation and Warhol Foundation. Again, these periodic sales and licensing activities might be undertaken to raise funds for operations and charitable programs related to the works of art or for charitable purposes independent of the artworks.

Additionally, as part of their charitable activities, some foundations make charitable gift-sales (also known as *bargain sales* or *gift-purchases*) to public charities such as museums and universities at prices below the works' fair market value. This is done both to fulfill a charitable purpose (for example, to educate the public about the artist's creative principles by placing artworks in the collections of museums whose exhibition programs expose the works to broad audiences) and to raise funds for the foundation's operations and other charitable programs. The Dedalus Foundation and Georgia O'Keeffe Foundation are among those having undertaken gift-sale programs. Finally, there are foundations, defined for the Study's purposes as *estate distribution foundations*, that liquidate art holdings through sales and grants as an aspect of their function to accomplish the posthumous, charitable distribution of an artist's assets, including artworks, owned at the artist's death and not bequeathed to other beneficiaries. This is the case for the Emilio Sanchez Foundation and Reuben Kadish Art Foundation, among others.

Artist-endowed foundations' sales of art are not new. Many artist-endowed foundations have been conducting periodic sales of art since their inception, including those that are among the field's most long-established foundations—the Sansom Foundation (Ruling Year 1959), Burchfield Foundation (Ruling Year 1967), and Gottlieb Foundation (Ruling Year 1976). With the recent increase in the number of artist-endowed foundations documented by the Study, the number of artist-endowed foundations conducting periodic art sales has grown, the incidence of foundations undertaking one-time auction sales of works to create endowment funds has increased, and the number implementing gift-sales to museums for related use has expanded as well.

Despite the ubiquity of art sales activity, sales of art by artist-endowed foundations in some circumstances can raise complicated questions. For example, what are the tax consequences of an artist-endowed foundation's sale of artworks when that foundation's charitable mission focuses on those very works? How is the income from the sale of artworks or licensing of intellectual property treated for tax purposes, and does it ever generate taxable, unrelated income? Can foundations create subsidiary organizations through which such sales and licensing activities are conducted? Who can buy the works sold by the artist-endowed foundation? When, if ever, would the sale of works of art threaten the exempt status of a foundation and for what reasons?

It is beyond the scope of this paper to provide answers to those questions or to the many others that a foundation manager will ask in considering a program to sell works of art or to license intellectual property. Moreover, it is not the purpose of this paper to discuss the policy and law affecting a foundation's commercial activities; those discussions are readily available.<sup>3</sup> Further, we assume that the basic concerns are familiar to foundation managers. Among others of these concerns are the following.

Private foundations are limited in the amount of interest in a business enterprise they may own or exercise control over, with the exception of a business that is functionally related to the foundation's charitable purpose.

A regularly conducted business enterprise functionally unrelated to a foundation's charitable purpose, other than its need for income, will generate unrelated business taxable income. Generally, neither passive income (for example, in some situations, licensing and royalty income) nor, in some instances, proceeds from the sale of items donated to a foundation are characterized as unrelated business taxable income.

Private foundations are subject to an excise tax on investment income, which since 2006 includes proceeds from the sale of charitable-use assets, meaning assets used or held for use in direct charitable activities such as a foundation's exhibition program.

Sales between a foundation and a disqualified person (such as a foundation's substantial contributor, its trustees, directors, and officers, and persons related to these individuals) are prohibited in all cases, even at public auction.

Finally, it is important to recognize that the charitable entities involved in many of these summaries are public charities and a few are private foundations. Although public charities and private foundations are both organizations described in Internal Revenue Code (Code) Section 501(c)(3), as is discussed throughout this Study, private foundations are subject to additional restrictions, primarily described in Chapter 42 of the Code, that do not apply to public charities.

## Summary of IRS Private Letter Rulings and Technical Advice Memoranda

### Unrelated Trade or Business Activities—Museum Shops

#### **Rev. Rul. 73-104, 1973-1 C.B. 263**

A modern art museum sold greeting cards featuring reproductions of works from the museum's collections and from other collections. Each card had information about the artist, period of the work's creation, title, and museum name. The cards were sold at the museum, through a catalogue, and to retail stores. The IRS found that the sale of these greeting cards was substantially related to the museum's exempt purpose of stimulating and enhancing public awareness, interest, and appreciation of art. The fact that the cards are sold in a clearly commercial manner at a profit and in competition with commercial publishers does not alter their relatedness to the exempt purpose.

#### **Rev. Rul. 73-105, 1973-1 C.B. 264**

A folk art museum sought advice on whether the sale of certain items in the shop constituted unrelated trade or business income. The IRS advised that the sale of replicas from the museum's collections, and literature relating to art, contributed to the achievement of the museum's exempt purpose and therefore was not subject to the unrelated business income tax. Sales and rentals of reproductions contribute importantly to a museum's exempt educational purpose as a means to enhance public understanding and appreciation. The IRS also stated that scientific books and souvenir items relating to the city where the museum was located had no causal relationship to the exempt educational purpose, and so would be unrelated.

#### **Tech. Adv. Mem. 80-340-22 (May 28, 1980)**

A museum sought advice on whether certain gift shop sales constituted an unrelated trade or business. The IRS evaluated a number of specific items sold and found a number of them were not related to the museum's exempt purpose, including souvenirs with or without the museum's logo. Because the museum actually sold the items on a regular basis, the IRS did not find merit in the museum's argument that some of the sale items unrelated to the museum's exempt purpose were *casual sales*.

#### **Tech. Adv. Mem. 82-020-01 (1982)**

A public charity that operates a restored colonial town sought advice on whether several activities constituted unrelated trade or business activity. Among these were its activities selling reproductions and adaptations of items in the collection, and receiving fees from licensing manufacturers to produce reproductions and adaptations of items in the collection. The IRS found that the sales of reproductions and adaptations of items from the collection served the foundation's exempt educational purpose by "stimulating and enhancing public awareness, interest, and appreciation of the restoration," whereas sales of souvenir items are unrelated to the educational purpose. The IRS also concluded that money received from

the licensees is royalty income under Section 512(b)(2) of the Code, and therefore is excluded from the computation of unrelated business taxable income.

***Tech. Adv. Mem. 83-260-03 (November 17, 1982)***

An art museum sought advice on whether the sale of certain items at the museum gift shop constituted unrelated trade or business. The IRS indicated that the sale of reproductions and adaptations of artwork from the museums' collection, or other collections, when accompanied by descriptive literature, does not constitute unrelated trade or business. These reproductions and adaptations might include a necktie sold with a pattern taken from nineteenth century folk art, playing cards with Japanese woodblock prints, or a candlestick that is a reproduction of an eighteenth century original. The IRS indicated that souvenir scarves, umbrellas, or tote bags with the museum's logo were unrelated to its exempt function. Children's interpretive teaching items with artistic themes, like puzzles and games, are in furtherance of the museum's educational purpose. The IRS also noted that no de minimis rule allowing unrelated items to be considered related could be implied from the Code.

***Priv. Ltr. Rul. 86-410-60 (July 16, 1986)***

An organization supported a federal natural and educational area. The organization proposed to operate a craft and gift shop at the visitor's center. The IRS found that items that would enhance a visitor's educational experience, like film and binoculars, would contribute to the organization's educational purposes. Reproductions with descriptive literature would be related because one of the organization's purposes is to promote regional culture. Items that are souvenir or utilitarian in nature, such as items with the organization's logo, would not be considered related.

***Tech. Adv. Mem. 88-140-01 (October 16, 1987)***

A public charity formed to promote the activities of a memorial commemorating individuals who made possible territorial expansion of the United States sought advice on whether certain gift shop sales constituted an unrelated trade or business. The IRS found that nineteenth century replicas of children's toys, utensils, and other replicas contribute importantly to the memorial's exempt purpose, as do books relating to American Indians and Westward Expansion. Additionally, puzzles, postcards, and prints depicting items in the memorial's exhibits contribute to the exempt purpose. Sales of contemporary Irish lead crystal or Indian crafts and jewelry do not contribute to the exempt purpose unless it can be shown that these items were identified as reproductions of items in the collection.

***Tech. Adv. Mem. 91-380-03 (June 24, 1991)***

A public charity operated a historic site that included a collection of china, porcelain, and glassware, as well as sixty-five landscaped areas. The foundation sought advice on whether certain activities constituted an unrelated trade or business (such as operation of a gift shop and sale of excess flowers and plants). The IRS found that items offered at the gift shop that

are reproductions or basically similar to those in the collection would be considered related, as would books related to the historic site. Souvenir items (such as dolls, stuffed animals, and logo shirts) are not related. The IRS found that the sale of plants to visitors would probably be substantially related to the exempt purpose, if accompanied by educational or other descriptive materials. Sales of the plants to nurseries are probably not substantially related to the foundation's exempt purpose.

**Tech. Adv. Mem. 95-500-03 (September 18, 1995)**

A public charity that operated a *living museum* sought advice on whether merchandise sales, both inside and outside the museum site, and engraving and gift wrapping services constituted an unrelated trade or business. The museum sold merchandise at shops on the museum site, locations near the museums site, and at a store in a nearby city. The IRS first found that items in the gift shop that are reproductions or adaptations of items in the collection are substantially related to the museum's exempt purpose. The IRS then decided that the off-site sales did not constitute an unrelated trade or business because these enhance the public's understanding of the museum's subject matter and would encourage people to visit the site. Finally, the IRS found that the engraving done in front of onlookers would be educational and contributed to the museum's exempt purpose, while engraving done outside the view of onlookers would not be educational. The gift-wrapping service was not educational in nature, and as such, it constituted an unrelated business.

**Tech. Adv. Mem. 97-200-02 (November 26, 1996)**

An art museum (a public charity) sought advice about whether sales of tots' and children's items in the museum shop constituted unrelated trade or business. The IRS found that certain children's items that help them realize their artistic ability (such as art supplies, a kaleidoscope, or a magnetic wood block set) are related to the museum's exempt purpose. Items that only generally develop motor skills (such as a baby play gym) or develop general knowledge (such as a fruit and vegetable play set) are not substantially related. The IRS noted the museum might want to seek additional information from experts on early childhood education. The IRS also stated that items such as storybook dolls, geography-based toys, and books are related to the museum's broad educational purpose, which includes operating a library and holding musical concerts.

**Unrelated Trade or Business Activities—Licenses**

**Rev. Rul. 76-297, 1976-2 C.B. 178**

An organization sought advice on whether income received from licenses would be considered royalty income. The organization, formed to promote scientific investigation and research, itself filed for the patents, and the inventors assigned legal and beneficial rights in their inventions to the organization. The IRS stated that because the organization is both the beneficial and legal owner of the patents (as opposed to solely the legal owner), the income from licensing agreements is considered royalty income, and therefore is not unrelated business income.

***Tech. Adv. Mem. 82-020-01 (1982)*** *(Discussed above.)*

The IRS also considered whether income from licensing reproductions could be treated as unrelated business taxable income where the organization participates in the development of the products and has quality control supervision rights. The IRS concluded that the income from licensed reproductions was royalty income and, as such, excluded from computation of unrelated business taxable income. The ruling noted the question of whether royalty income is unrelated business taxable income where licensing furthers an exempt purpose, but concluded that royalty income was unrelated whether or not from exploitation of an exempt purpose.

***Priv. Ltr. Rul. 2007-150-15 (January 17, 2007)***

A charitable trust was established for the purpose of making annual and periodical grants to public charities. The private foundation sought to engage in a limited partnership with another company, where the foundation would provide services relating to the “installation, maintenance, repair, and servicing” packaging, as well as promotion of the licensed products, in exchange for royalty income from the licensed products. The foundation would receive royalty income from the arrangement, and these payments would be used to make cash distributions to public charities. The IRS first noted that royalty income is not subject to the unrelated business income tax by definition. It also found that the limited partnership interest and the royalties are not unrelated business income to the foundation, nor does such an arrangement result in excess business holdings.

**Private Benefit—Sales of Art**

***Rev. Rul. 71-395, 1971-2 C.B. 228***

A gallery was formed as a cooperative that exhibited and sold its members’ work. A committee selected the works of members that met minimal artistic standards. The IRS found that the gallery was serving private purposes, even though the exhibition and sale of the works may be an educational activity in other respects. Therefore, the organization was not exempt under the tax code.

***Rev. Rul. 76-152, 1976-1 C.B. 151***

An organization that operated an art gallery to exhibit the works of local artists sought advice on whether it was operated exclusively for educational purposes. Ninety percent of all sales were turned over to individual artists. The IRS found that the private individuals were being directly benefited and such benefits could not be considered merely incidental to the organization’s other purposes and activities. Thus, the organization did not qualify for an exemption under Section 501(c)(3).



***Tech. Adv. Mem. 80-340-18 (May 14, 1980)***

A membership organization sought advice on whether forming a separate corporation to handle nonexempt activities would result in a loss of exempt status for the entire organization, and if income from art fairs and an art gallery would be considered unrelated business income. All members of the organization were artists, craftsmen, or craft centers. Members could submit their work for sale. If the work was approved, the member would be granted *exhibiting* status. About 50 percent of the members held such status. The organization held fairs where members' work was sold. The IRS found that the organization had been operating extensively to serve the private interests of its members and its exempt status should be revoked.

***Tech. Adv. Mem. 86-340-01 (August 31, 1986)***

An organization with an educational mission operated an art gallery that both rented and sold artwork and conducted a variety of art-related activities, including: exhibitions, bus trips to other art museums, presentation of performances, and arts and crafts workshops. For the sales, the artists set the price and the organization added a 40 percent mark up for its commission. The organization owned about 80 works and rented them to private individuals and local businesses (72 out of the 80 works were rented to businesses). The gallery asked for advice on whether these activities jeopardized its exempt status under Section 501(c)(3). The IRS found that the sale and rental of art was substantially related to and contributed importantly to the organization's exempt purpose while also noting that the only other gallery in the area selected works only with an eye on profitability, while the organization selected works based on quality and educational merit. The IRS also noted that the sales and rentals provided an incentive to artists to display their work locally.

***Priv. Ltr. Rul. 200829046 (April 17, 2008)***

A public charity was created to preserve Hawaiian arts and crafts. The organization displayed its members' art in a gallery and sponsored art shows, which also sold members' art, but in an outdoor environment. The IRS found the primary activity was selling art on behalf of its members, which constituted private benefit and ruled that the organization did not qualify for an exemption.

**Unrelated Trade or Business Activities—Sales of Art**

***Tech. Adv. Mem. 80-320-28 (May 5, 1980)***

An art museum operated a gallery in its facility where original works of art were offered for rent or sale. The income and expenses of the gallery represented two percent of the income and expenses of the museum. The IRS found that being in the same building as the museum was not enough for the gallery to be considered a functionally related business. The IRS further found that when the museum sells original artworks, it removes them from public display and the public cannot learn to appreciate the work. Thus, the gallery sales did not contribute importantly to the museum's exempt purpose and the gallery operation constituted an unrelated trade or business.

***Priv. Ltr. Rul. 81-490-54 (September 11, 1981)***

An organization created for the purpose of providing exempt arts organizations with space at reduced rents, providing workshops and classes in the arts, and providing a centrally located arts center for the general public sought advice on whether operating a gallery to sell art would constitute an unrelated trade or business, or would cause the organization to lose its exempt status. The IRS found that because most of the staff work associated with the gallery would be by volunteers working without pay, the gallery was not unrelated. The IRS also found that the organization would not lose its exempt status because the operation of the gallery would be in furtherance of the organizations' exempt purposes and because it would not be the primary purpose.

***Priv. Ltr. Rul. 82-230-41 (March 9, 1982)***

A private foundation whose primary purpose was to foster the growth of visual and performing arts and crafts in the American West through educational programs, exhibitions, grants to artists, and other similar activities, sought rulings on whether certain sales would be unrelated trade or business income. The IRS ruled that the sale of catalogues, cassettes, posters, and reproduction prints of artworks from the collection, as well as bronze statues that are either original artworks or replicas donated to the foundation, would not be treated as unrelated trade or business income, noting these sales would stimulate and enhance public appreciation of art and help to make fine art objects familiar to a broader segment of the public, thereby contributing importantly to the achievement of the exempt educational purposes of the foundation. In addition, it ruled that the periodic sale of original artworks from the collection that had been donated by the artists falls directly under the exception contained in Section 513(a)(3) of the Code, which specifically allows the selling of merchandise substantially all of which has been received as gifts.

***Tech. Adv. Mem. 83-260-08 (1983)***

A public charity—created for the purpose of “establishing and maintaining a museum and library of art, of encouraging and developing the study of the fine arts,...[and] of advancing the general knowledge of kindred subjects”—also sold items in its retail shops and through a mail order catalogue. The IRS ruling noted that because the museum has exhaustive collections of “man’s artistic and cultural history,” more diverse items can be related to the museum’s exempt purpose than would be the case for a smaller, more specialized museum. The ruling found that related items include reproductions and adaptations from objects in the collection if sold with accompanying literature. In contrast, sales of original arts or crafts would be inconsistent with the museum’s exempt purpose of exhibiting art for public benefit because art sold deprives the public from viewing and appreciating the art. Without a nexus to the museum’s educational purposes, such sales would be primarily engaged in for production of income, which would be unrelated.

**Priv. Ltr. Rul. 88-490-72 (September 10, 1988)**

An organization established for the purpose of conserving and developing the handicrafts of the southern mountains sought to begin operating four craft shops. The craft shops selected items based on design and craftsmanship, with no concern for marketability. The IRS noted this was a situation comparable to that presented in *Goldsboro Art League Inc., Petitioner v. Commissioner of Internal Revenue*, 75 T.C. 337 (1980), where an organization proposed to conduct sales directly and sought advice on whether such sales would jeopardize its exempt status. The IRS found that the sales would contribute importantly to the organization's exempt purpose and operating the shops would not cause it to lose its exempt status. The IRS also found that because the organization's purposes were broad, it would not be difficult to establish a nexus between the charitable purposes and the sales. If the primary purpose of a line of merchandise would be to interpret some facet of the folk art collection, it would be considered related.

**Tech. Adv. Mem. 89-430-07 (August 1, 1989)**

A private foundation created for the preservation and protection of two religious faiths' cultural craft of quilt making in the home sought clarification as to whether certain sales activities constituted an unrelated business activity. The foundation operated a museum that displayed quilts that can be considered works of art, featured exhibits about quilts, and offered visitors the opportunity to observe quilt making demonstrations. The foundation sold quilts and quilt-making materials, and also completed quilts that visitors had begun at home and not finished. The IRS found that the sales of unique quilts, sales of quilt-making materials, and completion of unfinished quilts were related to the foundation's exempt purpose and, as such, did not constitute excess business holdings. Sales of other craft items not associated with quilt making were not substantially related.

**Priv. Ltr. Rul. 91-410-53 (October 11, 1991)**

A public charity furthered its exempt purpose of developing arts training programs for the disabled by providing training and career opportunities in drama, dance, music, literature, and visual arts to the disabled persons, and educating the public about the roles of disabled persons in the arts. The organization proposed to establish a gallery for the consignment sale of art created by disabled individuals, the gallery to be the only one of its kind in the nation. The gallery would also display and sell a few pieces of artworks created and donated by non-disabled artists to attract people to the gallery. These sales would only constitute a small portion of the total sales. The IRS found that the establishment of such a gallery would not cause the organization to lose its exempt status. The sale of art by disabled artists would not be an unrelated trade or business, nor would the sale of non-disabled artists' work donated to the organization.

***Priv. Ltr. Rul. 2007-430-38 (May 16, 2007)***

The IRS revoked the exemption of an organization that sold art, but did not have an educational or charitable purpose. The art sales could not be considered a functionally related business as there was no charitable program to which the sales could be related. The IRS also included a summary statement affirming that sales and rental of reproductions contribute importantly to a museum's exempt educational purpose as a means to enhance public understanding and appreciation.

**Charitable Purpose and Sales of Art**

***Priv. Ltr. Rul. 2009-010-23 (September 29, 2008)***

A widow established a trust to "make her husband's works widely available for public exhibition, provide funding for education and training in the visual arts, and to be of benefit to the public in those areas." As outlined in the trust documents, the trustees would arrange for exhibition of artworks through loans to public galleries and museums, and may sell items from the collection in order to provide funding for future charitable activities. Various rulings were sought from the IRS with respect to the potential tax treatments of the widow's planned bequest to the trust, including confirmation that the trust's purposes would qualify as charitable. The IRS ruled that the trust purposes and planned operations were charitable, that all of the trust's assets would be devoted to charitable purposes, and that any art sold by the trust would be for the purposes of the trust and not for any private benefit. The IRS also ruled that the estate tax deduction and the gift tax deduction would apply to transfers to the trust.

**Self-Dealing and Sales of Art**

***Priv. Ltr. Rul. 90-110-50 (December 21, 1989)***

A private foundation created to promote the study, creation, preservation, and exhibition of the visual arts had previously received a private letter ruling stating that it could exhibit, loan, and sell art that was transferred to it from an artist's estate. Two individuals on the board of trustees, who also hold positions as officers, would be broker-agents selling artworks and receiving commissions for art sales. The IRS noted the estate would be conducting art sales and that there was an expectation the art collection would be transferred to the foundation to be exhibited, loaned to museums, or sold to finance a charitable grantmaking program. The IRS evaluated the proposed procedure to set commissions for disqualified persons serving as broker-agents and found it was reasonable. The IRS ruled that the payments of fixed commissions to disqualified persons did not constitute self-dealing under Section 4941 of the Code provided the percentages are reasonable compensation for services rendered. As such, the commissions would not be considered taxable expenditures.

## **Exempt Function Assets and Sales of Art**

### ***Priv. Ltr. Rul. 94-110-09 (December 10, 1993)***

An artist bequeathed almost all the art he produced and still owned at his death to a private foundation whose purpose was to educate the public on the life and art of the artist, and on modern art in general. Before the artist died, he entered into a contract with a master printmaking workshop and print publisher to create and sell lithographs for which the artist received a royalty of 55 percent. The estate distributed this contract to the foundation. The IRS found that the art collection, archive, and print contract will be assets used or held for use directly in carrying out the foundation's exempt purpose of educating the public, and as such, the foundation was not required to distribute five percent of their value annually. Payments to maintain the collection and archive would be considered as being made for activities constituting the purposes for which the foundation is organized. It also confirmed how the foundation would be treated under the income test and the endowment test to determine if it is an operating foundation. The IRS noted that although the foundation planned to sell original paintings to museums, and sell editioned multiples, prints, and works on paper to private collectors, the purpose of the sales being solely to raise money to endow and maintain the foundation's collection and archive.

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<sup>1</sup> Indeed, private letter rulings explicitly state: "This ruling letter is directed only to the organization that requested it. Section 6110(j)(3) of the Internal Revenue Code provides that it may not be used or cited by others as precedent."

<sup>2</sup> Observations about art sales by artist-endowed foundations and the examples cited in this paper are drawn from foundations' annual information returns (Forms 990-PF), which can be viewed at <http://www.guidestar.org/>.

<sup>3</sup> Among others, see Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* (2002–2008 with annual cumulative supplement).

## **9.6 CULTURAL RESOURCES: PROFESSIONAL PRACTICE IN ART HISTORY**

- 9.6.1 Artist-Endowed Foundations and Museums: Observations on the Relationship (James T. Demetrion and Lowery Stokes Sims)
- 9.6.2 Artist-Endowed Foundations: Archives, Access, and Scholarship (Joan Marter)
- 9.6.3 Artist-Endowed Foundations Stewarding Artists' Archives and Libraries: The Importance of Standards and Access (Tom McNulty)



## 9.6.I Artist-Endowed Foundations and Museums: Observations on the Relationship

JAMES DEMETRION AND LOWERY STOKES SIMS

The dynamic between artists and museums can be a complex one. In fact, the history of the artist-endowed foundation field includes foundations whose existence results in part from artists' concern with how their works might fare if incorporated into a museum collection or from artists' inability to come to satisfactory terms with museums in negotiating substantial bequests.<sup>1</sup> Nonetheless, the relationship between artist-endowed-foundations and museums has proved to be an important one and, as such, needs to be considered, clarified, and strengthened. This paper, prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study), offers some observations toward that goal.<sup>2</sup>

The relationship between museums and artist-endowed foundations in many ways is defined by the responsibilities that govern the operation of artist-endowed foundations according to their formation as private foundations. The foremost responsibility is to operate in the public benefit in all respects, whether in conducting grantmaking programs, maintaining archival holdings, managing a collection of an artist's works, or interacting with the marketplace.

The larger environment in which the relationship of artist-endowed foundations and museums plays out today is distinguished by a concern about perceived conflicts of interest within philanthropic and cultural institutions; increased public scrutiny of museum presentations, operations, and dealings with donors and other constituents; and a sense that intellectual integrity and independence of curatorial vision potentially can be at risk in museums pressured by many factors, including limited resources.

### **Realizing Public Benefit**

In considering the relationship among artist-endowed foundations and museums, we can start by parsing the requirement of public benefit on the part of foundations—what it is and how it is realized. This requirement takes a concrete form in that private foundations, including artist-endowed foundations, are required to expend their funds in support of their exempt purposes. In meeting this requirement, the question is whether a foundation will choose to allocate funds primarily for charitable programs (for instance, toward grantmaking) or use its funds directly to conduct various programs operated according to an educational mission.<sup>3</sup> These direct programs may include anything from educational



resources and exhibitions to art conservation and archival preservation. A further choice is to combine grantmaking and direct program operation.

Beyond financial resources, the critical assets that artist-endowed foundations deploy in fulfilling their missions include art collections, archives, copyrights and other intellectual properties, and in some cases, scholarly and technical expertise. Among the artist-endowed foundations that have been the focus of the Study, there can be found an array of practices by which these assets have been utilized through relationships with museums, demonstrating a wide range of possible public benefits.

Foundations can facilitate the work of curators in researching and developing exhibitions by providing access to archives, as well as lending artworks to exhibitions being developed and presented by museums. They often maintain collections and related materials in greater depth than is possible for museums managing broader holdings. Where curators over the course of a career may move among museums, foundations should be able to offer a continuous line of expertise and a consistent place where information can be found.

Foundations also can fund exhibitions taking place at museums and other public institutions, along with supporting publications related to exhibitions as well as public programs associated with exhibitions. In some cases, foundations will choose to make gifts of artwork to public collections, either fully contributing or combining a gift and sale of artworks in order to build the representation of an artist within a museum's collections.

Beyond specific exhibitions, artist-endowed foundations also can play an important role in stimulating knowledge more broadly, contributing to the wider scholarship in which a museum's activities take place. Foundations might facilitate biographies of artists and support publication of an artist's own texts or correspondence. They might commission oral histories to document the ideas and personalities that informed an artist's works. They also might commission papers and support convenings about scholarly and technical aspects of artists' works. For those artists associated with artist-endowed foundations, it is hard to imagine the production of a catalogue raisonné without the support and active participation of the associated foundation—drawing on its archive, art collection, and other source materials, and providing the necessary permissions and publishing rights in those cases where the foundation owns the artist's intellectual property.

Additionally, artist-endowed foundations can identify a need and then assist in conservation of artworks in public collections. Particularly for artists whose works incorporate materials that present challenges in conservation, artist-endowed foundations can assist curators and art conservators in developing and organizing access to technical expertise that is beyond the capacity of most museums to sustain individually.<sup>4</sup>

Artist-endowed foundations also can assist museums in the ongoing work of building collections. Grants and combined gifts and sales of artworks can facilitate efforts of museums that are trying to develop a deeper collection around a particular artist.<sup>5</sup> Foundations might place a special focus on encouraging collection development efforts of museums that are newer or those that are smaller institutions that have not had the resources to compete in the marketplace for an artist's work.

Similarly, foundations that circulate exhibitions can be a valuable resource for smaller museums with more limited opportunities to secure loans for exhibitions.

Artist-endowed foundations also can play a beneficial role in the art market, where museums may not be able to move quickly in making acquisitions. With greater flexibility, foundations can secure an artwork that is a priority for inclusion in public collections, and hold it for later resale to museums. They also can purchase artworks in need of conservation, see to that need, and subsequently place these pieces in museum collections.

And in situations where museums find themselves pressed by proposals that public collections be deaccessioned inappropriately, artist-endowed foundations can help to question the decision making and manner of the action. In this way, they can play a role to steward compliance with the terms of gifts made by artists during their lifetimes, prior to a foundations' existence, as well as those made by the foundation itself.<sup>6</sup>

Apart from activities focused on a specific artist, artist-endowed foundations can operate grant programs that assist museums more broadly. Grant programs operated by foundations might support long-term research, exhibition development, and other special curatorial programs, or identify and make direct grants to assist emerging or less-recognized artists of interest to museums.<sup>7</sup>

## **Stewardship Concerns**

While recognizing the great array of ways in which artist-endowed foundations' critical resources can be deployed for public benefit, from the perspective of museums there also are more provocative aspects to the relationship. Many of these are associated with foundations' efforts as advocates to develop recognition for and manage the reputation of their artists.

One aspect of concern is activities by artist-endowed foundations to organize exhibitions and tour these to museums for a fee that funds the foundation's curatorial and other professional services and, in some instances, generates additional revenue to support the foundation. It should be pointed out, however, that museums routinely charge loan fees to other museums that borrow works for exhibitions and also charge fees to circulate exhibitions they organize to other institutions.

Artist-endowed foundations that organize and circulate exhibitions in some cases hire and compensate independent curators to prepare the exhibitions. The question raised here is the degree to which a curatorial consultant in this role has intellectual independence and freedom of thought in preparing the exhibition and interpreting the artist's work or whether adherence to the promotional focus of the foundation as the exhibition originator is required. In theory, however, this could be a potential concern with respect to any entity committed exclusively to one artist, such as a single-artist museum.

A similar question in more pointed form is raised when artist-endowed foundations, in responding to requests from museums for art loans or permission to access archives, exert excessive control, requiring agreement with a particular perspective on the artist's achievements as a condition of loans or access. More generally, the same concern is presented by artist-endowed foundations that rarely lend to exhibitions in which they do not play a curatorial role. This poses the reasonable question: Where is the opportunity for independent scholarship essential in bringing a fresh view to artists' achievements?

And while artist-endowed foundations can make important contributions of artworks to build museums' collections, there is a concern that these gifts will fail to realize their real potential if they are complicated by onerous restrictions rooted in the ambition to control an artist's reputation.

## **Marketplace Concerns**

Also viewed as provocative by museums are foundations' activities in exhibiting art that may be for sale. By their donors' intent, some artist-endowed foundations appropriately sell artworks they own, generating funds to support their programs and operate the foundation. However, a foundation's loans to museum exhibitions that overlap with or are followed closely by sales of the exhibited works are in conflict with museum ethics prohibiting direct influence in the marketplace.<sup>8</sup>

These concerns potentially are not limited to art sales by foundations themselves. Concerns also would be raised were artworks owned privately by a foundation's trustees to be included in the loans to exhibitions that were assisted by the foundation, and then subsequently made available for sale.

## **Caveats: Museums in Relations with Artist-Endowed Foundations**

The work of museums is scrutinized on its own for public benefit, evaluated in a variety of ways, including by the press and, in some instances, Congress. The public benefit obligations of museums include making art accessible to the public, providing responsible stewardship of collections, and avoiding potential conflicts of interest involving marketplace

considerations that can undermine museums' credibility and position in the nonprofit sector.

The wide-ranging activities of artist-endowed foundation discussed above demonstrate how the relationship with foundations can complement, compete with, and complicate the public benefit responsibilities of museums in their own work. With a greater number of artist-endowed foundations taking their place in the infrastructure of contemporary art, this relationship is likely to become increasingly complex.

As with the influence of other parties that may have particular interests (such as private collectors), there is a concern that museums pressed for resources can be influenced by artist-endowed foundations in shaping exhibitions and programs, as well as interpreting artists' works. Here the desire of an artist-endowed foundation to promote the artist may move over the line from advocacy into potential censorship, limiting access to archives and controlling the curatorial process to shape the art historical record. Comparable to the case of independent curators hired directly by foundations, the ability of museums' curatorial staff to maintain intellectual independence in the interpretation of the artist's work is paramount.<sup>9</sup>

Likewise, museums and their curators must be mindful of directly influencing the marketplace in what is tantamount to the promotion of an artist's work through the vehicle of institutional presentation. Where this issue presents itself in the potential sales activities of foundations, museums, and foundations must be clear about the potential of sales. In some such instances, museums may require a moratorium on the sale of works featured in an exhibition for a period of time after conclusion of the exhibition.

Where the issue presents itself in the potential sales activity of private individuals associated with a foundation, a similar transparency and moratorium may be required.<sup>10</sup> At the very least, a thorough evaluation of the extent to which private ownership is represented in the overall makeup of works to be exhibited will be necessary to confirm that planned loans are consistent with a museum's ethical standards on this topic.

On the part of the artist-endowed foundations involved in this type of situation, there is a responsibility to recognize that a foundation's mission to bring the artist's art to the people, irrespective of ownership interests, is bounded nonetheless by appropriate limits to activities that provide excessive benefits to private individuals.

## The Working Relationship

Happily, the many constructive examples of public benefit highlighted at the start of this paper demonstrate the potential fruits that can result when foundations' critical assets are deployed through the working relationship between artist-endowed foundations and museums. In the final analysis, the success of this relationship rests on a commitment to transparency on all parts. The particular nuances of the relationship are fluid, but can be negotiated successfully with a basic sense of the ethical standards that are recognized in respective fields, as well as the appreciation of mutual benefit.

On the one hand, this should be bolstered by the fact that collecting institutions that are solidly governed will have existing policies with respect to ethics and best practices both in-house and according to the field at large.<sup>11</sup> To date, the adoption of conflict of interest policies is not a common practice among artist-endowed foundations, although that is beginning to change (for example, the application for recognition of tax exemption for new nonprofits now formally queries organizations about their conflict of interest policies and practices).

Artist-endowed foundations comprise a growing field of philanthropic activity. As with any newer field, there is an emerging sense about effective practices and an awareness of pitfalls presented to the field as a whole when a small number of entities function with less recognition about these matters. Newer artist-endowed foundations can be aware that ongoing conversations and broad efforts to bolster effective practices are underway in the foundation field, as well as the museum field.<sup>12</sup> These related efforts can be useful resources in clarifying the nature and working methods of artist-endowed foundations.

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<sup>1</sup> For example, see histories of the (Donald) Judd Foundation and Isamu Noguchi Foundation.

<sup>2</sup> This paper has been excerpted by Lowery Stokes Sims from the transcript of Christine Vincent's interview of James Demetrian and Lowery Stokes Sims, which took place January 18, 2008.

<sup>3</sup> The point is currently debated as to whether our country's system of charitable contributions should be rescaled with greater incentives to gifts aiding the poor and disadvantaged (Robert Reich, "A Failure of Philanthropy," *Stanford Social Innovation Review*, Winter 2005). What role educational and cultural institutions have in that purpose and, more specifically, how those artist-endowed foundations that focus primarily on advocacy for an artist's reputation via educational programs relate to this discussion are important questions.

<sup>4</sup> See Morris Louis Art Conservation Fund, Barnett and Annalee Newman Foundation, Roy Lichtenstein Foundation, (Donald) Judd Foundation, and others.

<sup>5</sup> See the respective foundations' gifts of grouped artworks by Josef Albers, Robert Mapplethorpe, Robert Motherwell, Georgia O'Keeffe, Herb Ritts, Mark Rothko, Andy Warhol, etc.

<sup>6</sup> See the Georgia O'Keeffe Foundation, and successor Georgia O'Keeffe Museum, regarding the artist's gifts to Fisk University, and the Rose Art Museum/Brandeis University regarding gifts of artworks to the museum by various artist-endowed foundations.

<sup>7</sup> See programs of the Andy Warhol Foundation for the Visual Arts, Jerome (Hill) Foundation, (Edward M. Levine) Harpo Foundation, and Richard A. Florsheim Art Fund, among others.

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- <sup>8</sup> However, there is a correlation between museum deaccessions and foundation art sales. When museums sell art, use of the proceeds is restricted specifically to art acquisitions in support of museums' core mission. Likewise, when artist-endowed foundations sell art, they are doing so to support their exempt activities, conducted in support of their core mission.
- <sup>9</sup> See American Association of Museums, "Guidelines on Exhibiting Borrowed Objects," (July 2000) for a discussion of best practice standards in these instances. <http://www.aam-us.org/museumresources/ethics/borrowb.cfm>.
- <sup>10</sup> Related to this, see January 2010 Message from President, Association of Art Museum Directors (January 24, 2010): "...We believe it is critical to maintain a balance between the benefit to the public of exhibiting privately owned works against the potential for conflicts of interest and the undermining of curatorial authority. In addition, because the monetary value of any work of art is arguably enhanced through exhibition in a public museum, museums must be mindful of showing works that may soon be destined for the marketplace." Association of Art Museum Directors, <http://www.aamd.org/newsroom/> (accessed March 3, 2010).
- <sup>11</sup> This is seen in the code of ethics of professional organizations such as the American Association of Museums and the Association of Art Museum Directors. Accordingly, museum trustees and staff are required to sign annual conflict of interest statements outlining the boundary to be upheld between the institution's public benefit interests and the private interests of its trustees and staff.
- <sup>12</sup> See *Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations*, released by the Panel on the Nonprofit Sector in 2007.



## 9.6.2 Artist-Endowed Foundations: Archives, Access, and Scholarship

JOAN MARTER

Decisions regarding the maintenance and accessibility of archives present many difficulties for both artist-endowed foundations and scholars hoping to benefit from the use of these materials. As president of an artist-endowed foundation, I am aware of the financial and logistical restraints on making archival data truly accessible. As a scholar frequently writing on artists who have received limited attention in existing literature, and as an adviser to dozens of doctoral candidates writing dissertations, I fully understand the need to consult primary sources, and the usefulness of these archives for articles and essays intended to enhance the reputation of an artist.

### **Audience for This Paper**

Not all artist-endowed foundations are likely to use this information because they do not intend to retain ownership of their artists' archives. Large grantmaking foundations such as the Andy Warhol Foundation for the Visual Arts, the Pollock-Krasner Foundation, and other foundations have already deposited their archives with appropriate institutions. This paper, prepared for the Aspen Institute's National Study of Artist-Endowed Foundations (Study), is addressed to foundations that intend to function as study centers, housing archives and works of art that can be examined and exhibited. These foundations have assets sufficient to provide dedicated facilities that are properly staffed by art historians and equipped as research sites. Lacking these, many small foundations will need to make decisions about the placement of archival materials. In some cases, *estate distribution foundations*—those whose purpose is the posthumous, charitable distribution of an artist's works—will have an immediate need for determining archival disposition. In other cases, the time-limited nature of the foundation means that an eventual decision will be required regarding archival placement.

In this paper, both sides of the dilemma will be considered. For an artist-endowed foundation, the existence of archival materials that relate to the life of a deceased artist can present challenges.

1. Which papers, receipts, correspondence, or journals are important to preserve?
2. How can archives—which include photographs, exhibition catalogues, brochures, books, etc.—be properly catalogued?



3. Should the archival materials be made available to scholars and students as soon as possible (for example, within the confines of the foundation's office or storage facility)?
4. What protections are necessary to ensure the proper use of these materials by scholars and graduate students?
5. Should the archival materials be sold or donated to a public repository, such as the Archives of American Art, Smithsonian Institution, or a library?
6. Should restrictions be placed on certain materials such as personal letters from other artists or diary entries that are judged to be sensitive? How are such restrictions handled?
7. What is the ultimate disposition of the archival materials?
8. Is online data retrieval an option, and how can the costs be handled?

Artist-endowed foundations need to identify what is important to retain among the remaining contents of a deceased artist's studio, and what materials can be removed. My experience has led me to believe that a foundation needs to seek professional advice about letters, postcards, records of supply purchases, etc. Virtually every document could have potential usefulness to researchers. Brochures and catalogues of group exhibitions that have included works by the deceased artist may be difficult to locate in existing library holdings. In preparation for the possible transfer of an artist's documents into an archival repository, it is advisable to obtain records from any art gallery that has represented the artist. Where possible, the names and addresses of collectors of sold works should be obtained. In addition, the foundation should seek professional help in preserving materials properly, using the proper folders, and determining the best storage methods for vintage photographs of the artist's works.

Artists' family members and recently formed artist-endowed foundations often seek help in determining how to proceed with their archival materials. In the case of a painter or sculptor where the archival material may include original sketches and studies for completed work, a decision must be made to separate material related to specific works of art, including maquettes, from exhibition catalogues, photographs, letters, and other documents. In 2007, the papers of Diane Arbus were given to the Metropolitan Museum of Art at the same time that a number of first-rate photographs were also purchased from the artist's estate. George Rickey's archive, maquettes, and sketchbooks, along with a collection of his sculptures, were given to the Snite Museum of Art, University of Notre Dame. Prior to his death, Sol LeWitt contributed his drawings and a related archive for these works to the Yale University Art Gallery, which is collaborating with the Massachusetts Museum of Contemporary Art (MassMOCA) and Williams College on a 25-year installation of the

drawings. Most artist-endowed foundations, being smaller in scale or associated with lesser known artists, do not have the opportunity to coordinate placement of an art collection in tandem with the artist's archives. Therefore, the disposition of archival materials may need to be determined separately from the storage or sale of sketchbooks or other works of art.

## **Importance of Archives to Artists-Endowed Foundations and the Need for Immediate Access**

When a nonprofit foundation is established, the private realm of the artist's creative life assumes a different identity. With the tax-exempt status of a nonprofit, the artist-endowed foundation is expected to serve as a public benefit and as an educational resource. In addition to the benefit to scholars and graduate students in having access to these archives, there are certain advantages to those assigned to *manage* the artist's oeuvre in organizing the archival materials and ensuring accessibility. Archives often include records of sales, descriptions of works, pamphlets, exhibition catalogues, and photographs. These materials can be used to identify works of art and find correct titles and dates. Letters and journal entries can help to establish a framework for understanding the creation of certain works of art. Systematic organization of archival materials can be an invaluable source of useful information for the sale of works and the proper disposition of the assets of the artist's estate.

## **Importance of Archives to Scholars and Curators**

Most persons associated with an artist-endowed foundation will understand that the recognition of the deceased artist's creative achievements will stimulate exhibitions of the art, and ultimately stimulate sales of the work. However, the archives are not commodities to be sold, but the necessary documentation about the artist and his or her career. A determination about the placement of archives needs to factor in location and accessibility rather than seeking the most lucrative deal. Access to archival materials by scholars, curators, and graduate students will ensure the attention that the foundation is seeking. Both established scholars and advanced graduate students have a need for unpublished materials that are held by the foundation. Not only will these archives facilitate a serious, thorough, and accurate assessment of the artist's career, but the use of unpublished primary sources will ensure recognition of the originality of the artist (or the unique contribution) to be found by examining these sources. Without access to these archival materials, scholars must rely on existing (and accessible) exhibition catalogues, published reproductions of the artist's works, and perhaps a limited number of articles and essays.

For example, recently I wrote an article on the early career of Mercedes Carles Matter. After exhausting the artist's files (vertical files) and exhibition records of the Museum of Modern Art Library, it was discouraging to realize that only a handful of articles were available, and that there was very little published material on Mercedes Carles' career in the 1930s and 1940s. Without the assistance of personal letters, journals, unpublished

biographical statements, exhibition catalogues, and photographs from the estate of the artist, it would not have been possible to write more than a short essay on this artist's formative period. Her years of instruction at the Hans Hofmann School of Fine Arts would have been impossible to describe. The Archives of American Art, Smithsonian Institution, (Archives of American Art) proved to be of valuable assistance in giving me access to original papers still being held at the New York office that were in the early stage of the cataloguing process. The opportunity to make a full assessment of the artistic development of a deceased artist is absolutely dependent on access to photographs, exhibition records, and other archival materials.

## **The Disposition of Archives by the Artist-Endowed Foundation**

There are several possible ways to make data accessible to those managing an artist-endowed foundation and to scholars who plan to use these resources.

### **Best Practices for Foundations Retaining Archives**

After the papers have been properly organized and catalogued by experts working with the artist-endowed foundation, these materials should be made available to the staff of the foundation and to scholars. To facilitate optimal access for scholars and graduate students, detailed collection descriptions and finding aids should be available on the foundation's website. Digitized documents that are accessible online are always desirable. Access policies and restrictions should be clearly indicated. In some cases, ARTstor, the online library of digital images in the arts and humanities (<http://www.artstor.org/>), can provide access to digitized art images for educational purposes (such as for Albers, Lichtenstein, Sanchez). In addition, the foundation's website should provide a guide to other collections that hold the artist's papers or artworks.

When possible, financial assistance should be made available to graduate students and scholars for travel expenses to consult the archive. For this disposition of resources, the problem may be personnel to accommodate requests for access. This is a problem that I can address personally as the president of the Dorothy Dehner Foundation for the Visual Arts, an artist-endowed foundation with no staff. I have spent many hours showing drawings, photographs, and scrapbooks to curators and scholars. If a copying machine is not available, scholars need to be ensured proper lighting for digital photography. A decision needs to be made about the degree to which users will be monitored while the archives are being consulted.

Most artist-endowed foundations do not have sufficient staff, or any staff, to assist and monitor the visiting scholar. Since most offices of foundations are not set up to provide acceptable conditions for scholars to read, take notes, and make copies of relevant documents, this practice seems to be best as a temporary measure only.

## Seeking a Repository with Public Access

It may be necessary to separate sculptural maquettes, drawings, and sketchbooks (that may have monetary value) from papers that serve a documentary purpose. Typically, sketches and maquettes need to be stored differently, and will be made available to a more select group of curators and scholars. For the papers, brochures, and letters associated with an artist, the anticipation of the sale of this data should not be a factor in the determination of its disposition. If the documents are to be donated, they should be transferred to a facility that is accessible both to the artist-endowed foundation and to scholars and students.

The best repositories are those that already house artists' papers. In these locations, the cataloguing process is more professional: *finding aids* will be determined more accurately for the art historian, curator, and critic; and the works will reference related documents already available in the collection. Where possible, the foundation should deposit archives where related material can be found. This related material could be the papers of other artists or a movement associated with the artist. If a remote location is selected as a repository, the foundation should consider providing grants for scholars' travel to a facility that is outside major travel hubs.

## Practical Considerations

### Delays

All libraries and institutions are experiencing delays in processing materials. This problem affects major institutions such as the Smithsonian, the Getty Research Institute, the Beinecke Rare Book and Manuscript Library at Yale University, and many other sites.

### Use of Microfilms and Digital Scans

Since 1954, the Archives of American Art has borrowed archival materials from artists, organized the data, and microfilmed these archives. The originals were stored in Washington, DC, or returned to the artists. The microfilms were made available at regional offices in locations around the country, and the microfilms were also mailed to university libraries through interlibrary loan for use by scholars and graduate students. When original papers were donated by artists (such as Alexander Calder), the originals were made available to scholars in the main office in Washington, DC

A case in point for my research has been the archives of Theodore Roszak. For years I consulted the microfilms of the Theodore Roszak Papers on deposit with the Archives of American Art. During his lifetime the artist had agreed to have his papers microfilmed. The originals were returned to his studio. After the artist's death, his papers, photographs, correspondence, and sketchbooks were sold to the Getty Research Institute. My trip to Los Angeles to examine these materials proved to be very expensive given the restricted hours for access to its special collections. I spent nine days at the Getty Research Institute, which necessitated substantial hotel bills and transportation costs, exceeding the research stipend

provided by the Getty. In addition, there were serious restrictions on the photocopying of materials that made the careful examination of many documents virtually impossible to complete during my residency.

Purchase of archives by public institutions may be an attractive choice for an artist-endowed foundation. In addition to the purchase price, the research facility guarantees that the works will be properly catalogued (eventually) and carefully maintained. However, the papers may be unavailable to many scholars because of a time lag in preparing the archives for access in their special collections. In the case of the Getty Research Institute, there is no provision made for online access. Only finding aids and general information about the collections are available online.

What is the solution? Scanning data for online use is the most practical action currently. The material should be made available to scholars easily and inexpensively. If high resolution digital images are provided online, access to the original documents will not be necessary in most cases. If the decision is made to sell or to donate archival materials to a library or another research faculty, the artist-endowed foundation must realize that this decision may permanently impact research and writing about the artist. For scholars it will be important to exhaust all existing archival sources, such as microfilms at the Archives of American Art, and all library holdings before incurring the expense of travel and residence at a library or other research facility where the original papers are made available.

## **Repositories for Archives**

The Harry Ransom Center at the University of Texas at Austin, the Beinecke Library, and the Getty Research Institute have taken a special interest in the archives of visual artists. These libraries and others could be approached regarding the disposition of artists' documents. The Museum of Modern Art, the Whitney Museum of American Art, and other museums have also accepted the archives of artists represented in their collections.

A favored repository remains the Archives of American Art, which has been in operation for more than five decades. However, it has a limited budget and has closed its Los Angeles office. In addition, it must adjust its policies to include materials other than paper documents. The Archives of American Art has changed its procedures since 2005, and no longer *borrows* material for microfilming. As it does not purchase archives, artist-endowed foundations must donate papers, but that contribution can be recognized as being made toward the fulfillment of a foundation's annual distribution requirement. If necessary, the documents can be appraised to ensure that the foundation's contribution of its artist's archive is appropriately valued. If an artist's family members have inherited the archive apart from the foundation, it can be contributed and a charitable income tax deduction taken by those individuals.

Although the Archives of American Art cannot purchase archival materials, it shoulders the major expense of organizing the documents, establishing finding aids, and scanning the documents into digital files. Making these documents available on the Internet provides the greatest accessibility to the public. Concerns about the availability of materials for unauthorized use and *uncontrolled* access can be remedied, for this is a long-standing service provided by the Archives. If necessary, a foundation can request restrictions that would control access to the collection overall or to certain parts of the holding by requiring an authorized letter from the foundation and the establishment of a password for limited access. Copyright restrictions prevent the publication of letters or documents without obtaining necessary permissions from the author of a document.

Advantages of the Archives of American Art include its history of stewardship of documents from artists, art galleries, and writings since 1954. The availability of documents related to the artistic production of a single artist, and the cross-referencing that is possible with documents donated by art galleries (particularly galleries no longer in operation) and other artists will enrich the study of any artist. It remains the largest resource for primary documents in the history of art. The main office is located in Washington, DC, and there are regional offices for viewing microfilms and reading oral history transcripts in New York, Boston, Fort Worth, and San Francisco.

My recent discussion with Charles Duncan, collection specialist for the New York Region, Archives of American Art, has provided details about the latest policies and programs. Among these, the Archives of American Art has been assisted with grants from the Terra Foundation for American Art to scan images and to make digital documents available on the Internet. Since August 2005, previous efforts to microfilm documents have been replaced by digital scanning. The Archives of American Art is willing to accept archival materials that have not been fully catalogued and to develop the appropriate finding aids. At the same time, a foundation retains access to the artist's original papers while the cataloguing and scanning of the collection is completed.

In addition to institutions already mentioned, other institutional repositories of archives include the Library of Congress, which has archival holdings of illustration artists, architects and designers (such as Herb Block and Charles and Ray Eames). The Center for Creative Photography at the University of Arizona is the nation's largest collection of photographers' archives (including those of Aaron Siskind, Frederick Sommer, Paul Strand, and Laura Volkerding). There are special institutional partnerships focused on individual artists, such as the Charles W. Moore Foundation, which partners with the University of Texas at Austin, School of Architecture in the preservation of the architect's home, studio, archive, and library. In other cases, artists' archives are collected with a specific focus, such as the Downtown Collection of the Fales Library and Special Collections at New York University's Bobst Library, with archives of artists active in SoHo and the Lower East Side during the 1970s to early 1990s (such as Martin Wong and David Wojnarowicz).

## Sensitive Items and Copyright Restrictions

Artist-endowed foundations may want to set restrictions on certain materials related to living persons and require readers to seek permission in order to examine letters, diaries, or other unpublished materials. Professional standards in the library and archive fields encourage donors to utilize restrictions judiciously, focusing, for example, on materials involving personal information about individuals during their lifetimes and possibly for a reasonably limited period following death. I would suggest that the documentation of exhibitions, brochures, and photographs should be made available to all scholars and interested readers, and that only personal correspondence or other sensitive materials should be restricted. For decades the Archives of American Art has honored restrictions placed on the access to documents by artists' family members and heirs and beneficiaries. These restrictions can be arranged through consultation. Copyright arrangements can be administered professionally, for example, with such agencies as the Artists Rights Society or the Visual Artists and Galleries Association.

## Summary

The following queries concern the maintenance and ultimate disposition of archives.

1. Is it possible for staff members of the artist-endowed foundation to catalogue the archival materials properly, including preparing finding aids?
2. Is the location of the foundation office conducive to visitation and examination of documents by curators and scholars?
3. What are the aims of the artist-endowed foundation? If the promotion of the artist's work, and better acknowledgement of her or his achievement is a goal, then scholars, curators, and graduate students need to be given access.
4. What is the nature of the archival materials? Are the holdings exhaustive or limited as documentation of the artist's career?
5. In addition to this archive, is the artist well known through other scholarly sources? Is there a substantial bibliography on the artist that is available already?
6. What is the best and most successful functioning of the archives? Can the foundation provide the most practical and functional use of the archives?
7. Have any restrictions been placed on the material by the artist in his or her will? Have family members exacted certain restrictions?
8. What is the relationship of this scholarly resource to others that already exist? (For example, has the entire selection of artist's papers been microfilmed previously and made accessible through the Archives of American Art?)

9. Are foundation staff prepared to take on all of the necessary responsibilities regarding the professional cataloguing and access to archives?
10. Will the archives remain located in the foundation's office or facility on a permanent basis or should they be moved to a public repository?

It is my hope that this document will prepare artist-endowed foundations to reach some decisions about how to manage archival materials. As a scholar and the adviser to more than 30 completed dissertations, and as the president of an artist-endowed foundation, I am familiar with the problems on both sides. Here it has been my intention to show that the foundation, as well as the artist's historical record, is best served by archives that have been professionally organized. The materials should be made available to scholars, pursuant to the role of the foundation as an educational resource. Finally, the accessibility of archives should include a consideration of the location and professional practices of the repository, as well as the related contextual holdings. Will scholars and graduate students be obligated to spend large sums for travel and accommodations in order to consult the archives in an exclusive venue, where no other artists' archives are deposited?

## **Promoting Access**

Artist-endowed foundations have different missions and a wide variety of facilities, some of which can accommodate scholars and graduate students and some that are not equipped to do so. As a researcher and as a dissertation adviser, I hope to encourage foundations to make their archives accessible to scholars. Because documents may be located separately from the foundation headquarters, a directory of artist-endowed foundation archives would be an excellent resource for scholars, and I would welcome support for this type of important publication. *Portal* mechanisms that help to connect and direct access to multiple archives in diverse locations are highly desirable. For example, Rutgers University has established the Women Artists Archives National Directory (<http://www.waand.rutgers.edu/>), which provides information on repositories of primary source material devoted to women artists in the United States. The Museum of Modern Art's website (<http://www.moma.org/>) includes a survey of archives for Latino and Latin American Art. There are many formats for artist-endowed foundations to make primary documents available to scholars. If a goal of the foundation is to encourage greater recognition for the artist and his or her creative production, ensuring access to documents for those writing this important history and organizing exhibitions is essential.





## 9.6.3 Artist-Endowed Foundations Stewarding Artists' Archives and Libraries: The Importance of Standards and Access

TOM MCNULTY

Over the past few decades, the proliferation of artist-endowed foundations has engendered certain expectations from the fine arts research community. Whether they define themselves as research centers, grantmaking entities, or both, foundations are expected to offer access to accurate information on their subject artists' lives and careers. Because research and scholarship resulting in publication and exhibition are central to the cultivation of interest in the foundation's subject artist, it behooves foundation managers to give serious attention to what for many may be one of the most important assets—its archival collections and library.

The word *archive* usually evokes images of rooms filled with boxes and folders containing correspondence, handwritten or typed manuscripts, and the like. While artists' archives will likely contain some such material, they can also be expected to include a wide range of materials in media other than print, including sketchbooks, notebooks, unfinished artwork, materials (such as paint tubes) and equipment (such as palettes, wooden mannequins, etc.). The artist's very home or workspace might even be considered *archival*, as is the preserved paint-splattered studio in the Pollock-Krasner House and Study Center in East Hampton, New York.

This paper will discuss the importance of properly maintaining artists' archives and personal libraries, or placing them in repositories where this will be possible, along with the related administrative issues of staffing, assessing monetary value, and ensuring the highest possible level of organization and access to the primary source material on the artist's life and work.

### **Standards and Best Practices**

The professional fields of librarianship and archives administration have established a wide range of procedures and standards over the years that ensure a degree of uniformity among libraries and archival repositories. Since their inception in the nineteenth century, some of these processes have enabled the inter-institutional division of labor that has made our nation's network of libraries so effective. For example, the monumental task of cataloging the ever-expanding universe of print publication could not have been achieved without

cooperation among libraries. In the pre-digital world, a primitive sort of *networking* was achieved through the sharing of cataloging that was based upon thesauri of subject terminology and commonly agreed-upon access points (author, title, subject, etc.). With their earliest application in the now-antiquated world of card catalogs, these standards have enabled the relatively rapid growth of the major digital systems (such as WorldCat, the international online catalog of thousands of libraries' holdings) that we have come to take for granted since the advent of the Internet in the 1980s.

What does all of this have to do with the individual foundation's planning vis à vis library and archival collections? The decision to adhere to professional standards ensures the subject collection's compatibility with the larger world of archives and libraries. New, and often quite inexpensive, software products can be utilized to streamline the task of processing and to facilitate the integration of the individual repository's records with national and international access systems. By adopting professional standards and practices, we're also facilitating access; uniformity allows students, scholars, and other researchers to transfer skills from repository to repository. Finally, and perhaps most important of all, by adopting professional standards, a foundation's administrators and staff are spared the task of reinventing the wheel—a costly, and ultimately wasteful, expenditure of time and money.

The following sections of this essay include an exploration of some of the most important standards employed by libraries and archives today, along with some tips for identifying local resources and expertise that can ensure their economical application.

## **Archival Collections**

Most scholarly studies of an artist and her work include references to unpublished, or *primary source*, material. The artist's archive is, therefore, an invaluable resource for curators, scholars, critics, and other art world professionals whose work is geared toward in-depth documentation and interpretation of the artist's oeuvre.

The archive of an artist is often of immediate importance to the staff of the foundation associated with the artist. For major activities—like the production of a catalogue raisonné—access to the subject artist's archive is essential. For this reason, some archives remain in the possession of estates and foundations for many years after their creators' passing. Indeed, some of the better-funded foundations result in the establishment of a permanent study center, which is sometimes housed in the artist's home or studio.

The decision to maintain an artist's archive, or to donate it to an established repository, is one that should not be taken lightly. The ultimate goal is to provide access. No one benefits from an archival collection that is retained in perpetuity by a deceased artist's heirs or beneficiaries or by a foundation that lacks the resources and expertise to maintain and make

the archive accessible. By so doing, estate and foundation managers are in fact stifling original research, and allowing the artist in question to slowly fade into obscurity.

If a decision is made to place the subject artist's archive in an established institutional collection, the foundation must decide whether it will give the material outright, or sell to the highest bidder. Some larger institutions have considerable budgets for archive and manuscript acquisition, while others must pursue donors to fund costly acquisitions. Some very prestigious institutions have minimal or no budget at all for acquisition, but rather rely upon donation. Generally speaking, only the most highly regarded artists will be able to sell their archives to institutions or to individual collectors; but again, it is the provision of access that the forward-thinking foundation manager should be most concerned with. Proper placement of an artist's archive can go a long way toward supporting research, which in turn can have a very positive effect on an artist's broader recognition. Income from the sale of an archive, in fact, might pale in comparison to the value that can accrue to an artist's work through ongoing publication and exhibition.

### **Identifying the Most Appropriate Repository for the Artist's Archives**

What should an artist or foundation consider when pursuing an institutional repository? One important point to consider is context. If an artist is a member of a group that can be defined along social or political (such as feminist), stylistic, geographic, or other characteristics, some investigation of institutions whose collections focus on that group is a logical first step. Some institutions—particularly very large research libraries with significant archival collections—offer the added benefit of major collections of secondary materials (books, journals, etc.) that support advanced research on the subject artist. By contrast, placement of papers in an archival collection with no other significant art materials does not serve to promote the artist in a meaningful way.

Marvin Taylor, curator of special collections at New York University's Fales Library, notes that "artists face a dilemma when thinking about placing their papers in a repository. Traditionally, museums have not collected artists' papers, nor have rare book and manuscript collections, unless the artists were illustrators or practitioners of the so-called 'book arts.' Any foundation looking to place an artist's papers should make sure that the organization, be it museum or archival repository, understands these fundamental shortcomings of either institution and is willing to keep the artist's materials together—including all the objects, media, etc.—and to describe them adequately for researchers."

Archival collections are of little or no use to the research community until they are processed, and institutions vary greatly in their ability to process in a timely manner. Indeed, many archives have considerable backlogs, and donors can be frustrated by the length of time it takes to process a collection. The potential receiving institution's record of timely

processing is a point that bears some additional investigation, and should be considered part of the negotiation from the outset.

Another important point to consider in the selection of an archival repository is the desired level of access to different classes of materials. Is the repository willing to provide open access to some materials, while requiring permission from the donor for certain classes of items?

Foundation administrators should consider the access policies of institutions prior to committing to a donation. Ultimately, the goal is to provide access to the artist's papers to scholars and curators, which will in turn serve to promote the appreciation of the foundation's artist and his or her work.

### **Access to Finding Aids and Related Collection Issues**

As noted throughout, one of the most valuable services a foundation can offer is access to information about an artist. Increasingly, researchers look to the Internet for this type of information. Some foundations that own artists' archives, and most institutional repositories, make good use of their websites for the provision of varying degrees of this type of information.

At the very least, foundations owning artists' archives should provide online access to the finding aids that describe the contents of an archival collection and facilitate researchers' use of the material. The foundation can add great value to its own archival holdings by doing a little digging and identifying materials that are part of other collections. For example, imagine that your artist has had a flurry of correspondence with another artist whose papers are held in a major institutional repository. Using the foundation website to alert researchers of these papers' availability and location is a wonderful service that can be accomplished by using one or more of the following readily-available databases.

#### **WorldCat**

<http://www.worldcat.org/>

WorldCat is an online database that identifies items in libraries around the globe. Freely available on the Internet, its advanced search function allows the searcher to limit by material type, including archival material. Foundation managers and staff can easily identify collections in archives around the world that contain one or more pieces relating to a subject artist.

#### **Archives Finder (including ArchivesUSA and NIDS UK/Ireland)**

<http://archives.chadwyck.com/marketing/index.jsp>

Many research libraries offer onsite access to this easy-to-use source for locating archival collections. Its indexing of records and finding aids representing more than

206,000 repositories makes it invaluable for the foundation seeking to round out its collection of pointers to archives housing materials on its subject artist.

### **ArchiveGrid**

<http://www.archivegrid.org/>

This very powerful resource identifies additional repositories, including a great many located outside North America.

## **The Artist's Library**

Most foundation managers probably consider the artist's library to be part of the artist's archive. We are separating the library from the rest of the archive in this discussion simply to draw attention to some of the unique questions that can arise in relation to the library, and to illustrate some of the readily available sources and processes that can be used to organize small libraries.

The personal library of an artist (or of anyone, for that matter) can provide a good indication of his or her interests. Some artists' libraries might even include titles that represent source material for their artwork. Ultimately, the foundation's decision to maintain an artist's library is very much related to the choice of what to do with his or her archives.

Sometimes, a large institution with substantial archival collections will acquire the artist's library along with the artist's archives. Depending upon the material, some publications are housed with the artist's papers, while others are added to the library's general stacks. For works that are placed in the library's stacks or other general collections, the record of provenance can be maintained by the simple addition of a note to the bibliographic record created for the title (for example, "General stacks copy from the collection of contemporary artist Susan Smith"). This affords the interested researcher the ability to create a list of titles previously owned by the subject artist.

Foundations that decide to maintain their artist's library internally can benefit from acquiring access to one of the numerous moderately priced cataloging systems that have emerged in the past several years. Ranging from free-of-charge to just a few hundred dollars per year, these online tools allow library organizers to download cataloging records from hundreds of libraries across the globe. Foundation managers might consider engaging the services of a consultant who has experience with various systems in a variety of settings before deciding upon a product. For assistance with system implementation, interns from graduate schools of library and information science are often able to provide help with this new technology. For a list of accredited master of library and information science (MLIS) programs, see Resources for Foundation Staff at the end of this essay.

At the lower end of the spectrum, in terms of cost, are the programs referred to as bibliographic citation managers. One such system, the web-based LibraryThing (<http://www.librarything.com/>) offers a great deal of advanced functionality, including the ability to download catalog records from hundreds of libraries. With a LibraryThing account, foundation staff can quickly catalog items in the library for a small fraction of the cost associated with original cataloging. Slightly more expensive, but much more powerful and flexible, another web-based citation management program—RefWorks<sup>1</sup>—is profiled below in a brief case study of its use by the Roy Lichtenstein Foundation.

The list of available products is too lengthy to include here, and would certainly become outdated very quickly. Foundation staff who are considering a library processing project are urged to seek input from actual program users prior to committing to a library automation system.

### **Roy Lichtenstein Foundation: Cataloging with RefWorks**

The online cataloging tool RefWorks is widely used by graduate students and other researchers. This easy-to-use utility was selected by the Roy Lichtenstein Foundation<sup>2</sup> for its ability to integrate a variety of functions related to the artist's library, exhibition history, bibliography, and catalogue raisonné production. Its ability to generate bibliographies in all of the standard formats (Chicago Manual of Style, Modern Language Association, American Psychological Association, etc.) makes it ideal for the preparation of works intended for publication.

Before going into a description of RefWorks' functionality, we'll consider the needs of the Roy Lichtenstein Foundation that led to its selection. One of the most important artists of the twentieth century, Roy Lichtenstein was the subject of thousands of books, journal, magazine and newspaper articles, exhibition catalogs, and other publications. The artist's personal libraries (one in the New York City studio, another in Long Island) needed to be processed and maintained, as some items included source material. While the collection was never formally cataloged during the artist's lifetime, it had become unwieldy by the late 1990s, at which point a decision was reached to organize the collection and to create an online catalog to enable better access to its contents.

The creation of an online catalog of the artist's several thousand books was achieved relatively quickly through RefWorks' copy-cataloging function. Many of the world's largest libraries are searchable through RefWorks, and individual catalog records can be imported directly into the local RefWorks account. With access to the Library of Congress, Yale University, Columbia University, New York University, and many other very large libraries with enormous art collections, RefWorks was found to provide easy access to more than 95 percent of the titles represented in the Roy Lichtenstein Foundation library. Unique items were given original cataloging directly into the RefWorks account.

Linking bibliographic citations to other data sources (article bibliographies, exhibition lists, and works of art) can be important to the work of many foundations. RefWorks' provision of user-defined fields allows the online catalog to be cross-referenced to object database, the long and growing exhibition list, and the comprehensive bibliography of writings on Roy Lichtenstein.

Note that the cataloging of a library is an ongoing activity that takes a certain level of commitment. The adoption of an easy-to-use product, like RefWorks, can facilitate the process. Nonprofessional staff members should be able to update and maintain any system, but again, the value of initial investment in the services of a consultant to set up the desired program cannot be overestimated.

## **The Monetary Value of Archives and Libraries**

For many foundations, the monetary value of libraries and archives is not a consideration; rather, they're simply facing the decision of what to do with the collection, and hopefully will seek the most appropriate established archival repository for placement. An appraisal will likely be required only by those foundations that intend to shop around for a purchaser, rather than donate the collection.

The process of assigning a monetary value to an archival collection is a challenging one. Generally speaking, the appraisal process is based upon comparison of the property at hand with an equivalent property that has been sold. For some personal properties (like houses, cars, jewelry, or art), finding sales of comparable items is relatively straightforward. In the case of personal archives, the process is much more complex and recorded sales records far more difficult to find.

In most cases, archive appraisers are "forced to adopt other criteria such as research value, the potential uses scholars will make of the material in years to come, historical value, the role the material can play in helping to write the history of the family, community, or society that the material documents, and cultural value, a value that embodies all the others and implies as well that every work reflects the civilization that produced it and, in that way, has value."<sup>3</sup> These kinds of value—while very real—are largely subjective, a fact that underscores the importance of finding an appraiser with experience with this type of material.

In order to identify a qualified appraiser, use one of the directories maintained by the following three professional appraisal associations' websites.

### **American Society of Appraisers (ASA)**

<http://www.appraisers.org/>



**Appraisers Association of America (AAA)**

<http://www.appraisersassoc.org/>

**International Society of Appraisers (ISA)**

<http://www.isa-appraisers.org/>

## Staffing Options

Many foundations do not have the resources that are required to maintain archives and libraries themselves. This does not necessarily mean that all should give up local control and donate to a larger, already-staffed institution. There are workaround solutions for the foundation manager who is looking to keep, process, and provide access to these materials onsite.

Some foundations retain consultants for a variety of tasks, from appraising the collection to setting up a strategy for its processing. Enlisting the services of a consultant early on can eliminate costly planning errors. Consultants might be expected to set up a system and to create some relatively jargon-free documentation to assist foundation staff in carrying out various tasks from processing archival materials to cataloging titles in the library.

## Conclusion

The goal of this essay has been to identify questions that foundation managers should be asking themselves via a vis archives—the ultimate goal being making decisions that result in maximum accessibility of its subject artist’s archives. Regardless of its functional mission, the foundation should not lose sight of its responsibility to provide information.

Optimally, artists will do some of this work during their lifetimes. Obviously, some artists are more organized than others. Hopefully, artists are increasingly aware of the importance of self-documentation. Accurate inventories of their own artwork and well-organized collections of personal papers, business records, and the like can go a long way toward facilitating ongoing organization, and can be most beneficial to those who will eventually be charged with stewardship of the artist’s collections, from works of art to archives.

## Resources for Foundation Staff

The following sources represent some of the key texts and websites containing basic information about archives management and library organization.

### Thesauri of Cataloging Terms

Thesauri are created in order to standardize the terminology used by catalogers. The following sources are available free-of-charge on the web.

## **Library of Congress Authorities**

<http://authorities.loc.gov/>

These resources are widely used by libraries across the globe for cataloging books, journals, and other publication formats and media. Of particular importance to catalogers are the *subject authority* and *name authority* headings. All Library of Congress Authorities are available free-of-charge.

## **Getty Research Institute Thesauri**

The following specialized thesauri of terms are intended for catalogers of objects.

### Art and Architecture Thesaurus (AAT)

[http://www.getty.edu/research/conducting\\_research/vocabularies/aat/](http://www.getty.edu/research/conducting_research/vocabularies/aat/)

One of three projects of the Getty Research Institute, the AAT provides catalogers with a standard vocabulary for describing works of art, architecture, decorative arts, and other aspects of visual culture. AAT does not include terminology related to subject matter or iconography; rather, its focus is on the physical characteristics of works of art, the built environment, design, and related disciplines.

### Union List of Artists' Names (ULAN)

[http://www.getty.edu/research/conducting\\_research/vocabularies/ulan/](http://www.getty.edu/research/conducting_research/vocabularies/ulan/)

The Union List of Artists' Names offers a "preferred" form for personal names (such as Rembrandt van Rijn for the seventeenth century Dutch painter). Novice catalogers might be surprised to learn that ULAN identifies twenty-five alternatives for Rembrandt's name. Like all thesauri used by catalogers, ULAN is intended to standardize these variants.

### Thesaurus of Geographic Names (TGN)

[http://www.getty.edu/research/conducting\\_research/vocabularies/tgn/](http://www.getty.edu/research/conducting_research/vocabularies/tgn/)

This thesaurus provides standardized vocabulary of place names; each entry includes descriptive information on language(s) spoken, geographical coordinates (longitude, latitude), etc.

## **Basic Archival Texts**

The *Archival Fundamentals Series*, published by the Society of American Archivists (SAA), includes a number of basic titles that incorporate practical instruction and basic theory of archival management. All titles are widely available in libraries, and offered for sale on the SAA website (<http://www.archivists.org/>). Titles in the series include the following.

Boles, Frank. *Selecting and Appraising Archives and Manuscripts*. Chicago: Society of American Archivists, 2005.

Cox, Richard J. and James M. O'Toole. *Understanding Archives and Manuscripts*. Chicago: Society of American Archivists, 2005.

Kurtz, Michael. *Managing Archival and Manuscript Repositories*. Chicago: Society of American Archivists, 2004.

Pearce-Moses, Richard. *Glossary of Archival and Records Terminology*. Chicago: Society of American Archivists, 2005.

Pugh, Mary Jo. *Providing Reference Services for Archives and Manuscripts*. Chicago: Society of American Archivists, 2005.

Roe, Kathleen D. *Arranging and Describing Archives and Manuscripts*. Chicago: Society of American Archivists, 2005.

## Finding Interns

Advanced students in graduate programs in librarianship and archives management are often required to fulfill an internship requirement. Graduate interns represent an important, and obviously, inexpensive source of expertise.

To identify an archives management program, consult the online directory maintained by the Society of American Archivist (<http://www.archivists.org/>).

To locate an accredited graduate school of library and information science in the United States and Canada, consult the online directory maintained by the American Library Association (<http://www.ala.org/ala/accreditation/lisdirb/lisdirectory.cfm>).

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<sup>1</sup> This case study should not be considered an endorsement of RefWorks over other citation management products.

<sup>2</sup> Thanks to Jack Cowart, director of the Roy Lichtenstein Foundation, for giving permission to describe the Foundation's use of the RefWorks system.

<sup>3</sup> Sam Kula, *Appraising Moving Images: Assessing the Archival and Monetary Value of Film and Video Records*, 95 (Oxford: Scarecrow Press, 2003).

## **9.7 ARTIST-ENDOWED FOUNDATIONS IN CONTEXT**

- 9.7.1 Alternatives to Foundations: Other Options for Artists  
(Lowery Stokes Sims)
- 9.7.2 Artist-Endowed Foundations, the Press, and Public  
Perception (András Szántó)
- 9.7.3 Artist-Endowed Foundations Internationally  
(Christine J. Vincent)



## 9.7.1 Alternatives to Artist-Endowed Foundations: Other Options for Artists

LOWERY STOKES SIMS

### Introduction

As established by other aspects of the Aspen Institute's National Study of Artist-Endowed Foundations (Study), the viability of artist-endowed foundations resides in the presence of several factors: an established artistic reputation, adequate assets (artwork, archives, cash), and dedicated parties of interest. As also established by the parameters of the Study, the function of such foundations include promoting or perpetuating the reputation of the artist in question, managing the assets of the estate, and drawing on proceeds of the first two activities to support various charitable and educational functions in the public benefit (grantmaking, scholarly research, publication, exhibition, etc.). But not every artist who leaves an artistic estate also has garnered a reputation—and by extension a market—that renders the assets of the estate viable as a bankable commodity. This may be the result of a variety of factors.

While there is the presumption that an artist, and his or her work, has not received recognition because of some consensus around them and their art in the art world at large, in some cases it is the personal predilections of the artists—and sometimes their immediate heirs and beneficiaries—that determines the fate of their oeuvre in the art world. For example, artists or their heirs and beneficiaries may view the market as a corrupting influence on creativity, and there may also simply be no interest or personal impulse to pursue and work through the vagaries of the art market over the period of a career. What do we make of these situations? And, more important, why should the field as a whole be concerned with the disposition of such artists' estates—particularly the artwork?

This paper considers these questions in the context of several artists and their artistic estates, and surveys a selection of individual cases where strategies pursued by artists or their heirs and beneficiaries indicate the emergence of alternatives to the artist-endowed foundation as a vehicle for artists' creative and philanthropic legacies.

### Artistic Careers, Legacy Quandaries

What we can find as we survey even a few cases of such artists as those described above is that their work—while outside the market purview—may have historical or cultural significance or the artist him or herself was an influential force in the art world as a teacher or innovator. Artist Herb Aach (1923–1985) would exemplify this situation. A long-time

teacher of color theory at Queens College of the City University of New York, Aach was “recognized by the New York art scene of the 1960s–80s for his individual and unique use of color,” which resulted in a style he dubbed “color expressionism.”<sup>1</sup> Aach drew on his long-time experimentations for the Art Crayon Company, during which he developed new shades using pigments produced by DuPont, as well as his interest in fluorescent pigments, when he began teaching studio courses and courses on art theory at Queens in 1965. When he died in 1985, however, his reputation was eclipsed by changing trends in the art world and undoubtedly by biases in the art world that disadvantage artists who are seen primarily as teachers. Nonetheless, the modest body of work that Aach left in his estate is an important document of an era of abstract art where form and color were considered the primary conveyors of meaning.

Aach was survived by his wife, Doris, who as the beneficiary of his estate plan was therefore presented with the dilemma of how to deal with a body of work with no discernable market and little accompanying literature to affirm her husband’s place in the New York art world. Certainly gallery representation for her husband’s work was an option. However, his limited output, lack of exhibition history, and minimal sales track has not attracted interest among dealers. Mrs. Aach therefore has begun to sell Aach’s work privately. She does so in a context where she has to establish and maintain a value for the work, as well as determine what is an appropriate value for the work in situations where potential buyers seek the best bargains.<sup>2</sup> While there is no doubt that Aach’s work has value as a pedagogical resource for teaching color theory and in that role might find a home in a museum or university gallery in a teaching context, Mrs. Aach finds that in her own retirement she also needs to view the art collection as a potential financial resource to help meet needs within her own family. Therefore, attempts at sales are clearly made in the hope of capitalizing the estate to provide a monetary resource for the family.

There is, as yet, no known entity—outside of legal and curatorial advice provided by Aach’s personal contacts and friends—that can provide a cogent and effective, dare we say guaranteed, strategy to ensure the scholarly and financial appreciation of the assets of this artist’s estate. We can also see by this example that the successful disposition of the assets of the estate depends heavily on the knowledge and sophistication of the artist and his or her heirs and beneficiaries. This point is vividly illustrated in the case of two African American artists, Bill Traylor (1854–1947) and William H. Johnson (1901–1970). In the context of art historical revisionism and trends in art historical theory and criticism over the last 30 years, the careers of these two artists—formerly undervalued and under-known—have been dramatically projected into the discourse of modern art history. At the time of their demise or incapacitation (respectively), these artists’ families were unaware of the potential value of their work, and unaware of the workings of the art world. Consequently, custodianship of their work was assumed by persons unrelated to them who

later came under fire for the decisions they made with regard to the work and who were accused of depriving the heirs of their rightful inheritances.

When he died in 1949, Traylor, a former slave, was living in reduced circumstances in Montgomery, Alabama. A white artist, Charles Shannon, not only had supported Traylor's art making while he was alive by providing art supplies, but also took it upon himself to be the caretaker of Traylor's work over the next 50 years. During this time he sought to write about Traylor, have others write about Traylor, and place Traylor's work in exhibitions and museum collections.<sup>3</sup> As a result of Shannon's support and promotion of the work, the value of Traylor's work increased. Eventually, representatives of the family posed a challenge to Shannon about his handling of the work and about the remuneration thought to be owed the family. Although not the case, the implication was that a poor, unknowledgeable family was being cheated out of its rightful patrimony. Shannon eventually settled with the family, whose members came to recognize the contribution that he had made to establish Traylor's reputation.<sup>4</sup>

William Johnson became incapacitated because of illness in 1947 and died 23 years later in 1970. In the absence of his family, Mary Beattie Brady, one-time director of the Harmon Foundation, which had supported Johnson in the 1920s and 1930s, oversaw the distribution of his work to various institutions, including the Smithsonian Institution and Fisk University. Again, as interest in African American art in scholarly and market contexts increased in the 1980s and 1990s, Johnson's reputation soared, and exhibitions and monographs enhanced the market for his work. In this case, an art dealer who assumed the role of advocate for the family initiated a broad-based lawsuit about ownership of the work. The action also engulfed the Michael Rosenfeld Gallery, which had mounted an exhibition to celebrate Brady's legacy.<sup>5</sup>

What these cases suggest is that it may behoove artists' families or executors to hold onto their art assets if possible, pending future growth and enhancement of the artists' reputations. And while it can be argued that the events around the work of Traylor and Johnson occurred at a moment in American art history where there was less awareness for the need to preserve artists' estates, these cases serve as bellwethers for many of the issues identified as significant in this overall study of artist-endowed foundations. They also serve to demonstrate the inequities of resources and information that, in the past and to a certain extent even today, have a direct correlation to issues of race and class. This is illustrated as well when we look at the fate of the estate of another African American artist, Norman Lewis (1909–1979). In this instance there was planning on the part of the artist and an estate structure put in place, which was subsequently dissolved.

Norman Lewis was a contemporary of the Abstract Expressionist group and participated in now famous group discussions, including the famed event at Studio 35 in the late 1940s



during which the theoretical underpinnings of the Abstract Expressionist movement were debated.<sup>6</sup> Lewis died in 1978 and left his estate in the charge of his chosen trustees, a group not including his surviving spouse. His widow challenged this arrangement, took sole control of the estate assets, and began to disperse the work privately and through various art dealers. When she in turn relinquished control of the estate, her daughter took up its management and began to work with one dealer in particular who, during this time, acquired a substantial body of the artist's work. The relationship between the family and that dealer was later dissolved. At this point, the family still owns the bulk of the artist's work, but there is no consistent market representation. In the absence of representation, there also is no potential to coordinate promotion and placement of the work with the previous dealer, who continues to own a substantial body of the artist's work.<sup>7</sup>

The artist's grandson, Ian Fuller, has more recently stepped in to assume the stewardship of the estate with his mother. When presented with the foundation model as a possible alternative for managing the collected works and intellectual property of Norman Lewis, Fuller noted that in his opinion that would not have been the best course of action at the time of the artist's death given the variables described at the outset of this essay. But Fuller does think that the input of some kind of advisory group comprising family members and experts would have been helpful, and that the family should not be solely burdened with the responsibility for an artist's estate. In Fuller's view, such an arrangement would have ensured a more orderly promotion and advancement of Lewis's work and art historical recognition.<sup>8</sup>

Fuller currently sees the need to focus on three main projects around Lewis's work: (1) establishing Lewis's reputation not only within African American art but also the larger American canon, thus building on the work of such scholars as Ann Gibson who have done much to expand the universe of Abstract Expressionist to include artists of color and women;<sup>9</sup> (2) organizing a major retrospective of Lewis's work; and (3) compiling a catalogue raisonné of Lewis's work.<sup>10</sup> In pursuit of these goals, Fuller suggested that an option for the Lewis estate at this point would be to consider merging assets with another organization, as in the case of the Gordon Parks Foundation, operated as a program of the Meserve-Kunhardt Foundation, or the Artists' Legacy Foundation (both of these examples will be discussed further on in this essay). This would of course mean a transition from private ownership of the artist's works, benefiting the artist's family, to ownership by the charitable organization.

## Alternatives to Artist-Endowed Foundations: Museums and Universities

There are several cases where, in lieu of a foundation, artists or their heirs and beneficiaries have sought to establish alliances with scholars, institutions, and dealers. In the case of Lois Mailou Jones (1905–1998), a more direct approach to supporting educational institutions was put into place. Jones, who has an established reputation within the overall history of African Americans in the arts, was a long-time and influential teacher of artists and architects at Howard University. She set up a noncharitable trust, known as the Lois Mailou Jones Pierre-Noël Trust, for her work and that of her artist-spouse, Louis Vergniaud Pierre-Noël (deceased 1982). This arrangement provided for works to be chosen by members of her family and other legatees, and also for donations of representative work from her oeuvre to designated art institutions. The balance of the assets owned by the Trust is to be liquidated and the proceeds contributed to Howard University and Jones's alma mater, Boston University, to establish endowed scholarships for students.<sup>11</sup>

Two other cases demonstrate how the non-art assets of an artist's estate have been designated to promote the careers of struggling artists. The estates of Edith C. Blum and Judith Rothschild, for example, have been disposed of in such a way as to support other artists of lesser means and comparable reputations or other institutional entities and projects. In addition to establishing a separate financially endowed grantmaking foundation (Edith C. Blum Foundation), Blum, who died in 1976, left money to endow a fund at the Metropolitan Museum of Art in New York City expressly to acquire the work of artists who have not received recognition by the art world. Likewise, the Judith Rothschild Foundation, which was established upon Rothschild's death in 1993 and holds the artist's works but is endowed primarily with other assets, has become an important source for financing projects around the work of “recently deceased American painters, sculptors, and photographers whose work is of the highest quality but lacks adequate recognition.” The Judith Rothschild Foundation additionally notes that its grant program “is dedicated to ensuring that the work of under-recognized, deceased artists has meaningful opportunities for public viewing and critical reassessment.”<sup>12</sup>

In the cases of artists Gene Davis, who died in 1985, and Roger Brown, deceased in 1997, the assets of the artists' estates were transferred respectively to an art museum and an educational institution. Upon her death in 1990, the will of Davis's widow made the Smithsonian American Art Museum her primary beneficiary, leaving a bequest of her husband's artwork (paintings, drawings, and collages) and other assets (including real estate), reportedly valued at \$1 million, to fund “upholding and enhancing” Davis's reputation.<sup>13</sup> Flo Davis also gave the Smithsonian American Art Museum “freedom to choose what to keep from Davis's work and what to sell...with all proceeds going into a Gene Davis Memorial Fund,” which “will cover the costs of maintaining the Davis collection and...support other museum programs relating to twentieth-century American art.”<sup>14</sup>

This relationship between the Davis estate and the Smithsonian American Art Museum is similar to one that had been established in 1970 when the widow of artist Edward Hopper bequeathed his entire estate to the Whitney Museum of American Art in 1970 (Hopper died in 1967, Jo Hopper in 1969, and the bequest was received by the Museum in 1970). As noted on the Museum's website, the Hopper bequest included 2,500 oils, watercolors, drawings, and prints dating from Hopper's student days to his later years, as well as his illustrated journals, and was "the largest single gift of art work in the history of the Museum."<sup>15</sup> The website notes the bequest resulted from the fact that the artist's career was and "remains inextricably bound up with the Whitney Museum of American Art, beginning with his first appearance at its predecessor, the Whitney Studio Club, in 1920, and continuing with the retrospectives of 1920 and 1964."<sup>16</sup>

Roger Brown, who died in 1997, began the transfer of elements from his estate to the School of the Art Institute of Chicago (SAIC) towards the end of his life, with the express purpose of using the gifts to "perpetuate the creative process for successive generations of students and faculty." Brown's gifts and bequests to SAIC are an "expression of his gratitude for the contributions SAIC made to his successful career."<sup>17</sup> The artist's personal study collection and archive, the Roger Brown Study Collection, is housed off campus in what is described as "a historic house museum setting that was the artist's former studio." In addition to Brown's work, the studio museum features "works by Chicago Imagists and other contemporary artists, self-taught artists, folk and tribal art from many cultures, objects from material and popular culture, costumes, textiles, furniture, travel souvenirs, and other things Brown surrounded himself with for artistic inspiration."<sup>18</sup> Since its inception in 1997, the Center has served as a resource for art curricula at the SAIC, internships for students, and as a resource for various educational and community entities outside the School. In addition, Brown also bequeathed to the School extensive holdings of his own works, including a permanent study and exhibition collection, an inventory of paintings and prints to be sold at the School's discretion to generate resources to assist in the care of Brown's other bequests, and several residential properties, one for use as an artists' retreat.

As worthy as these examples are, they also present several caveats that should be noted. In the case of Davis, the issue of conflict of interest was raised given that the generosity of the gift "means that the museum has a major stake in assuring that Davis's reputation remains high and that his art is carefully marketed."<sup>19</sup> The time period for settling the estate was so long that the final monetary allotment to the museum was greatly reduced—to about one-third of the original bequest.<sup>20</sup> There was also an accompanying delay in the art in the estate being available for sale, which undoubtedly affected Davis' market in the aftermath of his death. In the case of the Roger Brown Study Collection, the School of the Art Institute of Chicago found itself the custodian of an historical structure for which there were no specific funds provided to support upkeep, and a public responsibility for accessibility that would task its resources.<sup>21</sup>

A similar dilemma for the Whitney has been chronicled by Gail Levin, who opines that the museum was not prepared to accept the totality of the bequest from the artist's wife, Jo, which also included her artwork, and subsequently followed a course of deaccessioning and sale of works of art—which was widely seen as being in violation of the purpose of the bequest.<sup>22</sup> Levin goes on to suggest that the legacy of the Hoppers would have been better served if they'd been specific about the procedures the institution should have followed in the case of deaccessioning or had divided the estate among several institutions to insure a greater probability that their wishes would have been followed.<sup>23</sup> As Levin noted, this would accommodate the fact that museums “constantly change” according to the leadership at a given time and “[a]s institutional values, goals and tastes evolve, collections expand and contract.”<sup>24</sup>

While the artist's work itself has not been an important component of the financial assets of the Metropolitan Museum's Edith C. Blum Endowment or the Judith Rothschild Foundation, in the case of the Lois Mailou Jones-Noël estate, however, the artwork is the primary asset.<sup>25</sup> Therefore, the success of the Trust in fulfilling Jones's expressed wishes has meant that the managers of the Trust have had to actively work on exhibition projects with various art institutions in order to increase the awareness of Jones's work and enhance the value of her work. These projects are not without costs to the Trust. Robert Jones, the artist's nephew and one of the managers of the Trust, has noted the litigation that accompanied changes in the stewardship of the Trust involved two years in court and costs in the six figures. In addition, it is incumbent on the Trust to support all the exhibition and publication projects around Jones' work. At this point, there are no plans by the Trust to do a catalogue raisonné, and it is expected that the Trust will eventually terminate after it disposes of all its assets.<sup>26</sup>

### **Other Alternatives: Collective Archives, Multi-Estate Foundations, and Living Archives**

Alternatives to foundations focused on an individual artist have emerged as artists and their heirs and beneficiaries have begun to consider collaborative or collective harnessing of resources and expertise to preserve artistic legacies and make these available as cultural and educational resources. One of the earliest entities formed to preserve the legacies of multiple artists under a single organization is the Center for Creative Photography, housed at the University of Arizona in Tucson. Initiated in 1975 by a group of photographers, including Ansel Adams, the Center holds a research collection of the archives of more than 50 twentieth-century photographers (Adams, Lola Alvarez Bravo, Louise Dahl-Wolfe, W. Eugene Smith, and Edward Weston, among them). These archives “include photographs, negatives, albums, work prints, manuscripts, audio-visual material, contact sheets, correspondence and memorabilia.”<sup>27</sup>

Additionally, the Center for Creative Photography's permanent art collection, as distinct from its archives, includes "more than 80,000 works by 2,000 photographers." The Center's mission, therefore, is comparable to those of any individual artist's foundation in terms of its aspect addressing preservation of an artistic legacy and fulfillment of scholarship, education, and public access activities. For example, the Center's gallery is open to the public and features changing exhibitions; the Center offers fellowships and internships; the art collection is available for study by appointment; for some photographers in its collection, the Center manages issues of rights for publications and exhibitions organized by other institutions; and it also organizes original traveling exhibitions drawing on its holdings.

The San Francisco-based Artists' Legacy Foundation was initiated in 2000 by artists Squeak Carnwath and Viola Frey (the latter died in 2004) in a proactive move to pool resources to "promote, protect and maintain" their respective artistic legacies and to combine resources for philanthropy in support of artists. The Foundation seeks to "support established painters and sculptors through awards, grants and educational programs," and in general to "promote the visual arts."<sup>28</sup> At this point, Frey's bequest comprises the Foundation's holdings, according to Executive Director Diane Frankel. Additional collaborators are planned and will be selected by the board of the Foundation, whose members would evaluate the work of the artists. Frankel noted that bequests of potential artist collaborators would have to provide financial assets as well as art to support the work of the Foundation on their behalf.<sup>29</sup> The Foundation has presented an annual award to an individual artist beginning in 2007. In 2008, it sponsored an educational program at the San Francisco Art Institute to encourage students to think about the long-term trajectory of their careers and the documentation and disposition of their work in the future.<sup>30</sup>

In a similar manner, the development of the Gordon Parks Foundation as a division of the Meserve-Kunhardt Foundation in 2007 provides a context within which the noted photographer's work can best be preserved and promoted as an educational resource after his death. The collaboration undoubtedly grew out of the long-time friendship between Parks and fellow photographer Philip Kunhardt when they were colleagues at *Life Magazine* starting in the 1950s (the two men died within weeks of one another in 2006). The Gordon Parks Collection—which includes his photography, films, and writing<sup>31</sup>—is housed within an established organization dedicated to the "preservation and dissemination of the Meserve-Kunhardt Collection, a private collection of photographs, artifacts, and documents from nineteenth and early twentieth century America. The collection was begun in 1897 by Frederick Meserve and contains photographs by Mathew Brady, Alexander Gardner, and other early photographers."<sup>32</sup>

The case of Herb Aach described earlier in this discussion is not uncommon or unusual. Although having created a body of work with evident cultural and educational importance, lacking reputation, market, and related financial assets, he was not an obvious candidate for

any of the alternatives discussed in this essay—allocating assets to a university or museum, or forming a collaboration with other estates. So what to do about artists like him? It remains an open question, one that the field might do well to explore addressing in a coherent manner, and one that artists and their families need to consider in the process of estate planning. A possible solution may lie in entities that serve as *living archives* to both support artists while they are alive and preserve selective aspects of their legacies after their death.

The Artists Archives of the Western Reserve, for example, was created to preserve representative bodies of work created by Ohio visual artists. It aims to serve as “a repository for artists looking for a place to preserve their work and also make their work accessible to the public.”<sup>33</sup> To accomplish this, the Archives sponsors an ongoing exhibition program at its headquarters and in various “corporate locations throughout the Greater Cleveland area.” Like the foundations, trusts, and other entities discussed above, the Archives “fosters scholarly research and conducts educational outreach activities that teach students and community members about the value of art and the history of visual art and artists in our region.” As in the Center for Creative Photography and the Artists’ Legacy Foundation, the question of criteria arises. The Archives notes further on its website that it is “devoted to building the legacy of regional art in northeast Ohio” by identifying “significant artists from rich and diverse traditions and to provide resources to preserve the works of these artists, making them available to scholars and an interested public.” The Archives provides members—who can be artists, non-artists, or art patrons—access to special events (including gallery talks, exhibition openings, and more), discounts on classes, and a quarterly newsletter.

The Artists Archives of the Western Reserve finds a comparable model in the music field in the Georgia Legacy Foundation Inc., whose “mission is to recognize, protect, preserve, and promote Georgia’s Roots Musical Artists, and to do so with a historical, ethnic and regional perspective.”<sup>34</sup> Touting itself as a “unique approach to charitable organizations and the entertainment industry,” the Georgia Legacy Foundation combines the task of preservation, promotion, and education of individual musicians’ legacies with a form of career advancement to “assist talented artists with their careers and quality of life.” It explicitly addresses the issue of access to the career infrastructure of managers and recording studios—for artists this would be galleries and museums and collectors—by providing recording and services to the musicians free of charge. The musicians will own all rights to their work and will be able to use these materials for promotion and sales.

## Conclusion

The cases discussed above provide compelling examples that demonstrate why the art field needs to be concerned about the work of artists who die without established, or with only minimally established, reputations and without adequate assets. On the one hand, their

work may have cultural or historic value, and on the other it may have potential for being rediscovered in periodic art historical revisionism, which can reveal their influence on more successful artists or successive generations of students. It was once observed that perhaps 98 percent of all the artwork created in the history of humankind has disappeared through neglect, war, or deliberate destruction. Therefore, it would be important for the field as a whole to consider whether or not we are letting a legacy that could be important slip away due to the lack of a structural entity to preserve its existence and ensure its full utilization for purposes of education, philanthropy, and cultural transmission.

These cases also demonstrate the need for proactive education and orientation within the art field to provide information and expertise that will enable artists and their heirs and beneficiaries to deal most effectively with artists' estates. The program sponsored by the Artists' Legacy Foundation at the San Francisco Art Institute begins to address the need—even the responsibility—on the part of educational institutions to encourage aspiring artists to think long-range about their careers and the disposition of their work. In addition, specific legal and related advice and information should be available to artists who are currently further along in their careers, as well as to their families and legatees.

Some foundations are aware of this need. The Marie Walsh Sharpe Art Foundation's publication *A Visual Artist's Guide to Estate Planning*, published in 1998 in collaboration with the Judith Rothschild Foundation and updated in 2008, is a key resource for this purpose. A pilot effort by the Joan Mitchell Foundation, itself an artist-endowed foundation, aims to help mature artists inventory, document, and organize their works. Useful information resources will be further enhanced as a result of the Aspen Institute's National Study of Artist-Endowed Foundations, undertaken with the support of a donor consortium including several artist-endowed foundations, led by the Andy Warhol Foundation for the Visual Arts, the Pollock-Krasner Foundation, and Roy Lichtenstein Foundation. But a great deal more needs to be done. Taken together, it is hoped all of these efforts will help to focus the attention of the creative sector on the need for a greater sense of professionalism and strategic awareness on the part of artists concerning questions of their creative and philanthropic legacies in this contemporary global art world.

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<sup>1</sup> See <http://home.comcast.net/~jaach/>.

<sup>2</sup> Doris Aach, conversations and consultations with the author, between 2000 and the present.

<sup>3</sup> For example, Shannon and his wife donated and promised 10 examples of Traylor's work to the Metropolitan Museum of Art when the author was curator in what was then the 20th Century Art Department.

<sup>4</sup> See Richard Perez-Pena, "Settlement Over Artwork By an Ex-Slave," *New York Times* (October 7, 1993).

<sup>5</sup> See M.G. Lord, "A Wrangle Over a Rediscovered Artist," *New York Times* (January 3, 1999).

<sup>6</sup> See Ann Eden Gibson, *Abstract Expressionism: Other Politics* (Yale University Press, 1999).

<sup>7</sup> Ian Fuller, telephone conversation with the author, November 28, 2008.

<sup>8</sup> Ibid.

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- <sup>9</sup> See Gibson, op. cit.
- <sup>10</sup> Fuller, conversation with author.
- <sup>11</sup> Robert Jones, telephone conversation with the author, December 1, 2008.
- <sup>12</sup> See <http://www.judithrothschildfdn.org/>.
- <sup>13</sup> Jo Ann Lewis, "The Estate of the Art: NMAA & Gene Davis: A Legacy Advanced," *Washington Post* (July 30, 1995).
- <sup>14</sup> Ibid.
- <sup>15</sup> See <http://www.whitney.org/Collection/EdwardHopper>.
- <sup>16</sup> Vivian Raynor, "Art; 'Edward Hopper and the Figure' at the Whitney at Stamford," *New York Times* (August 10, 1993), <http://query.nytimes.com/gst/fullpage.html?res=9F0CE6D71738F932A3575BC0A965958260&sec=&spon=>.
- <sup>17</sup> See <http://www.saic.edu/webspaces/rogerbrown/brown/index.html>.
- <sup>18</sup> Ibid.
- <sup>19</sup> Lewis, op cit.
- <sup>20</sup> Ibid.
- <sup>21</sup> This fact is implied rather than stated in the posting on the website soliciting public support for their participation in the Partners in Preservation program sponsored by American Express and the National Trust for Historic Preservation. See tab "Partners in Preservation" on the SAIC website, <http://www.saic.edu/webspaces/rogerbrown/brown/index.html>.
- <sup>22</sup> Elaine A. King and Gail Levin, *Ethics and the Visual Arts*, 127–128 (New York: Allworth Communications, 2006). For the complete saga of the Hopper estate see pages 125–139.
- <sup>23</sup> Ibid., 139.
- <sup>24</sup> Ibid.
- <sup>25</sup> It should be noted here that in a separate effort, the Judith Rothschild Foundation has concurrently sponsored exhibitions of the artist's works at various museums and galleries demonstrating Rothschild's particular relationship to Abstract Expressionism, which may very well have been overlooked due to the gender politics of her era.
- <sup>26</sup> Jones, conversation with author.
- <sup>27</sup> See <http://www.creativephotography.org/>.
- <sup>28</sup> See <http://www.artistslegacyfoundation.org/>.
- <sup>29</sup> Diane Frankel, telephone conversation with the author, December 9, 2008.
- <sup>30</sup> Ibid.
- <sup>31</sup> In 1969, Parks and Paramount Studio donated a collection of photographs, biographical materials, posters, and other items pertaining to the career of Gordon Parks, specifically related to two movies directed by Parks: *The Learning Tree* and *Leadbelly*, to Pittsburg State University in Pittsburg, Kansas. See <http://library.pittstate.edu/spcoll/ndxparks.html>.
- <sup>32</sup> See <http://www.mkfound.org/projects.htm> and <http://www.gordonparksfoundation.org/>.
- <sup>33</sup> See <http://www.artistsarchives.org/>.
- <sup>34</sup> See <http://www.georgialegacyfoundation.org/>.





## 9.7.2 Artist-Endowed Foundations, the Press, and Public Perception

ANDRÁS SZÁNTÓ

“Your name should be printed in the newspaper only twice,” the old saying goes. “When you are born, and when you die.” Judging by their press-shy behavior, artist-endowed foundations take this advice to heart. They operate discreetly, under the radar, studiously avoiding contact with journalists. When their name pops up in the news, it’s usually considered unwelcome publicity, airing issues that foundation executives would rather not discuss in public.

And yet, as the field grows in scale, complexity, and ambition, so predictably will press interest. In a distrustful regulatory environment, it matters a great deal how foundations (artist-endowed or otherwise) are portrayed in the news. Reporting errors, bias, negative stereotypes, and a fixation with scandal can corrode public perceptions and undermine the best efforts of even the most scrupulous grantmakers and stewards of cultural resources. Moreover, given the fierce competition for attention in our society, foundations need the press on their side to achieve recognition and impact.

One thing is clear: It’s too easy to blame the journalists for sporadic coverage or bad PR. To obtain visibility and fair treatment in the press, artist-endowed foundations will need to modify their behavior. They need to educate journalists about their aims and procedures. They need to make a more compelling case about their contributions to the arts and to society. Above all, they need to dispel the culture of secrecy around foundations and adapt to a world where transparency is the norm. This paper, prepared for the Aspen Institute’s National Study of Artist-Endowed Foundations (Study), offers practical observations about that process.

Because press about artist-endowed foundations has, until now, been scant—dealing mostly with controversies around attributions, valuations, wills, and conflicts of interest—this paper is mainly concerned with the future. Half of the artist-endowed foundations identified during the Study were formed in the last two decades. Their number may double over the next 20 years. The value of their art holdings and other assets will increase over time as bequests are received and the global financial and art markets continue to regain their footing. Neither the public nor the press is fully prepared for the eventuality that the combined grantmaking activity of artist-endowed foundations may someday represent one of the most robust segments of the art funding community. That fact, coupled with artist-

endowed foundations' undeniably opaque operating methods, is likely to place the field in the crosshairs of hostile press scrutiny. Now is a good time to develop strategies to attract balanced, informed media coverage.

## Weaknesses in Cultural Journalism

The problems artist-endowed foundations experience with the press are a subset of wider dysfunctions in cultural news coverage. Why does the press so often fail to render an accurate picture of institutional practices in the arts or, for that matter, philanthropy?

As I have elaborated elsewhere,<sup>1</sup> arts journalism—and especially, reporting on controversial issues—is doomed to fail for a host of reasons that go beyond shrinking *news holes* and staff resources: First, because the arts are considered *soft* news and assigned to critics who shun fact-based reporting on legal, business, and policy matters. Second, because when art becomes *hard* news, journalists lacking in familiarity with cultural practices often set the tone of the coverage. Third, because news organizations assume limited cultural awareness among their readers and viewers, and dumb down their coverage. Fifth, because in contrast to sports or business, the inner workings of arts organizations are not covered on a continuous basis; reporters instead swoop in when controversy strikes, as when crisis erupts in a distant country, leaving the public to judge developments in the absence of a factual backdrop or narrative thread. Sixth, because, in order to fill gaps in awareness, or just to get stories past editors, arts journalists resort to hyperbole and sensationalism. Seventh, because when it comes to the nexus of art and money, reporters often assume that art institutions and their funders are colluding in shady deals. Not least, exploiting all these weaknesses in the coverage, public officials occasionally succeed in turning the press against cultural organizations, stirring up scandal while advancing political agendas that have little to do with art.

The list could go on, but the point should by now be clear. Even prominent cultural institutions find it challenging to project an undistorted picture of their activities via the press. The odds are all the worse for artist-endowed foundations. These doubly obscure amalgams of art and philanthropy present an even greater challenge for journalists. Artist-endowed foundations belong to no particular news department or cultural beat. Stories about them fall through the cracks of general-interest news coverage. But while the systemic failures of arts journalism are beyond the reach of foundations to remedy, steps can be taken to attract better coverage.

## Correcting Errors and Misperceptions

Foundation experts agree that the main problems of reporting on artist-endowed foundations are, on the one hand, chronic inaccuracies and erroneous assumptions about how these philanthropies operate, and on the other hand, an inordinate focus on scandal, which leaves important, positive contributions in the shadows.

Inaccuracies are the easier problem to fix. In dealing with the press, artist-endowed foundation representatives should try to proactively correct the following key misunderstandings.

**Mistaking an artist-endowed foundation with an artist's estate.** Journalists often conflate the two. An artist's estate is, in legal terms, a deceased artist's property administered per the will by an executor to satisfy debts, taxes, fees, court costs, and bequests, with the remainder delivered to the legatees. With respect to art, the estate comprises the artist's body of works, related property, and rights that are owned privately, either by the artist's surviving spouse or legatees directly or via a noncharitable trust or a business entity for their benefit. In short, an estate serves the *private* benefit of the inheritors. An artist-endowed foundation, by contrast, is committed to serve the *public* interest.

**Assuming that maximizing asset values runs counter to an artist-endowed foundation's purpose.** Journalists often incorrectly assume that the chief purpose of an artist-endowed foundation is to disperse artworks left behind by an artist to worthy custodians. But generosity and legacy building must be balanced with prudent management. Reporters often fail to realize that among the many responsibilities of foundation trustees, one is to maximize the value of foundation assets, which predominantly take the form of art holdings, in the service of exempt functions. Undervaluing assets or failing to realize the appropriate value for sold artworks does not amount to responsible stewardship. Well-timed sales on the art market and revenue-generating activities, such as licensing and enforcement of copyright fees, should not be assumed suspect. On the contrary, these are the means whereby an artist-endowed foundation can make the most of its assets in order to pursue its mission.

**Mistaking an artist-endowed foundation with a museum, or missing relevant analogies to museums.** Some journalists confuse artist-endowed foundations with museums and, by inference, mistakenly believe that sales of art by foundations are legally or ethically problematic. In fact, artist-endowed foundations are not only allowed to deaccession works, they may be obligated to do so. Their donors have typically charged the foundation with a mission. Almost invariably, the main asset available to satisfy this mandate is the body of work left behind by the donor, which must be prudently monetized via conventional art market channels. Although it is a mistake to confuse artist-endowed foundations with museums, journalists also make the error of underappreciating parallels with public collections. Artist-endowed foundations expend considerable resources to store, conserve, insure, document, research, loan, and staff their art collections. Such expenditures may be questioned by reporters on the prowl for evidence of waste or excessive overhead, but in fact they are intrinsic to the mandate of these philanthropies.

**Failing to grasp legal entitlements and obligations.** Many artist-endowed foundations are referred to as a *trust* or a *foundation*. But these names may confusingly denote a wide range of legal entities (see the accompanying briefing papers by Urice, et. al.), which imply different obligations and sanctioned activities. Journalists may not properly understand the distinction between, say, a charitable entity formed as a nonprofit corporation or charitable trust and a noncharitable trust, often the form of a proprietary entity, or they may simply forget to ask how an artist-endowed foundation was organized as to legal form. They take the *foundation* name at face value and fail to convey how the particular legal construct may bear upon the administrative and fiduciary responsibilities of those in charge. Lacking clarity about the rules, reporters can jump to the wrong conclusions about an artist-endowed foundation's legitimate or illegitimate activities.

## Long-Term Strategies for Improving Reputations and Reporting Accuracy

At risk of offering simplistic solutions, artist-endowed foundations should consider posting clarifications about the aforementioned points on their websites. Review them with reporters prior to granting interviews. A fact sheet or a *FAQ* list can go a long way to preempting errors and misunderstandings.

But that doesn't solve the larger problem—changing the media's mind-set, especially its obsessive preoccupation with scandal. It goes without saying that the best antidote against bad press is avoiding the behaviors that attract it. But what can foundations do to generate interest and sympathy from journalists on the long run?

- 1) **Nurture a culture of transparency.** Transparency is a matter of choice. Foundation managers and their legal counsel usually prefer privacy—understandably so. But institutions with a reputation for openness do, as a rule, get better treatment in the media. In the foundation sphere, compared to other realms of public life, the pursuit of transparency is still in its infancy. The Carnegie Corporation of New York and the J. Paul Getty Trust are examples of leading cultural and philanthropic institutions that have lately taken aggressive steps in this direction. The former, for example, posts details on the web about its grant recipients, finances, investment philosophy, and code of ethics. Part of nurturing a culture of transparency is making an organizational habit of it. Invite members of the press to the foundation offices. Staff and board should receive media training and seminars in crisis management. Trustees and executives should promote the view that the press is a fact of life, not nuisance or a threat.
- 2) **Make documents accessible.** When it comes to interacting with journalists, an artist-endowed foundation should try to make it as simple as possible to access annual reports, mission statements, annual information returns (Forms 990-PF), and

summaries of main revenue sources and expenditures, including executive compensation. Establishing a password-protected archive of documents and images expressly for journalists could be an additional step; reporters reward all such efforts to make their work easier. The documents should clarify, in the plainest terms, how the foundation benefits the public interest and how its activities comply with the original intentions of the donor. Publishing the results of a foundation's independent audits can reinforce a reputation for openness about its affairs, as can publishing program reviews by independent experts that document the foundation's charitable activities. Engaging a public relations professional may be a wise idea, particularly when the artist-endowed foundation is launching, reorienting its approach, or undergoing a crisis.

- 3) **Tell your story.** Given the paucity of positive media coverage, artist-endowed foundations should invest in telling their own stories. This does not mean having to finance a whole library of printed publications or lavish reports. Web publishing makes it possible for a foundation to make its story available relatively inexpensively in various formats, from commissioned foundation histories to news bulletins compiled by professional writers. An effective means of spreading word about a foundation is to invite the foundation's grantees to write testimonials. The foundation can also connect journalists to selected experts or commission work from knowledgeable writers on topics of frequent interest. An online *press room* can update journalists (or the broader public) on the latest foundation news, along with correct facts and useful quotes. Telling your own story is the best way of controlling your story.
- 4) **Highlight positive accomplishments.** Artist-endowed foundations should seize all opportunities to publicize the public benefits of their work. The launch of a new initiative is the most obvious occasion for such publicity efforts, and so are new publications, prizes, and anniversaries. But it is not just individual foundations that need to find venues to highlight their accomplishments. The entire field would benefit from newsworthy gatherings—conferences, a cross-field award or prize, or an annual state-of-the-field report—that draw attention to artist-endowed foundations. Public announcements and strategic communications surrounding new partnerships between foundations would provide especially positive reinforcement about their aims and operating principles.
- 5) **Elect a spokesperson.** Artist-endowed foundations make up a small and fragmented sub-sector of the wider foundation field. They lack centralized leadership and unified impact. Nevertheless, there are moments when it is useful to have a spokesperson available to convey the point of view of artist-endowed foundations to professional constituencies, including the press. An association of foundations could document and publicize trends in charitable giving and educational programs. It could

correct common misunderstandings and, during crises, address ethical or legal concerns. Rising above individual organizational interests, the representative of such an association—selected on a rotating basis from member artist-endowed foundations—could provide visibility for the field and serve as a trustworthy face and voice—a first point of contact for press inquiries.

- 6) **Cultivate journalists.** It doesn't take much to cultivate good relations with reporters and their editors. Relationships matter. A trustee or foundation executive who has an open style with the press and makes herself available to journalists (on or off the record) can expect them to return the favor. Reporters on deadline need help with quotes, data, and access to sources. And they keep returning to people who have been helpful in the past. It is best to establish such professional ties before either party needs a favor. An annual lunch can keep lines of communication open. Having an unfettered preexisting relationship with members of the press may someday mean the difference between getting or not getting coverage and, just as importantly, between attracting or deflecting hostile inquiries at times of friction. A helpful hint: Don't treat journalists like your PR machine.
- 7) **Support journalism training.** The most enduring investment into better news coverage would be to help conceive and support specialized training for reporters and editors. Few resources are currently available to journalists to acquaint them with the intricacies of covering foundations—let alone artist-endowed foundations. Journalism schools, for the most part, do not teach aspiring reporters how to cover philanthropy. Even so, there are good precedents for specialized training seminars. Short-duration training programs could include sessions on the particular challenges of artist-endowed foundation governance. Training programs could be funded through a consortium of foundations, and managed in partnership with journalism schools, academic programs in philanthropy, or journalism education organizations like the Poynter Institute. A reporter's field guide to artist-endowed foundations could be an additional useful tool to help orient journalists in their coverage of the field.

## Conclusion

The working constraints of the news media, coupled with incomplete information and pervasive bias—not to mention artist-endowed foundations' own aversion to publicity, work against the likelihood of generating up-to-date, accurate, sympathetic coverage for these philanthropies. But all cultural organizations suffer at the hands of the media. The good news is that the situation can be improved. A more transparent engagement with the press that includes sensible investments into information sharing, maintaining relations with reporters and editors, creating forums to highlight the field's contributions, and supporting journalism education will, in the long run, improve the media coverage of artist-endowed foundations.

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<sup>1</sup> András Szántó, “Don’t Shoot the Messenger: Why the Art World and the Press Don’t Get Along,” in *Unsettling ‘Sensation: Arts Policy Lessons from the Brooklyn Museum of Art Controversy*, ed. Lawrence Rothfield (New Brunswick, NJ, and London: Rutgers University Press, 2001), 181–198.





## 9.7.3 Artist-Endowed Foundations Internationally

CHRISTINE J. VINCENT

The Aspen Institute's National Study of Artist-Endowed Foundations (Study) aims to help the next generation of artist-endowed foundations make the most of its donors' generosity in service to a charitable purpose. Although the Study's audience is domestic, that audience exists within the international visual art and design universe. Thus it is important to understand the nature and activities of international counterparts that may be of interest to artists, their heirs and beneficiaries, and professional advisors contemplating creation of an artist-endowed foundation in the US. This paper summarizes key points of contrast and similarity among domestic and international artist-endowed foundations and then highlights several foundations outside the US whose experiences may be relevant to the next generation of those in the US.

### Different Terminologies and Legal Requirements

A variety of organizations located around the world are consistent with the Study's definition of an *artist-endowed foundation*: An artist-endowed foundation is a tax-exempt, private foundation created or endowed by an artist, the artist's surviving spouse, or other heirs or beneficiaries, to own the artist's assets for use in furthering exempt charitable and educational activities serving a public benefit.<sup>1</sup> As evidenced by these various organizations, the term *foundation* translates in a variety of languages. The most pertinent with respect to this review include the Dutch *stichting*, the Finnish *säätiö*, the French *fondation*, the German *stiftung*, the Italian *fondazione*, and the Spanish *fundación*, as well as the Catalan *fundació*.

As in the US, however, terminology in this field can confuse.<sup>2</sup> For example, outside the US, the term *foundation* may be used in many locales to refer to not-for-profit organizations generally, although in France the term is legally protected and can only be used by foundations as defined by law.<sup>3</sup> *Foundation* also is deployed broadly in the cultural sector as a synonym for *museum* or *art collection*, but this often as not relates to organizations created by others that use the artist's name honorifically.<sup>4</sup> Comparable to the US, however, are proprietary entities that are not philanthropic, but rather are legal forms for the private rights of artists' heirs and beneficiaries and may be titled with terms such as *trust*, *estate*, *succession*, or *archive*.<sup>5</sup>

Beyond matters of terminology, the legal framework for private philanthropy outside the US differs from country to country, with few systems incorporating the type of regulation found in the US tax system. As a result, artist-endowed foundations in the US and their

counterparts abroad may share some characteristics, but can differ in ways that should be understood when considering international precedents for US private foundations.

As a chief example, the US tax system's annual distribution requirement for foundations mandates expenditures for charitable purposes of an amount equal to five percent of noncharitable-use assets for nonoperating foundations, or for private operating foundations, an amount equal to 85 percent of net income or minimum investment return, whichever is less, in addition to meeting one of another three requirements related to endowment, assets, or support. In contrast, many foundations abroad are subject to no specified distribution requirements, and those that are may be required simply to expend a majority of all earnings for charitable purposes or to make a majority of all expenditures for charitable purposes.<sup>6</sup>

This difference may be one reason artist-endowed foundations outside the US are more likely to function as operating foundations, accomplishing their charitable purpose by conducting direct charitable activities, such as cultural and educational programs, more so than by grantmaking, or in some cases combining the two modes. Another reason may be that some countries abroad heavily subsidize their cultural sectors, and private foundation grantmaking, often associated with the cultural sector, has not been given incentives historically.<sup>7</sup>

As a further point of contrast, few countries have instituted the same level of regulation that exists in the US to ensure foundation insiders do not benefit privately as a result of their roles in controlling a foundation's activities and assets.<sup>8</sup> This distinction should be taken into account when considering the activities of international artist-endowed foundations controlled by artists' heirs and beneficiaries who may maintain a private interest in the artist's works or rights. For example, in a relationship that potentially would be problematic under US law,<sup>9</sup> some international foundations describe themselves on their websites as assisting or otherwise facilitating in managing copyrights owned privately by artists' heirs and beneficiaries who control the foundations.<sup>10</sup>

Finally, unlike the US, where foundations are required by law to submit annual information returns (Forms 990-PF) to the Internal Revenue Service (IRS) and to make these returns and their application for tax-exemption available to the public upon request, some countries have no statutory reporting requirements, and even those that do so may not require foundations to make annual reports or financial statements available to the public. Thus, many foundations internationally are substantially less transparent than those in the US.<sup>11</sup>

Apart from differences in legal requirements applicable to foundations themselves, artist-endowed foundations in the US and abroad also conduct their art-related activities in different legal and public policy contexts. In broad strokes, artist-endowed foundations in many countries, including the US, steward artists' intellectual properties under international

copyright law. Despite this mutuality, however, there are distinctions in copyright law among localities, including between the US and other jurisdictions.<sup>12</sup> Beyond copyrights, the laws of many countries internationally recognize a group of personal, noneconomic rights for the individual artist, referred to as *moral rights*. Among these are artists' right of authorship or attribution (to be correctly identified with works they create and not identified with works they did not create) and the right of integrity (to protect their works against modification and destruction prejudicial to the artist's honor and reputation).<sup>13</sup> In the US, artists' moral rights are recognized on a more limited basis than in many countries abroad, and they cease upon the artist's death.<sup>14</sup> In contrast, in many countries abroad an artist's heirs and beneficiaries may inherit an artist's moral rights including, in some countries, continuing to benefit from the artist's right to share in profits earned on resale of the artist's works.<sup>15</sup> In the US, however, artists' resale rights are recognized currently in one state (California) and do not continue beyond the life of the artist.<sup>16</sup> These factors are worth noting because they may produce differences among artist-endowed foundations in the US and their counterparts internationally.

As well, the public sector in other countries plays a very different role from that in the US. In some countries, artists or their heirs and beneficiaries are able to make their bequests to local or national governments, creating publicly owned and operated entities that use the term *foundation* in the title and own the artist's assets, but are not private foundations.<sup>17</sup> Even for those artist-endowed foundations organized as private foundations, the laws of some nations require that public agencies be represented on the foundation's board of directors by a designated member.<sup>18</sup>

## **Influences on Proliferation and Visibility**

Artist-endowed foundations in the US are located around the country, but are concentrated regionally in the Northeast and, to a lesser but growing extent, the West. These locations appear to correlate most directly with concentrated communities of professional artists. In what regions or countries artist-endowed foundations proliferate internationally is likely to be influenced by a number of factors. At least in theory, these could include such matters as tax treatment of philanthropies and donors generally and of artists' estates specifically, a tradition of public benefit organizations, the function of the public sector in funding and regulating cultural activities, the historic role of culture in national identity, and the presence of prominent artists.

Recent research in Europe cites six countries in which the arts and culture sector account for a prominent share of activities among private foundations overall—Spain, Finland, Germany, Italy, Portugal, and Switzerland.<sup>19</sup> This factor does not always correlate, however, with the proliferation of artist-endowed foundations. For example, France has the fewest private foundations per capita of all European countries,<sup>20</sup> its private foundations are active only nominally in the field of art and culture,<sup>21</sup> and historically it has had a complex approval

process to establish foundations, including a requirement of specified minimum endowments.<sup>22</sup> Despite all of this, the greatest number of artist-endowed foundations identified during this brief review are located in France. The French policy of "dation," enabling payment of estate taxes with artworks, appears to account little for this, given that "dation" provides for payment with artworks to the government and not to private foundations or other nongovernmental institutions.<sup>23</sup>

In contrast to France's general dearth of private foundations, Italy has a long tradition of private endowments created for public benefit, and its private foundation sector is active notably in the arts and culture sector.<sup>24</sup> It is home to a number of artist-endowed foundations, including the oldest extant foundation established by an artist, as noted below. However, also present in Italy are cultural associations, many titled *archive*, which are led by artists' heirs and beneficiaries and whose activities are focused on cataloging and authenticating an artist's works.<sup>25</sup> These appear to focus their activities as authentication committees with no actual ownership of art assets and, as such, would fall outside the Study's definition of artist-endowed foundation.

Artist-endowed foundations were identified during this brief review in Germany, Spain, and Switzerland, consistent with these countries' ranking by researchers as having robust foundation fields strongly engaged in the arts and culture sector. Finally, to round off that list of countries identified as those in which the arts and culture sector accounts for a prominent share of activities among private foundations, only a few artist-endowed foundations were identified in Finland and none in Portugal, although reportedly some may be in formation.

Just as in the US, artist-endowed foundations abroad are visible individually much more than they are collectively, with most maintaining a fairly low profile and one or two being more widely recognized publicly in any one country. National associations of private foundations have begun to emerge in recent decades as the private philanthropy movement organizes itself internationally. Some of these offer lists or searchable databases of members online.<sup>26</sup> Only a few include artist-endowed foundations, which is much the same case in the US, where these entities for the most part tend not to join larger affiliative organizations with memberships drawn from the foundation universe broadly.

## **Examples of Artist-Endowed Foundations Worldwide**

Despite these contrasts, there are relevant commonalities among artist-endowed foundations in the US and organizations abroad that share this philanthropic form as it has evolved globally. This brief review, limited by necessity, identified approximately 30 artist-endowed foundations in 10 countries<sup>27</sup> for which it was possible to ascertain private foundation status through databases or registries, ownership of artists' assets by action of the artists or artists' heirs and beneficiaries, and commitment by donors' intent to public

benefit purposes. There are many more that meet these qualifications potentially, but at this point cannot be confirmed as such by publicly available information.

The following profiles, listed chronologically, highlight seven artist-endowed foundations among the identified organizations that together demonstrate how this type of philanthropic entity has taken shape in the context of different legal systems and cultural traditions. Material for the profiles was drawn from the public record, including association databases, foundations' websites and publications, artists' biographies, histories by foundation insiders, and general media coverage. Published information on financial activities generally is not available; exceptions are noted.

### **Pio Istituto Catel, Italy**

Pio Istituto Catel<sup>28</sup> was established in Rome in 1874 under the will of the Berlin-born expatriate painter Franz Ludwig Catel (1778–1856). The foundation provides scholarships and postgraduate fellowships; periodically conducts competition exhibitions for students of the region's fine art schools with awards in painting, sculpture, and architecture; operates a study center and exhibition collection; and publishes catalogues for its competitions.<sup>29</sup> The foundation has sustained its program for more than 130 years, suspending activities only during World War II. In addition to works by the founding artist, the permanent collection includes works by Catel's colleagues active in Rome's German and Italian artist communities of the day.<sup>30</sup> The first history of the foundation was written in 1902, 28 years after its founding.<sup>31</sup>

This is the oldest extant artist-endowed foundation in the world, but in many respects its genesis is a modern story. Trained in Berlin and Paris with early achievements as a watercolorist and book illustrator, Catel moved to Rome in 1811 and joined the city's expanding colony of German artists and intellectuals. He grew wealthy in this new setting, painting Roman landscapes and Neapolitan folk scenes popular with wealthy tourists who came to Italy when the Grand Tour resumed after the Napoleonic Wars. Catel's success in this market economy, offering freedom beyond the traditional patronage mode, placed him at the center of a cosmopolitan milieu. He married Margherita Prunetti, a native of Rome and daughter of a prominent poet and artist, and with her hosted a popular salon. The artist owned a home in the city and two properties in the countryside, mentored aspiring artists, helped form a relief fund providing interest free loans to Rome's German artists in need, and counted among his collectors individuals in countries throughout the world.<sup>32</sup>

Catel wrote several wills during his lifetime and in the third and final one formulated his philanthropic legacy. Upon his death at the age of 78 and with no children, this will directed a generous bequest to the German artist relief fund he'd led and stipulated that his surviving spouse have lifetime use of his remaining assets, which, at her death, would endow a charitable fund to benefit the needy of Rome, primarily painters, sculptors, and other

artists.<sup>33</sup> Catel had observed the danger of artists falling into the hands of illegal money lenders.<sup>34</sup> Following Margherita Prunetti's death 18 years later in 1874, their estate was liquidated in seven auctions held over three months, the proceeds endowing the foundation, which also received the artist's home and studio located on Rome's Spanish Steps, his archive, and a collection of his works.<sup>35</sup> The philanthropic program focuses primarily on artists, but also includes assistance at the trustees' discretion to needy individuals in Rome generally.<sup>36</sup> Grants are made to individuals and also to institutions.

The charter stipulates a 12-member board, including three individuals of German nationality. Current members include sculptors, a scholar, architect, engineer, religious leader, educator, journalist, historian, and museum director. The foundation has maintained a low profile historically with respect to its patron's works. An exhibition in 1996 showcased the foundation's own collection.<sup>37</sup> To mark the 150th anniversary of Catel's death in 2006, it produced an exhibition and catalogue of the artist's work in conjunction with Rome's Goethe Institute; the Institute's director serves on the foundation's board. A website debuted the same year. In a recent exhibition publication, the foundation's president noted that although it had operated with the characteristics of a foundation for 130 years, until a few years ago it was classified as an *institution for public service and charity*.<sup>38</sup> It now has legal status as a private foundation.<sup>39</sup>

### **Stiftung Seebüll Ada und Emil Nolde, Germany**

Stiftung Seebüll Ada und Emil Nolde<sup>40</sup> was set up in 1956 under the terms of Emil Nolde's will (1867–1956), written by the painter in 1946, 10 years prior to his death at the age of 88. While Nolde had long sought a legal structure to establish a foundation that would protect and maintain his oeuvre, this became possible only upon the conclusion of World War II.<sup>41</sup> His wife of 44 years, Ada Vilstrup, predeceased him and they had no children, although he was survived by a much younger second wife, Jolanthe Erdmann, whom he had married eight years prior to his death.

In addition to the artist's archive and a permanent collection of his paintings, watercolors, and prints, the foundation owns a rural property near the North Sea, south of the Danish border and not far from the artist's birthplace. It was here that Nolde built a Bauhaus-influenced structure in 1927 as a home and studio retreat. The graves of the artist and his first wife are located in the garden. The area's natural terrain figured strongly in the artist's paintings, and the site's protective isolation proved essential to his creativity. In 1937, more than 1,000 of Nolde's works in Germany's museum collections were confiscated by authorities as degenerate art. In 1941, he was expelled from the National Socialist Party's cultural arm and forbidden to paint professionally or avocationally. He secretly continued to work at night on small watercolors, living in the refuge of Seebüll.<sup>42</sup>

Nolde's aspirations for the foundation were straightforward. He noted in the founding document that it would provide visitors a respite in the plain countryside from the fatigue of art-laden museums found in the cities, offering intellectual pilgrims "some happiness and artistic and spiritual relaxation."<sup>43</sup> That appears to be the case, with more than 3.5 million visitors to the site since the foundation's inception.<sup>44</sup> But in 1988, more than 30 years after its creation, the foundation was criticized publicly, including from those among its board of directors, as being overly controlling of the artist's reputation. In particular, critics claimed it had discouraged a full airing of Nolde's political involvement while cultivating a view of the artist exclusively as a martyr to the degenerate art campaign. Complaints cited a decision to deny copyright permissions to a museum exhibition publication that was planned to include the topic of the artist's political views.<sup>45</sup> The same complaints noted the lack of scholarship about the artist by persons unaffiliated with the foundation.

Staffed by professional art historians, the foundation is governed by a 10-member board, with members reportedly comprising primarily friends and family of the artist.<sup>46</sup> These included, until her recent death, Nolde's surviving spouse. In 1999, under a new director, the foundation collaborated on the publication of a catalogue for a museum exhibition of the works completed secretly by Nolde during the ban. Along with art historical analyses considering the impact of isolation on Nolde's mature creativity, the book included an essay by an independent scholar examining the artist's relationship to the Nazi regime and considering the context of his appeals to reverse the order of expulsion and the ban on painting, some of the appeals which conveyed anti-Semitic sentiments.<sup>47</sup>

For more than 50 years, the Foundation has operated the Seebüll property as a monographic museum, presenting annual exhibitions on site, circulating exhibitions internationally, and operating an ongoing publishing program.<sup>48</sup> The foundation owns the artist's copyrights, and the majority of its financial support derives from licensing his images and texts, as well as sales of its own publications. The copyrights will expire, however, in 2026.<sup>49</sup> A major initiative is underway to prepare for that day. An ancillary exhibition space in Berlin opened in 2007, aimed at stimulating interest among broader audiences in seeing the artwork in its optimal setting at Seebüll. An expanded museum facility has been developed at the main site, including new visitor amenities and a workshop for art education. A corporate partnership program has been inaugurated. The artist's first retrospective in France took place in 2008,<sup>50</sup> and a newly edited publication of the artist's autobiography was issued that same year.<sup>51</sup>

### **Alvar Aalto Foundation, Finland**

The Alvar Aalto Foundation<sup>52</sup> was created in 1968 by the architect and designer (1898–1976) and operated at a nominal level during his lifetime. Activities comprised modest grants to architects and architectural historians, which were approved once a year when Aalto, his family, and associates gathered for what was largely a social occasion.<sup>53</sup> According



to his biographer, who served as the Foundation's president after the architect's death, Aalto was aware of foundations created by other architects. Most notable among these was Le Corbusier's foundation, which had been announced upon his death in 1965 and received the bulk of that architect's estate.<sup>54</sup> Despite this awareness, his biographer states that Aalto himself defined no long-term objectives for his foundation beyond general purposes noted in its statutes, nor did he provide it with resources upon his death.<sup>55</sup>

Definitive actions on those critical fronts were left to his family. In 1981, Aalto's heirs donated to the Foundation the royalties from his furniture and glassware designs, as well as his writings.<sup>56</sup> Along with properties he designed and owned for his personal and professional use, and his share of Artek—the company set up in 1935 to market his furniture, lamps, and textiles internationally—these rights comprised a key part of his estate.<sup>57</sup> Subsequently, over a period of 15 years, Aalto's archive<sup>58</sup> and his studio and residence in suburban Helsinki were acquired from his heirs as well.<sup>59</sup> The Foundation now operates a municipally owned museum facility in the city of Jyväskylä; administers an architectural heritage department based in the studio; opens Aalto's studio, residence, and summer retreat to public tours; and conducts an international continuing education forum for architects and designers. Aalto's product designs are licensed by Artek and iittala, and the Foundation identifies itself as supervising the product development of everyday articles.<sup>60</sup> Funds provided by public sources and corporate sponsors support its projects addressing issues in the wider field of architecture.

Aino Marsio-Aalto, the architect's first wife, design partner, and a managing director of Artek, predeceased him; they had two children. His much younger second wife, architect Elissa Makiniemi Aalto, completed several of his projects posthumously, continued to manage the architectural practice, and served as chairman of Artek until her death in 1994. During this period, she led efforts to protect Aalto's buildings slated for inappropriate renovations or at risk due to deterioration. In stewarding the design integrity of his structures, she underscored the important future role to be played by the Foundation in this respect.<sup>61</sup> A family member now serves on the Foundation's 10-person board, which also includes municipal government representatives and members from the architecture, banking, business, education, and design industries.

The Alvar Aalto Museum draws from its holdings to organize exhibitions presented onsite, on the web, and for tour to museums abroad; features temporary exhibits on architecture and design themes broadly; publishes about Aalto and architectural issues related to its exhibits; and conducts a wide-ranging education program for classroom and youth audiences, with resources featured on the website.<sup>62</sup> The architectural heritage department houses the archives; maintains a register of Aalto's buildings worldwide; carries out research related to the structures; and advises private owners and governments on appropriate repair of the individual structures, as well as proposed updates to Aalto's town

masterplans. The Alvar Aalto Academy is a forum for discussion and continuing education activities in the architecture and design field internationally. Its programs address environmental culture, particularly contemporary architecture. Activities include research; convenings; publications; a triennial symposium addressing the artistic, social, and technical problems of modern architecture; and conferences on architectural research, conservation, and design<sup>63</sup>

### **Henry Moore Foundation, United Kingdom**

The Henry Moore Foundation<sup>64</sup> was created in 1977 during the sculptor's lifetime (1898–1986) with a goal articulated at the time to conserve the work and reputation of Henry Moore and the setting in which the work was created, and to assist the arts in general and sculpture in particular.<sup>65</sup> Accounts of this formation and the artist's motivations include his concern about the impact of death duties on his estate and his desire to keep a core collection of works together and accessible to the public.<sup>66</sup> No mention is made of precedents about which he was aware, and in fact there is no published precedent involving an artist undertaking the arrangement he implemented. In contrast to artist-endowed foundations funded posthumously, nearly 10 years prior to his death Moore transferred to the Foundation much of his real estate, all existing artworks created and still owned by him, his archives, an initial endowment, and, by virtue of the foundation's unusual structure, all rights in his future works.<sup>67</sup>

On this last point, Moore established a company to be operated as a commercial subsidiary of the Foundation and contributed his business to it, receiving shares in exchange that he donated subsequently to the Foundation. He was employed and salaried as managing director of the company by which all of his subsequent artistic production was owned and sold, or retained, to benefit the Foundation.<sup>68</sup> His wife, Irina Radetsky, who with his daughter was an original trustee, contributed a significant collection of works by Moore to the Foundation, more than half of what she owned individually.<sup>69</sup>

For much of the decade prior to his death, Moore continued to create prolifically, initiating new projects and authorizing new editions of earlier works from all points of his oeuvre. Accounts of this period indicate that providing for the Foundation was on his mind.<sup>70</sup> During this time, the Foundation and its commercial subsidiary assumed comprehensive management of Moore's creative and business life, as well as ramping up significant philanthropy in his name. His death in 1986 at the age of 88 was followed three years later by that of his surviving spouse. Moore's will stipulated that no new work could be cast following his death; however, all of the numerous editions underway could be completed at the discretion of the company's directors.<sup>71</sup>

The Foundation's structure was at the heart of subsequent litigation brought by Moore's daughter during settlement of her mother's estate.<sup>72</sup> Her suit claimed that the artist's

copies—finished proofs traditionally not included in a numbered edition and retained by an artist—for each of the numerous sculpture and print editions, as well as his later unique drawings, were his personal property, not owned by the company, and as such should be included with other properties the daughter was to inherit from her mother. The courts ruled against that position.<sup>73</sup> The Foundation now operates a wide-ranging program, stewarding Moore's artworks, rights, and property, and promoting sculpture in the cultural life of the country broadly by conducting collection, exhibition, and research activities on the art form of sculpture, as well as awarding grants and scholarships for that purpose.

The Foundation owns the sculptor's home and studio complex in Hertfordshire. This comprises the study center and archive, house and studio museum, garden with installed sculptures, and the permanent collection that is the basis for exhibits, loans, and organization of touring exhibitions internationally, as well as an active publishing program on Moore's life and works. The Foundation also operates the Henry Moore Institute in Leeds, the city where the sculptor attended art school, not far from the town where he was born the seventh child of a coalminer. The Institute is a municipally owned sculpture gallery, featuring works classical to contemporary, and maintains an archive on sculpture in Britain from the eighteenth century to the present.<sup>74</sup> The Foundation's activities there include conducting research, building a permanent collection through acquisitions, and presenting exhibitions and public programs on sculpture broadly. The Institute hosts research fellowships, sponsors an internship program, and collaborates with research projects funded by the Foundation.

The Foundation's grantmaking arm provides funds to organizations and individuals, primarily in the UK. It makes on average £1 million in awards annually in the area of sculpture, drawing, and printmaking.<sup>75</sup> Grants support activities in a number of categories, including: conferences, lectures and publications; exhibitions, catalogues and commissions of new works; collection acquisition, conservation, and installation; major project research and development; and grants to individuals, comprising grants to support fellowships and residencies for practicing artists, postdoctoral research fellowships to art historians, and postgraduate project grants for studio artists and art history graduates. In 2006, a partnership was initiated enabling the Esmée Fairbairn Foundation, a private foundation in the UK, to deploy a portion of its funds by accessing the Henry Moore Foundation's grantmaking capacity for projects involving living artists.<sup>76</sup>

A 10-member board governs the Foundation and includes individuals with experience as scholars, museum directors, civic and business leaders, art advisors, and art collectors. Annual reports are posted on the Foundation's website, and detailed financial reports for prior years are available at the UK Charity Commission website.<sup>77</sup> The Henry Moore Foundation is the largest grantmaking artist-endowed foundation outside the US.

## **Fondation Albert Gleizes, France**

Fondation Albert Gleizes<sup>78</sup> was created in 1984 under the will of painter and poet Juliette Roche (1884–1982), more than 30 years after the death of her husband, the painter, illustrator, and art theorist Albert Gleizes (1881–1953). Gleizes, an exponent of Cubism and philosopher of the artist's purpose in contemporary life, published and exhibited with the major modernist figures of his time. Roche—who chronicled the evolution of the late twentieth century avant-garde in her paintings, visual poetry, and literature—is among the women artists of that time whose contributions are being reassessed by contemporary scholars.<sup>79</sup> Upon her death at the age of 98 and with no children, Roche directed her bequest, with instructions to establish a private foundation, to the National Foundation for Graphic and Plastic Arts, an entity set up by the French state to facilitate artist residency programs, among other services to visual artists.<sup>80</sup>

The Gleizes foundation owns a historic property on the banks of the Rhone River south of Lyon. This was the site of a storied art commune beginning in 1927 when Gleizes gathered a group of students and followers to join in a life combining artistic creativity inspired by a progressive view of the artist's role in contemporary life and a commitment to traditional farming as a means to provide cooperative support.<sup>81</sup> In addition to the property, the foundation owns an exhibition collection of Gleizes's works, with rights to his texts and artworks. It also owns the artistic and literary works and rights of Roche, as well as the work of a long-time resident of the commune, Anne Dangar (1885–1951), an Australian-born ceramist represented in museum collections in France and internationally.<sup>82</sup> The foundation lends to and collaborates on exhibitions internationally and undertakes publication projects, including the Gleizes catalogue raisonné.<sup>83</sup>

Since 1993, the foundation has managed the rural property as an artists' residency program, open to artists in all disciplines, but with a summer session focused specifically on young visual artists, recent graduates of university art schools.<sup>84</sup> Reflecting the educational spirit of the commune's history, the foundation appoints a different supervisor for the program's summer session each year, typically an art educator, museum curator, or art organization director. The supervisor selects a group of young artists to participate and organizes the two-month session, culminating in a public exhibition. The summer residency program is cosponsored by the regional government and cultural association. Use of the residency facility at other times of the year is available to artists for a fee.

The foundation's administrative office is in Paris. It does not operate an exhibition facility, nor does it house an archive and study center. As part of its initial structuring, the archives and library of Gleizes and Roche were placed with the Centre Georges Pompidou, which includes works by Gleizes in its collection. A 12-person board includes a member of the artist's family, as well as individuals experienced as museum director, curator, art historian, photographer, business executive, legal counsel, and jurist, in addition to representatives of

the National Foundation for Graphic and Plastic Arts and the Culture and Interior Ministries. The Gleizes foundation is one of the few artist-endowed foundations internationally that is stewarding the oeuvres of multiple artists. By the terms of its bequest, the focus is on Albert Gleizes, engaging Juliette Roche and Anne Dangar secondarily in the context of his life initiatives.

### **Fundació Joan Brossa, Spain**

Fundació Joan Brossa<sup>85</sup> was organized in Barcelona in 1999 under the will of the Catalan poet and multidisciplinary artist (1919–1998). The foundation is led by the artist's surviving spouse, Pepa Llopis, who serves as president for life. Brossa created, published, and collaborated with contemporaries in the Spanish avant-garde, producing an influential oeuvre that crossed literary, visual, and performance arts. For much of his creative life, he presented his works in private settings, defying a culture of censorship under the Franco regime and achieving visibility, recognition, and distribution of his work only in later years.<sup>86</sup> The artist bequeathed his intellectual property rights to the foundation, as well as a body of work, including texts, books, performance scripts, films, musical scores, graphic designs, sculptures, installations, multiples, and photographs, along with his archive and personal library.<sup>87</sup> The Barcelona City Council was specified in his will as a member of the foundation's governing body. In 1987, 11 years prior to his death, Brossa had famously donated an extensive body of work to the City of Barcelona in exchange for a lifetime pension.

The foundation's mission is to preserve and disseminate the artist's works, achieving the distribution and public visibility long-delayed during his lifetime. Its program aims to bring together the many dimensions of his oeuvre and—through cataloguing, research, exhibitions, symposia, and educational programs—make the works available widely in order to promote appreciation of Catalan culture, as was Brossa's vision. In 2006, the foundation opened a modest facility with a permanent exhibition presenting an overview of the artist's visual, literary, and film works, and offering educational programs, readings, and guided tours to sites in the city significant in the artist's world. Brossa's personal library was placed separately with Fundació Vila Casas, a contemporary art collection with a library facility. Cataloguing was undertaken jointly with University of Barcelona.<sup>88</sup>

The foundation lends to and collaborates on exhibitions internationally, offers touring exhibits, provides schools with curricula and workshops in visual poetry, and conducts an ongoing publication program.<sup>89</sup> It has announced plans to present an award for research and development in the disciplines practiced by the artist, as well as a teaching award recognizing outstanding use of his poetry in the classroom.<sup>90</sup> Along with members of the artist's family, the foundation's stewards include representatives of the municipal government and individuals with backgrounds in the arts, literature, scholarship, business, and law. The foundation actively raises funds through corporate sponsorships and individual

memberships and sells materials inspired by Brossa's works, including facsimiles of his visual poetry, as well as his books and other products featuring his graphic designs.

Brossa was known for his wide-ranging collaborations and role as a catalyst for creative initiatives. Among many contemporaries, he was involved artistically with Modest Cuixart (1925–2007), Joan Miró (1893–1983), Antoni Tàpies (1923–), and, more incidentally, Eduardo Chillida (1924–2002). Each of these artists created a foundation in Spain, possibly indicating that among other factors, the proliferation of artist-endowed foundations in any one location is associated with demographic trends as much as it is with public policies. More specifically, as subsequent generations of artists create foundations, it is increasingly likely that these will include artists whose oeuvres encompass multiple art disciplines, as was true of Joan Brossa.

### **Fondation Henri Cartier-Bresson, France**

Fondation Henri Cartier-Bresson<sup>91</sup> was established in Paris in 2002, two years prior to his death by the photographer (1908–2004) and his family, including his wife, photographer Martine Franck, and their daughter. The foundation, with the artist's surviving spouse as its president, operates an eponymous cultural center focused on the photographer and on contemporary photography broadly. It holds a permanent collection that includes the artist's vintage prints, contact sheets, drawings, books, and films. It also owns the artist's archive and personal library, which are available to scholars and researchers. Creation of the foundation was motivated by a desire on the part of the artist and his family to keep intact his archive, vintage photographs, and related materials, and make them available in a dynamic setting that would sustain awareness of the photographer's contribution and connection to an evolving art form.

The foundation presents three exhibitions annually, drawing on its permanent collection, as well as featuring works by up-and-coming photographers advancing the photo-reportage form defined by Cartier-Bresson. Exhibitions extend beyond photography and include the creations of painters and sculptors as they inform and relate to the photographic works. It lends to exhibitions internationally, screens documentaries related to its exhibitions, presents lectures and symposia to stimulate discussion about contemporary photography, and maintains an active publishing program in conjunction with its exhibitions.<sup>92</sup> The Henri Cartier Bresson Award, presented in conjunction with a corporate sponsor, is presented biennially and provides €30,000, along with an exhibition and publication, to a rising documentary photographer or photojournalist with a demonstrated body of work who proposes an important project unlikely to be realized without special assistance.<sup>93</sup>

Cartier-Bresson was a founder of Magnum Photos, the international photography cooperative. The agency continues to distribute his photographs, manage his copyrights, and circulate exhibitions of his works, with 11 exhibitions listed as available currently in its

online archive.<sup>94</sup> In presenting itself on its website, the foundation does not claim ownership of the artist's copyrights.<sup>95</sup> It actively raises funds to support its programs with individual memberships, corporate sponsorships, and grants from institutional philanthropies. In addition to the artist's family members, its 12-member board of directors includes representatives of the Education, Interior, and Culture Ministries, as well as the municipal government, and individuals from the worlds of finance, international law, art sales, art history scholarship, and museum curatorial practice.

Reflecting the later emergence of the medium as a recognized art discipline, foundations created and endowed by photographers are fewer in number and more recently formed. As these types of foundations grow in number, it will be interesting to see how this particular art form, still quite dynamic, extends the range of activities to be found among artist-endowed philanthropies. In an interview not long before his death, Cartier-Bresson and Franck emphasized their vision of the foundation, intended to function not solely as an archive of history, but as a lively cultural incubator grounded in an evolving art form.<sup>96</sup>

### **Artist-Endowed Foundations Internationally**

As is evident from this review, artist-endowed foundations in the US and abroad can differ considerably, both individually in terms of historical circumstance, program focus, and cultural resources, as well collectively at the national levels with respect to regulatory environments. That said, there appear to be potential common interests on a number of fronts, demonstrated by the foundations highlighted here as well as those identified in the US. As the number of artist-endowed foundations continues to increase in all locales and the broader private foundation field maintains the current drive to organize itself internationally, the opportunity to explore potential mutual interests among artist-endowed foundations globally may be a natural next step in the evolution of this emerging field.

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<sup>1</sup> This definition assumes the criteria for tax exemption, stated in the Internal Revenue Code, as being an entity that is organized and operated exclusively for charitable purposes in the broadest sense, and that "no part of the net earnings...inures to the benefit of any private...individual...." See the accompanying briefing paper by Marion R. Fremont-Smith, "Federal and State Laws Regulating Conflicts of Interest and Their Application to Artist-Endowed Foundations."

<sup>2</sup> See discussions of terminology in the accompanying briefing paper by Stephen K. Urice, "Creativity and Generosity: Considerations in Establishing an Artist-Endowed Foundation."

<sup>3</sup> Isabelle Combes and Dominique Lemaistre, Fondation de France, "EFC Country Profile December 2008: France" (Brussels: European Foundation Centre, 2008), 1.

<sup>4</sup> Examples include Fondation Vincent van Gogh d'Arles, <http://www.fondationvangogh-arles.org/>; Fundación Picasso: Museo Casa Natal, [http://fundacionpicasso.malaga.eu/opencms/opencms/fundacionpicasso/portal\\_es/portada](http://fundacionpicasso.malaga.eu/opencms/opencms/fundacionpicasso/portal_es/portada); and Fundació Mies van der Rohe, <http://www.miesbcn.com/en/foundation.html>.

<sup>5</sup> Examples include Alexej von Jawlensky Archive S.A., <http://www.jawlensky.ch/>; Archivio Aldo Mondino, <http://www.aldomondino.it/archivio.php>; Roland Penrose Estate, <http://www.rolandpenrose.co.uk/>; and Succession Pablo Picasso, [http://www.picasso.fr/fr/picasso\\_page\\_index.php](http://www.picasso.fr/fr/picasso_page_index.php).

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- <sup>7</sup> Edith Archambault, "Country Report: France," in *Foundations in Europe: Society, Management and Law*, ed. Andreas Schlüter, Volker Then, and Peter Walkenhorst (London: Directory of Social Change, 2001), 129.
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- <sup>12</sup> Ralph E. Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers and Artists*, 3rd ed. (New York: Practising Law Institute, 2005), 1114–1117.
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- <sup>14</sup> Lerner and Bresler, *Art Law*, 1257–1309.
- <sup>15</sup> *Ibid.*, 1321–1338.
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- <sup>21</sup> *Ibid.*, 58.
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- <sup>25</sup> Examples include Archivio Alighiero Boetti, [http://www.archivioalighieroboetti.it/about\\_us.asp](http://www.archivioalighieroboetti.it/about_us.asp); and Archivio Opera Piero Dorazio, <http://www.archiviopierodorazio.it/index.php>.
- <sup>26</sup> See those associations of foundations in France, Germany, and Spain, among others.
- <sup>27</sup> Most are in European countries; a few are in countries of Latin America and Asia, and in Canada and Australia.
- <sup>28</sup> Pio Istituto Catel, <http://www.istitutocatel.it/>.

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- <sup>30</sup> Sabina Ginisci, "Il Pio Istituto Catel e le sue collezioni d'arte," in *Franz Ludwig Catel e i suoi amici a Roma, Un album di disegni dell'Ottocento* (Rome: Galleria Nazionale d'Arte Moderna, 1996), 21–23.
- <sup>31</sup> Andreas Stolzenburg, *Franz Ludwig Catel (1778–1856)* (Rome: Casa di Goethe, 2007), 126–130.
- <sup>32</sup> Ginisci, "Il Pio Istituto Catel."
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- <sup>37</sup> Ginisci, "Il Pio Istituto Catel."
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- <sup>41</sup> Markus Heinzmann, "Entwurf des Testaments," in *Emil Nolde und die Sammlung Sprengel, 1937–1956. Geschichte einer Freundschaft*, ed. Ulrich Krempel (Hanover, Germany: Sprengel Museum, 1999), 21–26.
- <sup>42</sup> Peter Selz, *Emil Nolde* (New York: Museum of Modern Art, 1963), 71.
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# ADDENDUM

## Artist-Endowed Foundations and the Academic Community: Potential Mutual Resources

KAVIE BARNES

### **Background**

The Aspen Institute's National Study of Artist-Endowed Foundations (Study) defines an artist-endowed foundation as a tax-exempt, private foundation created and endowed by a visual artist, the artist's surviving spouse, or other heirs or beneficiaries, to own the artist's assets for use in furthering exempt charitable and educational activities serving a public benefit. Among the more widely recognized artist-endowed foundations are the Andy Warhol Foundation for the Visual Arts, the Pollock-Krasner Foundation, and Roy Lichtenstein Foundation.

Many artist-endowed foundations are structured as grantmaking organizations, others as study centers, exhibition collections, artist residencies, or art education programs, and some as combinations of these activities. The Study has identified approximately 300 such foundations, active currently or previously, many of which are in their early years of operation. The Study notes that as a small but fast-growing segment of the greater foundation universe and broader contemporary art field, these organizations are worthy of consideration in light of their potential influence as a new force in visual arts philanthropy and as a new vehicle for stewardship of this country's significant contemporary art patrimony.

Artist-endowed foundations qualify for tax exemption based on classification as charitable and educational entities. While this most often is understood in applied terms as educating about the respective artist and his or her oeuvre, these organizations also have the potential to share knowledge about their highly specialized niche of the philanthropic sector and the myriad legal, financial, and cultural practices and issues that accompany the maintenance of an artist's legacy and implementation of a vision for philanthropy using an artist's assets. Effective administration of an artist-endowed foundation, and realization of its educational and philanthropic potential, requires a highly diverse set of skills that parallel budding areas of study in college and university programs focused on arts administration, law and philanthropy, archival management, the fine arts, museum studies, public policy, and art education. With these correlations in mind, this paper seeks to identify potential ways in



which the academic and philanthropic sectors could benefit mutually from robust connections rooted in the educational process.

## **Scope**

This paper reports observations about existing intersections and potential opportunities for future interaction between artist-endowed foundations and the academic community. As identified by the Study, artist-endowed foundations are located throughout the country, with a majority concentrated on the East Coast and an increasing number forming in western states. Websites for foundations in a number of locations indicate they interact with educational institutions. For the purpose of this paper, my exploration was limited to artist-endowed foundations in New York City, affording the opportunity for personal interviews, and I utilized New York University (NYU) as a proxy for academic institutions broadly.

Recognizing the growing number of college and university programs that focus on professional education in areas relevant to artist-endowed foundations, I inquired about the extent to which those foundations located in New York City utilized academic institutions as resources for student-worker help in the form of internships. These internships, often credit-based and essential for the fulfillment of undergraduate and graduate-level requirements, inform future art leaders about the work of artist-endowed foundations while fulfilling the foundations' missions to educate the public about their respective artists and the visual and contemporary arts more broadly.

Similarly, I investigated the potential for other types of mutually beneficial interactions among artist-endowed foundations and higher education institutions, using NYU as a representative model for an academic institution and its capacities relevant to this purpose. NYU's campuses are located throughout Manhattan, a foremost site of twentieth and twenty-first century modern and contemporary art activity, as well as the home of numerous artist-endowed foundations identified during the Study's research. NYU's proximity to many contemporary artists and artist-endowed foundations and its portfolio of nationally recognized programs in diverse topic areas related to foundation activities made it an ideal institutional representative for this investigation.

This paper reports observations on the state of these interactions among artist-endowed foundations and the academic community and considers possibilities for the future, especially those that reach beyond internships. These views are based on conversations with three types of individuals: internship program managers and related staff at a sample set of six artist-endowed foundations, former internship program participants, and faculty and program directors in departments and programs of NYU that are relevant to artist-endowed foundations.

Artist-endowed foundations whose internship program managers were interviewed include the Richard Avedon Foundation, (Alexander) Calder Foundation, the Dedalus Foundation (Robert Motherwell), (Donald) Judd Foundation, Joan Mitchell Foundation, and the Andy Warhol Foundation for the Visual Arts. These foundations were selected as those that have active internship programs and together would represent a sample of programmatic activities common to artist-endowed foundations, including: grantmaking, as well as functions as study centers, exhibition collections, and art education programs.

NYU faculty and program directors interviewed include those of the Archives and Public History Program, the Program in Museum Studies, National Center on Philanthropy and the Law, Program in Photography and Imaging, Program in Visual Arts Administration, Art Education Program, Robert F. Wagner Graduate School of Public Service, and the research facilities at the Elmer Holmes Bobst Library. Additional programs are relevant to our topic, including the University's Institute of Fine Arts, but time and schedule constraints limited the list of interviews.

The paper provides observations on overall findings based on discussions with foundation internship program managers, former participants in foundation internship programs, and NYU faculty members and program directors. Two appendices provide the basic questions guiding each interview and list the various individuals interviewed.

## **Observations on Findings**

Of the six foundations consulted, five—the Andy Warhol Foundation for the Visual Arts, (Alexander) Calder Foundation, the Dedalus Foundation (Robert Motherwell), Joan Mitchell Foundation, and (Donald) Judd Foundation—are associated with painters and sculptors, while one, the Richard Avedon Foundation, is associated with a photographer. Three are grantmaking foundations, either primarily or as a strong secondary focus, and three function exclusively as study centers or exhibition collections, in one case with a facility serving public audiences, albeit on a limited basis. Based on the year of their tax-exempt ruling by the Internal Revenue Service (IRS), the group ranges from very new to well-established. Two foundations, Dedalus and Warhol, were formed in the 1980s and are in their third decade; in contrast, the Avedon Foundation was formed less than 10 years ago. The remaining three, formed during the 1990s, are in their second decade. The group varies in size, with two foundations employing five staff members, and one each having 10, 11, 15 and 25 staff members.

An analysis of these six foundations suggests that the current relationship between artist-endowed foundations and the academic community is largely in its inception and that, for the most part, opportunities have yet to be fully explored and developed, especially in regard to activities that tap the full potential of foundations as educational resources. Currently, the most common mode of interaction between artist-endowed foundations and

the academic community is through student internships initiated by the foundations. Other areas of activity are nascent, although some examples can be cited to indicate potential directions and emerging opportunities.

### **Internship Programs at Artist-Endowed Foundations**

On an annual basis, the six foundations that were the subject of this paper together host approximately 50 interns, and that figure is likely to increase based on plans by the Joan Mitchell Foundation to expand its internship program. Of the 50 internships, most take place on a part-time, per-semester basis, and many also occur during summer sessions. The programs range from the Richard Avedon Foundation's year-round initiative, which appoints 20 or more interns per year, to the Warhol Foundation, with between one and four interns per year, all of these in the summer. The rest of the foundations appoint between two and eight interns annually. The great majority of these interns are college and university students, although in a few instances interns hold college degrees and are seeking a professional development opportunity.

As a recent graduate from the masters program in Visual Arts Administration at NYU, in which I performed several internships for nonprofit arts organizations, I was able to recognize internship practices that were beneficial for both the student and the organization. It became clear to me in the course of my research that, generally speaking, these foundations demonstrate qualities that internship programs in nonprofit organizations should hold as a basic standard. Clear supervisory leadership, sufficient training and orientation, demanding project-based work, diverse interactions with staff, and exit interview processes are just a few of the features that keep interns involved in assigned projects, produce the best work, and deliver the greatest educational experience; these are features that characterize for the most part the internship programs of this selected group of foundations.

In the interviews for this paper, two topics came to the fore as priorities with respect to student internships at artist-endowed foundations. The first is the focus of the internship—the responsibilities assigned interns, how these mesh with foundations' programs, and the benefits derived by students from this experience. The second topic is the way in which foundations go about recruiting qualified candidates for internships.

### **I. Work Focus and Outcomes**

For the purpose of identifying the opportunities between the relevant academic departments and the duties of interns at the artist-endowed foundations, it was useful to evaluate the programs by work focus. Student interns working with foundations are primarily involved with research projects in the areas of archival management and cataloguing; research related to art valuation appraisals; general administrative support in a nonprofit setting, including fundraising development; and catalogue raisonné research and drafting.

The level of work expected of the interns is also worthy of note, but due to the range of tasks and projects assigned to individual students over the course of an internship, this category has boundaries that are less clear. Some interns work more in an assistant capacity, while others perform tasks that require professionally rigorous training and, therefore, offer a more intensive learning experience for students.

As is standard practice in an internship portion of an academic program, internships at foundations are intended to provide a means for a student to learn more about his or her respective field, as well as apply in practical settings the knowledge presented conceptually in the classroom, and therefore are usually unpaid. In this study, the Calder Foundation has been the only exception, paying stipends to students based on experience; however, the foundation is in the process of reconsidering this practice.

### ***Archival Research and Preparation***

At the Calder Foundation, Joan Mitchell Foundation, and the Richard Avedon Foundation, interns had the opportunity to work with experts in the field on gathering data on artists for activities relating to archive management. To qualify for this work, the interns were expected to have backgrounds in art handling or some interest in archival or registrarial work. Three to 10 students per semester, some of them receiving academic credit from their art history and studio art departments, were given training in handling and documenting sensitive art material—such as photography negatives, original letters, and correspondence between artists and family or professional contacts—and other types of artists' papers and documents.

### ***Art Valuation Research***

The Andy Warhol Foundation's internship program to support the Foundation's annual update to the valuation maintained for its extensive art holdings enabled the intern to gain skills that one might expect to develop in an entry level art valuation research position. At the end of the rigorous internship, which entailed a weekly schedule of 35 hours, the student produced a memorandum summarizing data and findings on auction sales activities and prices paid for works by Andy Warhol during the past year.

### ***Catalogue Raisonné Research***

Interns at the Dedalus Foundation performing catalogue raisonné-related research had in-depth exposure to the artist's lifetime of creative works. Assisting in provenance research and bibliographic research, the students became familiar with the collections that hold the artist's work; how to properly identify the work; and through these activities, how to identify art historical links between the artist and his school or period. In addition, an editorial intern assisting with basic drafting and editing of the catalogue's bibliography and exhibition history section became familiar with the requirements for preparing scholarly texts. In sum, these interns gained the experience of assisting preparation of a publication

that will be a valuable contribution to the body of scholarship and educational resources available about the artist.

### ***Educational Resource Materials***

The Richard Avedon Foundation created an internship position to help jump-start expansion of its art education activities. The intern's work was focused on consultations with classroom educators to identify the demand for its resources and then on creating educational materials and defining content for student site visits at the Foundation appropriate for different age groups. The Joan Mitchell Foundation is establishing an intern position to support expansion of its art education program, offering free art classes for young people. In both instances, interns gain direct experience in program planning and development.

### ***General Program and Administrative Support***

At the Judd Foundation, two interns per semester focused on a range of duties related to the work of the five-employee staff. Students researched the history of the Foundation's landmark Spring Street building; acted as docents for public tour programs; supported fundraising research; and assisted as paid aides on the Foundation's Oral History Project, documenting interviews with the artist's friends, family, and business contacts. Through their internships, the students became familiar with several aspects of the Foundation's operations and program activities and the artist's life and work.

### ***Grantmaking***

Although three of the six foundations whose internship programs were investigated conduct regular grantmaking programs, either as a primary or prominent secondary focus of activity, no involvement of interns in grantmaking activities was identified. It isn't clear why this is the case, given that several of the foundations appear to conduct fairly labor-intensive grantmaking programs that involve processing a substantial volume of material.

## **2. Intern Recruitment**

In talks with the coordinators of these foundations' internship programs, two patterns emerged in the types of solicitation each uses to seek new interns. This process varied according to institutional needs, but there are significant areas of overlap

### ***Networking with Students and Faculty***

A number of foundations recruit interns directly through university departments and programs, but often do so via contacts with individual professors and students. The student docent program of the Yale Center for British Art has been a source of qualified undergraduate student interns for the Andy Warhol Foundation. Chief Financial Officer K.C. Maurer cites student word-of-mouth as one of the most promising ways to recruit qualified students applicants for internships. The Richard Avedon Foundation, which

appoints a greater number of interns than any other foundation interviewed, also found success with students and professors who announced internship openings to peers, as well as working through more formally organized internship placement programs, such as that of the Photography and Imaging Program at NYU's Tisch School of the Arts. The Judd Foundation has set up a more formal partnership with NYU's Gallatin School of Individualized Study and the School of Arts and Sciences, through which it recruits interns on a regular basis.

### ***Academic Online Job Postings***

Several foundations used all-campus websites as one means to advertise internship opportunities. The Andy Warhol and Joan Mitchell Foundations reported posting internship opportunities with NYU's Wasserman Center for Career Development. The Andy Warhol Foundation also utilizes the website of the Liberal Arts Career NetWORK, a collaborative effort among 28 selective liberal arts colleges in the greater northeast region to connect students and graduates with internship and employment opportunities.

### ***Extra-Academic Online Job Postings***

Most program managers from the six foundations found that the New York Foundation for the Arts' website (<http://www.nyfa.org/>) yielded more responses than any other online source, drawing both students and young professionals holding degrees who were seeking career development opportunities. In the case of the Andy Warhol Foundation, the internship program manager found that posting on the site attracted so many candidates (many of them unqualified) as to stall her ability to process them sufficiently. Neither the Andy Warhol Foundation nor the Judd Foundation uses the site to recruit interns. Other services used to advertise internship positions were the websites of the American Association of Museums, MonsterTRAK, and Idealist.org. These general websites attract diverse audiences that may include students, but for the most part include jobseekers in museums, nonprofit organizations, and academia.

### ***Other Strategies***

Two of the foundations, the Judd Foundation and Calder Foundation, featured notice of their internship program on their own websites, the Calder Foundation including a downloadable application form. As part of its broader education program, the Richard Avedon Foundation has hosted site visits by faculty members and students, no doubt strengthening its networks. Similarly, the Dedalus Foundation benefits from the academic ties of its president, a practicing educator and art history academician.

### ***Opportunities to Develop Relationships***

Based on my conversations with managers of foundation internship programs, former interns, and with faculty of academic departments at NYU, there is room to stimulate greater student interest in artist-endowed foundations and also to create more strategic

alliances between foundations and the academic community that would provide a mutual benefit based in the educational process. The recommendations detailed below offer the greatest potential for realistic exploration in both institutional bodies.

### ***Sharing Effective Internship Practices***

As is evident, the character of internship programs varies widely among foundations. Nonetheless, there is now a body of experience as to basic effective practices pertinent across the board. Sharing this information among artist-endowed foundations widely and encouraging exchange among foundation leaders and program directors involved in these programs would be useful for students and foundations alike. Inviting faculty who manage internship programs on the academic side of the equation to participate in an exchange with a group of artist-endowed foundation leaders would be a particularly valuable step.

### ***Bolstering Educational Opportunities in Foundation Internships***

The practical demands of operating a foundation with limited staff can pose a challenge when attempting to balance an intern's educational enrichment with the foundation's work needs. Based on my conversations with interns, there is a strong interest in learning about all facets of artist-endowed foundations. Developing an internship program that fulfills this broader interest among interns who are engaged in a focused work experience could be a shared effort among a group of artist-endowed foundations. For instance, foundations undertaking catalogue raisonné projects might join forces for a one-day workshop on research practices. Those with staff archivists could host a tutorial on archives for interns. Those involved in oral history projects could present a session on this mode of research. Grantmaking foundations, a topic with which no interns were involved, might consider hosting a practical seminar on this topic for interns working at peer artist-endowed foundations. These types of efforts could help develop relationships among artist-endowed foundations, as well as with the academic community.

### ***Site Visits to Advance the Curriculum***

As demonstrated by visits to the Andy Warhol Foundation and Richard Avedon Foundation by faculty and student groups from various colleges, and visits to the Roy Lichtenstein Foundation led by Bobst Library's Fine Arts Librarian Tom McNulty for students enrolled in New York City-area programs in art business and library science, leaders of artist-endowed foundations are willing to share time with interested students. Universities' connections to these foundations are relevant given the degree to which students receive training for careers through departments whose specializations are central to the functions of artist-endowed foundations. For example, programs in visual art administration, archival management, and library sciences would benefit from relationships with artist-endowed foundations for onsite visits.

### **Visiting Lecturers**

A number of faculty have remarked on what they perceive to be the largely unknown status of artist-endowed foundations, which within the academic community have defining characteristics related to the wider worlds of philanthropy and contemporary visual art. With greater familiarity about the role of these foundations, university programs would be in a position to invite foundation leaders or their program managers as guest speakers and visiting lecturers (for example, to address subjects related to visual art history, studio art, artists' professional development, philanthropy, nonprofit management, and archival conservation, among other subjects).

### **Educational Resource Practices**

The Richard Avedon, Calder, and Joan Mitchell Foundations have begun to advance their educational missions by developing curricula or instructional materials for use by educators in classrooms or exhibition settings or by staff onsite at the foundation. As evidenced in the experience of the Avedon Foundation, there is an appetite for this knowledge among educators and students at all levels. Given the possibility that a growing number of artist-endowed foundations will be developing similar activities, there is a timely opportunity for foundation leaders to engage faculty and students of university art education programs in discussions about effective practices in the development of educational resources.

### **Collaborations with Professional Associations**

Both Ruth Ann Stewart of the Robert F. Wagner Graduate School of Public Service, and Peter Wosh of the Archives and Public History Program observed that artist-endowed foundations might contribute to professional associations and publications in the arts and service fields. In particular, some artist-endowed foundations are involved in cutting-edge developments in digital archiving, oral histories, research into creativity processes, etc., about which wider fields should be made aware. Particularly where artists, scholars, and policy experts sit on the board of an artist-endowed foundation, there may be opportunities to utilize the knowledge and professional associations of such people to stimulate dialogue about the foundation's work in publications, conferences, and broader venues.

### **Conclusion**

The dissemination process for the Aspen Institute's National Study of Artist-Endowed Foundations report will encourage discussion of issues related to this topic and stimulate dispersal of research findings to relevant audiences, including academic communities. This process should lead the way to more informed discussions about the function and activities of artist-endowed foundations and potential ways in which the academic community and foundation sectors could benefit mutually from robust connections rooted in the educational process. It is the intention of this paper to encourage such discussions by drawing on the experiences and ideas of the foundation program managers, former interns, and university faculty members who generously shared their time and perspectives as reflected in the following sections.



# Interview Questions

## **1. Questions Guiding Foundation Interviews**

- History of program, length of operation, and supervisory structure
- Intern recruitment strategy and process
- Qualifications and number of interns sought
- Alignment of the program with the organizational mission
- Training and supervision of interns
- Content and duties of internship assignments
- Workplace culture for interns and their integration process into the organization
- Procedures for evaluation, feedback, and follow-up
- Lessons learned to date in program operation

## **2. Questions Guiding Former Intern Interviews**

- Background in arts, research, and administration
- Career goals
- Time spent as an intern
- Specific work projects performed and archival materials handled
- Staff integration and participation in work meetings, lunches, etc.
- Supervisory structure and ability to give feedback to the program administrator about daily work
- Current relationship to foundation
- Suggestions for how internship could be improved for future interns

## **3. Questions Guiding Faculty Interviews**

- Prior knowledge of and student involvement with artist-endowed foundations
- Student engagement with issues related to the artist-endowed foundations
- Academic groups that might benefit from intersections with foundations
- Potential opportunities for foundations and the academic community to be mutual resources

# Persons Interviewed

## New York University Faculty

Bruce Altshuler (May 27, 2008)  
Director  
Program in Museum Studies  
Graduate School of Arts and Sciences

Jessica Hamlin (December 15, 2008)  
Program Coordinator, Adjunct Professor,  
Art Education  
Department of Art and Art Professions  
Steinhardt School of Education

Mark Jenkinson (October 27, 2008)  
Faculty Internship Advisor  
Program in Photography and Imaging  
Tisch School of the Arts

Sandra Lang (July 14, 2008)  
Chair and Professor  
Visual Arts Administration Program  
Steinhardt School of Education

Jill Manny (May 27, 2008)  
Executive Director  
National Center on Philanthropy and the  
Law, School of Law

Tom McNulty (May 27, 2008)  
Fine Arts Librarian  
Elmer Holmes Bobst Library

Erin Sircy (October 28, 2008)  
Art Professions Graduate Advisor and  
Internship Coordinator  
Art and Art Professions  
Steinhardt School of Culture, Education,  
and Human Development

Ruth Ann Stewart (June 23, 2008)  
Clinical Professor of Public Policy  
Robert F. Wagner School of Public  
Service

Deborah Willis (May 20, 2008)  
Chair and Professor  
Program in Photography and Imaging  
Tisch School of the Arts

Peter Wosh (June 17, 2008)  
Director  
Archives and Public History Program  
Department of History

## **Artist-Endowed Foundation Internship Program Managers**

Clemency Cooke (December 1, 2008)

Educational Outreach Manager

The Richard Avedon Foundation

Michelle Franco (June 4, 2008)

Program Director

The Richard Avedon Foundation

Lily Lyons (June 24, 2008)

Program Manager

Calder Foundation

K. C. Maurer (July 1, 2008)

Chief Financial Officer

The Andy Warhol Foundation for the Visual Arts

Jennifer Moon (June 4, 2008)

Administrator and Board Liaison

Judd Foundation

Katy Rogers (June 3, 2008)

Project Manager

The Dedalus Foundation

Trish Suess (May 29, 2008)

Executive Assistant

Joan Mitchell Foundation

## **Former Participants in Foundation Internship Programs**

Samantha Gale (June 6, 2008)

The Andy Warhol Foundation for the Visual Arts

Olivia Kalin (June 24, 2008)

The Dedalus Foundation

Sarah Langham (June 25, 2008)

Calder Foundation