

A VISUAL ARTIST'S GUIDE TO ESTATE PLANNING

The 2008 Supplement Update

Sponsored by
The Marie Walsh Sharpe Art Foundation and
The Judith Rothschild Foundation

Edited by Barbara T. Hoffman

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Special Note:

Appendices may be downloaded from the *Supplement* and *A Visual Artist's Guide to Estate Planning* by clicking on the "download pdf now" option listed in Appendices in the table of contents.

A Visual Artist's Guide, the *Supplement*, and Appendices may also be downloaded from the website. Go to:

<http://www.sharpeartfdn.org>

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A Visual Artist's Guide to Estate Planning

Part I

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The 2008 Supplement Update

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To facilitate the networking and exchange of information, The Marie Walsh Sharpe Art Foundation is interested in receiving your comments on the publication and any experiences related to this topic.

Send your comments and contact information to The Visual Artist Legacy Project ("ALP")™ at sharpeartfdn@qwest.net.

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PREFACE

Joyce E. Robinson
Vice President/Executive Director
The Marie Walsh Sharpe Art Foundation

It was the long-held dream of Marie Walsh Sharpe to support the visual arts by providing financial assistance to the gifted in the field. In June 1984, as the culmination of that dream, Mrs. Sharpe established The Marie Walsh Sharpe Art Foundation, charging it with providing assistance to individual visual artists of demonstrated talent and with providing seminars and workshops for gifted high school students. Mrs. Sharpe died on September 21, 1985. Her will stipulated that a substantial part of her estate be used to fund the Foundation.

To develop programs for the Foundation's Individual Artists Program, the Foundation turned to artists, who themselves turned to artists again. It was Chuck Close who initiated the idea of involving artists in the process of gathering information about the most important needs of the visual arts community. Further encouraged by Philip Pearlstein and Irving Sandler, the Foundation embraced the concept. With this purpose in mind, on November 16, 1988, the Foundation convened a meeting of twenty-six visual artists at Philip Pearlstein's New York studio, hosted by Chuck Close and Philip Pearlstein and facilitated by Irving Sandler. The publication *Roundtable Discussion on the Needs of Visual Artists* is a report of the session. A small group of artists from that meeting later met to prioritize the report's recommendations in developing programs; Cynthia Carlson, Chuck Close, Janet Fish, Philip Pearlstein, Irving Sandler, Harriet Shorr, and Robert Storr were selected from the original group to form the Foundation's Artists Advisory Committee.

The first program developed by the Committee was the Visual Artists Information Hotline, which was established in cooperation with the American Council for the Arts and began on October 1, 1990. The Hotline

is primarily a referral service, providing visual artists with information on a wide variety of programs and services available to them. During five years of operation at the Council, the Hotline responded to over 20,000 calls from artists. In March of 1996, the operation of the Hotline was transferred to the New York Foundation for the Arts, where it still continues, funded by a consortium of members, supporters, artists, and friends organized by the Sharpe Foundation's executive director. The Visual Artists Information Hotline Number is 1-800-232-2789. Now called NYFA Source, the website address is <http://www.nyfa.org>.

On April 4–5, 1997, The Marie Walsh Sharpe Art Foundation and The Judith Rothschild Foundation sponsored a Visual Artists Estate Planning Conference in New York, planned by the Artists Advisory Committee and facilitated by Chuck Close, Irving Sandler, and Robert Storr. The conference was attended by artists, accountants, archivists, art dealers, curators, lawyers, writers, and representatives from foundations, government, museums, and other nonprofit organizations, who discussed practical and legal issues related to both the planning and the administration of artists' estates. The result was *A Visual Artist's Guide to Estate Planning*, published in 1998, a comprehensive handbook designed to help artists plan their estates. Part I introduces general estate planning concepts and offers practical advice and a discussion of legal issues raised by artists at the conference. Part II consists of an in-depth discussion of policy and law on selected issues of estate planning and administration for visual artists. The Committee on Art Law of the Association of the Bar of the City of New York, chaired by Barbara T. Hoffman, Esq., wrote Part II.

With the passage of time and the fact that print copies of *A Visual Artist's Guide to Estate Planning* were no longer available, the Artists Advisory Committee recommended that the Foundation publish a supplement and update to the first edition. We turned to art lawyer Barbara T. Hoffman to assist us in developing the supplement and update, a task which she has taken on with passion and dedication. The current issues and the state of the art of the complicated issues confronting the artists and their advisors in planning the artists' estate and foundation are brilliantly put into focus by the contributors to the *2008 Supplement Update*, conceptualized, edited, and organized by Barbara T. Hoffman.

With the *2008 Supplement Update*, *A Visual Artist's Guide to Estate Planning* should continue to be a useful guide and essential tool for all those who create visual images, their advisors, including lawyers, accountants, museums, and galleries and those concerned with the post mortem preservation of the artist's legacy and reputation.

The Foundation's intention in publishing the update is the same as in publishing the first edition: "We intend this book to help you ask the right questions and seek the appropriate advisors. The book is intended to assist all visual artists regardless of their level of financial success in the current art world."

I want to personally thank and express the deep appreciation of The Marie Walsh Sharpe Art Foundation to Barbara Hoffman, and to the Advisory Board—Phong Bui, Cynthia Carlson, Matthew Deleget, Tara Donovan, Janet Fish, Philip Pearlstein, Irving Sandler, Harriet Shorr, Robert Storr and Chuck Close, Emeritus—for the time and invaluable contributions they have made without monetary compensation in support of this supplement and the work of The Marie Walsh Sharpe Art Foundation.

INTRODUCTION TO *THE 2008 SUPPLEMENT UPDATE TO*

A VISUAL ARTIST'S GUIDE TO ESTATE PLANNING

Barbara T. Hoffman, Esq.

It has been ten years since The Marie Walsh Sharpe Art Foundation, The Judith Rothschild Foundation, and the Association of the Bar of the City of New York collaborated to produce *A Visual Artist's Guide to Estate Planning*. The 5,000 print copies have long since sold out and the book has earned a merited reputation as an essential reference for the visual artist and his or her advisor, whether the artist is motivated by financial concerns, preserving an artistic legacy, or both.

The 2008 Supplement Update is to be used in tandem with *A Visual Artist's Guide to Estate Planning*. *A Visual Artist's Guide to Estate Planning* has two parts and appendices. Part I introduces general estate planning concepts and offers practical advice and a general legal discussion of issues raised by artists and their advisors at an estate planning conference in 1997. The questions posed, the wide-ranging discussion, and the anecdotal information in Part I is as timely today as it was ten years ago. To the extent that changes in policy or legislation have an impact on the discussion, they are reflected in the discussion in the *Supplement* or the materials in the Appendices.

AN UPDATE OF LEGISLATIVE DEVELOPMENTS IN TAX AND COPYRIGHT

Part II of *A Visual Artist's Guide to Estate Planning* consists of an in-depth discussion of policy and law on selected issues of estate planning and administration for the visual artist. Significant developments in the last decade have influenced the discussion and required revision to or supplement of a number of chapters. With the exception of the chapter on tax and the chapter on foundations, which have been entirely rewritten, Part II is intended to be read with the *Supplement*.

Recent tax legislation at the federal level, in particular, The Economic Growth and Tax Relief Reconciliation Act (“2001 Tax Act”) and The Pension Protection Act of 2006 (“2006 Tax Act”), have important planning implications for artists and their advisors. The 2006 Tax Act has several significant changes that impact charitable contributions, including provisions affecting (i) fractional interest gifts in donated property, (ii) the related use rule, and (iii) appraisal reforms with respect to noncash charitable contributions, imposing strict penalties on both appraisers and recipients (donees) for failure to comply with the reforms. The 2001 Tax Act and the 2006 Tax Act are discussed in the “Update to Overview of Tax and Estate Planning,” whilst the appraisal reforms and other developments with respect to valuation are discussed in “Valuation and Appraisal: Current Issues,” which supplements *A Visual Artist's Guide* chapters on “Valuation and Appraisal.” Extensive appendices are provided that reflect these changes and include relevant Internal Revenue Service circulars (“IRS”).

“Copyright and Other Intellectual Property Issues in Estate Planning and Administration for the Visual Artist” is supplemented by “Protecting the Intangible Assets of a Visual Artist’s Work: Estate Planning and Management of Copyrights to Create Value and Preserve a Legacy.” The chapter discusses the two significant changes in the Copyright Act that have occurred since 1998. In 1998, Congress passed The Digital Millennium Copyright Act to implement two treaties of the World Intellectual Property Organization (“WIPO”). Appendix B-1 provides a summary by the United States Copyright Office of The Digital Millennium Copyright Act. Perhaps of more importance to the planning and administration of artists’ estates and foundations is the discussion with respect to the Copyright Term Extension Act of 1998 (“CTEA” or Act), Pub.L.No. 105-298, 112 Stat.2827 and the policy implications of that discussion. More recently, legislation with respect to “orphan works” has been introduced, and its importance for those entrusted with protecting an artist’s intellectual property should not be overlooked. This chapter also discusses the increasing value in the exploitation of images in the digital world, with an emphasis on emerging business models and issues.

AN EXPANDED TREATMENT OF THE ARTIST FOUNDATION AND ARCHIVE

Chapter 4, “Artists’ Foundations,” has been entirely rewritten to reflect both the enormous growth and popularity in the artist foundation as an estate planning vehicle and the significant legal changes that have occurred with respect to advising the artist foundation. Because this is an evolving and complex area in which knowledge is acquired incrementally through shared experience, The Marie Walsh Sharpe Art Foundation sent a survey to thirty-five artist foundations, of which fourteen responded. The surveys are discussed in chapter 5, “Artists’ Foundations and Museums: Reflections on the Survey and Other Musings.” *A Visual Artist’s Guide to Estate Planning* discussed the Andy Warhol Foundation, the Pollock-Krasner Foundation, the Robert Rauschenberg Foundation, and the Dorothy Dehner Foundation as different models of the artist foundation. To this discussion, we add as additional models, the Roy Lichtenstein Foundation, and Judd Foundation, private foundations, and the Anyone Can Fly Foundation, a public charity.

Harriet Shorr, artist, remarked, in the first edition, “Dead artists leave two bodies: their own, and a body of work.” In fact, artists and writers leave a third body—their archives. Rachel Dondio, writing in the *New York Times*, March 25, 2007, observed, “When writers die, their work lives on—and their papers go to Texas. Or Yale, Harvard, Emory, the New York Public Library, the British Library and other scholarly institutions that collect authors’ manuscripts and correspondence. How such papers change hands and find monetary value—is the result of a peculiar alchemy between market forces and literary reputations. Like the art and real estate markets, the archive market has gone through the roof.”

Because of this expanding market and because of the increasing importance for financial, educational, and reputational interest of the artist’s archive in the estate plan, we have expanded the discussion of the artist’s archive in the *Supplement*. Special emphasis is placed on the accumulative meaning of visual archives, the various functions of visual archives, and the selling of such archives to appropriate repositories.

CHANGING PUBLIC POLICY AND THE IMPORTANCE OF ADVOCACY

In a section titled “In a More Perfect World: Changing Public Policy” of *A Visual Artist's Guide to Estate Planning*, participants at the visual artist estate conference noted “that current tax laws in the United States work against the preservation of cultural heritage in this country.”

Participants proffered a number of alternatives both legislative and practical to improve the situation. Sadly, ten years later, to my knowledge, none of the recommendations have been implemented, and if anything, the situation is worse.

One of the proposed legislative initiatives dealt with changing the current tax law, which restricts an artist's income tax charitable donation of the work to the artist's basis (cost of the materials), rather than the fair market value of the work. Although such legislation to permit artists and writers to obtain a fair market deduction and achieve parity with collectors has been repeatedly introduced, it has not been enacted as law. Legislation passed the Senate and House in different forms in 2001. A reconciliation bill was derailed by 9/11. In 2003, the U.S. Senate passed, by a vote of 95-5, the Artist-Museum Partnership Act, but the legislation did not pass the House. Again in 2005, a bill passed the Senate as an amendment to a broader \$59.6 billion tax relief bill. Under the bill, artists could donate their work during their lifetimes at full fair market value provided it was properly appraised and donated at least eight months after it was created. The House tax relief bill did not include the provision. The most recent version of the legislation as well as a background report by the American Association of Art Museum Directors originally prepared with the assistance of the Committee on Art Law is included in the Appendices (C 1-3).

A glimmer of hope has appeared at the state level and should encourage artists to engage in advocacy at the state level as well as the federal level. Oregon code (ORS316.838) allows “a subtraction to artists who contribute their own works of art to a recognized charitable organization or governmental unit.” The art object must qualify for the deduction allowed by IRC Section 170. Unlike the federal tax law, the charitable

organization is not required to use the art for some purpose or function that qualifies it for its federal tax exemption. The legislation thus addresses two hurdles faced by artists who make charitable contributions—the limitation on the value of the contribution and the related use rule, which permits the artist to receive a gift and estate tax deduction and retain the copyright in the work of art, only if the work of art is donated to a charity for a related use.

In July, 1998, the Association of the Bar of the City of New York issued a report and recommendation titled “Qualified Contributions of Works of Art and Their Copyrights Treated as Separate Properties in Certain Cases.” The report addresses certain problems in the relationship between the U.S. copyright law and federal tax law, which also deter artists’ charitable deductions. The report is a call to action today as it was in 1998.

It is more than time for Congress to implement the proposed tax reform legislation to encourage donations of art, manuscripts, and other items created by the taxpayer to our cultural institutions.

Also included in the Appendices is a current legislative initiative to amend the copyright law to address the issues raised by “Orphan Works”—copyrighted works whose owners may be impossible to locate or identify. Concerns have been raised that the uncertainty surrounding ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts or from making such works available to the public. Associations representing photographers and other visual artists argue that producers of visual imagery are disproportionately impacted by the proposed legislation and have argued against the breadth of remedies advocated by museums and libraries. Legislation introduced in the last Congress, which will no doubt surface again, is included in the Appendices along with two different views on the subject.

It is important in view of the foregoing for the artist and his or her advisors to be involved in advocacy at the state and federal levels. The links to several important organizations whose websites should be consulted for advocacy updates are provided for the convenience of the reader.

American Association of Museums <http://www.aam-us.org/>
Americans for the Arts <http://www.artsusa.org>
Association of Art Museum Directors <http://www.aamd.org/>
Association of State Art Agencies <http://www.nasaa-arts.org/>
College Art Association <http://www.collegeart.org/>

A WORK IN PROGRESS

The 2008 Supplement Update is intended primarily for visual artists, their lawyers, and other advisors. Thus, for the most part, the discussion in the *Supplement* is of concepts and strategies rather than detailed technical information to which lawyers or accountants already have access. More technical information is provided in the Appendices, with particular reference to tax materials.

In many respects, artists share the same estate planning concerns as other members of society. Basic estate planning techniques cannot be ignored. Visual artists and collectors of works of visual art, however, have additional concerns, albeit different, arising from creation and ownership of works of art. Both *A Visual Artist's Guide* and the *Supplement* intend to flag the issues and make the artist and his or her advisor aware of the specific concerns faced by the artist, both as creator and collector of works of visual art.

Artists, collectors, and their advisors need to be aware of the consequences of not planning, or rather, as is the case, having state law determine distribution of their property. Statistics indicate that 70 percent of the population dies without a will. Do not be part of the percentage. Substantial financial and reputational benefits accrue to the artist who carefully plans for the disposition of assets, particularly his or her art assets, including copyright and archives.

A Visual Artist's Guide to Estate Planning and *Supplement* is a work in progress for a subject not always demarcated by bright line rules. Estate planning is personal and fact specific. No one size fits all. Several of the issues are complicated, and this *Supplement* is not a substitute for competent legal advice.

Because there are no easy answers to many of the questions posed, we believe that there is a benefit to sharing techniques and strategies. We hope that you share the information with your fellow artists and their advisors.

Send your comments and contact information to The Visual Artist Legacy Project™ (“ALP”) at sharpeartfdn@qwest.net.

PART 1: CHAPTER UPDATES TO THE FIRST EDITION

CHAPTER 1: UPDATE TO OVERVIEW OF TAX AND ESTATE PLANNING

Genevieve L. Fraiman, Esq.

FEDERAL TAX UPDATE: THE ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT (“2001 TAX ACT”)

Since the publication in 1998 of *A Visual Artist's Guide to Estate Planning*, there have been a number of significant changes governing the federal estate tax, gift tax, and generation skipping transfer tax (GST tax) under the Economic Growth and Tax Relief Reconciliation Act (“2001 Tax Act”) that are described below. In light of the complex provisions of the Internal Revenue Code as modified by the 2001 Tax Act, an artist would be well advised to consult an attorney to assist in the development and implementation of an estate and tax plan.

The 2001 Tax Act purports to repeal the estate tax and the generation skipping transfer tax (GST tax) for the estate of decedents dying during calendar year 2010. But the provisions eliminating the estate and GST

taxes do not apply to decedents dying, gifts made, or generation skipping transfers after December 31, 2010.

For decedents dying after December 31, 2001 and before January 1, 2010, the 2001 Tax Act:

(1) gradually reduces the maximum unified gift, estate, and GST tax rate from 50 percent to 45 percent for decedents dying in 2007, 2008, and 2009;

(2) increases the exclusion amount that can pass free of the estate tax and GST tax in the following years:

2002 and 2003	\$1,000,000
2004 and 2005	1,500,000
2006, 2007, and 2008	2,000,000
2009	3,500,000

[The federal estate tax and GST tax are repealed for persons dying during calendar year 2010.]

(3) reduced the maximum state death tax credit allowed in computing the federal estate tax by 25 percent, 50 percent, and 75 percent for decedents dying in 2002, 2003, and 2004 respectively; and in 2005 converted the credit for state death taxes into a deduction from the gross estate.

(4) did not repeal the federal gift tax, the gift tax exclusion remaining at \$1,000,000. However, annual exclusion gifts of \$10,000 indexed for inflation (now \$12,000) and gifts in any amount for tuition paid directly to an educational organization, and gifts paid directly to a provider for medical care or health insurance on behalf of an individual are not treated as transfers for purposes of the gift tax. Gifts made after 2009 will be subject to a rate schedule ranging from 18 percent to 35 percent.

(5) after repeal of the estate tax, property acquired from a decedent will be treated as though transferred by gift. However, the basis of selected assets for income tax purposes may be increased to \$1,300,000, and the basis of property left outright to a spouse or in a qualified terminable interest trust may be increased to \$3,000,000 (but not above fair market value).

[CAVEAT: However, under the sunset provision of the 2001 Tax Act, if Congress does not act, the above-described amendments will not apply in the case of decedents dying after December 31, 2010; and the federal estate tax, gift tax, and GST tax will revert to the tax system in effect prior to the enactment of the 2001 Tax Act.]

One important benefit of the 2001 Tax Act is the increase in the exclusion amount for purposes of the federal estate and generation skipping taxes to \$2,000,000 in the case of a decedent dying in 2006–2008 or \$3,500,000 in the case of a decedent dying in 2009. In the case of a married couple, the attorney may advise use of a “credit shelter” or “by-pass trust” in order to enable a husband and wife to each utilize his or her exclusion amount to pass a total of \$4,000,000 (if dying in 2006–2008) or \$7,000,000 (if dying in 2009) to their children free of federal estate and GST taxes. For example, a by-pass trust under the will of the first dying spouse (Spouse 1) would provide that his exclusion amount that can pass free of the federal estate tax would be held in a discretionary trust for the benefit of his surviving spouse (Spouse 2) and children. The trustee would be given the discretion to pay all of the income and so much of the principal as the trustee determines to Spouse 2, or alternatively, to pay over the income and principal of the trust among a class consisting of Spouse 2 and the children. On the death of Spouse 2, the trust remainder would pass outright to the children or, alternatively, continue in a generation skipping trust for the descendants. Since Spouse 2 will have no interest or power over the remainder, the assets held in the by-pass trust will not be taxed in her estate. In a typical estate plan for a husband and wife, Spouse 1 would create a by-pass trust funded with assets equal to his exclusion amount, and would bequeath the balance of his estate in excess of the exclusion amount outright to Spouse 2 or in a QTIP trust that would qualify for the marital deduction. Thus, no federal estate taxes would be imposed on the estate of Spouse 1. On the death of Spouse 2, the by-pass trust funded with Spouse 1's exclusion amount will pass free of estate tax to the children, and Spouse 2 will have the benefit of her own exclusion amount to apply to her taxable estate (that would include the assets she owned outright or in a QTIP trust.) Under this scenario, depending on whether each spouse had a

\$2,000,000 or \$3,500,000 exclusion amount, the children could receive up to \$4,000,000 or \$7,000,000 free of federal estate taxes.

If, on the other hand, Spouse 1 does not create a by-pass trust and leaves his entire estate outright to Spouse 2, he will fail to use his \$2,000,000 or \$3,500,000 exclusion amount. On Spouse 2's death, although her estate will include the assets she inherited from Spouse 1 as well as her own assets, she will have the use only of her own exclusion amount, and depending on the year of her death, the children would receive only \$2,000,000 or \$3,500,000 free of federal estate taxes.

FEDERAL TAX UPDATE: THE PENSION PROTECTION ACT OF 2006 ("2006 TAX ACT")

Fractional Gifts

Under the Pension Protection Act of 2006 ("2006 Tax Act"), fractional gifts of tangible personal property (e.g., art) to a public charity, made after August 17, 2006, are subject to stringent rules regarding timing limitations and use limitations. Under section 170(o)(3)(A)(i),¹ the donor must complete the donation of his entire interest in the work of art before the earlier of (1) ten years from the initial fractional contribution or (2) the donor's death. If the donee charity is no longer in existence, the collector's remaining interest may be contributed to another section 170(c) organization.

Under the new provisions, the donee charity of a fractional interest in a work of art must (1) have substantial physical possession of the work of art during the donor allowed possession period (maximum of ten years) and (2) use the work of art for an exempt use during such period and satisfy the related use rule, section 170(o)(3)(A)(ii). The Joint Committee on Taxation Report (the JCT Report) gives an example of an art museum described in section 501(c)(3) that is the donee of a fractional interest in a painting that includes the painting in an art exhibit sponsored by the museum, as satisfying the related-use requirement. However, the JCT Report contains no example as to the meaning of "substantial physical possession." The market value of the additional contribution will be deter-

1. All section references are to the Internal Revenue Code of 1986, as amended.

mined by the lesser of the fair market value of the art at the time of the initial contribution or the value at the time of the additional contribution.

Regulations will need to further clarify this meaning of “substantial physical possession.” Requiring a museum to take physical possession of an artwork during this time period, without regard for the museum’s ability to store or display that work, will impose additional costs on museums. Requiring the art to be transported back and forth subjects it to additional risk of damage or loss.

Recapture of deduction: Onerous recapture rules and penalties are imposed if the entire interest in the art is not received by the museum within that timeframe, or if the museum does not obtain possession of the art commensurate with its interest and/or does not use it for its related purpose. Under section 170(o)(3)(A), if the donor violates the ten-year timing limitation or the use limitation (the substantial possession or related-use requirement), then the donor’s charitable income and gift tax deductions for all previous contributions of interests in the work of art are recaptured plus interest. In any case in which there is a recapture of a deduction, the statute also imposes an additional tax in an amount equal to 10 percent of the amount recaptured.

This severe penalty for noncompliance will deter donors from making fractional gifts. In addition, the law is unclear about what would happen if a donor dies before the end of the ten-year period, but before the donee museum has had a chance to comply with the “substantial physical possession” requirement. Would the donor’s heirs be subject to the tax penalty? The law also is unclear whether these penalties are cumulative.

Denial of deduction: Under 170(o)(1)(A), no income tax deduction is allowed for a contribution of a fractional interest in a work of art unless immediately before such contribution all interests in the work of art are owned (1) by the taxpayer or (2) by the taxpayer and the donee organization. Under 170(o)(1)(B), the secretary is authorized to make exceptions to this rule in cases where all persons who hold an interest in the work of art make proportional contributions of undivided interests in their respective shares of such work of art to the donee organization.

The 2006 Tax Act contains similar limitations as described above for gift and estate tax purposes. (See section 2055(g) and section 2522(e).) Like the income tax provision, IRC § 2055(g)(1) limits the estate tax charitable deduction to the lesser of: (1) the fair market value at the time of the initial fractional contribution; or (2) the fair market value at the time of the additional contribution by gift or at death. In order to avoid the recapture of the income tax deduction, the transfer to the donee charity must be completed on the earlier of ten (10) years from the initial contribution or the donor's death.

Many collectors choose fractional gifts so they can (1) spread out the tax benefits of the donations over many years, and (2) retain some possession of the works during their lifetimes. Imposing a ten-year limit on the duration of a fractional gift most probably will eliminate these incentives and discourage fractional donations of artworks to museums.

Related Use of Donated Property

The 2006 Tax Act also added new Internal Revenue Code section 170(e)(7)(A) that provides if a charitable organization receives appreciated tangible personal property as a charitable contribution and disposes of the property within three years of receiving it, the donor may not derive any tax benefit beyond a deduction in the amount of the property's basis, section 170(e)(7)(C).² However, this rule will not apply if the donee provides a "certification" from the donee charity that the property was intended to be used or was put to a use related to the donee's exempt purpose, section 170(e)(7)(B).

The related use rule applies to capital gain property that is tangible personal property contributed to a public charity. The term "tangible personal property" includes paintings and art objects not produced by the donor. The related use rule requires that the use of the tangible personal property by the donee organization be related to the purpose or the function constituting the basis for the donee's exemption under section 501.

2. One of the major changes made by the Tax Reform Act of 1986 was the amendment of section 170(e)(1) so that 100 percent of the appreciation in value is lost as a charitable deduction if the related use rule is not satisfied.

STATE UPDATE: TRANSFER-ON-DEATH SECURITY REGISTRATION ACT

In 2005, the New York legislature adopted the Transfer-on-Death Security Registration Act (effective with respect to decedents dying on or after January 1, 2007) that allows the owner of securities to create an account with a broker or transfer agent in “beneficiary form” (referred to as a “TOD” or “POD” account). [See New York Estates, Powers and Trusts Law Sections 13-4.1 ff.] The securities in the TOD account are transferred on the death of the owner by the broker or transfer agent directly to the named beneficiary or beneficiaries, and accordingly will not be subject to the terms of the owner’s will. It is therefore of the utmost importance that the artist advise his or her attorney of a sizeable TOD brokerage account that would pass outside of the will and could result in a major distortion of the testamentary plan.

CHAPTER 2: THE APPRAISAL: CURRENT ISSUES

Dr. Alex Rosenberg

President, Alex Rosenberg Fine Art

THE PENSION PROTECTION ACT OF 2006 AND THE QUALIFIED APPRAISER

The Pension Protection Act of 2006 (“the 2006 Tax Law”) has added strict requirements for appraisals of noncash contributions for which an income tax charitable deduction is sought. Unlike the income tax law, estate and gift tax laws do not require a qualified appraisal by a qualified appraiser. The IRS has discretionary authority to waive all or part of the section 6662 penalty if the taxpayer establishes that there was a reasonable basis for the valuation claimed and that the claim was made in good faith.

For any contribution of exempt use property of more than \$5,000, a qualified appraisal by a qualified appraiser must accompany the return. The 2006 Tax Law defines the terms. Any appraisal must be obtained no more than sixty (60) days before the donation. (See tax appendices regarding noncash contributions.)

VALUING ESTATES: PURPOSE OF THE APPRAISAL IN RELATION TO HOW THE ASSETS WILL BE HANDLED

While the Internal Revenue Service (IRS) regulations require estate appraisals employ Fair Market Value (FMV) in determining value, and that the end result be the same as when an item is valued when being donated as a tax deductible gift, in practice we have found that there is a considerable variance in the approach taken by both the IRS and the appraiser for the taxpayer. The IRS, as a money-raising organization for the government, will tend to overvalue items in estates and undervalue them when given as gifts. These are rational positions, as each side has an opposite interest.

The appraiser must be keenly aware of this situation and be careful in determining how far he or she can deviate from an impartial value. When one considers that the IRS's position is unreasonable, considering that in determining FMV one is called upon to add the auction house's fee to the hammer price and that an estate is not a buyer but a seller that will have to pay 10 percent to sell an item, one finds there will be as much as a 25 percent difference between the IRS's calculations and the real amount to be realized from an auction sale.

Therefore, it becomes important for the appraiser to advise the attorney or accountant of the estate to dispose of as much of the estate that is unwanted prior to the date of probate. This will prevent inheritance taxes being levied on objects valued higher than the amount they will sell for.

When the IRS examines an estate appraisal, they will forego challenging the appraisal if the appraiser's value is within 15 percent of the IRS appraisal. The IRS will rarely, if ever, take the time to examine the condition of the objects being taxed and will value them in accordance with previous sales at auction. Therefore, the appraiser must examine each item and carefully describe any blemish, damage, or shortcoming of the asset as a means of lowering its taxable value. Further, the appraiser must determine if he or she has a case for employing blockage discount. The IRS will generally oppose the amount of this deduction, leaving the appraiser with the responsibility to clearly show the justification for taking a blockage discount and to be careful not to take a discount that is unwarranted.

When there is a surviving spouse, both the spouse and appraiser should be aware of the future ramifications of values given to the objects inherited free of inheritance tax by the spouse. In valuing any inherited item, the appraiser should find out which items will be given away, which will be sold, and which will be kept. As no tax is involved, it will be advantageous to the surviving spouse if those items being donated and those being sold are given as high a value as is logical. This will decrease the taxes on the estate on that portion not being inherited by the spouse. By increasing the base value of art being inherited by the spouse or others, the appraiser will help reduce the tax on the profit of the item when sold.

If the amount of the art inherited by the spouse is of considerable quantity, the IRS may allow that blockage lowers the value of the items being inherited. The sale at auction of unwanted objects before probate will supply the appraiser with values the IRS will normally accept.

The Artist's Death and Stepped-Up Basis

During an artist's lifetime, the art that the artist created is termed "ordinary income property." As such, it is not a capital asset, and the artist pays the higher income tax rate on sale, deducting from profits the artist's expenses. This explains the difference in treatment for charitable contributions of an artist and a collector.

The tax consequence of death for the artist is that in the artist's estate, the art is taxed at its fair market value. The good news is that property included in the artist's gross estate for federal estate tax purposes acquires a "step-up" in basis for income tax purposes equal to its federal estate tax value. The IRC section 1014 provides that the basis of property is the fair market value at the date of death or the alternate valuation date as appraised for purposes of the federal estate tax. The heirs acquire the art at the step-up in basis. If a work of art is occasionally sold by an artist's estate or heirs after the artist's death, the work acquires the "stepped-up basis" or fair market value used for estate tax purposes. Any profit on the sale determined by subtracting the estate fair market value from the selling price is taxed at the lower capital gains rate. However, if the artist's business is continued by his estate, his trust, or his heirs, the profit on any sale is taxed at the higher ordinary income rate.

The Janis Case and the Principle of Consistency

Janis v. Commissioner, 87 T.C. Memo 1322 (2004), is a good example of the issues discussed in this section as well as of the concept of blockage discount. Art dealer Sidney Janis died owning many works of art in the gallery that he ran as a sole proprietorship. The IRS Art Panel first determined the total value of the works of art owned at death to be \$36,000,000 based on a per item appraisal submitted by executors. The panel then allowed a \$13,600,000 discount based on the following arguments made by the taxpayer:

- (1) there were numerous works by individual artists;
- (2) some of the art would be sold in the dealer market as opposed to the retail market;
- (3) the executor's inability to sell the gallery in the retail market for the sum of the value of the individual works of art;
- (4) the fact that a buyer of the gallery would not pay the full resale price of the underlying assets in a bulk sale; and
- (5) any buyer would consider the cost of maintaining the business for a reasonable period of time.

After accepting the taxpayer's arguments that reduced the value of the artworks by \$13,600,000 the IRS Art Panel agreed to further apply a blockage discount. The panel first acknowledged that the blockage concept generally applies to a large number of works by one artist, usually in an artist's estate. It then went on to apply some of the general blockage discount principles to the gallery's inventory as follows:

A number of factors have been considered in determining whether a blockage discount is appropriate and to what extent it should be applied to the subject properties. Consideration was given to the prominence of the artists; the types of works in the estate; the distribution of the items (for example, the number and types, and their quality and saleability); the number of similar items available in the marketplace; the market's response to such works around the valuation date; the number of sales and the prices at which sales were made during the period immediately preceding and following death; the annual sales of the gallery; length of time necessary to dispose of the items; the works that are saleable within a relatively short period of time; the works that can only be marketed over a long period; the demonstrated earning capacity of the business; the tangible and intangible assets, including goodwill and the reputation of the gallery and provenance.

In addition, consideration was given to the possible disbursement and handling of the gallery. One option would be the continuation of the gallery through Sidney Janis's surviving sons and the selling of the items in the course of business. Another option would be the sale of the gallery to a willing purchaser.

Attention was given to the gallery's annual gross and net receipts of the inventory since 1985. This resulted in a further 37 percent reduction of the value of the gallery's inventory or a total combined discount of approximately 60.42 percent.

When the heirs of the estate who continued to operate the gallery as a trust then partnership, some years later, sold some of the artworks, they used as their new stepped-up basis the original per item appraisal value accepted by the IRS Art Panel before the application of the 60.24 percent discount. The Tax Court rejected the heirs' argument, holding that the "appraised value" contemplated by section 1.1014-3(a) is a value that includes the blockage discount. Accordingly, the heirs' step-up in basis was limited to the discounted per artwork value.

The heirs of the estate appealed the Tax Court's decision to the Ninth Circuit (*Janis v. Commissioner*, 461 F.3d 1080, 2006), which affirmed the Tax Court's decision on the basis of the principle known as the "taxpayer's duty of consistency."

APPRAISING SITE-SPECIFIC WORKS OF ART

In appraising site-specific works, the appraisal value used will often determine if a work has any monetary value other than replacement cost for insurance purposes or as salvage. An immovable installation that cannot be reconstructed elsewhere can be insured initially for its total cost and increased in value if and when the artist's prices increase. The values for the site-specific work must increase in the same proportion as the artist's other works. No further justification is required. As salvage, the value, however, is unpredictable. Only after a piece has been sold are we able to determine its value. This is the amount that the owner received from the sale.

Fair Market Value (FMV), Market Value, and Marketable Cash Value require that for a property to have value it must be moveable, usable, and able to be possessed by a new owner. If there is no way to disassemble an installation and install it elsewhere or no way to remove the furnishings from the site without destroying them, the piece has no commercial value. The exception to this rule would occur if one were able to sell an installation to another party as part of the sale of the real estate.

An illustration of this took place about twenty years ago in a bankrupt hotel in Miami Beach, Florida. While constructing the hotel, the owners installed an extremely large-sized Henry Moore pink marble sculpture. The work was so large and heavy it had to be embedded in concrete when placed in the atrium of the hotel, prior to the atrium being completed and the roof installed.

In subsequent bankruptcy proceedings for the hotel, the value of the sculpture became an issue because the trustees wished to sell the sculpture to raise funds needed to reach a settlement with the creditors. The sculpture had originally cost, including the installation, \$5 million.

An appraiser was hired to determine the FMV of the Henry Moore sculpture. The work was quite beautiful, enhanced the entire ground floor of the public area of the hotel, and had a public relations value far greater than its original cost. Moving the sculpture, however, from its present location proved to be an impractical idea because the cost of freeing the sculpture from its concrete base and removing the roof of the atrium so that the Moore could be hoisted out was much more than the amount for which the Moore could be resold. This being the case, the appraiser concluded that the work had no FMV and only had value in its present site.

This finding pleased no one, and the appraiser was replaced by another. The second appraiser suggested that the sculpture be cut into sections that could then be removed from the hotel without damaging the building's structure. He estimated the net value of the pieces to be \$1 million after deducting the cost of disassembling the sculpture and repairing the site where it had rested. The parties accepted this value, which was actually a salvage value, because the art would no longer be in its origi-

nal form and would have lost its artistic integrity. Henry Moore himself objected to this solution, preventing it from being employed. The sculpture remained in place but its monetary value was lowered to the salvage value to benefit the creditors.

This situation and other similar examples have resulted in several well-known artists using purchasable objects in their installations. Instead of the installation being unique, it has become part of a numbered series with each example being accompanied by a blueprint that allows the work to be moved and reassembled elsewhere. By handling installations in this manner, the work can be sold, moved to a new location, and have a commercial value.

On the other hand, there is an occasion when a site-specific work may be eligible to have a fair market or replacement value. Sol LeWitt has created nonunique site-specific works by selling a kit of objects that is accompanied by a certificate of authenticity signed by him, giving the title of the work and its number in the edition. The certificate includes the instructions needed to install the work.

This work can be disassembled, sold to another person, and reinstalled at a new location. These conditions make this work of art possibly eligible for an FMV or Replacement Value appraisal. However, the question arises if an object that can be moved and reinstalled at a location other than where it was originally installed qualifies to be a site-specific work.

ARTISTIC INTEGRITY AND VALUATION

Visual artists in the United States, under section 106A of the Copyright Law (the Visual Artist's Rights Act of 1990), are given a limited right of integrity. (See Hoffman, Chapter 3.) The right of artistic integrity is an intangible right that remains with the artist even after the work of art is sold. Thus, if a purchaser purchases all right and title to a work of art, the buyer may not modify or alter the work of art in a manner that is harmful to the artist's reputation. A contrary result would prevail if a sale is characterized as a commercial transaction of a work not defined as one of the narrow categories of a work of visual art.

In a case that resulted in a negotiated settlement, the works of a prominent sculptor, represented by one of New York's top galleries, declined in value and appeal. The sculptor entered into a commercial-type arrangement under which he sold his foundry, tools, inventory, and rights for a significant amount of money plus a royalty arrangement covering future sales. Included in the agreement was a medical plan, salary, and even the number of weeks of vacation the selling artist was entitled to each year.

The new owner destroyed much of the inventory as excess and undesirable, placed the work with a number of lesser quality galleries, and in short order revived the artist's market to such an extent that the artist received about \$3 million from the proceeds of the sales and royalties. The artist then sued based on the owner having violated his artistic integrity.

The issue was to determine if the sales agreement was that of an artist and a dealer or a commercial agreement between an owner of a plant, machinery, and inventory with a dealer of equipment who was not in the art business at the time of the transaction.

The sculptor abandoned the case on the advice of counsel, as in the course of the proceeding it was determined that the transaction was a commercial one in which the artist had surrendered his rights governing artistic integrity.

As appraisers, it is important for us to make several determinations when asked to appraise an object that uses the image that an artist created for another purpose. If the reproduction is an image of a painting made into a poster that clearly is a true reproduction of the original work, our only problem is to determine if the poster was made legally and recognizes the right of the artist. But if the colors have been changed or it is being used to decorate toilet paper, for example, the artistic integrity of the artist has been violated and we may not appraise the reproductions without the permission of the artist, as we will be attributing value to an illegal or immoral product; something our ethics prevents us from doing.

This can be a very complicated issue, and if we appraise such items, we can find ourselves defending our actions. The best advice is to either not do the appraisal or, if sufficiently important to the appraiser, consult an attorney versed in these matters.

GIFTS BY ARTISTS HAVING REPURCHASED THEIR OWN WORK

The tax effects on an artist who has repurchased his own work in the open market are unclear and have never been adjudicated or been subject to an official Internal Revenue Service (IRS) ruling.

The regulation, as written and now in force, deals with artists gifting their own work. In this case, the IRS has decided that the artist can only deduct from his taxes the cost he incurred in creating the work. However, two recent occurrences, both conflicting, indicate that the IRS is not totally convinced of its own ruling, especially when the artist is the donor of one of his own works that had previously been owned by others.

In the first case, a well-known artist purchased his own work at auction many years after having painted it. Considering himself to be a holder in due course and not the original owner-donor, he decided to gift the work and take a Fair Market Value (FMV) tax deduction. His accountant refused to allow him to do this because he read the regulation in its strict interpretation. The IRS's legal department at the behest of the Art Advisory Panel ruled he could deduct what he paid for the painting at auction, but not its FMV. In addition, the IRS ruled he would have to surrender his copyright. In the face of this, the artist took no tax deduction.

In the second similar case, another well-known artist had a very different result. The artist's personal corporation bought one of his own works at auction and after holding it for more than a year, sold the work. His accountant advised him that the sale was subject to only a capital gains tax, as he was a holder in due course and no longer the original owner (painter). The IRS accepted his tax return; it never went before the Art Advisory Panel for an opinion.

From these two experiences, it would appear that the Art Panel's opinion is in conflict with the general IRS policy, since the difference between these two similar sales is that in one case the donation was made personally and in the second case the sale was made by the artist's personal corporation. We can assume that had the second artist's transaction gone before the Art Advisory Panel, they might have ruled against his taking

a capital gains tax and would have insisted that normal taxes be paid. Had the first artist sold the painting and donated the money to a tax-free donee, he would have received a full deduction for the gift, which offset its cost and profit, instead of only being allowed to deduct the cost and being forced to cede his copyright.

For years, the art world has protested the IRS's treatment of artists' gifts of their own work; hopefully, a change in the law is in the offing.

CHAPTER 3: PROTECTING THE INTANGIBLE ASSETS OF A VISUAL ARTIST'S WORK: ESTATE PLANNING AND MANAGEMENT OF COPYRIGHTS TO CREATE VALUE AND PRESERVE A LEGACY

Barbara T. Hoffman, Esq.

The Supplement Update to the chapter "Copyright and Other Intellectual Property Issues in Estate Planning and Administration for the Visual Artist" assumes that the reader is familiar with the basic copyright concepts discussed in that chapter.

This chapter provides a more in-depth analysis on some of the practical concerns and policy issues encountered by an artist, his or her advisors, and those who are otherwise entrusted with planning and administering the artist's estate, foundation, or archive.

The rapid advance of the digital technologies and the increasing demand for visual content provide significant opportunities to artists, their foundations, and their estates, and make it even more important for planning and administration for the artist and his or her advisor to focus on intellectual property issues, primarily copyright, but also trademark and state law rights of privacy and publicity.

The Internet has the ability to make exhibitions and archival material available to a global public. Artists, artists' foundations, artists' trusts and estates and archives may hold valuable intellectual property assets, which with careful management can promote the artist's reputation, provide revenue streams, and benefit society by providing visual images for study, research, and education. Consider the private foundation set up by the will of Willem de Kooning. Its IRS Form 990-PF for the year ending June 30, 2006, listed income of \$44,579.00 from reproduction income. In the section of the 990 that describes how its revenue-raising activities are related to its exempt purpose, the foundation states, "Royalties from the licensing of reproductions and/or publications of Willem de Kooning

constitute some of the means by which the Foundation currently accomplishes its exempt purpose. Its exempt purpose is to preserve the artwork of Willem de Kooning, and provide access thereto; to create and maintain an archive of artworks and reference papers relating to Willem de Kooning and provide access to the archive to scholars for research; and to educate the public about the art of Willem de Kooning and art in general.”

The Isamu Noguchi Foundation and Garden Museum manages an extensive collection of sculptures, architectural models, stage designs, drawings, and furniture designs. Its 990 for 2005 shows reproduction income of over \$400,000. Judd Foundation (see Chapter 8) has a rights clearance program as well as an extensive licensing program for Judd furniture. In 2006, combined income from these activities based on its Form 990 was \$114,120.

For many photographers, their foundations, and estates, the exploitation of their photo archives is a primary source of revenue as well as a means of building a reputation. Licensing usage rights, reproductions of prints, and publications are core activities. Richard Avedon bequeathed to the Richard Avedon Foundation the photographic and archival materials he possessed at death as well as the copyright to his images. The Richard Avedon Foundation on its Form 990 for 2006 reported a total of \$106,571 from royalty income, book income, and usage fees (<http://www.richardavedon.com/>).¹

The “mother” of licensing foundations is The Andy Warhol Foundation for the Visual Arts. Since 2004, The Andy Warhol Foundation for the Visual Arts has seen significant growth and development in its licensing program. Licensed products designed from Warhol images have appeared in prominent publications such as *Italian Vogue*, *Interview*, and *i-D Magazine*. The foundation was nominated for International License of the Year by the Licensing Industry Merchandising Association, competing against major properties such as Harry Potter and Spider Man. The line of Andy Warhol products, including clothing, housewares, stationery, and other items, is well established and successful in Europe, and will soon move aggressively into the North American market with a new line of

1. The Robert Mapplethorpe Foundation on its Form 990 for 2006 reported income from loan fees and royalties of \$246,202 and gross income from sale of photographs of \$4,304,240.

products for the home. Annual revenues from licensing are estimated at approximately \$19 million per year.

Copyright and other intellectual property rights should be specifically discussed and addressed in any visual artist's estate plan with respect to the dual benefits of minimizing estate taxes and building a legacy. As I use the term, "visual artist" includes those who create images—photographers, painters, multi-media artists, graphic artists, computer artists, performance artists, and filmmakers. There is no one correct solution. Strategies will in part depend on the medium of expression, the importance of licensing to the medium, and whether works exist in editions, are intended to be unique, or are plans for yet unrealized works.

COPYRIGHT AND CHARITABLE CONTRIBUTIONS: A TRAP FOR THE UNWARY

Other chapters have discussed the benefits of charitable giving. Even for a visual artist currently disfavored under the federal income tax law with respect to lifetime charitable contributions of works created by him or her, the federal estate tax provides a 100 percent deduction of the fair market value of any artwork left to a qualified charitable institution.

Qualifying for this deduction, particularly for the artist, is an important part of any estate plan, not only because of its potential for building a legacy, but because it reduces estate taxes for the artist. Artists and their advisors need to be fully aware of the traps and pitfalls in IRS requirements respecting charitable deductions. The subject of the interface between the copyright law and the federal tax law is explored in my original chapter. The subject is also fully discussed in the Report and Recommendations issued by the City Bar Association when I was Chair of the Committee on Art and Law. (See Appendix C-4.)

An artist who retains copyright in the estate or bequests it to a foundation or archive and may lose the benefit of a fair market charitable deduction for the artwork unless attention is paid to the disposition of the artwork. If the artist at the time of her or his death does not own the copyright, this cautionary note does not apply.²

2. See Chapter 1, Fraiman, G. (Related Use Rule) and Chapter 4, Bjorklund, V., Esq. and Lerner, R. and Bressler, J. *Art Law* (2005).

[CAVEAT: An artist should not make a testamentary gift of an artwork without its copyright if the artwork is given to a “non-operating private foundation” or to a qualified charity for an unrelated use. In light of my recommendation for centralized management of copyright, careful planning with the artist’s advisors is necessary with respect to tax planning and copyright management. If the copyright interest is maintained by the artist’s estate or foundation, without the art, the transfer of the art must be made to a “qualified organizaion” and meet the requirements of IRS Code 2055(e)(4)(c) and 170(e)(1), otherwise 100 percent of the appreciated value of the property may be lost for failure to comply with the related use rule.]

In 2004 Congress enacted the American Jobs Creation Act of 2004. The law contains provisions to deal with what the IRS saw as abuses in deducting charitable contributions of intellectual property. The law places limits on the initial charitable contribution. Artists are not covered by this provision, which does not apply to copyright on works created by the taxpayer.

UPDATE TO THE FORM “DEED OF PARTIAL GIFT TO THE NATIONAL GALLERY” P. 113 OF THE CHAPTER

This form must be modified to reflect the restrictions imposed on fractional interest gifts by the Pension Reform Act of 2006 discussed in the update to the Chapter “Tax and Estate Planning.”

SUPPLEMENT TO “SOME THOUGHTS ON A CHECKLIST FOR COPYRIGHT AND INTELLECTUAL PROPERTY MANAGEMENT IN ESTATE PLANNING AND ADMINISTRATION”

I have reprinted from the original chapter the checklist for the convenience of the reader.

1. Inventory copyright interests and other intellectual property assets; record all assignments, exclusive licenses, nonexclusive licenses.
2. Create art image and likeness usage checklist for prospective licensees/usages.

3. Plan for unified management of artistic and intellectual property and identify future owners of artistic property, secondary materials like journals, photographs, letters, and copyright interests in both categories.
4. Consider various options for copyright licensing management.
5. Consider moral rights (statutory and contract).
6. Create documents for foundation, trust, basic licensing forms, artist/gallery consignment agreements.
7. Seek out and enter into agreements with art critics, art historians, or galleries for preparation of catalogue raisonné of all or part of a body of work.
8. Provide testamentary instructions and guidance concerning copyright exploitation of works of art in the estate.
9. Consider limiting value in the estate plan by imposing restrictions on reproduction rights, such as creating limited editions, etc.

In these next sections, I will supplement the discussion of points one, four, and five of the checklist.

Creating an Inventory of Copyright and Other Intellectual Property Assets

Often, in advising estates, foundations, archives, and museums, one of the more difficult issues, particularly for works created prior to the effective date of the 1976 Copyright Act, January 1, 1978, is determining the copyright status of works in the collection.³ Because of the technicalities now eliminated in the Copyright Act of 1976, many works of art under the

3. Until 1978, the term of federal copyright was 28 years from the date of publication. To maintain copyright protection during the second, or renewal, term a copyright owner had to file a renewal application during the 28th year of the initial term. Failure to comply in a timely manner with those strict requirements meant the work fell into the public domain. That changed with the passage of the 1976 Copyright Act, which provided that federal copyright protection of works created by "identified natural persons" would run from the

Copyright Act of 1909 inadvertently fell into the public domain for “publication” without copyright notice, or for failure to renew in a timely fashion. The public domain is an expansive concept that includes facts and ideas. A significant part of the public domain consists of works that once were protected by copyright but have lost that protection by forfeiture, abandonment, or expiration of their term.

Normally, an artist’s foundation or estate will own the copyright in works created after 1978, unless the work was created as a “work for hire”⁴ or the artist assigned the copyright in writing or published the work without notice prior to March, 1989, and failed to correct the omission as permitted by the 1976 Copyright Act. Nevertheless, the foundation, estate, or archive must use due diligence to establish the copyright status of works. Particularly, photographic collections may have multiple layers of authorship (i.e., the “author” of the photograph and the “author” of the original work). In addition, certain works of art may implicate rights of privacy and publicity of a depicted subject.

In 1998, the Sonny Bono Copyright Term Extension Act (CTEA) retroactively extended the duration of copyright from “the life of the author plus 50 years,” in the 1976 Copyright Act, to “the life of the author plus 70 years,” in the case of individual works, and from 75 years to 95 years in the case of works of corporate authorship and/or those first published before Jan. 1, 1978. This extension was challenged by Eric Eldred, a New Hampshire-based Web publisher who puts public domain books on the Internet. In *Eldred v. Ashcroft*, he argued that the Internet and digital

work’s creation—rather than its publication—and that such protection would last until 50 years after the author’s death. At first, Congress retained the renewal feature for works copyrighted and still in their initial term before Jan. 1, 1978, but in 1992 it eliminated the mandatory renewal registration requirement, automatically extending the second term for works copyrighted between Jan. 1, 1964 and Dec. 31, 1978.

4. Sec. 101 of the 1976 Copyright Act defines two types of “work for hire”: (1) An employer-employee relationship if the employee creates the work within the scope of employment; (2) one of several categories of commission works. To help determine who is an employer, the Supreme Court in *CCNV v. Reid* identified certain characteristics that define the relationship of employer-employee. The typical artist commission does not normally fit within any of the categories.

technology made it possible for people to create and distribute new works made from older ones, if only copyright law would permit it.

It is important, if only briefly, to understand the dynamics of this lawsuit, because the resolution of the policy issues involved are recurring, and those who are responsible for the management and administration of artist's estates and foundations should participate in the ongoing dialogue. As with so many copyright battles, the interest of the author (the creator) had been overshadowed by fears of corporate interests collapsing the public domain. The CTEA was called the "Mickey Mouse Law" by opponents, since these Disney characters arguably would have entered the public domain circa 2002. However, artists, their estates, and museums that own copyright benefit by longer protection for their works and the ability to license works in their collection.

In its 7-2 *Eldred* decision, the Supreme Court addressed the appropriate balance between copyright and the Free Speech Clause of the First Amendment and struck the balance in favor of Congress's power to enlarge the term of copyright. The Court determined that CTEA was constitutional and that the extension of existing copyrights did not exceed Congress's power under the Intellectual Property Clause of the Constitution.

Artists and their advisors often ask whether in order to receive copyright protection, it is necessary to register with the U.S. Copyright Office. Under the 1976 Copyright Act, the "author" of a work in a "tangible medium of expression" is the copyright owner. Registration is not a condition of copyright protection.

Even though registration is not a requirement for protection, the 1976 Copyright Act provides several inducements or advantages to encourage copyright owners to register. Among these advantages are the following:

- Registration establishes a public record of the copyright claim.
- Before an infringement suit may be filed in court, registration is necessary for works of U.S. origin.

- If made before or within five years of publication, registration will establish prima facie evidence in court of the validity of the copyright and of the facts stated in the certificate.
- If registration is made within three months after publication of the work or prior to an infringement of the work, statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.
- Registration allows the owner of the copyright to record the registration with the U. S. Customs Service for protection against the importation of infringing copies.

For additional information, go to the [U.S. Customs and Border Protection](http://www.cbp.gov/xp/cgov/import) website at www.cbp.gov/xp/cgov/import. Click on "Intellectual Property Rights."

The current fee is \$45.00 for each registration. Photographers and visual artists meeting the requirements may file all the images created by the same author in one year as one group registration on Form VA.

Most artists' estates and foundations may not normally hold trademarks. Nevertheless some museums with notable buildings like the Guggenheim have trademarked Frank Lloyd's building in New York and Frank Gehry's Bilbao. The Warhol Foundation and the Andy Warhol Museum hold many trademarks. For example the Warhol Museum, One Stop Warhol Shop, Warhol.org are all service marks or trademarks of the Andy Warhol Museum. Unlike copyright law, trademark and unfair competition law allow protection of words, logos, and designs that otherwise would be in the public domain. This difference in protection is rooted in the historical development of these separate and distinct bodies of intellectual property law. Copyright law falls under the Intellectual Property Clause of the Constitution; trademark law falls under the Commerce Clause. Thus, trademark's primary purpose is to identify and distinguish the source of a good or service. A trademark is any "word, name, symbol or device adapted or used by a manufacturer or a merchant to identify his goods and distinguish them from those sold by others." To determine the degree

of trademark protection received, marks are categorized according to a common-law hierarchy of descriptiveness. The order is (1) generic marks, which are never registrable; (2) descriptive marks, which are registrable upon proof of secondary meaning; (3) suggestive marks, which are registrable; and (4) arbitrary or fanciful marks, which garner the highest trademark protection.

As a result, trademark law reverses copyright by allowing an individual or organization to select a word or design (“the mark”) to represent a product or service. If that word or design symbolizes the product or service in the public’s mind, it obtains a “secondary meaning,” and the individual or organization acquires a property right in the mark. For example, trademark rights carry important implications for characters, since characters can be used to identify the source or origin of goods or services as well as embody the creative expression of an author. A character whose name and appearance has acquired secondary meaning for trademark purposes during or after the expiration of the term of copyright has been protected by trademark law even after the character has fallen into the public domain for copyright purposes. Such protection allows the owner of trademark rights in a character to prohibit others from unauthorized trademark uses of the character. Trademark law may also serve to protect iconic photographic images if such images identify services or a product.

In theory, trademark protection has no time limit. Trademark rights continue indefinitely so long as the mark is used in commerce and, if registered, timely renewals are filed. In addition, aspects of the same work (e.g., fictional characters) may be protected by both copyright and trademark. The inquiry in an action for trademark infringement is whether there is any likelihood that an appreciable number of “ordinary prudent” purchases are likely to be misled or confused as to the source of the goods in question.

In *Dastar Corp. v. Twentieth Century Fox Film Corporation*, another 2003 case, the U.S. Supreme Court had to decide whether trademark law takes over when copyright protection ends.

The Supreme Court unanimously (Justice Breyer did not participate) reversed the lower courts' decisions and held that Section 43(a) of the Lanham Act does not prevent the unaccredited copying of an uncopyrighted work.

The Supreme Court held that the phrase "origin of goods" in the Lanham Act "refers to the producer of the tangible goods that are offered for sale," and not to the author of any idea, concept, or communication embodied in those goods. The court rejected the idea of carving out a special exception for communicative product.

Various Options for Copyright Licensing

Under Section 106 of the Copyright Law of 1976, the copyright owner has the exclusive right to (1) reproduce the work in copies or phonorecords, (2) prepare derivative works based on the copyrighted work (which includes the right to recast, transform, or modify), (3) distribute copies by sale or other ownership transfer, or to rent, lease, or lend copies, (4) perform the work publicly, and (5) display the work publicly.

Ownership of the bundle of intangible rights comprising copyright is separate and distinct from ownership in the work of art. Under current law, absent a writing expressly conveying copyright, the sale, gift, or transfer of the original work of art does not transfer the copyright in the work of art. Under the 1976 Act, copyright interests can be transferred *inter vivos* or at death and in whole or in part. For example, a copyright owner can transfer all the rights or one or more of the exclusive rights or a full or undivided interest, or a divided interest in the copyright. A copyright owner may license or assign copyright in the work in a number of ways: by the type of use and/or media, by an exclusive license or nonexclusive license, by territory or duration, to name only a few possibilities.

A nonexclusive license is not a transfer of copyright ownership, but a transfer of a contract right; thus, the artist should be aware that the holder of a nonexclusive license cannot bring a copyright infringement action and the artist or his or her heirs must defend any copyright infringement. The scope, duration, and fee for a nonexclusive or an exclusive license,

like any contract, may be the subject of negotiation.

Many artists' foundations will have as part of their mission the organization of exhibitions, publications, including catalogues and books, and other activities to promote an understanding of the work of the artist and enhance his or her reputation. Each of these activities involves careful management of copyright.

Digital technology has provided the basis for a number of models for the licensing of images both for profit and not for profit. In my original chapter, I discussed the role of artists' collecting societies. Since that time, a number of new models and initiatives are underway to make images available. For example, a project funded by the Mellon Foundation, ARTstor Digital Library, is a not-for-profit organization that operates and makes available an access-restricted electronic database of digital images of art and other works, cataloguing and texts, an electronic search capacity, and other tools and software solely for noncommercial, educational, and scholarly purposes.

Artists, their archives, estates, and foundations should carefully review and negotiate any such agreements. The mission of the artist or his or her foundation must be carefully analyzed to make sure that any licensing program is consistent with the said mission. Particularly if licensing revenue is an important component of estate or foundation income or if control of the artwork via access rather than copyright is important, the foundation or estate should undertake licensing to electronic image data banks with caution and with carefully negotiated conditions.

[CAVEAT: The artist and his or her advisors should be wary of any grant of a perpetual license and in any license agreement define precisely and narrowly terms such as "educational," "noncommercial," and "publicity or public relations." Such terms are terms of art and derive meaning from industry practice and context.]

What Is "Fair Use"?

I would be remiss if no word was mentioned of the doctrine of "fair use." Every person charged with the administration and management of an

artist's foundation or estate should have some knowledge of "fair use." The doctrine may inform the development of licensing schedules and fees. In this era of appropriation art, it should also help the administrator to defend against charges of wrongful appropriation.

The fair use doctrine "permits other people to use copyrighted material without the owner's consent in a reasonable manner for certain purposes." Recognized at common law, the doctrine is now codified in section 107 of the 1976 Copyright Act, 17 U.S.C. @ 107 (1994). Section 107 provides an illustrative list of the purposes for which the doctrine may be invoked, including "comment" and "criticism," id., as well as a now familiar list of factors that courts should consider in determining whether a use is "fair." These factors are (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the work used, and (4) the effect of the use on the market for the original. The Supreme Court case of *Campbell v Acuff-Rose Music, Inc.* 114 S. Ct. 1164 (1994) clarified the fair use defense in general and its particular application to parodies. As a general matter, the Court emphasized that the fair use determination "calls for case-by-case analysis," and "is not to be simplified with bright-line rules." The Court made clear that all four of the statutory factors "are to be explored, and the results weighed together."

Campbell also significantly illuminated the proper application of the first fair use factor, the purpose and character of the use. The focus of this inquiry, the Court explained, should be on whether the copying work "merely 'supersedes the objects' of the original . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." The Court considered this standard appropriately captured by Judge Leval's helpful adjective "transformative" (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 [1990]).

The Court's emphasis on an aggregate weighing of all four fair use factors represented a modification of the Court's earlier view that the fourth factor, effect on the potential market for, or value of, the original, was "the single most important element of fair use," a characterization conspicuously absent from the Campbell opinion. Rather than accord the

fourth factor primacy, the Court explicitly noted that “the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.”⁵

Those who manage and administer an artist's copyrights should consider and develop a rights and reproduction policy. Certain estates, like the Diane Arbus estate, are known for the “widow or daughter censor.” If scholars cannot have access to or use photographs of an artist's work because of excessive usage fee or because of censorship of their writings, scholars and art writers will no longer write about the artist or use images of his or her work. A world devoid of images because of an overly restrictive licensing or review policy may, in the end, harm the reputation and legacy of the artist.

Artist's Moral Rights

Under French law, every creator has a personal, perpetual, and inalienable right to respect for the artistic integrity of the creative work. The *droit moral* is generally considered to have five components: (1) the right of paternity: a work must be attributed to its creator and to no one else; (2) the right of creation: no one except the creator may determine whether or when the work is put before the public; (3) the right of integrity: no one except the creator can change the work; (4) the right to protection from excessive criticism; and (5) the right to withdraw the work from the public. Legal protection of an artist's so-called “moral or personality right” was controversial in the United States because U.S. copyright law focused primarily on the protection of economic rights and interests. Prior to 1990, artists relied on theories of contract law, defamation, or trademark as a “moral rights equivalent.” In 1990, after years of debate, Congress enacted the Visual Artists Rights Act (VARA) as section 106A of the Copyright Act, a limited form of “moral rights” protection.

VARA vests in the artist a right of attribution and a right of respect and integrity. VARA provides that the author of a “work of visual art” shall have the right to claim authorship of that work, and shall have the right

5. A more extensive discussion of fair use is beyond the scope of this chapter, but see www.hoffmanlawfirm.org.

to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and to prevent any destruction of a work of recognized stature.

An artist who wishes to state a claim under VARA must first establish that VARA applies because the work meets the statutory definition of a work of visual art. A “work of visual art” is defined by VARA in terms both positive and negative. VARA affords “protection only to authors of works of visual art—a narrow class of art defined to include paintings, drawings, prints, sculptures, or photographs produced for exhibition purposes, existing in a single copy or limited edition of 200 copies or fewer.” VARA attaches at the moment of creation. The artist is protected because her creation infuses her spirit in the work; the personality as well as the integrity of the work should be protected.

Works of recognized stature, within the meaning of VARA, are those works of artistic merit that have been “recognized” by members of the artistic community and/or the general public, prior to or at the time of the lawsuit. To achieve VARA protection, an artist must show not only that the work has artistic merit, but also that it has been recognized as having such merit. The stature of a work of art is generally established through expert testimony.

As noted, VARA-type rights are more expansive in other countries, including the scope, applicability to works for hire (i.e., works made for an employer), duration, and lack of waiver. With respect to duration, France, the most expansive moral rights jurisdiction, regards moral rights as “perpetual, inalienable, non-seizable and universal.”

Some other countries, such as Mexico and Nigeria, follow the French tradition and similarly provide that moral rights are perpetual. Other nations, such as the United Kingdom, treat moral rights the same as copyrights, protecting them only for a specified term of years after the artist’s death. In most instances, that means protection for the lifetime of the author plus fifty years or seventy years.

Although VARA was enacted as part of the Copyright Act, the duration of VARA rights is limited to the life of the artist. However, there are limited instances when VARA protections may last beyond the life of the artist.

For example, one provision of VARA allows moral rights to continue after the death of the artist if the work in question was created before the enactment of VARA and the artist still retains title to the work. Another section of VARA allows the surviving artist of a joint work to retain moral rights after the co-artist's death. These postmortem rights are exceptions to VARA's scheme to terminate moral rights at the death of the artist.

The implications of postmortem moral rights after the passage of VARA becomes even more complex when viewed in light of VARA's preemption provision. This provision is intended to ensure that the federal legislation overrides "equivalent" state moral rights during the life of the artist. Many state statutes allow moral rights to continue after the artist's death. Several state statutes also extend the scope of protection beyond the narrow category of works of "visual art" protected by VARA. For example, the New York Artist's Authorship Rights Act protects reproductions, while the Massachusetts statute protect films.

Rights equivalent to VARA may and should be protected by contract, particularly after the artist's death. Any licensing of images by the artist or his or her foundation, estate, or advisors on his or her behalf should include provisions for credit and a prohibition against cropping, altering, or any other action harmful to the reputation of the artist.

The original chapter discussed the importance of nominating an "art executor" or "art trustee" in will and trust documents with power to exercise rights with respect to attribution, integrity, and protecting reputational interest. Digital technology has cause even more difficult issues for artists, particularly photographers, with the ease of manipulation of the image. Questions as to editions, what is an original, who owns copyright, what is entitled to an estate stamp must be addressed by the artist, his "art executor," and advisors.

VARA rights may only be waived explicitly in writing. An artist should avoid waiving VARA rights or at least narrowly draft any waiver provision. Although VARA rights may be protected by contract, in the event of a breach of contract, the artist may only obtain damages, whilst the successful VARA plaintiff is entitled to copyright remedies including statutory damages and attorney's fees.

PART 2: ARTIST FOUNDATIONS

CHAPTER 4: ARTISTS' FOUNDATIONS

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An artist's private foundation may have many purposes, including research, documentation, and the protection and sharing of the artist's legacy. The foundation may also be an educational and lending resource of the artist's work. Creating a private foundation may appear to be an attractive idea to an artist because a private foundation is a tax-exempt entity and contributions, including gifts of art, are eligible for income, estate, and gift tax charitable deductions. A private foundation is also advantageous because the artist may lend his or her own vision to the activities and purposes of the foundation.

GRANTMAKING VS. OPERATING FOUNDATIONS

Prior to deciding whether to create a foundation, the artist should be aware of some general information about private foundations. An art-

ist cannot contribute his or her art to a private foundation and have the foundation merely hold the art; the foundation must be operated as an educational organization, offering a benefit to the public, to qualify as a tax-exempt charitable organization under the Internal Revenue Code (the “Code”). The artist must choose to create either a grantmaking foundation or an operating foundation. Most foundations are considered “grantmaking foundations,” which operate by annually granting an amount equal to at least 5 percent of the foundation’s noncharitable use assets to other charities. Thus, for example, the Andy Warhol Foundation annually makes grants to museums and other public charities. A special subset of private foundations are classified by the Internal Revenue Service (the “IRS”) as “operating foundations.” Instead of making grants, an operating foundation uses its assets in its day-to-day operations. An example is the Menil Foundation, which uses its assets to operate the Menil Collection.

Private foundations, both grantmaking and operating, are subject to a relatively complex set of rules under the Code and Treasury Regulations, including a 2 percent annual excise tax on the foundation’s net investment income. In addition to the general rules applicable to all private foundations, an operating foundation is subject to specific requirements with respect to using the foundation’s assets, and annually paying out substantially all of its net income, to carry out its exempt purposes. A private operating foundation must demonstrate annually to the IRS that these requirements have been met.

The income, estate, or gift tax deductions available for gifts of art to a private foundation may make the creation of a foundation an attractive idea. However, the artist must provide the foundation with sufficient income to sustain its operations. Income can be generated through investment of an initial cash contribution or through a donation of saleable art. Operational costs of the foundation will include rent, salaries, storage, and insurance. The foundation will also have to pay legal and accounting fees. Many artists assume that the foundation could engage in fundraising to derive support from the public. As a practical matter, however, this is an unlikely result for two reasons. First, grants are expensive and time-consuming to seek and only limited funds are avail-

able.¹ Second, most grants are available from other private foundations and from corporations. For certain tax and policy reasons, most private foundations and corporations are much less likely to make grants to private foundations than to public charities like schools or cultural organizations. Therefore, sales, admission fees, and licensing arrangements would be more likely sources of revenue for an artist's foundation, along with endowment income from stocks and other investments.

A common question is how much cash or art is required to create a private foundation. As a legal matter there is no monetary threshold to create such a foundation. As a practical matter, however, a private foundation may not be justified if the cash and assets to be donated are valued at less than \$2 million. That is because private foundations can have high operating costs, including salaries, rent, storage, insurance, and maintenance costs. If services are not donated, mandatory tax, accounting, and filing fees may annually cost the foundation between \$5,000 and \$20,000 or more. In every case, an artist should create a proposed budget in order to determine whether a private grantmaking or operating foundation makes sense given the artist's cash and art assets.

If the artist is not in a position to contribute the necessary funding and the proposed private foundation would be unlikely to be self-sustaining through sales of the art or fundraising, the artist should consider alternatives to establishing a private foundation. Libraries, universities, museums, and art galleries represent a valuable resource for artists in placing their artwork and archival materials. Other alternatives are the Archives of American Art² or a donor advised fund³ for disposition of art (or its proceeds) to charity. An artist should always confer with a potential recipient before donating or bequeathing his or her work to charity.

1. The foundation would be required to register before soliciting and annually report if it is raising funds in any of the thirty-nine states that requires registration.

2. The Archives of American Art does not generally collect original works of art, but accepts sketchbooks, drawings, correspondence, diaries, and oral histories from artists.

3. Some donor advised funds do not accept donations of art assets.

DEDUCTIONS FOR THE GIFT

An artist making a gift of his or her artwork during the artist's lifetime to a private foundation is entitled to claim a federal income tax deduction in the amount of the artist's cost basis in the work (essentially the cost of the materials used to create the work), but not in the amount of the fair market value of the work.⁴ In contrast, the artist is entitled to claim a federal gift tax deduction in the amount of the fair market value of the donated work.⁵ In relation to the artist a piece of art is considered ordinary income property because it is self-created property.⁶

A collector unrelated to the artist who purchases art from the artist and then donates the art to a private operating foundation will be able to claim a federal income tax deduction for the fair market value at the date of the gift.⁷ In relation to the collector the art is considered capital gain property as long as it is purchased for investment and not inventory purposes. In order to qualify for a fair market value deduction, the donation must meet the "related-use" test, which requires proof that the art will be used in a way that is related to the exempt purposes of the recipient organization.⁸

4. IRC § 170(e)(1)(A).

5. IRC § 2522(a).

6. IRC § 1221(a)(3)(a). Treas. Reg. § 1.170A-4(b)(1).

7. Recently the Pension Protection Act of 2006 modified the law with respect to contribution of fractional interests in tangible personal property, which would include contributions of fractional interests in works of art. If a donor makes a charitable contribution of a fractional interest in tangible personal property, the donor must subsequently contribute his or her entire interest in the property within ten years of the initial contribution (or by his or her death, whichever is earlier). If the donor fails to do so, the tax benefit the donor received will be recaptured. Furthermore, the recipient charitable organization must have "significant physical possession" of the property. When the remaining interest in the property is donated, the value of the donor's charitable contribution deduction will be based on the lesser of fair market value at the time of the initial donation or fair market value at the time of the donation of the remaining interest.

8. IRC § 170(e)(1)(B)(i)(I). Treas. Reg. § 1.170A-4(b)(3)(i). A sale of art is not a related use. Thus, art donated to and sold at a charity auction is not being put to a "related use" with the result that the fair market value deduction is not allowed. Display of art in a museum is

Example 1: A is an artist who creates oil paintings. It costs A \$200 in supplies (paint, brushes, and a canvas) to create the painting. One of A's paintings typically sells for \$5,000 at a gallery in Gotham City. A has created a private foundation with members of her family, and A donates one of her paintings to the foundation she has created. A is only entitled to claim a deduction of \$200, her costs basis in the painting, because she is the creator of the painting. If A chose to give the painting to Gotham City Museum, a public charity, instead of giving it to her private foundation, she would still only be entitled to claim a deduction of \$200 because she is the creator of the painting.

Example 2: C is a collector who has purchased one of A's paintings. C recently purchased the painting for \$5,000 at a gallery, and he has obtained an appraisal by a qualified appraiser stating that the fair market value of the painting is \$5,000. C donates the painting to Gotham City Museum, a public charity. C is entitled to claim an income-tax deduction of \$5,000.

Example 3: The facts are the same as in Example 2 except that C decides not to donate the painting and instead to hang it on the wall of his apartment. Three years later C decides to donate the painting to the museum, which agrees to hang the painting as part of an exhibit, a related use. According to a qualified appraisal the painting is now worth \$8,000. C is now entitled to claim a deduction of \$8,000, the fair market value of the painting at the time of the donation.

In the case of a testamentary gift (that is, a gift made under the artist's will) of artwork to a private foundation, an artist's estate is entitled to claim a federal estate tax deduction for the fair market value (determined as of the artist's date of death) of the bequeathed artwork.⁹ Thus, the tax law favors gifts by artists at their deaths over gifts by artists during their

a classic related use. The Pension Protection Act of 2006 amended the law to provide that if the organization sells the property within three years of the donation the tax benefit that the donor received will be recaptured, and the donor will only be able to claim a deduction equal to his basis in the property.

9. IRC § 2055(a).

lifetimes. It is this tax policy that has driven the creation of so many testamentary foundations during the past twenty years.

Example 4: The facts are the same as in Example 1 except that A dies and under her will bequeaths all of her self-created paintings to the private foundation she started with members of her family. Her estate is entitled to claim an estate tax deduction for the fair market value of the artwork. However, A's estate consists of many paintings by the artist. Therefore, the qualified appraiser aggregates the unit values of A's bequeathed works and applies a blockage discount. A blockage discount would lower the fair market value of the bequeathed artwork due to the downward effect on the market of having a large number of A's works available for hypothetical sale at the same time.¹⁰

STEPS FOR CREATING A FOUNDATION

If the artist chooses to create a foundation (whether operating or grant-making) there are certain steps that must be followed. Assuming that the foregoing financial and regulatory hurdles to establishing the foundation can be met and the artist decides to form the foundation, he or she will need to decide whether to establish the foundation in trust or corporate form. A private foundation in trust form is established by a trust agreement between the artist, as settlor of the trust, and the trustee(s). Assets are transferred to the trustees to hold in trust and be administered or managed to carry out the foundation's exempt purposes in accordance with the terms of the trust agreement. The trust agreement generally may not be amended, but can be drawn broadly enough to give the trustees flexibility in operating the foundation.

A private foundation in corporate form is established by filing a certificate of incorporation with the Secretary of State of the state of incor-

10. For more on tax and estate planning for artists see Ralph E. Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers, and Artists* (3rd ed. 2005). For cases that discuss blockage discount see *Estate of Georgia T. O'Keeffe v. Comm'r*, 63 T.C.M (CCH) 2699 (1992), In re Determination of Legal Fees Payable by the Estate of Andy Warhol, deceased, N.Y.L.J., Apr. 18, 1994, In re Warhol Estate, No. 824/87, unpublished opinion, N.Y. Surrogate's Court, Apr. 14, 1994.

poration and holding an organizational meeting in person or by written consent at which the corporation's directors are appointed and by-laws are adopted. A corporation may or may not have members. If it does, the artist may appoint the initial members of the corporation who will elect the directors. The directors manage the foundation and elect the officers who carry out the day-to-day operations of the foundation.

In general, the corporate form limits liability. It is more familiar to banks and businesses, while the trust may be less formal to operate. The directors of a corporation are generally judged under the business-judgment rule, while trustees of a trust are held to higher fiduciary standards. The artist's legal advisor can explain in greater detail the differences between a corporation and a trust.

No matter how it is organized, the foundation must apply to the IRS for recognition of tax-exempt status (on IRS Form 1023), and must demonstrate that it is an educational organization benefiting the public (rather than the artist) and otherwise meets the requirements for tax exemption. In addition, counsel for the foundation will need to show the IRS on Form 1023 how the foundation will operate if the foundation is to be classified as a "private operating foundation."¹¹ Many foundations do not seek classification as an "operating foundation" until the foundation is established and can give proof of its operations.¹² However, a foundation may seek operating classification at its start if the request is based on a good faith determination that it will satisfy the requirements.¹³

An artist may want to receive confirmation of the foundation's tax-exempt status before making contributions to the foundation; however, if recognized by the IRS, the foundation's exempt status will generally relate back to the date of its creation if the IRS does not require any material changes in the foundation's governing documents. Therefore, if the artist and counsel are confident that no material changes will be required

11. Treas. Reg. § 53.4942(b)-3(a).

12. Treas. Reg. § 53.4942(b)-3(b)(1).

13. Treas. Reg. § 53.4942(b)-3(b)(2).

by the IRS, the artist and others can begin making donations as soon as the foundation is organized. Once established, the foundation will be required to file annual reports of its assets and expenditures (on IRS Form 990-PF) with the IRS.

In addition to complying with the rules, regulations, and reporting requirements under the Code, an artist's foundation may be required to register with the State Attorney General's office or other state agency charged with oversight of charitable organizations or fundraising activity within the state and also may be required to file annual reports with that state agency. In New York State, a museum maintaining a collection is required to be chartered by the Board of Regents.¹⁴ Any charitable organization that holds art may qualify as a museum, including a private foundation that holds art assets.¹⁵

SELF-DEALING

Once the foundation has been created, the artist should be aware of the penalties on self-dealing. An act of self-dealing between a disqualified person and a private foundation may expose the disqualified person and possibly the foundation's managers to excise taxes. Section 4941 of the Code imposes a tax on disqualified persons who participate in an act of self-dealing with a private foundation. Acts of self-dealing include selling, exchanging, or leasing property, lending money, furnishing goods, services or facilities, paying compensation, and transferring or using the private foundation's assets for the benefit of a disqualified person. Even if a sale, loan, or other act is beneficial to the foundation it will still be considered an act of self-dealing subject to penalty taxes. A disqualified person is defined in the Code to include major donors, trustees, and officers of the private foundation, members of their families, and entities in which these persons have more than a 35 percent interest.¹⁶ Therefore an artist who

14. N.Y. Education Law §§ 216 and 256(1).

15. Rules of the Board of Regents § 3.27.

16. IRC § 4946. A corporation will be considered a disqualified person if disqualified persons own more than 35 percent of the voting stock. A private foundation will be considered

creates a private foundation and makes a large donation to that foundation or is a director of the foundation will be considered a disqualified person. In addition, entities in which the artist has more than a 35 percent interest may be disqualified persons. An artist who chooses to start a private foundation should be aware of the self-dealing rules and should seek counsel's advice when entering into any interaction with the private foundation.

Not all acts of the private foundation affecting the disqualified person will be considered self-dealing. A disqualified person may receive an "incidental and tenuous" benefit from a foundation.¹⁷ In the facts of an IRS private letter ruling a collector donated one of his two collections to a private foundation he had founded. The collector retained possession of the other collection. The foundation intended to keep the collection on continuous public display. In this case the IRS privately ruled that the indirect benefit the collector received from a private foundation exhibiting the collection he had donated was an incidental or tenuous benefit and therefore was not self-dealing.¹⁸ The IRS has not issued a ruling explaining how an artist would be treated under similar facts. A private letter ruling is not precedential authority and is only binding on the taxpayer who requested the ruling. However, these rulings do provide an indication of the IRS' views on a particular situation.

An artist who makes a substantial contribution of art to a private foundation will be considered a disqualified person. In a revenue ruling, the IRS advised that the placement of paintings owned by a private foundation in the private residence of a disqualified person was self-dealing even though the paintings were occasionally made available for viewing by the public.¹⁹ An artist may also run into trouble if the foundation is operated for a pri-

a disqualified person if disqualified persons own more than 35 percent of the profit interests. A trust or estate will be considered a disqualified person if disqualified persons hold more than 35 percent of the beneficial interest.

17. Treas. Reg. §53.4941(d)-2(f)(2).

18. IRS Priv. Ltr. Rul. 9011053 (Dec. 22, 1989).

19. Rev. Rul. 74-600 (Jan. 1, 1974). A revenue ruling has precedential value for all taxpayers.

vate purpose, such as the promotion of the work of a disqualified person. For example, paying or reimbursing expenses to or for a disqualified person is generally self-dealing.²⁰ The IRS has privately ruled that self-dealing occurred where a foundation participated in various exhibitions that primarily exhibited works of the artist that were still owned by the artist, and the foundation incurred expenses (transportation, display, and storage) on behalf of the artist.²¹ Once beyond analysis of payments, it can be harder to determine whether an expenditure will confer a “more-than-incidental” benefit and, therefore, be an act of self-dealing for which the artist or her family could be liable for penalties. In order to determine whether a particular payment is incidental or whether it rises to the level of self-dealing, an artist may confer with his or her tax advisor for advice. Where stakes are large and the answer unclear, the artist may ask her tax advisor to request a private letter ruling from the IRS. Unfortunately, a letter ruling can cost more than \$15,000 and take one to two years to obtain.

The examples above address foundations that hold or exhibit artwork. Self-dealing is also an issue for private grantmaking foundations. The IRS has privately ruled that self-dealing occurred where a private foundation granted funds to a charity, and the funds were then used by the charity to buy artwork from individuals who were disqualified persons as to the private foundation.²² One disqualified person was on the charity’s acquisition committee and did not make an adequate disclosure to the charity of her conflict of interest. Although the charity made the purchase and not the private foundation, the sales of art by the disqualified persons were considered an act of self-dealing.

There is also an exception to the self-dealing rules that allows a private foundation to pay compensation to (and pay or reimburse expenses of) a disqualified person for personal services that are reasonable and necessary to carrying out the exempt purposes of the foundation, so long as

20. IRC §4941.

21. IRS Priv. Ltr. Rul. 9408006 (Dec. 4, 1992).

22. IRS Priv. Ltr. Rul. 8310002 (Dec. 17, 1982).

23. IRC §4941(d)(2)(E).

the payments are not excessive.²³ A private foundation should consult with counsel before paying compensation to any disqualified person.

If an act is considered self-dealing it will need to be corrected²⁴ and an excise tax may be imposed. Artists who fit the definition of disqualified persons should take extra care to make sure none of their activities and none of their foundations payments would constitute self-dealing.

24. The terms “correction” and “correct” mean, with respect to any act of self-dealing, undoing the transaction to the extent possible, but in any case placing the private foundation in a financial position not worse than that in which it would be if the disqualified person were dealing under the highest fiduciary standards. IRC §4941(e)(3).

CHAPTER 5: REFLECTIONS ON THE SURVEY AND OTHER MUSINGS ON THE MANAGEMENT OF ARTIST'S FOUNDATIONS AND MUSEUMS

Barbara T. Hoffman, Esq.

The arts live continuously. They outlive governments and creeds and societies, even the very civilizations that produce them.... They are what we find again when the ruins are cleared away.

Katherine Anne Porter

Introduction

This chapter discusses and summarizes the results of an informal survey (the "Survey") conducted by me for The Marie Walsh Sharpe Art Foundation of artists' foundations and the lessons to be derived from the Survey. The written survey was initially distributed to thirty-six artist foundations affiliated with the Council on Artist Foundations, of which fourteen responded. In order to supplement the Survey, I reviewed an additional twenty-five or so artists' foundations on [Guidestar](#), a database which gives access to the IRS Form 990 tax return required of exempt organizations ("Form 990"), and interviewed the executive directors of several other artists' foundations. The anecdotal results discussed in this chapter are a compilation of the above data and of the collective knowledge gleaned by myself and colleagues practicing in this area.

As a complement to Chapter 4, a second part of the chapter discusses state corporate law issues, including formation, governance, and director liability. The chapter concludes with an overview of legal issues faced by foundations and trusts in the conduct of business, including the special concerns involved in authentication of works of art and the preparation of a catalogue raisonné.

The Survey

A copy of the Survey is attached as Appendix D-1. It asks questions which, in many respects, reflect the questions often asked by an artist contemplating the preservation of his or her legacy and considering how and whether an estate plan should incorporate a non-charitable trust, a charitable trust or not-for-profit corporation, and if so, whether it should be created while the artist is alive or by will, to take effect on the death of the artist. Clients often ask whether a charitable trust is appropriate, and if so, how many trustees or directors should be selected, and how much money is required to fund the foundation, or trust. Because our Survey was sent to the Council on Artist Foundations, and we used the Guidestar database, the foundations analyzed were all 501(c)(3) exempt organizations. Whether an artist creates a charitable organization as the exclusive estate planning vehicle or whether the artist creates a charitable foundation or a non-charitable entity as part of an overall estate plan, in large part, will depend on the articulation of the mission, distribution of proceeds and whether the primary intent is to provide revenues to support the exempt purposes of a charitable or educational entity, or whether the purpose is to provide revenue streams to support the family and others.

For example, the Nickolas Muray Photo Archive is incorporated in Utah as a limited liability company. Its mission and activities may not differ significantly from some of its tax-exempt counterparts, such as the [Richard Avedon Foundation](#) or the [Laszlo Mohly-Nagy Foundation](#). Both the for-profit and the not-for-profit hold the “reputation of the artist in trust.” Nickolas Muray (1892–1965) was a Hungarian photographer who, in 1913, immigrated to New York City where he became internationally known as a portrait photographer. His circle of friends in the art culture in Mexico in the 1930s included Miguel Covarrubias, Rufino Tomayo, Diego Rivera, and, especially, Frida Kahlo, with whom he exchanged love letters in 1939. Between 1920 and 1940, Nickolas Muray made over 10,000 portraits of celebrities, including Babe Ruth and Greta Garbo. However, it is in part because of the phenomenal rise in popularity of Frida Kahlo that interest in Muray’s photographs, particularly the photos of Frida, has also

grown. On Muray's death in 1965, the Nickolas Muray family gifted his negatives to George Eastman House but retained all other rights in and to the images. More than thirty years later, the Estate of Nickolas Muray formed the LLC. Ms. Muray, the daughter of Nickolas Muray, is the director of the archive and is educating the public through the sale of his photographs, the licensing of his images, and the arranging for the writing of catalogues and books to preserve her father's legacy. As noted, these activities are similar to those undertaken by some tax-exempt entities described in the next section. The significant difference is in the distribution of revenues from these activities, which in the case of the Nickolas Muray Archives, are distributed to Mr. Muray's son and daughter.

The Type of Entity, Its Mission, and Whether the Organization was Created by Will to Take Effect on the Artist's Death

As noted, the Survey was skewed in favor of charitable organizations. In addition, in many cases, no access was had to the artist's overall estate plan and no conclusions, except where specifically noted, should be drawn. All of the foundations considered were exempt 501(c)(3) organizations—some were organized as trusts under state law, others as not-for-profit organizations.¹

The vast majority of trusts and not-for-profits devoted to artists are pri-

1. Because New York State has an extraordinarily expansive view of those organizations which must be chartered, it is not surprising that foundations like the Lichtenstein Foundation, the DeKooning Foundation and the Richard Avedon Foundation have incorporated in Delaware. Particularly since 2004, New York's Department of Education/Regents Chartering Division has construed broadly its authority to regulate not-for-profit corporations and to subject them to cumbersome regulations and requirements. Previously, not-for-profit corporations were routinely approved for incorporation with minimal review by the Department of Education under the authority of the New York Secretary of State. Absent special considerations or activities like operating a museum or maintaining a collection open to the public, the artist or his/her advisor is advised to incorporate in a state with a less stringent regulatory framework, such as Delaware, and file the required registration for doing business in New York as a foreign corporation. Trusts are formed by trust documents signed by the creator of the trust or by will. The creator of the trust does not file the documents with the state. (See pages 60–68 of *A Visual Artist's Guide to Estate Planning* and Chapters 1 and 4 of this *Supplement* for a discussion of the difference between a trust and a corporation.)

vate foundations rather than public charities. A private foundation is a charitable entity primarily funded from one source (individual, family). As a general rule, “public charities” normally derive one-third of their income from public support measured in terms of gifts or grants.

In our limited Survey, only the Anyone Can Fly Foundation (www.anyonecanflyfoundation.org), the Aperture Foundation (www.aperture.org), the Noguchi Foundation, the Romare Bearden Foundation and Through the Flower are publicly supported charities which actively seek funds from public support, although Judd Foundation and others have successfully obtained grants targeted to their mission and used such grants to evolve to another level of development.

Private foundations are further divided into two categories: private operating foundations and private non-operating foundations. Private non-operating foundations are those that conduct their charitable programs through grant making to other qualified foundations. The [Larry Rivers Foundation, Inc.](#), a private non-operating foundation, has as its purpose the advancement of the visual arts and education of the public about the visual arts and in particular the work of the late artist Larry Rivers. It accomplishes these purposes by making grants to public charities that support the visual arts, holding exhibitions of works of art, placing works of art created by Larry Rivers in museums, universities, and other public art collections, and creating a catalogue raisonné of the works of art created by Larry Rivers. The items sold by the foundation further its exempt purposes by placing the works of art by Larry Rivers in the public realm and allowing the foundation to fulfill its charitable mandate in accordance with its purposes.

When Andy Warhol died unexpectedly on February 22, 1987, at 58, he left a vast inventory of art. His will specified that most of his estate would go to create a foundation dedicated to “the advancement of the visual arts.” His executors created a non-operating private foundation. During the tenure of its President, Archibald L. Gillies, from 1989–2001, the foundation converted its asset base from one based primarily in the art bequeathed to it by Warhol’s estate to one with over \$131 million in cash and investments, even as it distributed over \$41 million in 1190 cash grants. During

this time, the foundation also helped establish the Andy Warhol Museum in Pittsburgh, to which it donated more than 3900 works of art, including paintings, drawings, photographs, prints, sculptures, film and video work, as well as all Warhol archival material it had inherited from the estate. It also funded the preservation of all Warhol's film and video work by the Museum of Modern Art; helped establish Creative Capital, a foundation dedicated to supporting individual artists; and launched the Warhol Initiative, a multi-million dollar capacity-building effort directed at smaller visual arts organizations. Throughout Gillies' term, the foundation was an outspoken champion of freedom of artistic expression, and supported the legal defenses of the NEA Four and the Brooklyn Museum of Art in their battles against government censorship.

The [Barnett Newman Foundation](#), the [Adolph and Esther Gottlieb Foundation](#), the Robert Mapplethorpe Foundation, [Reuben Kadish Art Foundation](#), and the George Rickey Foundation are all private non-operating foundations.

Private operating foundations are characterized by a more active programmatic agenda than the solely grantmaking activities of the non-operating foundation. The vast majority of artists' foundations in general and in the Survey were formed as 501(c)(3) private operating foundations under the will of the artist.²

The first question in the Survey was unintentionally ambiguous. "Is the Foundation one that was set up during the lifetime of the artist" was intended to ask whether the foundation was operated by the artist during his lifetime; however, some respondents interpreted a foundation created by the artist in his will as a "yes" answer to this question. In fact, most foundations which came into being on the artist's death were created while the artist was alive in the sense that the artist provided for the foundation in his or her will.

The [Joan Mitchell Foundation](#), the [Roy Lichtenstein Foundation](#), the

2. Federal income tax charitable deduction rules favor gifts to public charities as opposed to private foundations (IRC Sec. 170). The IRS has complicated rules to govern the operation of private foundations and equally complicated rules to govern the amount allowed for charitable deductions to various charitable entities.

DeKooning Foundation, Judd Foundation, the Calder Foundation, the Larry Rivers Foundation, the Nancy Graves Foundation, the Judith Rothschild Foundation, the Romare Bearden Foundation, the Saul Steinberg Foundation, the Josef and Anne Albers Foundation, the Barnett Newman Foundation, among others all came into existence on the death of the artist.

A number of exempt organizations have been founded by artists during their lifetime. Before his death of AIDS at the age of thirty-two, Keith Haring established a foundation in his name to maintain and enhance his legacy of giving to children and AIDS organizations. The [Keith Haring Foundation](#) was established in 1989 to assist AIDS-related and children's charities and maintains the largest resource of archives on Keith Haring. The foundation is also committed to expanding and sustaining public awareness of Keith Haring and his artwork. The foundation also authenticates works attributed to Keith Haring.

Simultaneously, after discovering in 1986 that he had been diagnosed with AIDS, Robert Mapplethorpe was determined to build a lasting artistic legacy. He accelerated his creative efforts, broadened the sweep of his photographic inquiry, accepted increasingly challenging commissions, and, despite his illness, continued to create provocative images up until his death in 1989.

The Robert Mapplethorpe Foundation, Inc. was founded on May 27, 1988, some ten months before the artist's death. Robert Mapplethorpe funded the foundation with substantial contributions of his work, selected four trustees to serve with him on its board, and was appointed its first president. He also established the Foundation's initial philanthropic mandate, targeting the area of his greatest concern: the recognition of photography as an art form of the same importance as painting and sculpture. He directed that the net revenues proceeds from the sale of his works be used to benefit those museums and other artistic institutions that had shown particular interest in establishing photography departments or expanding their existing one. During the last weeks of his life he supplemented the Foundation's mandate with a second mission to support medical research in the HIV/AIDS area.³

3. See *A Visual Artist's Guide to Estate Planning*, page 98, for earlier discussion of the Mapplethorpe Foundation.

In keeping with Mapplethorpe's wishes, The Robert Mapplethorpe Foundation has spent millions of dollars to fund medical research in the fight against AIDS and HIV infection. In the field of the photographic arts, the Foundation has funded numerous publications on photography, supported exhibitions at various art institutions, and provided grants—in the form of funding or gifts of original Mapplethorpe works—to qualified art institutions, ranging from the world's major art museums to small university galleries. In addition to its charitable work, the foundation works to maintain Mapplethorpe's artistic legacy by organizing and/or lending to Mapplethorpe exhibitions around the world, preserving his archive of vintage editioned prints, strictly maintaining the editions he established during his lifetime, and placing his work in important museum collections around the world.

The Anyone Can Fly Foundation has been created by the artist Faith Ringgold as a private operating foundation to expand the art establishment's canon to include artists of the African Diaspora.⁴

Robert Rauschenberg created his foundation in the 1980s as a private operating foundation. The foundation has assets currently of \$12 million. The foundation lists as its direct charitable activities on Form 990:

- 1) Continuation of a program to give instruction to teachers of learning disabled. Host annual workshop to provide guidance on the use of art as an educational enhancement;
- 2) Curatorial archival and other expenses incurred in connection with the anticipation of the receipt of artwork and collaboration of its uses with the Guggenheim Museums; and
- 3) Arts for abuse counseling treatment centers help raise awareness of spousal abuse and the need for remedial support and temporary housing.

The [Isamu Noguchi Foundation and Garden Museum](#) was set up in 1986 by the sculptor Isamu Noguchi and funded with an initial endowment of \$2 million, through the sale of artworks and revenues from the sale of his popular Akari lamp. Since Noguchi's death, the organization has evolved into a public 501(c)(3) charity dedicated to maintaining and promoting

4. See Chapter 7 of this *Supplement*.

the artistic legacy of Noguchi. The foundation raises funds from the public and states, “We are a public foundation and museum which is why we raise public money and rechartered as such under New York State law in 2004.” Jenny Dixon, the museum’s director, responded in the Survey, “The primary activity of the foundation is the operation of a museum—the maintenance, conservation of the core collection and mounting temporary exhibitions accompanied by publications; developing and maintaining an archive of the artist’s work and development of a catalogue raisonné. The foundation sells art—only works that were left by the artist to sell in order to support the foundation, not any of the work that is part of the core museum collection. These works that are for sale are called ‘residual assets.’”

The Aperture Foundation, the nonprofit organization devoted to photography that publishes *Aperture Magazine* and Aperture books, was founded by nine photographers, including Dorothea Lange and Ansel Adams, with the mission to advance photography through the publication of *Aperture Magazine*, books, traveling exhibitions and educational programs. Aperture was gifted the Paul Strand Archive by the Paul Strand Foundation and Paul Strand’s wife, each of whom had originally inherited a part of the archive on Strand’s death. The Paul Strand Archive is now integrated into Aperture, and any revenue generated from its exploitation serve Aperture’s exempt purposes.

Judy Chicago founded [Through the Flower](#), a tax-exempt public charity, in 1978. *The Dinner Party*, *Birth Project*, and the *Holocaust Project*, monumental collaborative works which explored her deepening feminist vision, were sponsored, documented, exhibited, and preserved by Through the Flower. When *The Dinner Party* opened at the San Francisco Museum of Modern Art in 1979, Through the Flower offered programs and information documenting women’s unsung roles in history. It managed subsequent exhibitions, mostly initiated by community groups, in fourteen cities: seven in the United States, three in Canada, two in the United Kingdom, and one in Germany and Australia. The art was stored and cared for by Through the Flower until it was acquired and donated by Dr. Elizabeth A. Sackler to The Brooklyn Museum. A

Getty Conservation grant was awarded to Through the Flower in preparation for permanent housing.

The Birth Project engaged Chicago with 150 needle-workers around the U.S. and in Canada and New Zealand. Through the Flower organized the execution of 85 works in various needle and textile techniques and planned and implemented a varied and successful multi-year exhibition tour to 100 venues. It also cared for the art until most of it was placed by gift in other nonprofit institutions. Through the Flower was also the fiscal umbrella for the research and preparatory work of the *Holocaust Project*.

László Moholy-Nagy, the Hungarian constructivist painter, photographer, Bauhaus professor, and one of the most gifted and versatile of the artists of the twentieth century, died in 1946. Like the Nickolas Muray Photo Archive, the [Moholy-Nagy Foundation](#) was created many years after the artist's death. Almost sixty years later, his daughter, in 2003, founded The Moholy-Nagy Foundation, Inc. with \$100,000 as a private family operating foundation under Section 501(c)(3). It was formed in response to the continuing interest in the life and works of László Moholy-Nagy, and in response to the growing number of fakes attributed to him on the market. The primary goals of the foundation are to produce a complete catalogue raisonné of Moholy-Nagy's art and photography, record and conserve works in the foundation's collection, augment and catalogue the foundation's archive and library and make them available to interested researchers, provide an interface between scholars and the public through the website, exhibitions, and other events, and provide authentication of works attributed to Moholy-Nagy. In my opinion, the foundation offers an excellent model of how a small amount of capital can effectively combine with twenty-first-century technology to preserve and enhance an artist's reputation and legacy. The newly designed website, which cost approximately \$15,000 to establish, effectively links to other archives and repositories of the artist's work, such as George Eastman House, which purchased a collection of Moholy-Nagy photographs and is an important resource for research on the artist and recent news about him.⁵

5. The internet is a valuable tool for artist's trusts and foundation and can assist in many of its programs, including research, education, and the preparation of a catalogue

A trust or not-for-profit must be funded. Most artists' foundations initially are funded with bequests of money from the estate, works of art by the artist, works owned by the artist of other artists, pension funds, and real estate. For the most part, the initial value of the endowment of these testamentary foundations was \$500,000 to \$2 million. Not surprisingly, most foundations responding to the Survey created by the artist's will indicated that art sales were an important source of funds. The increasing prices for contemporary artists like Judd, Lichtenstein, and Mapplethorpe have resulted in large endowments. Consider, for example, Judd Foundation's sale of Judd works at Christie's in 2006, which gained more than \$22 million for the foundation. Artist foundations' operating budgets, as reported on the Form 990, indicated a wide range from approximately \$15,000 to \$3 million and above. Artists and their advisors should review several Forms 990 to identify the line items of a budget for the proposed artist's foundation and the range of projected costs.

Not surprisingly, many artist foundations include amongst their activities providing grants for the support of artists. In addition to those previously noted, and by way of illustration, the Joan Mitchell Foundation supports artists through grants, as does the Judith Rothschild Foundation. Both foundations focus on assistance to under-recognized artists and in the case of Judith Rothschild Foundation to the estates or foundations of deceased artists. (See Appendix D-2, "Guidelines of Judith Rothschild Foundation for Grants.") The Joan Mitchell Foundation's total budget program in 2006 was approximately two million five-hundred thousand dollars (\$2.5 million).

Board of Directors and Trustees

Most of the foundations surveyed had a board of directors or trustees selected by the artist in his or her will. Some trustees or directors were selected by the executor. Generally, a trust created by the artist's will has one to three trustees. According to the Survey and our further review, most nonprofits have four to seven directors or trustees who are a mix of family members, friends, and professional advisors, principally lawyers

raisonné. See The Catalogue Raisonné Scholars Association, CRA Forum (Spring 2007) websites and the [Catalogue Raisonné](#).

and accountants. The Joan Mitchell Foundation's board is mainly composed of working artists who understand the challenges for artists of supporting themselves through art making. In most instances, the original directors or trustees selected by the artist in his will are still serving in that capacity. In many instances, additional directors have been added as the foundation and activities grow in maturity.

The Internal Revenue Service recommends "that governing boards should be composed of persons who are informed and active in overseeing a charity's operations and finances." (See IRS Good Governance Practices for the 501(c)(3), Appendix A-9.) Most of the organizations reviewed seem to reflect the IRS recommendation with respect to both selection of board members and trustees as well as with respect to numbers. "Organizations with very small or very large governing boards may be problematic: small boards generally do not represent a public interest and large boards may be less attentive to oversight duties." (See Appendix A-9.)

Words of Advice

In response to the question "what advice would you give to other artists," answers included:

"Make sure trustees are knowledgeable about the artist's work, the art world, and the worlds of criticism, scholarship and museums. Create a detailed database, with images, of all works still owned by the artist and, if possible, those already sold. An extant database at the time of the artist's death will save the estate an enormous amount of money since the lawyers will have to be involved in the work."

"Speak with an attorney, an accountant and others who have experience and expertise setting up an artist's foundation."

"Before setting up a foundation, inventory art works, organize documents and all other archival materials as much as possible, and contact experts in the field that will enthusiastically support your work and start dialoguing with them before giving them a role in the foundation."

“Plan to spend a lot of time negotiating with IRS red tape, and cultivate great patience.”

GOVERNANCE OF THE EXEMPT ORGANIZATION

Most artist foundations are organized under state law as either a charitable trust or a not-for-profit corporation. Directors/trustees are charged with the management of the not-for-profit or trust in the conduct of its activities in furtherance of its exempt purposes.

A Director's Fiduciary Duty

Directors and trustees are said to be “fiduciaries,” that is, to be in a special relationship of trust and confidence. The fiduciary principle imposes on a director of a nonprofit organization a duty of loyalty and a duty of care. A director's duty of loyalty includes loyalty to the trust or foundation's mission and purpose and avoidance of conflict of interest and self-dealing. A director's fiduciary duty of care often works in tandem with the duty of loyalty to impose upon the director a duty to abide by the laws, ethical codes, and internal rules and regulations that govern the exempt organization. “The first responsibility of any nonprofit board is to comply with all laws, treaties and international regulations,” says Edward H. Able Jr., President and CEO of the American Association of Museums (AAM) in Washington, D.C. “Board members need to be certain that procedures are in place for whatever oversight is necessary to assure that the organization is acting in compliance with the laws.... such directors and trustees have a fiduciary duty of care and loyalty to the institution and the public.” Duty of loyalty and duty of care issues also arise from federal tax status in so far as the exempt status of the organization prohibits “private inurement,” excess benefit transactions, acts of self-dealing or private benefit to directors and trustees of such organizations. The IRS can impose prohibitive excise taxes for self-dealing under the Code.⁶

6. Under the IRC, directors and trustees of private foundations are held to more stringent standards and regulations with respect to loyalty and care than directors of public charities are held to the “business judgment” and state conflict of interest standard.

Under the laws of most states, a trustee of a trust and executor are also fiduciaries and owe a duty of loyalty and care to the trust or estate. Both nonprofit directors and trustees were held originally to the highest standard of care.⁷

Following the decision of a District of Columbia federal court in *Stern v. Lucy Webb* in 1973, courts “tend to measure a not-for-profit director’s duty of care by the more lenient,” “business judgment rule” applicable to directors of for-profit corporations. Courts have participated in this “hands-off” business judgment approach to the directors or trustees of nonprofit corporations, stating that “if the trustees act within the bounds of reasonable judgment in the exercise of the discretion conferred upon them, the court will not interfere.”

There has been a renewed and heightened emphasis on duty of loyalty issues particularly resulting from conflict of interest situations. The typical conflict of interest arises when a trustee or director is on both sides of a transaction. In addition to the normal transactions involving conflict of interest with respect to corporate boards and nonprofits, a unique set of conflicts applies in the case of the trustee or director of a foundation or museum if that trustee or director is a family member or collector with a large collection of works created by the artist on whose foundation board she/he sits or a dealer in the artist’s works. For example, if a trustee acquires a work of art based on knowledge obtained at a board meeting instead of permitting the museum to acquire such object or if the museum displays an object loaned by a trustee or if the trustee borrows a work owned by the museum and displays it in the trustee’s collection, self-dealing and conflict of interest arises. The potential for conflicts also exists for a living artist and his or her foundation.

7. Justice Cardozo articulated the classic fiduciary obligations of a trustee more than eighty years ago in the New York case of *Meinhard v. Salmon* when he stated, “Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound to fiduciary ties. A trustee is held to something stricter than morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard behavior.”

Shared space and staff, authentication of works in which the authenticator has an interest, acquisition of works from the family of the artist, and the preparation of a catalogue raisonné may pose potential conflicts and “private benefit.”

Best Practice. Discuss and adopt bylaws to avoid conflict of interest and adopt a policy addressing conflicts of interest among directors that includes disclosure, recusal and memorialization in the written board minutes of any action and disclosure. A director or trustee should not participate in discussions of any business dealing in which the director or trustee or an immediate family member has a financial interest or fails to disclose such interest.

One of the results of the revelations of corporate scandals such as Enron and WorldCom in 2001 led to the enactment of a new federal law, the Sarbanes-Oxley Act of 2002, that requires greater compliance with accounting rules and greater transparency. The consensus of the legal community is that the statute does not apply to nonprofit organizations, but that in light of Sarbanes-Oxley, regulators and the public are going to be taking a closer look at how nonprofit boards of directors manage the affairs of the corporation. In fact, the Internal Revenue Service is already drafting new regulations impacting nonprofit accounting and reporting.

In 2005, the ABA Coordinating Committee on Nonprofit Governance published a “Guide to Nonprofit Corporate Governance in the Wake of Sarbanes-Oxley.” The Guide recommends that a nonprofit organization “should adopt and implement ethics and business conduct codes applicable to directors, senior management, agents and employees that reflect the commitment to operating in the best interests of the organization and in compliance with applicable law, ethics business standards and the organization’s governing documents.” The Guide observes in relevant part that such codes should include “definitions of procedures for handling conflict of interest.” The Guide continues: “Conflict codes should cover self-dealing transactions as well as prohibitions against personal use of corporate assets....”

Steve Gunderson, President of the Council of Foundations, which represents more than 2,000 grantmaking foundations, recently stated, “Foundations are clearly in an era of public scrutiny because we are

growing in size and service, and in public awareness.” In December, the Council placed the Getty Trust on probation for allegedly allowing Mr. Munitz, the Getty’s President, and Marion True, curator, “use of foundation assets for personal benefit and potential self-dealing, as questions about its spending became public and the trust did not cooperate fully with an inquiry begun by the Council. The Council, which can censure or eject members, said it was looking into whether trust officials had used the trust’s money for personal benefit; into a land deal between the trust and Eli Broad, a billionaire financier who is a friend of Mr. Munitz, the Getty Trust’s President, and into whether there was “inappropriate compensation” for the foundation’s C.E.O. and potential self-dealing.⁸

Form 990 and Its Opportunities

The Form 990 is the information return that most 501(c)(3) charities file annually with the IRS. (Organizations with revenues of less than \$25,000 and religious organizations are exempt.) Although audits provide more comprehensive financial information, few not-for-profit organizations conduct or are required to conduct audits. Consequently, the Form 990 is the primary source of information about the nonprofit sector.

As of June 8, 1999, the new IRS regulations provide greater access to the public to Form 990. In the past, a nonprofit only had to disclose its Form 990 if a request was made in person at the nonprofit’s offices, and was not even required to make a copy. The new regulations require that a 501(c)(3) organization make copies of its three most recent Forms 990 for anyone who requests them, whether in person or by mail, fax, or e-mail.

The Internet is making the Form 990 more widely available than ever before. Since July 1998, Forms 990 received by the IRS have been scanned and are available at Guidestar.

The Form 990 is a primary source for data. As previously mentioned,

8. For an expanded discussion of ethics in the art world, see *Ethics and the Visual Arts*, eds. Elaine A. King and Gail Levin (Allworth Press, September 2006), Chapter 19, Hoffman, “Law, Ethics and the Visual Arts: The Many Facets of Conflict of Interest.”

9. For example, the 990 reveals how much executive directors and staff in comparable organizations are being paid and what their lawyers charge.

other foundations' budgets are an excellent aid in fiscal planning. The 990 also is a source of industry "gossip."⁹

Best Practice. Filing a complete and accurate Form 990 with the IRS and state charity officials is the law. However, artists' foundations and trusts should see the 990 not as a burdensome obligation but rather as a public relations opportunity. Forms 990 also help the organization to comply with the enhanced accountability and transparency required of nonprofits. A recent survey indicated that two out of three grant-makers also used the 990 in assisting them in making their final awards.

OVERVIEW OF LEGAL ISSUES

A complete discussion of the legal issues involved with the management of an artist's trust or foundation is beyond the scope of this chapter. For governance and corporate issues, the reader is counseled to review the IRS Draft-Good Governance Practices for 501(c)(3) Organizations. (See Appendix A-9.)

With respect to day-to-day activities in furtherance of its mission, the foundation, estate, or trust should enter into written contracts whether the transaction is a loan of art to an exhibition, the organization of an exhibition, sale, or licensing of art, or any other of the numerous activities previously discussed herein. Both good practice and the IRS require the trust, estate and/or foundation to adopt grant guidelines and procedures, if grants are to be awarded.

The Risks of Legal Liability for Attribution of Works of Art

Authentication and the preparation of a catalogue raisonné by the foundation or trust pose special risks which merit discussion here. In Chapter 3, the concept of "droit moral" or "moral rights" was briefly discussed. In civil law countries like France, an heir or designee by will is given authority to assert the artist's "moral rights," including the right to authenticate which works are done by that artist. In the United States, moral rights do not include the right of attribution by persons other than the artist. *Greenwood v. Koven*, a 1993 New York case, although decided on other grounds raises interesting issues concerning the moral right under French law and U.S. law as it respects authentication.

Jane Koven owned a pastel purportedly created by Georges Braque, a prominent twentieth-century French painter. On May 16, 1990, Christie, Manson & Woods International, Inc. sold the Braque pastel by auction for \$600,000 to Barbaralee Diamonstein. Christie's remitted the sale proceeds to Koven. Diamonstein raised questions about the pastel's authenticity shortly after the sale. On January 10, 1991, Christie's, purportedly concerned about the authenticity of the pastel and the potential liability those concerns portended, rescinded the sale, returned the purchase price to Diamonstein, and sought return of the sale proceeds from Koven.

Koven refused to remit the sale proceeds, believing that Christie's acted improperly in rescinding the sale, since prior to the sale Christie's own experts had conclusively determined the artwork was a Braque.

Diamonstein demanded authentication by an outside scholar, and Christie's contacted Claude Laurens who held the *droit moral* for Braque. Christie's contacted Laurens through his son Quentin, and in November, 1990, Christie's had the pastel flown to France where it could be examined by Quentin Laurens, who had been given the moral right. Quentin informed Christie's that he did not believe the pastel to be the work of Braque, and that a certificate of authenticity would not be issued.

In dismissing Ms. Koven's case, the Court stated:

I think it appropriate to say something about the import of this opinion, given that counsel for Christie's and Koven have each presented a parade of horrors likely to result from a decision adverse to their clients. Koven's attorney, in particular, has stated that this opinion will have tremendous implications for the glamorous world of art collection and dealing, that it will be an important statement about the complex relationship between buyers, sellers, and auction houses, and that it will determine the proper role to be played by different types of experts in arbitrating the authenticity battles of artworld titans.

These predictions notwithstanding, it should be apparent that this decision is mostly about the relatively unglamorous world

of contract law. The Consignment Agreement in this case clearly addressed the dispute between the parties. Though Koven is understandably dissatisfied with the rescission of the sale, Koven read and understood the Consignment Agreement and is bound by its terms.

For the work of some artists, special authentication boards or committees have been established to answer inquiries of authenticity, many by the artists' foundations. Those seeking authentication typically provide a board or committee of experts with the work itself or photographs coupled with information such as the work's size, medium, any publications or exhibitions the work has been included in, and any information or documentation relevant to the work's provenance.

To protect themselves, authentication boards and committees of experts often require applicants to "hold them harmless and indemnify them against any resulting claims." Applicants must also acknowledge that the board's decision is an "opinion," not a "warranty or guarantee."¹⁰ The committee may also contract for certain rights, such as the right to publish its opinion with an image of the work, to "permanently mark" the work issue "to reflect its opinion," to alter its opinion in the future if new information comes to light, or to not issue an opinion at all.

The Pollock-Krasner Authentication Board, Inc. was established in 1990 to provide authentication services, free of charge, for works of art purportedly created by either Jackson Pollock, or his wife Lee Krasner. After the Pollock-Krasner Authentication Board had been sued several times by individuals whose works were deemed forgeries by the board on legal theories ranging from negligence, slander of title to anti-trust, the authentication board stopped authentication for several years. Recently, however, the discovery by Alex Matter of a large number of "Pollocks"

10. This distinction arises from constitutional jurisprudence which originally distinguished assertions of fact from opinion to create the breathing space required by the First Amendment. That safe harbor was eliminated by the 1990 Supreme Court case of *Milkovich v. Lorain Journal Company*. The Court stated that as far as the First Amendment is concerned, even "opinions" can give rise to defamation actions if the opinion includes "a provably false connotation."

which belonged to his parents, Herbert and Mercedes Matter, and their authentication by a former board member and author of a well-received 1989 Pollock biography, Dr. Ellen Landau, has caused the foundation, which considers the works fake, to reconsider authentication. Former members of the authentication committee, including Eugene Thaw and catalogue raisonné scholar Francis O'Conner, agree the works are fakes. None of the previous suits against the authentication committees were successful. As the Court stated in the last litigation where the authentication board was sued for failure to authenticate a Pollock, signed on the back by "Pollack."

The defendants have submitted overwhelming proof that every single one of the plaintiff's claims in this case are not only without any merit whatsoever, but constitutes a laughable and clumsy attempt at fraud. In the absence of a contravening public policy, exculpatory provisions in a contract purporting to insulate one of the parties from liability resulting from that party's own negligence, although disfavored by the law and closely scrutinized by the courts, generally are enforced, subject however to various qualifications. Where the language of the exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence, the agreement will be enforced. The court held for the Pollock-Krasner Authentication Board.

Best Practice. Prior to any authentication by a foundation or board, the person seeking to authenticate the artwork should sign a written agreement which in substance and effect states: "I agree to hold the Authentication Board and its directors and officers in their representative and individual capacities harmless from any liability towards me or others because of its rendition of an opinion (or its refusal to render any opinion)." The agreement should provide also that nothing the Authentication Board "says should be considered a factual statement nor a representation or warranty with respect to the authenticity, provenance, or condition of artwork submitted." The agreement should also provide a broad arbitration clause.

There is little reason to fear that an expert committee involved in authentication will ultimately be held liable for its opinions if it follows best practices and avoids certain recurring situations which may give rise to claims for negligence, defamation, or product disparagement.¹¹ My own experience is that many experts have misconceptions of the laws and exaggerated fears not necessarily based on facts.

The Catalogue Raisonné

A catalogue raisonné is an authoritative index of an artist's work, covering either the artist's full oeuvre or a specific category of his other works. It is an invaluable reference, often containing detailed descriptions, history, and provenance for each work. Primarily, however, it is a list of all known works attributed to the artist. Therefore, when the authors of a catalogue raisonné omit a work, they cast serious doubt on its authenticity and profoundly affect the work's marketability. As the attorney for a leading art dealer put it, "If a work isn't going to be included in the catalogue, from a commercial view it's the death of your painting." For this reason, a catalogue raisonné committee may have exposure to similar legal claims for omission of works from a catalogue raisonné: negligence, defamation, disparagement, fraud, anti-trust, and negligent misrepresentation, if the expert is a fiduciary. As noted previously, a carefully drafted contract prior to consideration of the work and insurance will serve to protect the expert in the unlikely event of lawsuit except in the event of gross negligence or fraud.

The Catalogue Raisonné Scholars Association was founded in 1994 to serve the interests of authors of catalogues raisonnés of works of art. Members are typically engaged in the study of a single artist's body of work to establish a reliable list of authentic works, their chronology, and history (usually including provenance, bibliographic, and exhibition histories). The membership also includes those who are not actively engaged

11. See Levy, S.M., "Liability of the Art Expert for Professional Malpractice" in 1991 University of Wisconsin Law, Rev. P. 509. See also, Spencer, R.D., *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts* (Oxford Univ. Press, 2004). See also Hoffman, B., College Art Association Annual Meeting, Catalogue Raisonné Scholars Association, February 1995, "Issues of Liability and Copyright for the Catalogue Raisonné Scholar."

in such a project but who have a keen interest in this type of work, such as patrons, collectors, art dealers, attorneys, and software designers. The organization publishes a newsletter, the CRSA Forum, and maintains a list serve for discussion of relevant issues. As an affiliated society of the College Art Association, the CRSA holds its annual meeting and program at the CAA Annual Conference. It holds interim panels in New York on an occasional basis and has begun collaborating with the New York University School of Continuing and Professional Studies to mount an annual symposium.

Best Practice. Foundations and estates involved in preparing a catalogue raisonné are advised to participate in the Catalogue Raisonné Scholars Association or other professional associations. I have always thought it a good idea for the College Art Association to provide a resource bank of scholars interested in working with a particular artist's estate or foundation and serve as a network to connect artists, their estates, and foundations to interested scholars.

Sale of Artworks by the Foundation or Estate

Most artists' foundations and estates sell art. Difficult questions arise for an executor and trustee regarding sales of works of art: whether to retain the artist's dealer if the artist had a dealer prior to death, whether to engage a new dealer, when and whether to sell works of art, and whether to sell through a dealer or at auction, are questions which should be discussed by the board of directors, the executor, or the art executor.

Professional advice should be sought on the basic artist-dealer consignment agreement and careful attention paid to the scope of the dealers' agency—exclusive versus nonexclusive, territory and medium, and the term, as well as basis for early termination.

Foundations may prefer to sell at auction. If the foundation has multiple works to sell and/or sells often, relationships with several auction houses should be developed. Different auction houses serve different geographic areas and have expertise with different collections. As in the sale of an artist's personal archive, the quality of the artwork and the notoriety of the

artist will determine value. Auction houses may provide useful advice on whether to sell, appropriate values, reserves, and guarantees. The executor or board of directors should solicit proposals from more than one auction house. The basic auction contract of Sotheby's and Christie's, the two major auction houses, can be found online. While certain provisions of the standard agreement are not negotiable, certain provisions—reserves, guarantees, commissions, insurance, and costs—may be negotiable and the executor or board of directors should seek advice if not familiar with such contracts to comply with the fiduciary duty of care imposed upon them.

URLs Referenced in this Chapter

Guidestar <http://www.guidestar.org>

Richard Avedon Foundation <http://www.richardavedon.com>

Laszlo Mohly-Nagy Foundation <http://www.moholy-nagy.org>

The Larry Rivers Foundation, Inc. <http://www.larryriversfoundation.org>

The Barnett Newman Foundation <http://www.barnettnewman.org>

Adolph and Esther Gottlieb Foundation <http://www.gottliebfoundation.org>

Reuben Kadish Art Foundation <http://www.reubenkadish.org>

The Joan Mitchell Foundation <http://www.joanmitchellfoundation.org>

Roy Lichtenstein Foundation <http://www.lichtensteinfoundation.org>

DeKooning Foundation <http://www.dekooning.org>

Judd Foundation <http://www.juddfoundation.org>

Calder Foundation <http://www.calder.org>

Nancy Graves Foundation <http://www.nancygravesfoundation.org>

Judith Rothschild Foundation <http://www.judithrothschildfdn.org>

Romare Bearden Foundation <http://www.beardenfoundation.org>

Saul Steinberg Foundation <http://www.saulsteinbergfoundation.org>

Josef and Anne Albers Foundation <http://www.albersfoundation.org>

Barnett Newman Foundation <http://www.barnettnewman.org>

Keith Haring Foundation <http://www.haring.com>

Isamu Noguchi Foundation and Garden Museum <http://www.noguchi.org>

Through the Flower <http://www.throughtheflower.org>

Catalogue Raisonné <http://www.catalogueraisonne.org>

CHAPTER 6: THE ROY LICHTENSTEIN FOUNDATION¹

Jack Cowart

I am nominally copying, but I am restating the copied thing in other terms. In doing that, the original acquires a totally different texture. It isn't thick or thin brushstrokes, it's dots and flat colors and unyielding lines. It seems to be anti-art, but I don't think of it that way.

— Roy Lichtenstein (1983)²

Roy Lichtenstein was born to middle-class parents, Milton, a real estate broker, and Beatrice (née Werner) Lichtenstein, on October 27, 1923, in New York City. He and his sister grew up on the Upper West Side. He studied with American scene painter Reginald Marsh at the Art Students League in 1939, then at Ohio State University from 1940 to 1943. In 1943, he entered the United States Army, serving in Europe as a cartographic draftsman until 1946. He returned to Ohio State, and after obtaining a B.F.A. degree that June and an M.F.A. in 1949, he taught there until 1951. In 1949 he married Isabel Wilson, assistant in the nonprofit 10-30 Gallery in Cleveland. Their sons, David and Mitchell, were born in 1954 and 1956. Between 1951 and 1957, Lichtenstein worked intermittently as an engineering draftsman in Cleveland and at other designing jobs while continuing to paint. His final period of teaching was at New York State College, Oswego, from 1957 to 1960 (where his work was abstract expres-

1. This chapter is reprinted with the permission of Rutgers University Press, Salvesen, Magda and Cousineau, Diane, eds. *Artists' Estates: Reputations in Trust*, chapter 9, pp. 336–351. Copyright © 2005 Magda Salvesen.

2. Statement made in February 1983, quoted in *Roy Lichtenstein*, by Lawrence Alloway (New York: Abbeville Press, 1983), p.106.

sionist), and at Douglass College, Rutgers University, New Jersey, from 1960 to 1964. His first paintings of comic strip characters and speech balloons appeared in 1961. With their exhibition at Leo Castelli the following year, he was launched as the leader of the new pop style and moved into New York City in 1963. He was divorced in 1965 from Isabel, who received custody of the children, and married Dorothy Herzka in 1968. In 1971, they moved to Southampton, New York, but after 1982 they maintained the option of living and working in the city.

A lifelong interest in the machine quality of printing, whether in newspaper and magazine advertisements or in art magazines and books, as well as the art deco style, provided a wealth of material for Lichtenstein. Usually working in series, he began in the mid-1960s—with deadpan humor and using emphatic forms and colors—to make pop versions of twentieth-century styles, working his way through cubism, futurism, surrealism, and so on. Beginning in the early 1980s he created witty sculpture cutouts, subsequently fabricated on a large scale for public plazas or sculpture gardens. He died of pneumonia on September 29, 1997, at the age of seventy-three....

The double-storied, skylit, sixty-by-eighty-foot former studio of Roy Lichtenstein in the West Village of Manhattan now houses the foundation that his widow formed in his name. Its new function is reflected in the office compartments and the bank of filing cabinets that take up two sides of the room. But, as I saw when I went to visit Jack Cowart, the foundation's director, the presence of Lichtenstein was still strongly felt: his painting wall has been left intact, and his paintings and sculpture—on their way to or from the warehouse—could be seen in the main area of the studio, while his prints hung in the room upstairs where we talked.

...

You were in the museum world for many years. What enticed you to move from Washington to New York and become the executive director of the Roy Lichtenstein Foundation?

After I finished the Matisse paper cutouts show of 1977, I decided that I wanted to work with a living artist. I hit upon Roy Lichtenstein. He hadn't

had a lot of exhibitions since the retrospective at the Guggenheim in 1969, so I pitched him the idea of doing an exhibition of recent work and then touring it around the world. I was based at the Saint Louis Art Museum at that point, but I spent a lot of time staying with Roy in Southampton on Long Island. He and Dorothy were very generous, and we got to know each other. I had an art historical, curatorial way of thinking—quite different from Roy's—but he put up with me. We were periodically together in the early 1980s when the exhibition *Roy Lichtenstein 1970–1980* traveled, and we stayed in contact.

When I was called by the National Gallery in 1983 to take over the twentieth-century department, he was the first artist I invited to create an artist's room. Every five years or so, I would dream up another way for us to do something. Or if Roy needed an essay for an exhibition catalogue, I would sometimes get a call. Being involved with the Meyerhoffs as they formed their collection for the National Gallery put me in continued contact with Roy, and the Gemini print exhibition at the National Gallery in 1984 was another big project that involved his work.

I certainly wasn't aware that he was deathly ill in the summer of 1997—by then I was deputy director and chief curator at the Corcoran Gallery of Art—so it came as a big shock to me when Roy died so quickly. It also came as a relative shock when Dorothy revealed that there was a plan for a foundation and asked me to participate. It was intriguing, but I didn't want to move from Washington, especially since my wife's career is there and we had deep community roots. Dorothy said, "Oh, you don't have to. We'll be very flexible about it. I can't think of anyone better." I probably could, but I didn't want someone else to get the job!

So I live in this guesthouse beside Roy's former studio when I am in New York, and then, from Virginia, I can annoy the staff by e-mail, fax, and phone. Maintaining constant communication is a major part of our operation, especially with Mrs. Lichtenstein, who travels a good deal.³

3. Dorothy (née Herzka) Lichtenstein was born on October 26, 1939, in New York City. After obtaining her B.A. from Beaver College (now Arcadia University), Pennsylvania, in 1960, she worked at the Paul Bianchini Gallery in New York from 1963 to 1969, meeting

Our job is to give her the freedom she deserves. She is less resident in Manhattan than previously, staying on the eastern end of Long Island during the summer and in Florida during the winter. She travels a good deal, but we try to stay in touch as best we can.

The Barnett Newman Foundation is a small, functional office space in midtown, rented after Annalee Newman died, whereas you work in Lichtenstein's studio and are surrounded by his work.

Certainly it is a great privilege. It is a constant delight to be able to hang things up for ourselves and then learn from them. Then, because I live here with his art, I can actually watch television and look at a Lichtenstein sculpture at the same time—and begin to think about what was in Roy's mind. We want to maintain the studios in a way that will allow curators and others who want to think about Roy's work to breathe a little bit of that air and to understand the scale of things, the light, and the setting. At the same time I'm not trying to create a mausoleum. I think he does still inhabit these spaces in some way. The paint marks and the studio materials are still there. But this New York space wasn't his only studio. From 1988 to 1997 was a good run. If he had lived here forever, that would have created a very heavy burden, I think, similar to that of maintaining the Brancusi studio.⁴

The Southampton studio that Roy was in from 1970 onwards would be a harder place to disengage from. The National Trust for Historic Preservation and the Henry Luce Foundation have funded a project looking into the problems and requirements for preserving artists' studios. I'm watching from the side.

So besides the possibility of visiting Georgia O'Keeffe's studio in New Mexico in the future, one might also be able to visit the Lichtenstein studio, the de Kooning studio, and so on?

Roy Lichtenstein in 1964. They married in 1968. Her book, *Pop Art One*, was published in 1965. She became an Officier de l'Ordre des Arts et des Lettres in 2000.

4. The sculptor Constantin Brancusi (1876–1957) bequeathed the whole of his studio and its contents to the French government. It has been reconstructed outside the Pompidou Center in Paris.

Yes, and there's a whole group of living artists like Cindy Sherman, Chuck Close, and Julian Schnabel on the eastern end of Long Island. Should Roy's be managed by the Parrish Art Museum in Southampton, or should it be part of a consortium of artists' studios? Should it be independently funded by the foundation? Should it be torn down? Should it be moved? Do we let it, like Alfonso Ossorio's, get sold to a private individual? If it becomes a public facility, you have to have a parking lot, the handicap facilities, the ramps, and so on. Georgia O'Keeffe had dirt floors. What do you do with dirt floors and five hundred people? You can't. You ruin the studio by trying to save it. But people still want to make pilgrimages. Do you buy into the pilgrimage site, or do you forget it? Delacroix's studio on Place de Furstenberg in Paris is a great evocative setting, but Gustave Moreau's feels dusty and dead. Dorothy and I do kick these questions around as part of the open agenda. The house in Southampton is going to a Lichtenstein family member. Nobody wants to have a studio open to the public in their side yard, with people knocking at the door, saying, "Can we come in?" like the Pollock-Krasner House at Springs, New York.

Would you ever think in terms of setting up a Lichtenstein museum elsewhere?

No, for many reasons. Roy didn't want one. The family doesn't want one, and we're not interested. We couldn't anyway because we only have very early Lichtenstein or relatively middle to late Lichtenstein. Increasingly, Roy was able to keep back more work, but he sold almost everything that he was making in the 1960s in order to stay in business, to stay alive. You can't have a Lichtenstein museum without some of the great pop sixties masterpieces. We wouldn't want it to look like the Fernand Léger Museum in Biot, which has all the things that Léger couldn't sell, or late works, and none of the core.

Did you have any previous experience dealing with the complications of foundations?

Having lived through the Rothko Foundation situation when I was at the National Gallery, I prayed heavily that this was not some kind of bear trap. I'd also witnessed the O'Keeffe heirs suing each other until the day

they decided to settle and become a foundation. But Roy was scrupulous in his relationships and very clear. I felt that we were starting with a completely fresh charter. And, like Roy, it was joyful.

After the wide scope of the museum world, does focusing on one artist suit you?

I've been in the museum business for twenty-seven years. I must have been involved with three hundred or five hundred exhibitions, thousands of objects, two-hundred-thousand-square-feet of gallery space, fifty staff members, and endless reports. It is wonderful at this stage of my life—and having developed a certain cynicism about the museum, gallery, and collecting world—to be able to work on “one” subject. Actually, my job involves the same kind of things as museum work: publishing, research, exhibitions, management of objects. We have a mini-museum collection here. So it's very curatorial, art-historical, political, and amusing, and it's very family-related. There are four of what I call our technical side: myself, my managing director, the accountant, and the lawyer. And then there are the four Lichtenstein family members: Roy's two sons, his sister Renée Lichtenstein Tolcott, and his widow. We don't have outside members on the board. However, it's not insular or secretive. Although there is a charter that states the five basic purposes of the foundation, in typically Lichtensteinian fashion, we are quite content in our board meetings to adjust or add to them as needs demand. We're in total control—not total control, relative total control—of our own destiny. We can do what we want, responsibly, and have the luxury of setting a course under our own steam and then navigating it. When Roy did something, he did it very well. And now Dorothy Lichtenstein, too, insists on a very high level of quality, which directly relates to my nine years with the National Gallery, where we had enormous resources and very high expectations.

Could you talk a little bit about the financial structure of the organization?

The foundation clicked into existence at Roy's death, beginning as a legal entity with no assets. We're private and will only give grants if we have an income greater than our own needs. The foundation exists to facilitate exhibitions of the work of Roy Lichtenstein, to publish catalogues raisonnés,

and to encourage new scholarship. We also want to do good deeds and be a model of good management for artists' foundations. The end game is to get Roy's remaining art into major urban centers, cultural complexes, and museums.

When we had our first board meeting, we asked ourselves how long we wanted to stay in business. O'Keeffe sunsets in 2006, the Judith Rothschild Foundation in 2018. We roughed out about thirty years, or until the last person who knew Roy still cares. It depends, too, on how deep the family involvement of his sons and grandchild will be. We came up with three interlocking ten-year plans. This all relates to the financing. Dorothy gave the money from the estate to run the foundation. I'm also informal chief policy advisor to the estate. There are other direct links in that Cassandra Lozano, the part-time managing director of the foundation, is also part-time administrator of the estate, and the accounting teams and the lawyers are the same.

We began with a primary donation of art from the estate to be sold over time, if proper placement came up. Eventually, some were placed, providing around \$10 million. That created the "starter endowment," which we put into treasuries and fixed return investments. The income meets about half of our operating expenses. The rest are check-written from the estate. Recently we've fabricated some objects, and the sales will fill in some of the gaps in funding and be set aside for ongoing major projects like the catalogue raisonné.

What would improper placements be?

A lot of people bought the work for resale and profit, especially the paintings of the sixties. That was fine in the old days when Roy was making new stuff every year. But, as his position becomes more secure over the years, certainly the idea is to place all works with primary institutions, or to identify collectors who have very firm commitments to an institution so that there is a high probability, something like ninety-nine percent, that their acquisition will eventually go there. There are, though, some things in the estate that can be sold to new and upcoming collectors in an attempt to get them to appreciate the work.

With somebody like Lichtenstein whose work is already so available in museums, is there really a need to keep proving his worth?

Yes, Roy is ubiquitous. He himself, I think, was in general wonderment about his success. He was certainly a driven, professional, and ambitious artist and very sure of his own talent, but making art was his primary purpose. He believed that if the work was good, it would stay on the walls, but the question didn't keep him up late at night.

However, there's more to Roy than the comic paintings from 1962 through 1964. That was two years out of a complex artistic career that spanned forty-seven. We are very keen to reveal these other aspects of Roy's work, whether it's the American or art historical cartoon pieces of the 1950s, the *Perfect/Imperfects* and the *Brushwork* paintings from the 1980s, or the *Interiors* of the 1990s. The Louisiana Museum is now doing a retrospective, *Roy Lichtenstein: All about Art*, which we hope will not be like every other retrospective. We want to see an idea that goes beyond the known ideas. Books are still to be written that will recontextualize and reevaluate the work, going beyond the existing studies, including my own. For example, we have a German Ph.D. candidate, Karen Bandlow from the University of Heidelberg, living with us in this house for the next three months. She's researching Roy's acceptance in Asia and his use of Asiatic motifs, and she's been converted from a Chinese art historian to an American contemporary art historian in the process. She reminds us that Roy lived from 1951 to 1957 in Cleveland, which has a great Asian collection from Japan, China, and Korea, and he must have picked up something there.

We have an archive that was transferred as a gift about a year and a half ago from the estate: the papers, object records, and photographs of Roy. All the filing cabinets and their contents are now ours, as well as the library, but not the real estate property. Our databases now say that Roy produced some five thousand unique works—each of the print editions counts as one. If there are five thousand in all, I can figure what your next question is—how many works are there in the estate?

Exactly!

At this stage the foundation has fifteen objects—major paintings, sculpture, collages, and drawings—things that we wanted to make sure were not lured away by the marketplace. I don't want to give numbers, but it's fair to say that of the 1,200 paintings that Roy produced during his lifetime, the estate holds a relatively minor number. However, Roy made—and kept for future work—at least three thousand drawings: *croquis*, finished drawings, studies, work in sketchbooks, et cetera. So we have a major reference base here. Following our advice, the estate spent a lot of time getting them measured, matted, inventoried, and organized in solander boxes. We've got them plus the paintings, collages, and maquettes, all recorded digitally so we can share this information. We also have a big website with a tremendous amount of data on it. A vast number of major paintings, various major drawings, collages, prints, and other works are out in the world.

Ours is the obverse of the Warhol Foundation. When Andy died, there were thousands of objects that came immediately into the foundation. The plan was to sell them as reasonably as possible to make up an enormous endowment and give great grants for the advancement of the visual arts. Ours is not like that at all. It's also not like what I imagine the Morris Louis estate to have been at the beginning, when a lot of his work wasn't documented, with unstretched stain paintings on rolls that had never been seen. Almost everything that Roy made was shown, documented, published—except perhaps his pre-1960s works—mostly because he had annual exhibitions at Castelli from 1962 on. He didn't change galleries on a whim, but just stuck it through with Castelli. So we're working with a relatively accessible situation and are also doing two or three exhibitions a year. There are no secrets.

Roy's *Times Square Mural*, which was installed in 2002 in the subway at 42nd and Broadway, was actually finished in 1994, three years before Roy died. Are there other murals that were commissioned but not installed? And you mentioned new fabrications of sculpture?

There are one or two large-scale sculptures that he left as maquettes because the specific commission didn't go forward in the 1980s. There are designs for others, done on spec in the mid-1990s, that also were

not executed, although the ideas were sufficiently developed. They will be seen as time goes by: one will be installed on the Cantor roof garden at the Metropolitan Museum next month [May 2003]. But if there are too many post-Lichtenstein judgments to be made, we don't do it. We err on the side of caution.

We'd really like to remake the *Greene Street Mural*, which was done for the Castelli gallery on Greene Street in 1983, and then purposely destroyed because Roy wanted it to be temporary. If we do, it will not be as an art object, but as a mural-graphic experience, without value, as a recasting, on portable panels. That project may get lost, however, because we're also trying to do a book of great photos of Roy, a new chronology, oral histories, and the catalogues raisonnés. We're working on three retrospective exhibitions and a show for Brazil as well—and things always happen you don't ever anticipate.

Many estates talk a great deal about conservation costs. Is that a worry or a burden for this foundation?

So far it's not. Roy was working with very professional, stable, specifically made, materials. They have a good life span. If we need to have something conserved, we'll have it done. His pre-1960 work is more fragile, and we are overseeing the renovation of some of those owned by the estate. We also want to make sure that Roy's early work owned by others is preserved. We have yet to work out some kind of formulation for helping them, or for reacquiring the work and then fixing it up ourselves. We fully believe that museums owning the artist's work should take care of what they possess. But, if people have problems that impact their ability to show Roy's work, we'll have to consider that as a conservation program for the future. I know the Morris Louis Conservation Fund said that because Louis worked on unprimed canvas and the paintings tend to degrade visually, they would underwrite a program to facilitate their restoration by their known practitioners.

We're working on an artist's material archive at three different institutions that would allow scientists to create databases of information about Roy's materials. We haven't signed a deal and haven't made a transfer. But we will. We're dancing cheek-to-cheek with one institution. The other two are just verbal agreements that this would be a good thing to do.

By the time of his death in 1997, had Roy drifted away from the Castelli gallery?

No, Castelli was still the gallery of record. I don't think there was ever any formal contract of representation when he came into the gallery in 1962, and there wasn't an exit one. Leaving had nothing to do with Barbara [Castelli] or anybody else.⁵ In her recent interview in *Art & Auction*,⁶ she said that it would not be appropriate for her to represent the Lichtenstein estate and foundation.

Whose decision was it to move from the Castelli gallery to Mitchell-Innes & Nash?

In between moving from the Castelli gallery to the Mitchell-Innes, there were two or three years of being noplacement. But the board kept getting pressure from aspiring galleries, and we had been informally looking at all of the applicants. We decided that we had little interest in either sales or exhibitions, but wanted a gallery to organize things and shield us from getting too involved in the occasional deal or two. Dorothy and I had both known Lucy and David for a long time. We took a board vote and had them come down and make a presentation to us. We said, "Okay, we like your thinking. Draw up a contract." We needed the agency of somebody whom we could trust and who wouldn't be intrusive or directive, but would, at the same time, be consummately professional. Roy probably would have gone with some other dealer. He needed a larger space and a different relationship to contemporary artists. But Roy's not alive, he's not producing annually; it's no longer about annual shows of big work. It's about a careful management of the finite legacy.

I know the National Gallery in Washington has a very good collection of Lichtenstein prints following Roy's gift of 154 of them in 1995. Do you want to facilitate other museums in forming major holdings of Roy's work?

5. Barbara Bertozzi, Leo Castelli's third wife, already managed the gallery before her husband's death in 1999 at the age of ninety-one. The Leo Castelli Gallery, now at 59 E. 79th St., is much smaller than the former space in SoHo.

6. The interview, "Act Two," by Anthony Haden-Guest, appeared in *Art & Auction*, volume XXV, no.5 (May 2003), pp. 48-50.

I let in a word earlier about my wariness about museums. However, I admire and, in some cases, understand them all too well and realize the pressures they are under. Roy always wanted his work to be accessible to the public, and museums remain the best, if somewhat flawed, institutions by which one can have that global access. We also believe in institutions of higher learning, university galleries, and study complexes. We believe in large institutions like the Getty and small ones like semi-private museums, so we are pretty inclusive.

Dorothy and the board are much more attentive when people approach us rather than my making blind telephone calls to curators. When they come to us from this country or abroad to organize an exhibition, to add to their collection, to learn more about the artist, or to suggest a publishing project, we like to respond to them. If we find a work on the secondary market, even something that we would like to buy ourselves, we're inclined to call the museum that's approached us and say, "You were looking for a *Mirror* painting of the 1970s. Are you aware that there's a great one coming up at auction?" We'll try to realign work in the outer world before offering one of our own.

Unlike the Motherwell foundation [the Dedalus Foundation] or the Warhol—that say, "Ok, here's the appraised value of the work; we'll sell it to you for half price"—we don't own much work. The estate is set up to provide for the heirs. The foundation is second or third or fourth in line from those front-end costs and needs, and we understand that. We're not about wanting to be the richest foundation in the neighborhood, and we haven't come to the point of large donations. That could come twenty years from now if the foundation is winding down. Then a large group of drawings, or the rest of the print archive, or a collection of maquettes might be gifted to institutions where art history and connoisseurship are taught, both in this country and abroad.

In actual fact, is it necessary for you to make a great distinction between the paintings in the estate and the paintings in the foundation, since you're giving advice on both?

Officially, it's inappropriate for us to be overly involved in the affairs of the estate per se, though we do have an overarching sense of quality control, and we share the same art dealer for certain sales. Dorothy has great expertise in her own right. Over time, more will come from the estate to the foundation, but this beginning-small approach has been very good. She and the family have well exceeded their allowance to claim tax benefits—it is pure philanthropy.

Turning to Dorothy Lichtenstein—your website states that she's been involved in the arts since the 1960s. What has her particular role been within the art world?

In the early sixties, she worked with Paul Bianchini at his gallery in New York. She helped him put together the *American Supermarket* show in 1964, which gave her the chance of working with some Leo Castelli artists and getting them in on this joint project. That was how she met Roy. They got married in 1968 and, I would say, her primary noninstitutional role has been as an involved and sensitive enthusiast. She's very interested in the Trisha Brown Dance Company and other things, usually through her many personal friendships. She's open to new ideas and has a wide inquisitiveness and great intelligence. The foundation is Dorothy's foundation. She is the initiator, the president, and she is not a figurehead. I wouldn't contemplate doing anything that would run contrary to her instincts or her level of comfort.

Was she deeply involved in Roy's career previously?

Dorothy was the more gregarious partner. She is elegant, engaged, verbal, fun, funny, and she didn't take the position of an Annalee Newman type. She created her own independent sphere and was not the mouthpiece for Roy's art. She also has a fantastic memory for the details of the last thirty years. Our oral history program will have endless interviews with Dorothy for as long as she will put up with them. She was involved in so many aspects of Roy's life, and sometimes much more in the art than I might have thought. While she traveled a lot—taking these long treks to China or Africa—Roy, who hated to travel, would be home beavering away.

Were these trips sometimes to do with his work?

Not really. Dorothy is inquisitive, and so she would directly experience other cultures in ways that Roy might not. He would say, "All I need are pictures of it." Her involvement in the art world has been as a partner, as a social and softening agent on behalf of Roy. Then, because she is also close friends with so many of the Castelli artists, and those of the next generation— such as Jeff Koons, David Salle, and Julian Schnabel— she has an indirect but almost tangible presence in the art world and an enthusiasm for it. It's hard to suggest all this on a website for the foundation. She always was behind Roy, strategically, purposefully, personally. When I first met the Lichtensteins in 1977, it was Dorothy and also Olivia Motch, Roy's studio manager, who facilitated access, dovetailing all the arrangements for social interaction with Roy. Dorothy's also very good at remembering who said what to whom about the endless commissions and benefit appearances and charity things that Roy got talked into on an annual basis.

The art historian Lloyd Goodrich is said to have said something like, "Never believe the widow and never listen to the children!"

And never believe the artist or the critic or anybody else! We get through that by triangulating everything. We're now running a strictly informational, oral history program and making wonderful discoveries. Since 2002, Avis Berman has been taping the people who knew Roy substantively during his lifetime, and then *Rashomon*-like we find the truth is someplace in the middle. We have a fascinating time building up the similarities and contrasts, themes and variations from these multiple sources.

The Lichtenstein family is different from more polemical families in that they are casual about their importance. There's no family line that has to be adhered to. We reach edges of sensitivity, but we're not out there to prove a point. Roy had his own kind of internal history that he didn't share, so we can only arrive at some suspicion of it by inference. That means talking to artists whom he talked to. A lot of these are names no one will know. I can go to Bob Rauschenberg, Jim Rosenquist, and Claes Oldenburg, but Roy may not have told them the most revealing things. He told more to people like Stan Twardowicz, whom he was really buddies with, or Spike Landsman, who was interviewed at various times and

let his guard down. They were with him at times of particular growth and change. We're not intending to publish a biography of the artist or these oral histories per se, but we, as well as researchers, can use them as raw data—to be taken with all of the usual caveats—to help us solve certain problems like dating of objects and chronology, especially for the catalogues raisonnés.

Did Roy enjoy socializing in the broader sense?

I think he did like to be relatively social in a cozy way with a certain number of artists. Did he like going to the Warhol factory? I think he liked to see the scene because he knew he didn't have to participate in it and that he could withdraw from it at any time. He would be taken into these mega-experiences by Dorothy or by friends and had a kind of wry, tolerant wit and wisdom about them. "David Byrne? The Talking Heads? I really like jazz," he would say, "but it works fine. I'll use it later. I'll think about it."

How much were Roy's two sons involved in their father's world?⁷

Once Roy and Isabel separated in 1963, the boys spent a formative period living with their birth mother outside Princeton. Mitchell eventually spent a lot of time with Dorothy and Roy in Southampton. David was fairly independent in ways that had to do with surfing, music, and doing his own creative things, but he did spend some time there. To the best of my knowledge, they had a very comfortable relationship with both Dorothy and Roy. Dorothy invited them to be senior officers of the board. There was never any question of either giving up his career, but we ask them to participate as much or as little as they want. I'm sure Roy said, "Well, you know, yes, Dorothy, if you want to, why don't we invite Mitchell and David and Renée to sit on the board?"

Apparently there weren't many letters in the files. Is that because Leo Castelli took care of most things to do with his career?

7. David Hoyt Lichtenstein, a graduate of Columbia University, with a B.S. in electrical engineering, a former rock musician, recording engineer, and software developer, is currently working independently. Mitchell Wilson Lichtenstein, a graduate of Bennington College and Yale School of Drama, has acted in film, television, and theater, and is currently a screenwriter.

I have about ten letters from Roy in the whole archive. He was not a man of the written word. He would talk on the phone a certain amount, but mostly he had other people do the talking for him. The studio assistants, the studio managers in particular, certainly Leo, and the gallery would do the deals and all the paperwork. I don't have access at this stage to everything in the Castelli archives, as they are still privately owned. There is some correspondence from his old buddy artists. He would be tortured for several months trying to figure out how he could write a response. He would usually start with, "I'm sorry it's taken me so long, but writing is not my thing. I'll be lucky if I get to the bottom of the page," and he'd say, "I'll really try hard." His longest letter known to me is about three paragraphs and, if he gets to the back side of the sheet, it's "Phew, I made it!" There are family letters written in 1945 from Europe during the war to indicate that he was still alive, and to comfort his father and mother. But that's the longest string of coherent correspondence. He was much more a talk-to person when he wasn't working.

What about his various studio assistants, who have a kind of insider's knowledge they might reveal?

These issues of disclosure and nondisclosure have to do with the judgment and the sensibility of people. He was generous towards them; they will always be generous towards him. A filmmaker came in last year wanting to do a film about the man, not an art history film. We kind of gritted our teeth and said, "Go ahead and interview these people, but we don't think there's a story. Maybe you can tell us there is." Six months later he came back and said, "You know, I talked to a lot of people. I was really trying to juice them up, but they just said, "Roy was a nice guy."

That means that the emphasis will be on the work and not on the personality or the myth?

I felt it was such a privilege to be asked to come into this startup situation because I admired both the art and Roy's behavior to people. There was a level of trust very quickly between Roy and me. "Do you want to read the text that I've written?" "Not necessarily. I trust you." That's the way we work with museums now. "You don't have to pre-clear your essay

with us. If you want to show it to us, terrific. We'll correct it for factual error, but your spin is your spin. We trust you; we'll take that gamble." There's no family line and no one fixed esthetic. We're still amazed and intrigued by the new information we get from the foundation manager Cassandra Lozano, an artist herself, who worked with Roy as the studio manager for seven years.

What is the foundation's attitude towards intellectual copyright? At the 2003 College Art Association meeting, the difficulty and the expense that scholars have in obtaining reproductions for their books was discussed.⁸

The estate currently holds the copyright on Roy's work and will for the foreseeable future. It is managed by Shelley Lee, who comes in once a week on behalf of the estate. Basically, the net from that operation offsets the cost of having her come in and do quality control. She makes sure that the color is done properly, that there's no overprinting and no bleeding, that a Lichtenstein image is not going to be on a tea cozy and on at least properly made coffee cups, et cetera. The estate has also always subscribed to the major international copyright societies such as [CISAC](#) [International Confederation of Societies of Authors and Composers], and expects those copyright associations to do their proper vetting and billing and control, and every now and again a minor check arrives.

We're pretty accommodating when people come to us with specific needs. When Michael Lobel was publishing his Ph.D. dissertation in book form for a commercial operation with the Yale University Press, [*Image Duplicator: Roy Lichtenstein and the Emergence of Pop Art*], he came to us and said, "We're really having trouble with copyright fees and getting photo rights, and therefore my thesis on Roy," which we kind of admired, "when published, will be underillustrated." I said, "Have Yale write me a letter telling us the cost to handle the rights and reproduction fees, and we will offset that with a grant." Obviously, it's in our best interest to have books on Roy illustrated and in color instead of just fields of gray text.

We have our own difficulties. Because we have so many photographs of

8. "Clearing Rights and Permissions: How to, Why to, When to," sponsored by the CAA Committee in Intellectual Property and the Association of Art Editors, CAA conference, February 22, 2003.

Roy by so many professional photographers, we are constantly negotiating with them to come up with a reasonable fee. Whether it was work for hire [when the photographer doesn't own the copyright] or not is always an open question. What's the standard fee? There is none. Is it two hundred or is it one thousand dollars?

What is your position on royalties?

We often gain more in other ways. I mean, the Louisiana Museum in Denmark is giving away 32,000 of their Lichtenstein publication, so the estate will disregard any royalty share on that. If it goes to hardbound, then we might ask for a nominal fee. Roy always split royalties with the institution. He felt that the institution took the risk of publication and put the front end into it, so he wanted to advance their net gain. We don't have our own product line, and we are under no obligation to market the name to keep, for example, a grant program running.

You mentioned previously that directors of foundations meet together. Do you gather once a month?

That's far too ambitious! When I moved up here, I said, "Okay, what's the peer group?" I had worked with the Rothko and O'Keeffe foundations and realized that they all beaver away in their little cells and don't talk to each other. I didn't want to reinvent the wheel, so I built a list of artists' foundations by going to GuideStar on the Internet and by contacting people. I phoned Arch Gillies at the Warhol Foundation and suggested we get together and form a loose association, and then help other artists making plans for their foundation. About twelve or so foundations assembled here for lunch. It's a freewheeling thing and has no administration. The best scenario is that we try to meet about two times a year. At first, it was basically show-and-tell. Come to our house, we'll show you what we look like, what we do. If we have things on the agenda for discussion, fine. If not, it's social. We just went over to the Dedalus Foundation, and last summer we went on our first field trip, to the Josef and Anni Albers Foundation, outside of New Haven. Our summer trip this year is to the Archipenko Foundation in Bearsville, New York. So it's just, "Gee, it's nice to get together. And by the way, talk to me about how you filed your 990-

PF. Oh, who's your counsel for warranties if you get an attribution blowup that somebody's going to sue you about?"

Now I have a little databank of almost all known American artists' foundations, those evolving for deceased artists, and others being planned by living artists. It's open source material. If someone asks how many foundations there are in the U.S., I'll say, "Maybe forty or forty-five. I'll email you the doc." If there's a question about what you do when you find a fake, I'll say, "I don't know. I'll call Sandy Rower at the Calder Foundation. He does this all the time." It's just a loosely disorganized, spiritually sympathetic group of like- and unlike-minded foundation workers. It's not only in New York. It extends to the Chinati Foundation in Texas [set up by Donald Judd], the Midwest, and the West Coast.

We actually did take a name, the Council of Artist Foundations, because we wanted to encourage IFAR [International Foundation for Art Research] when it was organizing a conference on catalogues raisonnés, and also to give members of the group an opportunity to write letters to their Congresspeople in support of artists giving their work to museums and receiving some tax benefit during their lifetimes. There was a split within the group about lobbying or not lobbying. We ourselves had nothing to gain because our artists had already given and gotten nothing, but we could work on behalf of living artists. While not taking an official position, our emotional position is that cultural institutions should, with proper controls, work out lifetime gifts from living artists rather than leaving it to the estate. So many opportunities are lost; things are sold many times for the wrong reasons—for death taxes, et cetera. In France and Britain, it's a case of national patrimony, and they tend to release the tax burden in some way.

The group also discussed gifts of archival material to institutions. Artists and foundations sometimes find they can't get access to their own archive again without forty-eight releases and a service fee, so we're thinking of developing a group position for those institutions that wish to donate collections but want to be able to get them back when needed.

Do you spend quite a bit of your time authenticating work?

Well, Cassandra will occasionally be expected by the auction houses to help with that. We don't have a formal board that does authentications or appraisals. Informally we'll say, "Yes, it is in the Castelli registry or, yes, it is in Roy's studio records." And we're glad to help because then we know where the work is, and it helps our catalogue raisonné process. We don't expose ourselves or anyone in the foundation to the possibility of legal claims. Some foundations are quite structured and aggressive on this whole issue, and they do prevail six months of trial later. We don't think that Lichtenstein authentication issues are of such profound moment that we want to get into that. I think we can solve them all person-to-person, at a lower level.

Which foundations are more concerned with authentication?

Well, in public record, the Pollock-Krasner Foundation has been involved in landmark cases dealing with authentication issues. *Lariviere v. Pollock*⁹ is a recent case. That's good case law. Certainly the Andy Warhol Authentication Board is separate from the foundation. The Calder Foundation is very aggressive in going after known forgers of Sandy Calder's work.

It seems as though the artist's foundation has become a new entity within the art world, creating new and specialized jobs for art historians, assistants, lawyers, and accountants.

It certainly has. There's a necessity for estate planning and the management of large bulks of material when artists are dying with such enormous holdings of their own work. How does one act strategically, or just responsibly? There is the possibility also of substantial asset buildup, or the hope that maybe a nonfunctional, nonfiduciary estate can be converted to some cash at some point. And, if there isn't a market for the work at present, it can at least be properly distributed to responsible, adopting agencies. The foundations are this intermediary point. We are not all alike by any stretch of the imagination and don't intend to be. We feel

9. In *Lariviere v. E.V. Thaw, the Pollock Krasner Authentication Board, et al.*, the court held that an owner who had signed the Authentication Board's application form containing an agreement not to sue the experts for their opinion cannot then sue the board if its opinion was not what was hoped for. See *IFAR Journal*, 3, no.2 (spring 2000).

wonderfully idiosyncratic, operating within our guidelines established legally and ethically. It's wonderful to be free, but at the same time, I always try to figure out what Roy would have wanted. Largely, he would have wanted not to be troubled by a lot of our troubles. It's our duty to carry on an intensity of investigation that no other institution would be so crazy to do, to indulge our love and our excitement for the work in ways that are responsible and that keeps us going. So we're deep mining. Museums can strip mine, but we can really dig tunnels, burrowing through layers of rock on behalf of Roy, maybe figuring things out.

April 2003

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For Further Information

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CHAPTER 7: THE ANYONE CAN FLY FOUNDATION: THE LIFE, CAREER, AND MISSION OF FAITH RINGGOLD—AFRICAN AMERICAN ARTIST, FEMINIST WRITER, AND CHILDREN'S BOOK ILLUSTRATOR, PAR EXCELLENCE

By Michele Wallace

When nations grow old, the Arts grow cold, and commerce settles on every tree.

William Blake

There's a necessity for estate planning and the management of large bulks of material when artists are dying with such enormous holdings of their own work. How does one act strategically or just responsibly? ...The [artists] foundations are this intermediary point."

Jack Cowart

Executive Director of the Roy Lichtenstein Foundation, 2003¹

Faith Ringgold is professor emeritus at the University of California, San Diego, where she taught art and art history from 1984 through 2002. She is highly praised internationally as a painter, mixed-media artist (soft sculpture, dolls, masks and quilts), performance artist, and lecturer. Ringgold is a prize-winning writer of children's books and has penned an autobiography. She is the recipient of nineteen honorary doctorates of fine arts

1. Cowart is a founder of an organization called the Council of Artist Foundations. The author understands that Dr. Cowart has played a major role in assisting in the development and professionalism of artists' foundations. Chapter 6 on the Roy Lichtenstein Foundation for this author went beyond informational, and was inspirational. Cowart has apparently created a network which is a resource for living artists and their foundations, as well as for the executive directors who must try to interpret the intentions of deceased artists' foundations.

and more than seventy-five awards and grants, including the National Endowment for the Arts Award for Sculpture (1978) and Painting (1987), La Napoule Foundation Award for Painting in France (1990), and the John Simon Guggenheim Memorial Foundation Fellowship for Painting (1987).

Ringgold's art is included in many private and public art collections, among them the Metropolitan Museum of Art and the Guggenheim Museum. She has been exhibited in museums and galleries in the United States, Europe, Asia, South America, the Middle East, and Africa. *Tar Beach*, published by Random House in 1991, is the first of fourteen children's books which Ringgold has written and illustrated. These uniquely illustrated books have won more than thirty awards, including a Caldecott Honor and the Coretta Scott King award for best illustrated children's book of 1991. Aside from her activities as writer and artist, Ringgold makes it a policy to participate on juries and organize exhibitions for young and emerging artists, thus enabling her to continue to support the talent, dedication, and creativity of generations of artists to come.

Faith Ringgold founded the Anyone Can Fly Foundation, Inc. in 1999 as a New Jersey not-for-profit corporation and a 501(c)(3) in order to address the ongoing issues of her particular legacy as an internationally famous African American woman artist. First and foremost to be confronted was the possibility of the misinterpretation of the massive body of artwork Ringgold has created over the course of her career of fifty years, given the ongoing lack of recognition of the collective contributions of African American arts and culture to the American visual arts scene. On the one hand, the problem is systemic in that the contributions of African American culture to the visual arts remain universally unrecognized in terms of art historical interpretation. On the other hand, Ringgold's legacy as a black woman artist is also at risk, once she is no longer alive, from the whims of surviving members of her family who might misinterpret her goals and wishes or, under the pressure of various financial considerations including the outstretched arms of the Internal Revenue Service, be forced to make ill-considered and hasty decisions on the future disposition of her works. Without going into detail, it has happened repeatedly in the case of the works of African American artists that the work was disposed of too

cheaply, or sometimes simply destroyed for lack of understanding of it, its value, or a clear-cut way to store or preserve the work.

It goes without saying that the visual arts require a level of care and attention in terms of preservation and maintenance, which grows increasingly expensive in a world in which space is money. Thus, from the outset, the primary mission of Ringgold's foundation was envisioned as the promotion, documentation, and preservation of the visual arts history and culture of the peoples of the African Diaspora, with a particular emphasis for the foreseeable future on the works of African American artists born during the 1930s and before. The foundation's mission as articulated in its articles of incorporation is to expand the art establishment's canon to include artists of the African Diaspora and to introduce the great masters of African American art and their art traditions to kids as well as adult audiences.

The debate continues in African American intellectual circles over whether or not it is appropriate to borrow the term Diaspora from descriptions of the Jewish Diaspora and the European Holocaust in order to summarize the various narratives of the dispersal across the Americas of peoples of African descent via the Atlantic slave trade from the sixteenth through the nineteenth centuries. In any case, we use the term Diaspora advisedly with the comprehension that subsequent scholarship may find intellectually more apt terminology to account for the rebirth of African cultures as the music, dance, religion, visual and material cultures which were developed by the former slaves of the Caribbean and the Americas.

One of the main goals of the creation of the foundation is to even those odds, to promote the recognition of a canon of African American art and African American artists, and in the process, to prepare the ground for the second stage of the foundation's work after Ringgold's death, which will be to preserve and promote the Faith Ringgold legacy and life work in art, performance, and the writing and illustrating of children's books. The relationship of the foundation's present mission to its intended mission in the second stage of its existence makes complete sense. Specifically, without the existence of a canon of African American art in the nineteenth and early twentieth centuries, it makes little sense to talk about the genius and mastery of Faith Ringgold born in 1930.

Indeed, even when the art world chooses to selectively recognize an individual black artist (for example, in the cases of Jacob Lawrence, Romare Bearden, and Jean Paul Basquiat), it is always on the pre-condition that this is someone who is unlike other African Americans, whose work distinguishes him or her from other African Americans, who is more universal or modern or humanistic or anything but black and African American, so that each success story among African American artists puts the group collectively further and further back in terms of the recognition of the collective reality of the group. One of the fascinating things about Ringgold's development is that she has built her career in such a manner that it is almost impossible to use her accomplishments for this purpose.

Which is why Ringgold could only conceive of doing the work of her foundation by first taking up as well the task of laying the groundwork for a total paradigm shift in the perception of the art world of African Americans in the visual arts collectively. How did she know this was what she needed to do? Simply because she has had to do this from the outset at every step of her journey toward becoming a black woman artist. Before each step in her individual development is taken, she must first insist upon the existence of her potential to take that step. Why? Because at every step, there were always plenty of detractors in the art world itself ready to tell her that what she was attempting to do could not in fact be done.

The Anyone Can Fly Foundation is unique and unprecedented among foundations founded by African American artists. Artists' foundations in general have only fairly recently become a significant movement in the dispensation of white American and European artists. For African American artists who have much less mainstream financial support, the artist foundation remains still largely unobtainable. Nonetheless, the Anyone Can Fly Foundation, through the efforts of Ringgold and a loyal band of supporters and contributors, is an accredited 501(c)(3) private operating foundation, which pursues its programs based upon the support and donations of voluntary contributions and labor.² Although

2. The Romare Bearden Foundation has received a preliminary and anticipates definitive ruling on its public charity status based on percentage of funds received from the public.

the Anyone Can Fly Foundation is a public charity, it has not applied for grants in the past because of the impermanent nature of grants as a continued source of funding. The foundation currently operates out of offices located at 345 West 145th Street in Harlem in a co-op apartment, which the foundation will also inherit.

Ultimately, the purpose of the foundation will revert after Ringgold's death to the more traditional function of an artist's foundation of overseeing and protecting Ringgold's specific achievements as an artist, writer, and visionary. Her entire collection of art copyrights, royalties, and unpublished works, as well as property and land, will be bequeathed to the foundation upon her death, thus providing the foundation with an ongoing source of endowment. This foundation will also at this point oversee the completion and publication of Ringgold's catalogue raisonné, on which she continues to work.

The foundation annually offers a series of scholar and educator grants designed to promote research and knowledge of the history of African American artists among audiences of both children and adults.

DESCRIPTION OF FOUNDATION PROGRAMS

The Distinguished African American Scholar (or Artist) Lifetime Achievement Award includes a monetary grant of \$2,000 to the designated recipient. Winners thus far have been in 2004 Cuesta Benberry, celebrated art historian of African American quilts; in 2005 David Driscoll, artist and Professor Emeritus of Art and Art History at the University of Maryland in College Park; in 2006 Elizabeth Catlett, sculptor and printmaker; in 2007, Samella Lewis, art historian and artist. Each Distinguished Scholar (and/or Artist) has been extensively interviewed on videotape concerning the contributions of his or her life's work and contributions to African American art history. The videotapes will appear in full on the foundation website together with a complete written transcript of the interviews. Distinguished Scholars are awarded their prizes at the annual foundation garden party given the last Sunday in June each year since 1999. In 2007, the artworks of Samella Lewis were also featured in a special exhibition during the garden party.

Future Distinguished Scholars under consideration are painter Richard Mayhew, printmaker Margaret Burroughs, quilter and sculptor Aminah Brenda Lynn Robinson, and Evangeline Juliet Montgomery.³

In addition to the annual Garden Party as a fundraiser, there is an annual art exhibition and silent auction held each year at the ACA Gallery at 529 West 20th Street, 5th Floor in mid-October. There is live music and wonderful soul food and festivities at both the Garden Party and the Silent Auction.

The foundation offers a Printmaking Scholarship to selected artists who have never made a print edition before. Half the edition of twenty-five prints becomes the property of the Anyone Can Fly Foundation for exhibition and sale. The scholarship recipients, who thus far have been Grace Matthews, Linda Freeman, and Samantha Hill, make the prints either at the Robert Blackburn Printmaking Workshop or at the Experimental Printmaking Institute with Curlee Holton at Lafayette College. The Anyone Can Fly Foundation made a \$4,000 donation to EPI in 2006 in order to support the printmaking scholarship.

The foundation also sponsors an Art with Kids grant overseen by Barbara Wallace in which teachers who apply go into the public schools to do presentations on African American artists included on the ACFF Masters List. The teachers who have thus far participated in these programs are Linda Camardo, Trish Maunder, Dawn DeCosta, Robin Miller, and Jose Ortiz. ACFF also sponsors a professional scholar's grant, in which \$2,000 is given to an art historian for producing a 3,000-word illustrated essay on one of the designated Masters of African American Art from the ACFF approved list.⁴

3. Richard Mayhew (http://www.acagalleries.com/dynamic/artist_bio.asp?ArtistID=15); Margaret Burroughs (<http://www.slam.org/images/spex/BLKHIST/burroughs.html>); Aminah Brenda Lynn Robinson (<http://www.columbusmuseum.org/view/robinson.php>); Evangeline Juliet Montgomery (http://www.udel.edu/museums/jones/archive/archive_pages/artist_pages/montgomery.html)

4. Masters of African American Art (born 1765–1920). See <http://www.anyonecanflyfoundation.org>.

Essays currently featured on the ACFF website (<http://www.anyonecanflyfoundation.org>) include: "Patterns of Change: the Work of Lois Mailou Jones" by Dr. Catherine Bernard; "A Life In Print: Robert Blackburn and American Printmaking" by Dr. Deborah Cullens-Morales; "Casting Feral Benga: A Biography of Richmond Barthe's Signature Work" by Dr. Margaret Rose Vendryes; "A Child's Eye: An Artist's Mind, and a Man's Heart: Romare Bearden" by Dr. Lisa Collins; and "The Sculptural Legacy of Selma Burke" by Dr. Lori Verderame.

Board meetings take place regularly in conjunction with the annual Garden Party and the annual silent auction and exhibition of the ACFF collection. The foundation also hosted a holiday party for its volunteers in 2006 and plans to do so again in December of 2007.

In 2008, the Anyone Can Fly Foundation will celebrate its tenth anniversary with the inauguration of an endowment to raise capital funds for an artist-in-residence (AIR) program for children six to twelve years old. To be called the Anyone Can Fly Kids Artist-in-Residence Endowment Fund, it will begin with an initial donation of \$50,000 from Ringgold with the intention of raising matching funds designed to purchase an appropriate property for housing a residency program for children in which there would be a concentration on learning about the arts and producing art for a period during which school was not in session.

The future for the Anyone Can Fly Foundation is a bright one indeed. Please join us in the celebration of our tenth anniversary.

CHAPTER 8: JUDD FOUNDATION NEW YORK/MARFA

Barbara Hunt McLanahan
Executive Director, Judd Foundation

INTRODUCTION

Following the creation of an endowment in 2006, Judd Foundation entered a new phase in its development. With the appointment of its first Executive Director in 2006, and subsequent staff expansion, the Foundation has begun to build an administrative and financial infrastructure that will enable the growth of programs that properly facilitate the fulfillment of its mission. The founding Board of Directors has been expanded from four members to the current six. The Board is undertaking strategic planning, working on a development plan that will consider board expansion, the role of family members and lifetime trustees, the status of the Foundation as a private operating foundation (as opposed to a public charity) and its impact on the foundation's fundraising potential, as well as the growth of its programs relative to staffing and infrastructure.

It should be noted that these developments are fairly standard in the lifecycle growth of a nonprofit, particularly the growth of an artist's foundation. The resolution of estate matters is often a complex and lengthy process, and the foundation's board of directors must prioritize their volunteer efforts to best serve the organization's mission. As professional staff are gradually appointed and resources become available, issues of archiving, collections management, conservation, scholarly research, and public programming can be considered, and achievable plans can be put into place. The Board—once called upon as volunteers to undertake critical work as it arises to ensure the protection of the artist's legacy in its early stages—move into a new leadership role. With professional

staff to oversee the foundation's organizational management demands, the Board is now able to function as a strategic and visionary body that directs the staff in the fulfillment of the mission, taking on a legal and fiduciary role in the long-term stewardship of the organization.

About Judd Foundation

Judd Foundation was created in 1996 by twentieth century American artist Donald Judd (1928–1994) through his last will and testament to maintain and preserve his permanently installed living and work spaces, libraries, and archives in Texas and New York. The Foundation is dedicated to promoting a wider appreciation for Judd's artistic legacy by facilitating public access to these spaces and resources and developing scholarly and educational programs. Judd Foundation is a nonprofit operating foundation with 501(c)(3) tax-exempt status and is distinct from Chinati Foundation—a public institution founded by Donald Judd in Marfa, Texas, which houses Judd's large-scale, publicly installed artworks, and which has an independent 501(c)(3) status and organizational mission. As sister organizations that share the same founder, Donald Judd, Chinati Foundation and Judd Foundation collaborate on programmatic activities that serve to further the shared aspects of their discrete missions.

EVOLUTION OF THE FOUNDATION

Though the Foundation was established in 1996 pursuant to the artist's will, the transfer of the properties and art that comprise the assets of the Foundation was not fully completed until 2002. At that time, the Board of the Foundation began a strategic planning process that culminated in the hiring of the first full-time Executive Director of Judd Foundation, Barbara Hunt McLanahan, in 2006. Ms. McLanahan brings more than twenty years of arts management to the Foundation.

ESTABLISHING AN ENDOWMENT

It was Donald Judd's expressed intention for uninstalled works owned by the Foundation to serve as a source of revenue for an endowment that would help to preserve permanently installed works and spaces in both New York and Marfa. On May 9, 2006, Judd Foundation sold thirty-six of

these select works by Donald Judd at Christie's New York for \$27,788,400 (including buyers' premium). The proceeds of the sale provided the cornerstone for the Foundation's endowment that will help to sustain Judd's legacy. However, since the Foundation shoulders the responsibility for over 126,000 square feet of museum space and numerous public programs in New York and Texas, it must seek additional support to help it carry out this important work.

As a result of the stability provided by the endowment, it is anticipated that the Foundation will soon be able to undertake the restoration of 101 Spring Street, Donald Judd's first home and studio in New York, and the artist's fifteen private living and working spaces in Marfa, Texas; provide new public programs at these locations; and develop the Donald Judd catalogue raisonné and other critical collections care projects.

PROGRAMMATIC ACTIVITIES

Too often, I believe, the meaning of a work of art is lost as a result of a thoughtless or unsuitable placement of the work for display. The installation of my own work, for example, as well as the work of others, is contemporary with its creation, and the space surrounding the work is crucial to it. Frequently as much thought has gone into the placement of a piece as into the piece itself. Accordingly, it is my hope that my works of art which I own at the time of my death as are installed at 101 Spring Street in New York City, or in Marfa, Texas, will be preserved where they are installed.

— Donald Judd, 1993

101 Spring Street Restoration, NYC

As one of the founding sites of The National Trust for Historic Preservation's program of Historic Artists' Homes and Studios, 101 Spring Street is the only remaining intact, single-use cast-iron building in SoHo. Serving as the New York residence and studio space for Judd, 101 Spring Street was an inspiration for much of the artist's work, as well as the birthplace of "the Permanent Installation," now a hallmark of contemporary art as evidenced by the recently opened DIA: Beacon Museum.

In 2001 Judd Foundation was awarded a prestigious National Trust grant to plan the restoration of this significant property. In early 2002 the Foundation retained the services of an architectural firm to create a master plan for rehabilitating 101 Spring Street to protect the building from further disintegration and to accommodate more public programming onsite. A master plan was created by the architects over the course of one year, the first phase of which was completed in 2005. The project team has now entered the second design phase of the project, which includes onsite assessments of conditions and the creation of construction drawings.

In March 2006, Judd Foundation was awarded a competitive Cultural Enhancement Grant from Lower Manhattan Development Corporation (LMDC) for \$250,000 toward the innovative fire and life safety systems designed for the building, and in December 2006 Judd Foundation was awarded \$200,000 from Save America's Treasures toward the renovation of the façade of 101 Spring Street.

Archives

As the repository for the artist's personal, artistic, and intellectual property, Judd Foundation maintains and preserves the personal papers of Donald Judd. The Judd Foundation Archive is the largest and most comprehensive archival collection existing on the art and life of Donald Judd. Housed in the offices of the Judd Foundation in Marfa, Texas, its primary purpose is to serve as a resource for scholars to promote and stimulate knowledge and understanding of Judd's art and life.

The Foundation is committed to preserving this vast intellectual property of Donald Judd, including his writings, personal correspondence, historical documents pertaining to his relationship with other artists and art institutions, as well as photographs, videos, an expansive research library, and fabrication drawings. In addition to making these invaluable resources more available to students and scholars, the Foundation has begun an assessment and cataloguing process of these materials toward the creation of an artist's catalogue raisonné.

In 2004, the Foundation was awarded \$10,000 from the National Endowment for the Arts (NEA) grant to continue the preservation of its

valuable archival resources. The resulting Archival Needs Assessment Report, prepared by a conservator-archivist team, will guide the Foundation in its ongoing efforts to catalogue and conserve this invaluable resource. An Archives and Research Manager was hired in 2006 to begin a preliminary study of the Archive and develop a long-term plan for its cataloguing and preservation for increased scholarly access.

Catalogue Raisonné

As the single most important scholarly publication on an artist, the publication of a catalogue raisonné is a primary long-term goal for Judd Foundation. Judd Foundation has begun work on this major undertaking, which will begin with in-depth research of its collection, and the preparation of its archives for use as primary source material for this project. Now in its initial planning stages, The Catalogue Raisonné Project will be a multi-year project.

PUBLIC AND PRIVATE TOURS—NEW YORK/MARFA

Throughout his lifetime, Judd collected works of art, furniture, and decorative art objects from various countries and time periods solely for the purpose of his personal enjoyment. While Judd commissioned works for public view at Chinati Foundation, Judd's collection in his private living and working spaces represents his personal investment in art objects and their sensitive placement in and around rehabilitated structures, including former WWI and WWII military buildings, abandoned hotels, a bank, and a grocery store. Artifacts and furniture representing local cultures and Judd's travels throughout Europe and Japan combine with works of art by Judd and his peers to create an all-encompassing art environment that uniquely expresses the individuality and the creative mind of the artist.

Judd's personal collection, now under the care of Judd Foundation, spans the entirety of his career and represents the full range of media in which he worked, comprising the largest collection of the artist's work in the world. Judd installed his work throughout his private living and working spaces, together with works of art by some of the founding artists of modern art, Judd's peers, as well as works by many of the younger art-

ists whose work Judd championed in his writings. These works are interspersed with an array of textiles and decorative objects of African, Asian, Northern European, and Central and South American origin.

Judd Foundation's collection spans two states, with 118,000 square feet of space in Marfa, Texas, and nearly 8,000 square feet in New York, New York. The Foundation's properties, as the clearest expression of the artist's vision and artistic process, hold a prominent position in the international art community, and in broader cultural circles, as unique must-see destinations.

Tours — New York

Following the restoration of 101 Spring Street, Judd Foundation programming at 101 Spring Street will focus on public access to this unique single-use artist studio in SoHo. As part of Judd Foundation's current tour program, the building receives approximately 800 visitors annually (in 2006: 21 percent students, 39 percent art patrons/collectors, and 40 percent arts professionals). Regularly scheduled tours are offered every Friday and by appointment Monday through Friday, and are led by knowledgeable tour guides who provide an art historical perspective on Judd and his philosophy on art and installation. The Foundation is currently conducting research with education professionals to develop interpretation plans to emphasize the many educational aspects of the building and its collection as a reflection of Judd's multifaceted artistic legacy.

Since the artist's death in 1994, more than twelve thousand people have toured 101 Spring Street. Upon completion of the building's restoration, which is estimated to take approximately three years, the Foundation will offer an expanded tour schedule and regular seasonal public programming in its renovated spaces. Future plans include hosting lecture series and public symposia on topics related to Donald Judd's legacy and the artists that were his contemporaries. It is estimated that visitation to 101 Spring Street will average five thousand visitors for the first three years after its renovation.

Tours — Marfa, TX

Located in the southwestern section of West Texas, two hundred miles southeast of El Paso, Marfa is situated near the Chinati mountain range

of Presidio County, the second largest county in Texas. Beginning in the early 1970s, Donald Judd gradually purchased numerous buildings in downtown Marfa, including former military structures dating to WWI and WWII, former hotels, banks, and a grocery store. Over the course of two decades, Judd renovated the structures as living and working spaces, and to house his personal art collection. The Foundation currently offers tours of La Mansana de Chinati, "The Block," a large complex of buildings in which the artist lived, as well as The Architecture Studio, Ranch Office, Cobb House, and Whyte Building. These tours follow a regular schedule (Wednesday–Sunday). It is the intent of the Foundation to open additional properties to public tours in the near future.

The Foundation co-hosts the annual Open House weekend in Marfa with the Chinati Foundation every October. This weekend features free admission and additional programming by the Foundation (video/film screenings, a public barbeque at one of the Foundation Ranch properties outside of Marfa) and public tours of all properties. More than 2,500 visitors attend these events each year.

COLLECTIONS PRESERVATION/CONSERVATION OF WORKS OF ART BY DONALD JUDD

Judd Foundation's collection comprises an invaluable cultural asset to the local, national, and international community. The Foundation considers the conservation of this collection to be of the highest priority and is committed to setting a new standard for the preservation of works of art by Donald Judd, and to increase awareness of the importance of preserving an artist's collection in its original context in his/her living and working spaces. Future conservation projects will be held to the highest conservation standards, thereby setting new standards for artists' foundations and encouraging ongoing research into contemporary materials.

With the assistance of an Advisory Committee for Conservation and Restoration (ACCR)—comprised of preeminent conservators from the U.S. and Europe who meet quarterly to discuss best practice in the handling, installation, and maintenance of works of art by Donald Judd—Judd Foundation is creating guidelines for the care and handling of works of art in modern materials for both its collection and other public and pri-

vate collections. These efforts serve to ensure the longevity of Donald Judd's artistic legacy, while serving as a model for other artists foundation to take a proactive approach in the preservation of artists' works.

ORAL HISTORY PROJECT

As one of the most influential artists and writers of art in the twentieth century, Donald Judd shared his artistic vision and process with those working around him, including his early dealers, fabricators, assistants, and many of the most prominent artists, scholars, and collectors of the time. These individuals, who each have unique perspectives into the artist's artistic philosophy, maintain equally invaluable points of view on his working method. Despite the incredible collective breadth of knowledge that these legacy holders possess, many of them have not yet shared their insights in an interview format for a documentary or publication. It is hoped that a series of sensitive and timely interviews will enable those closest to the artist to impart their understanding of Judd as only they can.

In 2006, Judd Foundation received a National Endowment for the Arts (NEA) grant of \$25,000 to begin the first phase of the Oral History Project. The Foundation is interested in capturing interviews in audio-visual format (digital) and audio-only format, as well as in transcript form. The Oral History Project will enable the Judd Foundation to serve its mission to sustain the legacy of Donald Judd by compiling heretofore undocumented views and information on his artistic practice and helping to make it more accessible to the public in various formats for scholarly research and the education of the general public.

Judd Foundation, in partnership with Marfa Public Radio, launched its initial presentation of the project, working footage of the first interviews titled "Marfa Voices," at the Open House weekend in October 2006. This footage addressed key events or aspects of Judd's artistic practice, while also touching upon a more intimate view of the artist as resident of Marfa for nearly twenty years. In addition, "Marfa Voices" gave new consideration to Judd's impact on Marfa, as well as the impact that Marfa had on Judd's own belief systems and artistic practice. In May 2007, Judd Foundation presented a panel discussion at the Museum of Modern

Art in May 2007 titled *Oral History for Artists' Legacies*. The Foundation received a record response from artists, foundations, curators, art historians, oral historians, and the general public, to the extent that the auditorium was booked to capacity, approximately 150 people. Speakers included Avis Berman (writer and historian), Lynne Cooke (Curator, Dia Art Foundation), Vincent Fremont (Andy Warhol Historian and Filmmaker), Arne Glimcher (Founder and Chairman, PaceWildenstein), Rainer Judd (Artist and Filmmaker, President of Judd Foundation), and Glenn Lowry (Director, The Museum of Modern Art). Judd Foundation's development of its oral history project through future interviews, screenings, and other public program, related to oral history is ongoing.

PUBLICATIONS

Each year an estimated 500,000 readers access Judd scholarship through the Foundation's active support of publications and rights clearance on copyrighted writings and images and assistance with articles, independent publications, and exhibition catalogues by museums and art institutions. In 2003 Judd Foundation reprinted 4,000 copies of "Architektur" ("Architecture"), which included corrections made by Judd, and in 2004 Judd Foundation worked with the original publisher, Nova Scotia Press, to re-release 5,000 copies of an anthology of writings by Donald Judd, *Complete Writings 1959–1975*, which includes corrections made by the artist after its initial release.

Judd Foundation plans to release guidelines for the care and handling of Judd artworks in various materials. This practical manual will benefit major art institutions worldwide, as well as private collectors, art handlers, and conservators, while furthering research into the conservation issues specific to Judd's work in various media. It is estimated that by January 2008 the first chapter on metals will be available to professional conservators, institutions, private collectors, and those who handle or treat Judd artworks.

EXHIBITION SUPPORT

Judd Foundation regularly supports programs that extend the reach of its educational mission such as national and international exhibitions.

Roughly 500,000 museum visitors benefit each year from exhibitions of works loaned from Judd Foundation's collection.

In 2004 Tate Modern in London organized the well-attended *Donald Judd Retrospective*, which traveled to Kunstsammlung (Dusseldorf) and Kunstmuseum Basel, attracting more than 200,000 visitors, and included works loaned by Judd Foundation and a monograph supported extensively by the Foundation. In 2005, the Foundation collaborated on the traveling exhibition *Design is not Art*, organized by the Smithsonian, Cooper-Hewitt, New York, which traveled to Atlanta's Museum of Design, as well as the Aspen Art Museum, and attracted 152,000 visitors. The Foundation currently has major works of art on long-term loan to DIA: Beacon and Chinati Foundation and actively supports several university and independent galleries in the U.S. and abroad.

INTERNSHIP PROGRAM

In 2005, Judd Foundation initiated an undergraduate internship program at 101 Spring Street, in partnership with New York University's Fine Arts department in the College of Arts and Sciences and the Gallatin School of Individualized Study. Under the advisement of Foundation staff, interns participate in planning and preparation for ongoing programs at Judd Foundation, and undertake scholarly research projects toward the development of current and future programs including oral history interviews, Open House, and an artist's catalogue raisonné. Judd Foundation has expanded its program to include graduate level students, and currently offers seven to ten internships per year, each of which runs for approximately three months.

In addition, the Foundation is in the process of developing a comprehensive internship program at Donald Judd's permanently installed spaces in Marfa, Texas.

WEBSITE

Judd Foundation hosts a comprehensive website (www.juddfoundation.org) which includes images and descriptions of Judd's studios and residences in Texas and New York, as well as critical biographical informa-

tion on the artist and his art-making and furniture design. The site also includes tour information and contact information for directing inquiries to the appropriate Foundation personnel for further assistance.

FURNITURE

The Foundation manufactures and sells functional examples of furniture fabricated using the original designs and fabricators of Donald Judd in order to further preserve and increase the public's appreciation of the artist's work. The Foundation supports exhibitions of Judd furniture and makes furniture from its collection available to Museums for exhibition.

PART 3: ARTISTS AND THEIR ARCHIVES

CHAPTER 9: INCREASING KNOWLEDGE AND UNDERSTANDING OF ART AND ITS HISTORY: DONATION AND SALE OF THE ARTIST'S, PHOTOGRAPHER'S, AND ARCHITECT'S PERSONAL ARCHIVES

Barbara T. Hoffman, Esq.

On October 19, 2007, the Smithsonian's Archives of American Art made public it had acquired the records of one of the most influential art dealers of the twentieth century, Leo Castelli. The records comprise the history of the Leo Castelli Gallery from its founding in 1957 until Mr. Castelli's death in 1999. Among the papers are art registry books, auction and sales history information, exhibition records, photographs of artists and of works of art, ephemera pertaining to Castelli's artists (e.g., clippings, reviews, invitations and announcements, letters and memorabilia), original correspondence with artists, collectors, curators, dealers, and all gallery business records.

Of particular interest are the extensive files of clippings and correspondence with the artists whose work Castelli championed and whose careers he nurtured, including Richard Artschwager, Lee Bontecou, John

Chamberlain, Dan Flavin, Jasper Johns, Ellsworth Kelly, Roy Lichtenstein, Bruce Nauman, Robert Rauschenberg, Richard Serra, and Frank Stella, among others. The archive also contains the sales records for every work of art sold by Castelli from 1957 to 1999.

Other significant highlights include photographs documenting gallery installations and works of art exhibited and sold by the gallery. The breadth and depth of these records will provide historians and scholars unparalleled insight into an era critical to the development of American art history and visual culture.

Castelli died in 1999. In 1992, amid rumors that Castelli was negotiating to sell his archives to the Getty Center for the History of Art and the Humanities in Los Angeles, the collection was said to be worth some \$2 million. As Carol Vogel reported in the *New York Times*, October 19, 2007, “‘Nothing came of the talks,’ said his widow, Barbara Bertozzi Castelli. Instead she and his two children, Jean-Christopher Castelli and Nina Castelli Sundell, decided to give the collection to the Archives of American Art.” John W. Smith, director of the Archives of American Art, stated:

The gift of this collection by Leo Castelli’s family represents a milestone in the history of the Archives of American Art. Without question, the Castelli archive is one of the richest resources for the study of art produced in the second half of the 20th century. Leo Castelli’s unparalleled eye for quality, combined with his extraordinary skill for nurturing and promoting new art and artists, secured his position as one of the most respected and influential advocates of contemporary art for more than four decades.

John W. Smith discusses the Archives of American Art and its importance to the scholarly community in Chapter 12. The Castelli Archive was, without question, a coup for the Archives, which has had some difficulty competing with the well-endowed Getty Research Institute for archives significant to modern and contemporary American art history. Professor Irving Sandler, who in Chapter 11 discusses the sale of his personal archive to the Getty Research, is a case in point.

If the Castelli donation of the Castelli Gallery archives was based on years of cultivation by the Archives and collaborative projects between Castelli and the Archives of American Art, long-term relationship is said not to be a factor of influence for Frank Gehry. Gehry has indicated he is not focusing on institutions he feels close to, like the Guggenheim Museum for which he has designed two satellite museums.

Gehry has been quoted as stating, “I don’t want to give it away—it’s an asset. It’s an asset. It’s the one thing in your life you build up and you own it. And I’ve been spending a lot of rent to preserve it.” MOMA chief curator of architecture and design Barry Bergdall said he had been approached about the Gehry archive and that the price range was in “multimillion dollars.”¹

Alison Nordström in Chapter 10 provides a superb overview of various factors for consideration by artists, architects, and photographers in the selection of institutions for the sale and donation of archives. Money, long-term relationships, compatibility with other materials in the collection, accessibility, capacity for conservation, and ability to provide access to scholars, researchers, and the public may all be factors.

What is evident is that the artist, photographer, architect, and others with archives of scholarly and research value must do their homework or work with competent advisors to do so, particularly if they view the archive as a goldmine like Gehry or Peter Eisenman, quoted as saying, “I could not afford not to sell the archive.”

A theme articulated throughout this supplement is that “no one size fits all.” It is not unusual for an artist to provide for both donations and/or sale of artwork and archive to several institutions. For example, following the provisions of his will, Saul Steinberg’s collection of his own works was divided between the Saul Steinberg Foundation and the Beinecke Rare Book and Manuscript Library at Yale University, which also received Steinberg’s archives. The Saul Steinberg Foundation holds the copyrights to Steinberg’s artworks and writings.

1. Pogrebim, R. “For Architects, Personal Archives as Gold Mines,” *New York Times*, July 23, 2007.

The value of an archive for study and research is, absent other factors, in its integrity. Thus, Steinberg divided his works, other than the archive between Yale and the Saul Steinberg Foundation. The archive in its entirety went to Yale.

My experience is that like any other transaction, the donation or sale of an archive or collection is the subject of negotiation. Like any other negotiation, the value of the collection or archive to the recipient institution both in terms of its existing collection strengths or its ability to develop new areas of research and use the archive as a magnet, will influence the artist's, photographer's, or architect's bargaining power. Some artists, photographers, and architects are gratified that their collections are of sufficient historical value that an institution is interested in dedicating space to the archive. Others will be in a position to command money and/or a creative structure surrounding the archives. There are a relatively small number of repositories in the United States that have endowments that enable six or seven figure purchases.

In all instances, competent professional advice should be sought to structure the deal which maximizes value for all parties to the transaction, and resolves sometimes complex issues involving copyright, privacy, preservation, education and access.

Examples such as the acquisitions of Hatch-Billops collection by Emory University in Atlanta, Georgia, the Diane Arbus Archive by the Metropolitan Museum in New York City, and the Black Star Archive by Ryerson University in Toronto, Canada, illustrate both the creativity and complexity involved in the sale or donations of archives.

The extraordinary Hatch-Billops Collection in New York was built over thirty-five years by artist and filmmaker Billops and theater historian Hatch, and will be known as the Camille Billops and James V. Hatch Archives at Emory University. Hatch/Billops will continue its active program of documentation and acquisition, including development of the oral history archive and publication of an annual volume of interviews, "Artist and Influence: The Journal of Black American Cultural History."

The contract for the acquisition provided for a phased transfer of materials. The materials transferred to Emory include oral history tapes, scripts of unpublished plays, posters, photographs, and many boxes of books and periodicals, all of which will be catalogued and documented by Emory. Included among the several hundred playscripts received are works by Amiri Baraka, Ed Bullins, Ossie Davis, Ruby Dee, Lorraine Hansberry, Zora Neale Hurston, Willis Richardson, Wole Soyinka, Melvin Van Peebles, Derek Walcott and Richard Wright.

At the time of the gift, the director of special collections and archives stated, “Emory received this wonderful gift not only because of the growing reputation of our collections, but also because of the commitment we were willing to make: this includes a designated space, a curator and fellowships for researchers.” Emory also intends to become a center for scholarly research in African-American arts and letters. An advisory body formed by the University to advise on the uses of the archive also includes Hatch and Billops.

In fact, an archive of this nature is significant not just on its own merits, but also because it attracts additional collections. Following the acquisition of the Hatch Billops Collection, Emory acquired the Delilah Jackson Archive of papers, photographs, and memorabilia of New York performers of all kinds, including dancers, singers, musicians and theater folk and the archives of several other noted African American and other artists and writers.

Another example of the special “archive alchemy” created by the desire of an institution to become a center in a particular area, and the magnet quality of the acquisition of an important collection is the gift to the Metropolitan Museum of Art of the Diane Arbus Archive. For years the Met has made efforts to expand its modern photography collections. In 1994 it captured the archive of Walker Evans, including some 30,000 black and white negatives, 10,000 color transparencies, motion picture film from the late 1920s to the 1970s, original manuscripts, diaries, recordings of interviews and lectures and his personal library.

In 2005, the Met mounted an exhibition of Arbus’ work including not only her portraits but photographic equipment, pages from her diaries, books from her home and studio and family pictures.

In December 2007 the Arbus estate gifted to the Met her priceless archive along with hundreds of early and unique photographs; negatives and contract prints of 7,500 rolls of film; and hundreds of glassine print sleeves that she personally annotated before her death by suicide in 1971.

At the same time, the Met purchased twenty of Arbus's most important photographs, for a roughly estimated five million dollars and promises to conserve, catalogue and organize the archive for study and research.

Black Star, the once-great photojournalism agency founded in 1935, was gifted to Ryerson University in Toronto in 2005. An anonymous donor gave the collection, along with \$7 million earmarked for its "preservation, study and exhibit." The archive contains nearly 300,000 photographs "shot by world-famous photographers and photojournalists." The list includes Robert Capa, Andreas Feininger, Germaine Krull, Philippe Halsmann, Martin Munkacsy, W. Eugene Smith, Marion Post-Wolcott, Bill Brandt, Henri Cartier-Bresson and Mario Giacomelli.

Ryerson has started building an \$8 million facility to house the exhibition with the hopes of it becoming an important cultural attraction for Toronto and one of the top facilities in the world for the study, teaching, research, and exhibition of photography.

The new gallery and research center will be home to the two graduate programs at the School of Image Arts: its master's program in photographic preservation and collections management—the world's first of its kind and jointly created by the university and photography museum George Eastman House in 2003—and its new master's program for documentary media, which is planned for fall 2007. The deal was brokered by Ryerson faculty, curator, and administrators.

A lawyer or dealer often plays a role in brokering the sale of an archive. Often, in my experience, if the archive's owner is still living, then the artist, photographer, or architect may make the initial contact often through a curator or director, patron, the archivist, or librarian. Once there is an interest, the deal moves up the hierarchy and may involve the artist and her or his lawyer in complex negotiations with university or museum counsel, president, and potential donors.

Art historians and critics, either through professional associations like the College Art Association and the [International Association of Art Critics](#), or independently have a key as yet underdeveloped role in the mining of the artist archive, the preparation of catalogue raisonné, and the development of web sites to preserve artist, photographer, and architect's legacies.

Best Practice: Develop a preliminary checklist and inventory of the archive. What is the nature of and value in the archive? A dealer's archive, a stock agency's archive, a photographer's archive, an installation or performance artist archive, a sculptor's archive and a painter's archive are all different in both subject matter and materials. Identify the institutions that may be interested in the archive because of the subject matter of the archive, the medium of expression or the archive's historical value. In many respects the same considerations may apply for the sale of a collection by a collector as will apply to the sale of an archive by an artist, architect or photographer. Significant differences may arise if the archive sale is accompanied by the sale of the copyright in the work. Normally the collector will not hold the copyright in works of art in the collection. Museums and other institutions that do not collect comprehensive archives may still be interested in acquiring selected artworks from an artist's body of work. The sale of individual aspects of the archive must be carefully considered and weighed against the value of the archive as a whole, and careful attention must be paid to copyright issues.

As digital technology conflates the library, museum and archive, establishing links between art historians, art critics, and artists, their estates and their archives, can contribute to the public's understanding of our visual culture and the contributions made by the creators of visual images to our history. I urge the [College Art Association](#), the Art Critics Association and the Marie Walsh Sharpe Artists' Legacy Project to facilitate the establishment of a match.com to preserve artists' legacies, particularly those who may not be in fashion at this time.

CHAPTER 10: ARTISTS AND ARCHIVES: MAKING THE MATCH

Alison D. Nordström, Ph.D.

Curator of Photographs

George Eastman House International Museum of Photography and Film

An archive is a collection of papers and other documents kept for their historical or cultural interest. It may contain correspondence, diaries, business records, photographs, audiovisual material, works of art, computer files, or three-dimensional objects. Allen Ginsberg's archive, which he sold to Stanford University for around a million dollars a few years before his death, included a pair of tennis shoes!

Archives come into existence in many ways and for many reasons. Some, like national, state, and municipal archives, are begun with the intention of establishing an official historical record. Many, like most newspaper and picture agency archives, began as something else, usually a tool for doing business. A third category, and the one in which most artists' archives belong, are a by-product of the activity of an individual, company, or institution. Regardless of how they begin, archives are intentional; that is, they do not become archives until they are understood and used as such.

An archive takes its shape and meaning from the ways it is used, and use is generally what dictates the way an archive is organized. An archive that is mostly correspondence will probably be organized either chronologically or by the author of the correspondence. An archive that contains a lot of photographs, sketches, or drafts of poems may be organized by subject. Some archives are organized by the types of material they contain, especially if some of them require specialized storage.

Museums that do not collect artists' comprehensive archives may still be interested in acquiring selected artworks from an artist's body of work. While this kind of acquisition is outside the scope of this paper, many of the considerations related to archives may also apply. This is especially

true for issues of documentation and organization and for beginning the conversation while the artist is alive. Artists who make photographs may be a special case. Individual prints and portfolios may be acquired by a museum, but finished prints as well as negatives, contact sheets, and work prints may accompany the usual papers, correspondence, and business records more generally held by an archive.

An archive is an ecosystem. While it may contain individual objects of great significance as well as minor ephemera, it is best understood as a single entity. Each element affects every other element, and the relationship amongst the objects in it is critical. Unlike a museum collection, which usually consists only of “important” objects in pristine condition, archives are often a unique source of context for these very things, and should be preserved as such.

There are many advantages to artists who are able to place their archives in a public institution. In rare instances, there may be compensation. There may also be some tax advantages to the artists themselves or to their heirs. There may be some assistance in organizing, transporting, and storing archive material. Loans, research requests, and the like are channeled through the institution. Most important, artists who place their work in archives enjoy a permanent legacy. Their work is protected in perpetuity, kept together for whatever future needs may arise.

The ongoing processing and care of archives is expensive and time-consuming, and no institution is in a position to accept everything that it is offered. Artists can increase the desirability of their offered gift by meeting with a prospective recipient to determine how its archives are organized and what kinds of things they are looking for. Most institutions now use some kind of digitized database to keep track of what they have, and an offer of a collection that has been systematically organized in a compatible manner will promise to save an institution an important amount of time. Similarly, collections that have been digitized before acquisition are of greater value than those that have not. Some archives material, especially visual material that could be licensed and manuscripts that could be published, will have potential to earn income for the institution that controls them. Any discussion between artists or their heirs and a potential recipi-

ent of an artist's archive should include a determination of just what is being offered, whether material only or the rights to that material.

Prospective donors should also give thought as to how and by whom their donated material may be used over time. While an unrestricted gift is usually most attractive to a receiving institution, artists may choose to limit certain aspects of their gift. Photographers, for example, may restrict the printing for exhibition of a negative never deemed good enough for printing in their lifetimes, as a writer may specify which manuscripts may be published. It is not uncommon to seal or otherwise restrict publication or research access to correspondence or other writing to some future date related to the death dates of those whom the material concerns. If an archive is seen as one that has income potential, artists may ask that a portion of that income be directed to their heirs or estates. Other common restrictions include limiting use of archive materials to educational rather than commercial purposes, specifying the language and placement of any credit line, and specifying that reproductions must meet certain standards such as no cropping, overprinting, or colorization. Artists may specify that everything donated must be kept, or, conversely that certain objects (identified or not) may be sold to benefit the institution (or the institution and the estate, or the estate)

Artists who understand the range of missions and responsibilities of collecting institutions will be best able to match themselves with appropriate homes for their lives' work. While it is appealing to assume that one's work belongs in a national institution like the Smithsonian or a major university library, often it is in smaller institutions that an artist's archive is most appreciated and best used. It is wise to consider a broad range of connections between artist and institution, which may include region, discipline, various affiliations, and area of interest. An institution with a specialized collection related to a particular place, time period, ethnic group, or medium is most likely to look favorably on the offer of a donation that expands on these strengths. Do not overlook local and regional libraries and historical societies, or organizations and universities with which the artist was or is directly associated. Clubs, unions, political groups, and publications often keep archives of their own, to which a contributor's material may be very welcome.

In considering if an institution is best suited to receive an archive, artists will want to ascertain its capacity for care, access, dissemination, and use of donated material. Ideally, these conversations begin at a time in the artists' lives when they can be fully involved in planning and decision making. While there is no substitute for a strong and trusting relationship between an artist and an individual archive worker, it is important to remember that the collection will survive any of the individuals involved in its transfer, and that clear written guidelines will ensure ongoing fulfillment of the artists' wishes. These may be a standard formal document used regularly by the receiving institution, or something as simple as a memorandum of understanding written by either party.

In summary, artists or artists' heirs who wish to deposit their material in an archive should begin by considering what their motivations are. They should decide what of the material they wish to offer and how they wish it to be used, while remembering that the fewer restrictions they place on this use, the more likely they are to find an interested recipient. The material should be as well housed and well organized as possible. Once they have determined some likely candidates, they should begin discussions early with them. Once an agreement is reached, a written document should be produced for both parties' agreement.

Artists who pay attention to the future of their work and the material that supports it are doing the right thing by their heirs and their legacies, but they also do a service to the general public. Those who determine that a public institution may play a part in this future, and who work to make it happen, should be commended.

Chapter 11: PRESERVATION OF ARCHIVAL MATERIAL

Professor Irving Sandler

For more than a half-century, it has been my practice to take notes in whatever artists' venue I happened to be. Looking back, at one point, it occurred to me that I had amassed an historically valuable archive, including notes of some six years of weekly panels at the club founded by the Abstract Expressionists in 1949, as well as hundreds of interviews and conversations with leading older avant-garde artists, among them Philip Guston, Willem de Kooning, Barnett Newman, Ad Reinhardt, and Mark Rothko, and with younger artists, Mark di Suvero, Alex Katz, Al Held, and Joan Mitchell.

As an art historian, I wanted this material saved since it could be useful to future historians. Consequently, I looked around for a library or research in which to deposit it. After investigating a number of repositories, it seemed to me that the Getty Research Center would best suit my purpose since it had committed itself to the preservation of archives like mine; because it had already received several important archives of artists and critics associated with avant-garde American art; and because it had the resources to properly document and care for this archive. I then established contact with librarians at the Getty. One of them visited me to determine the importance of my archive, and agreed to accept and purchase it. Subsequently, the Getty informed me that my archive was being actively used by critics and historians.

Most artists I know have also collected and saved their own statements and letters; catalogues and brochures of their work that are only too often lost; articles, particularly in out-of-the-way publications; and memorabilia and ephemera, that would be valuable for art historians to consult. More important for the artist, such material would also be useful in the consideration of the artist's work by future scholars in books and arti-

cles. It is important for artists to find repositories, such as the Archives of American Art, the Getty Research Center, or public libraries, colleges, and universities. Artists should do this while they are alive since they can provide information to archivists that their heirs would not have. I know of too many cases where lifelong collections of valuable material, that would have been useful in the perpetuation of an artist's work, were junked because the heirs were not instructed as to what to do with them and because of the cost of storage.

Chapter 12: THE ARCHIVES OF AMERICAN ART

John W. Smith

The Smithsonian's Archives of American Art

In a 1954 letter from then Director of the Detroit Institute of Arts Edgar P. Richardson to Lawrence Fleischman, Richardson poses a question: "Do you realize what a big thing you have done in starting the Archives [of American Art]? I know you do. But *do* you? It is enormous in its implications; enormous!" Richardson and Fleischman, a Detroit businessman and an active young collector, founded the Archives earlier that year.

The pair's initial goal for the Archives to serve as a centralized microfilm repository for manuscript collections housed in other institutions or in the hands of private individuals quickly expanded to collecting and preserving original archival material from across the country. Covering over two hundred years of American art history these primary sources include illustrated letters and diaries; manuscripts; the historical records of museums, galleries, and schools; original and rare photographs of art world figures and events; and artists' sketchbooks and preliminary drawings or studies. A long-standing Oral History Program serves as a valuable companion resource to the documentary collections. Microfilming has been replaced by an active digitization program. Researchers now have access to unprecedented and ever-increasing electronic resources on AAA's website, such as selected collections scanned in their entirety, representative images from collections, transcripts of oral histories, online exhibitions, guides, and finding aids, as well as research assistance.

In 1970 the Archives joined the Smithsonian Institution, a perfect synergy with the Institution's mandate—the increase and diffusion of knowledge. Today, the Archives includes more than 16 million items, 5,000 collections, 2,000 oral history interviews and receives up to 12 million users annually to our website. The Archives maintains a research center in New York in addition to its headquarters in Washington, D.C., where 2,500 vis-

itors are received annually. It is the world's largest and most widely used resource on the history of art in America.

WHAT DO WE COLLECT?

For more than fifty years, the Archives of American Art has provided researchers worldwide with access to the largest collection of primary source materials documenting the history of the visual arts in America. The Archives has played a defining role in fostering scholarship and illuminating the history of art for the benefit of future generations. Today, the Archives continues to fulfill its ongoing mission to collect, preserve, and make available for study documentary records of this country's rich artistic legacy.

The Archives of American Art collects primary source materials that have art historical significance. We seek historical records, routine and unusual, whose stories and meanings are rich and complex, that have inherent value as originals, and that both reflect and challenge conventional ideas about art. We collect the personal papers of individuals and the records of organizations that include letters from, or references to, prominent figures in American cultural history; a significant body of unpublished manuscript material; and documentation on major American artists or major art trends. Our collections form the foundation for research, scholarship, publications, exhibitions, public programs, and outreach.

The following kinds of papers are most useful to researchers:

- *Personal letters* from colleagues in the arts, family and friends covering a wide span of years
- *Professional correspondence* with galleries, dealers, collectors, critics, institutions, and organizations
- *Drafts or copies* of outgoing letters
- *Diaries or journals* giving a day-by-day view of ideas and activities, travels, sales, exhibitions, and options

- *Sketchbooks, loose sketches, and studies*
- *Photographs, slides, film, and videotapes*, not only of work, but of the subject's family, friends, and studio
- *Lectures, addresses, published or unpublished articles* preferably from first to last draft
- *Audiotapes*
- *Scrapbooks, clippings, exhibition catalogues, and announcements*
- *Teaching material*, including lecture notes, reports, and comments
- *Research files*
- *Financial papers*, including bills, receipts, lists, and ledgers

WHY DO WE COLLECT?

The audiences of the Archives of American Art are primarily art historians, as well as scholars in other disciplines, artists, students, curators, art dealers, and the general public. The materials we hold are the raw materials for scholarship. The Archives has grown with the field of American art history and has greatly contributed to the available knowledge about art in the United States. Independent inquiry and in-depth research simply could not occur without access to these primary source materials. In this way, the Archives preserves and provides access to this country's rich artistic legacy.

HOW DO WE COLLECT?

There are a variety of ways in which materials come to the Archives. Typically, personal papers are donated by the artists themselves or by their heirs. Artists and their families come to us through friends and colleagues who recommend the Archives as the world's foremost repository of art-related materials. For example, in the case of the Joseph Cornell papers, Cornell's sister Elizabeth Benton donated most of his personal papers in 1974. The remainder of the material was donated in 1989 and in 2004 by the Joseph and Robert Cornell Memorial Foundation via Richard

M. Ader. The personal papers of Jackson Pollock and Lee Krasner were donated to the Archives in 1983, just before Krasner's death. The remainder of her personal papers were then donated to the Archives through a bequest in 1985. Today, the Archives holds over fifteen feet of materials from the personal archives of both Pollock and Krasner, a collection that has been invaluable to the study of twentieth-century American art.

Papers also come to the Archives through documentation projects that focus on particular areas of study within the field of American art. These projects are funded through grants and gifts from various donors and institutions. For example, the Nanette L. Laitman Documentation Project for Craft and Decorative Arts in America has resulted in more than one hundred oral history interviews of craft artists at the height of their careers, and has led to the acquisition of over fifty collections of personal papers from these artists, including the papers of William P. Daley, Jack Lenor Larsen, Italo Scanga, Robert Chapman Turner, Patti Warashina, and Toshiko Takaezu.

The records of leading galleries also prove to be invaluable to scholars who use these records to research provenance, document an artist's oeuvre, or determine the gallery's role in a particular movement or school, among many other reasons. The Archives' holdings of major and minor gallery records is unprecedented and covers the collecting and creation of all major American art movements—particularly American modernism. Among the collections at the Archives are the records of Jacques Seligmann & Co., Macbeth Gallery, Downtown Gallery, Betty Parsons Gallery, Kraushaar Galleries, and the Perls Galleries. In 2006, the Archives acquired the records of the Paula Cooper Gallery, including the records she held on behalf on the artist's cooperative Park Place Gallery and Art Research, Inc.

The Archives of American Art does not purchase papers. However, as a donation to a non-profit organization, the gift of papers is tax-deductible. We depend upon the generosity of the visual arts community, their friends, and their families for donations of letters, photographs, sketches, journals, and other files that allow historians, students, and the public to understand and appreciate art and the role of the artist in America. As you plan for the disposition of your estate, you can either contact the Archives directly or add a codicil to your will.

If you are ready to donate your papers to the Archives of American Art, please call the Curator of Manuscripts, Liza Kirwin, at (202) 633-3957 or e-mail her at KIRWINL@si.edu. At the curator's discretion, a representative may come to your studio (or wherever documents are stored) to assess the collection and determine how it is to be shipped to Washington. In some cases, the curator may ask for you to send the documents directly to Washington for assessment. At that time the curator and a committee of other staff members, as well as outside advisors, will decide whether the records are in keeping with the Archives' mission. If they are, we will contact you and ask you to sign a deed of gift. This document transfers legal ownership of the material to the Archives of American Art, Smithsonian Institution.

Lastly, as you plan your estate, please consider including a monetary donation to support the arrangement, description, and preservation of your papers.

WHAT HAPPENS TO MY PAPERS ONCE I'VE DONATED THEM?

Upon the papers' arrival in our Washington or New York office, a team of professional archivists and art historians will re-box the collection into archival containers. Duplicate and out of scope materials may be returned to the donor or, in some cases, transferred to another area within the Smithsonian. (In most cases, this is the Smithsonian American Art Museum/National Portrait Gallery Library.) The remaining material (the "collection") is then described in detail and entered into our database ("accessioned"). A brief biography and all pertinent dates, proper names, and places are also included in the record. In many cases, an inventory of each box is included (created by the donor or by Archives staff). Your collection will be properly cataloged according to established national archival standards and linked to other related collections and items in our collection. A catalog record will be created and entered into the Smithsonian's searchable bibliographic database and also sent to the Research Libraries Group/OCLC national online bibliographic research database. The collection is then shelved and fully accessible to researchers as it awaits any additional processing and preservation work.

To access original documents from your collection, researchers must make an appointment with the Archives' reference staff. The researcher is then given one box at a time and allowed to study the material in our secure manuscript reading room. The Archives makes its collections fully accessible to the public in a closely monitored and documented manner. In this way, the Archives acts as a steward for the safekeeping and security of your documents.

Collections may be prioritized for further enhanced archival processing and descriptive work completed by trained professional archivists. Such work would typically include detailed organization and arrangement of the papers and folder-level inventories, ultimately resulting in an online finding aid to the papers. A finding aid provides a detailed description of the entire scope and contents of the papers, and greatly aids staff and researchers in locating items within the collection. Additional preservation work completed on the collection is designed to halt any further deterioration of the papers and generally includes re-folding the collection into acid free folders; removing staples and clips; interleaving acidic and brittle materials; and identifying critical documents for conservation work.

At any time after the materials have become part of our holdings, they may be selectively digitized at the discretion of Archives' staff. Digitization can be of an entire collection or of a single item. The Archives was recently awarded a substantial grant by the Terra Foundation for American Art to digitize a cross-section of our collection. The selection of collections for this project is based on user statistics and the potential research value as determined by Archives' staff and outside advisors. After items or collections are digitized, they are made available worldwide on our website at www.aaa.si.edu. They are then searchable through our image database and through various web-accessible search engines, and also may be used by Archives staff as part of special web-based programs, including special-focus guides and acquisition highlights that are available to the general public.

The Archives also produces exhibitions and publications and lends documents to exhibitions worldwide according to best archival and museum registrarial practices. The Archives maintains the Lawrence A. Fleischman

Gallery in the Smithsonian's Donald W. Reynolds Center for American Art and Portraiture. In 2006–2007, the exhibitions included “Artists in Their Studios,” “Exquisite Surprise: The Papers of Joseph Cornell,” and “Anatomy of a Painting: Honoré Sharrer’s *Tribute to the American Working People*.” The Archives also publishes a scholarly journal based on its collections and has recently published a book of illustrated letters titled *More Than Words: Illustrated Letters from the Smithsonian’s Archives of American Art* [2005].

WHY CHOOSE THE ARCHIVES OF AMERICAN ART?

The Archives of American Art recognizes that artists today have many choices to make when planning for the disposition of personal records and papers. This may include considering one’s alma mater, a university library, and other research institutions as the chief repository. However, when it comes to the history of art, no other organization approaches the breadth and depth of our collections, which have the broadest American art historical context. The Archives of American Art is the only organization that functions solely as a research facility dedicated to providing access to materials of American art historical significance. While other organizations have strong reputations and impressive collections, they are often a part of a much larger library or institution. The Archives of American Art has a staff of over forty archival professionals, along with an independent board of trustees, all dedicated solely to promoting research in the field of American art.

A CAUTIONARY TALE

In 1969, Rockwell Kent lost his home in a fire. The Archives of American Art salvaged his papers, though they had been under six feet of water. Kent wrote, “We wish that the whole house, with all its now irreplaceable contents, had been sent to the Detroit Archives.” Later, he gave this ringing endorsement: “In letters to other artists I am occasionally asked for my advice as to what they should do with their records. My advice is... offer them to the Archives of American Art.”

PART 5: BIOGRAPHIES OF CONTRIBUTORS TO THE 2008 SUPPLEMENT UPDATE

Victoria Bjorklund, Esq.

Victoria Bjorklund is a partner at Simpson Thacher & Bartlett LLP where she heads the firm's Exempt Organizations Group. She advises public charities, private foundations, boards, and donors.

In 2001, Ms. Bjorklund was appointed by the Secretary of the Treasury to serve as one of six exempt-organization members on the IRS's Tax Exempt/Government Entities Advisory Committee and served as Chair for 2004–2005. In June 2005, she received the IRS Tax Exempt Division Commissioner's Award for "ground-breaking service" to the Advisory Committee.

Ms. Bjorklund was named a David Rockefeller Fellow for 1997–1998 as a rising civic leader in New York City. From 1989 through 2001, she served as a director, secretary, and still serves as pro bono legal counsel for Doctors Without Borders, the emergency medical relief organization that was awarded the 1999 Nobel Peace Prize. She is also a director of and pro bono counsel for the Robin Hood Foundation. She chaired the ABA Tax Section Committee on Exempt Organizations from 2001 through 2003 and now serves as co-chair of the Subcommittee

on International Philanthropy. Ms. Bjorklund was honored in May 2002 as ABA Tax Section “Pro Bono Lawyer of the Year” in recognition of her 9/11 work. She also accepted the “Pro Bono Firm of the Year” award from the NYS Bar Association in recognition of the firm’s 9/11 work. In 2003, she received the Commissioner’s Award, the highest honor the Commissioner of Internal Revenue can bestow, for her “timely, creative and nimble response to 9/11’s unprecedented legal challenges.” In 2005, she received the Assistant Commissioner’s Award for her contributions to the IRS Advisory Committee. In 2006, Ms. Bjorklund was appointed to the Board of Trustees, Institute for Advanced Study, Princeton.

Ms. Bjorklund speaks and writes frequently on exempt-organization subjects. She is the coauthor with Jim Fishman and Dan Kurtz of *New York Nonprofit Law and Practice* (Lexis Publications, 1997 and annual supplements).

She earned her J.D. at Columbia University School of Law, a Ph.D. in Medieval Studies from Yale University, and a B.A. *magna cum laude* from Princeton University, where she graduated in three years and was elected to *Phi Beta Kappa*. Ms. Bjorklund is a former cochair of the firm’s Pro Bono Committee and in 2006, she was appointed cochair of the Diversity Committee.

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Dr. Jack Cowart

Jack Cowart received his B.A. (history) in 1967 from the Virginia Military Institute, Lexington, Virginia, and his Ph.D. (art history) in 1972 from the Johns Hopkins University, Baltimore, Maryland. He was assistant curator of paintings at the Wadsworth Atheneum, Hartford, Connecticut (1972–1974); curator of nineteenth- and twentieth-century art at the Saint Louis Art Museum, St. Louis (1974–1983); head of the department and curator of twentieth-century art at the National Gallery of Art, Washington, D.C. (1983–1992); and deputy director-chief curator of the Corcoran Gallery of Art (1992–1999). His major publications include monographs and studies

on Roy Lichtenstein, Henri Matisse, Ellsworth Kelly, and Manuel Neri. In 1999 he was appointed the founding executive director and member of the board of the Roy Lichtenstein Foundation.

HYPERLINK "<http://www.lichtensteinfoundation.org>"

Genevieve Lam Fraiman, Esq.

Genevieve Lam Fraiman, Lord, Day & Lord, Barrett Smith, (1954–1994, partner 1976–1994); Cadwalader, Wickersham & Taft (senior attorney/consultant 1994–1999); chaired or served on various committees of the American Bar Association, Real Property, Probate and Trust Law Section, New York State Bar Association Trusts and Estates Section, American College of Trust and Estate Counsel; and Association of the Bar of the City of New York (now New York Bar Association); publications: *Estate Planning for Authors and Artists*, (T.M. 815, 1998 ed.); contributor *A Visual Artist's Guide to Estate Planning* (1998 ed.); "The Lifetime Disposition of Fine Art" and "You Can't Take it With You," *Probate and Property* (Nov./Dec. 1990).

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Barbara T. Hoffman, Esq.

Barbara T. Hoffman, editor, is a prominent New York City arts and intellectual property lawyer with a national and international transactional and litigation practice, representing governments, visual artists, photographers, writers, collectors, and filmmakers. She has also advised for-profit organizations, including photo archives, and not-for-profit organizations, including museums and artists' foundations, on managing and protecting intellectual property assets, board development, strategic planning and governance, as well as on routine contractual matters, including exhibition loan agreements and licensing. Hoffman has served as counsel or on the board of organizations such as the Explorers Club, the College Art Association, the Art Critics Association, Williamstown Art Conservation, The International Federation of Women in Legal Careers, and PERFORMA. Hoffman collaborates with tax and estate counsel with respect to art

and intellectual property related aspects of estate planning and administration, and has successfully negotiated the sale or donation and sale of several artist archives and collections to major public institutions. Publications include *Art and Cultural Heritage: Law, Policy and Practice* (Cambridge University Press, 2006) and *Exploiting Images and Image Collections in the Media* (Kluwer Law International, and International Bar Association, 1999). She is a former chair of the City Bar Association Committee on Art Law and the former chair of the International Bar Association Committee on Art and Cultural Heritage Law.

She earned her J.D. at Columbia University School of Law (Harlan Fiske Stone Scholar), M.A., *cum laude* from Johns Hopkins SAIS, an M. Phil. from London School of Economics, and a B.A. *cum laude* from Brown University, where she studied art history and French literature. She speaks French, Spanish, and Italian.

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Barbara Hunt McLanahan

Barbara Hunt McLanahan joined Judd Foundation in January 2006, having formerly been the Executive Director of Artists Space, NY (2000–2006), Visual AIDS, NY (1997–2000), and Camerawork Gallery + Darkroom, London, UK (1992–1996). Following a BA (Hons) degree in visual and performed arts and a postgraduate diploma in gallery and museum studies at the Universities of Kent and Manchester respectively, she worked as a curator and arts administrator for over twenty years on both sides of the Atlantic. She has been an active volunteer throughout her career, sitting on the board of the African and Asian Visual Artists Archive and the Leisure Services Committee of the Royal National Institute for the Blind in the United Kingdom, as well as participating in Godzilla, a group of Asian American artists and curators, and sitting on the board of ABACA (Arts Benefit All Coalition Alternative) at Satellite Academy. She recently joined the board of the Jerome Foundation in Minneapolis. In 2006 she was named *Chevalier de l' Ordre des Artes et des Lettres* by the Republic of France.

Ms. Hunt McLanahan has been a panelist and lecturer at museums, non-profit galleries, conferences, and colleges in the U.S. and UK, particularly on career options for emerging artists and the changing opportunities facing artist-run alternative spaces.

Irving Sandler

Irving Sandler, born in New York City in 1925, holds a B.A. from Temple University (1948) and an M.A. from University of Pennsylvania (1950), where he studied American history. For a year or so after graduation, he tried his hand at painting, specifically abstract expressionism current in the 1950s, and became manager of a gallery on 10th Street, thereby meeting artists he admired. It gradually became clear that his vocation was to be that of chronicler and critic rather than artist. In 1954, Sandler began taking copious notes of conversations with artists, or among artists, during informal gatherings at the Club, the Cedar Street Tavern, or in artists' studios. In 1956, he became the director of the Tanager Gallery, program chairman for the Artists' Club, and a reviewer for *Art News* and *Art International*, establishing two roles that he would fill for the rest of his career: supporter of emergent artist groups, and advocate critic. A third role, that of professor, emerged in the 1960s. Sandler began writing books in the early seventies that synthesized his collection of interviews and reviews into broad surveys of contemporary art. His titles include *The Triumph of American Painting: A History of Abstract Expressionism* (1970), *The New York School: The Painters and Sculptors of the Fifties* (1978), *American Art of the 1960s* (1988), *Art of the Postmodern Era: From the Late 1960s to the Early 1990s* (1996), and *A Sweeper-Up After Artists: A Memoir* (1993). In addition, he has also written monographs on individual artists, such as Alex Katz and Mark Di Suvero. After teaching at New York University throughout the 1960s, Sandler earned a Ph.D. in art history in 1976 and then taught at SUNY Purchase, with occasional visiting professorships at other northeastern U.S. institutions. In 1972, he organized "Artist's Space," an alternative exhibition space for young artists. Laurie Anderson, Judy Pfaff, Barbara Kruger, Cindy Sherman, Nan Goldin, and Chuck Close are among those who got their start there. He has served on the boards of, or otherwise lent support to, many other art-

ists' organizations. He has influential positions in academic and curatorial organizations as well, such as the College Art Association and Independent Curators Incorporated, and in major foundations supporting the arts, such as the National Endowment for the Arts and the Sharpe Art Foundation. He has also served on the board of Public Art Fund, which generated public art projects such as "Sculpture in Environment," "City Walls," and "Prospect Mountain," and was involved in many other public art commissions around the country. *Avant Garde to Pluralism* (Hard Press Editions, 2006) is his most comprehensive work in over a decade.

Alison D. Nordström

Alison Nordström is curator of photographs at George Eastman House, the oldest and largest museum of photography in the United States. She was the founding director and senior curator of the Southeast Museum of Photography in Daytona Beach, Florida from 1991 to 2001, and previously held positions involving photography at the Brattleboro (Vermont) Museum & Art Center and the Peabody Museum of Ethnography, Harvard. She has worked extensively with archives and artists' estates. She has curated over one hundred exhibitions of photography, including the popular biennial series *Fresh Work*, and major surveys of landscape, portraiture, travel photographs, and journalism. She has worked extensively with historical photographs related to the construction of race and place and is the author of numerous books, catalogue essays, and chapters, articles, and reviews in academic publications. In 2006, she curated the exhibition *Paris: Photographs by Eugene Atget and Christopher Rauschenberg* for George Eastman House and the International Center for photography in New York City and the traveling exhibition *Why Look at Animals?*, a historical survey coupled with contemporary installations. Nordström holds a B.A. in English literature, an M.L.S. with museum emphasis, and a Ph.D. in cultural and visual studies.

Faith Ringgold

Faith Ringgold began her artistic career more than thirty-five years ago as a painter. Today, she is best known for her painted story quilts—art that combines painting, quilted fabric, and storytelling. She has exhibited in major museums in the USA, Europe, South America, Asia, Africa, and the Middle East. She is in the permanent collection of many museums, including the Studio Museum in Harlem, the [Solomon R. Guggenheim Museum](#), the [Metropolitan Museum of Art](#), and the [Museum of Modern Art](#). Her first book, *Tar Beach*, was a Caldecott Honor Book and winner of the Coretta Scott King Award for Illustration, among numerous other honors. She has written and illustrated eleven children's books. She has received more than seventy-five awards, fellowships, citations, and honors, including the Solomon R. Guggenheim Fellowship for painting, two National Endowment for the Arts Awards, and seventeen honorary doctorates, one of which is from her alma mater, [The City College of New York](#). She recently retired as a tenured professor of art at the [University of California in San Diego](#).

HYPERLINK “<http://www.anyonecanflyfoundation.org>”

Dr. Alex Rosenberg

Dr. Alex Rosenberg AAA/ASA, former president of the Appraisers Association of America and certified/senior appraiser in personal property/fine art has thirty years of experience as an art dealer and publisher. Dr. Rosenberg founded Transworld Art in 1968, and published over six hundred editions of original prints, portfolios, and multiples. He is currently the president of Alex Rosenberg Fine Art, which offers a selection of the finest paintings, sculpture, tapestries, prints, and multiples by internationally important artists. He is currently in the process of writing a forthcoming book, *Advanced Problems in Appraising*.

John W. Smith

John W. Smith is director of the Smithsonian's Archives of American Art, the world's largest archive devoted to collecting, preserving, and disseminating the rich documentary evidence of art in the United States.

Smith was formerly assistant director for collections, exhibitions, and research at the Andy Warhol Museum in Pittsburgh (2000–2006), where he oversaw all aspects of the permanent collection, organized exhibitions, raised money for the museum's exhibitions and collections programs, and lectured and published books on various aspects of the museum's collection.

As curator of archives and director of the Archives Research Center at the Andy Warhol Museum (1994–2000), Smith established the founding policies and guidelines of the center, raised funds to support the center's goals, and collaborated with colleges and universities to promote the center's resources. He also served as interim director of the museum from 1995 to 1996.

In addition, Smith's extensive archival experience includes serving as chief archivist at the Art Institute of Chicago (1990–1994), visiting archivist at the Royal Opera House in Covent Garden, London (1991), and as founding curator of special collections and archives at the Chicago Park District (1988–1990).

Smith's exhibitions and publications include "Strange Messenger: The Work of Patti Smith" (2002); "Andy Warhol: His Work, Ideas, and Process" (2003); "The American Supermarket" (2003); "Flowers Observed, Flowers Transformed" (2004); "Andy Warhol's Time Capsules" (2004), a collaboration with the Museum for Modern Art in Frankfurt, Germany; "Seeing Double: Encounters with Warhol" (2005); "Andy Warhol: Artist of Modern Life" (September 2005–April 2006), the first major exhibition of Warhol's work to travel to three major museums in Russia; and "Grayson Perry" (February–May 2006), the first U.S. museum exhibition of Great Britain's prestigious 2003 Turner Prize winner.

Smith received his bachelor's degree in English from Southern Illinois University in 1980.

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Michele Wallace

Professor Michele Wallace, author of *Black Macho and the Myth of the Superwoman*, *Invisibility Blues: From Pop to Theory*, and *Dark Designs and Visual Culture*, is Professor of English, Women's Studies and Film Studies at the City College of New York and the City University of New York (CUNY) Graduate Center. She also completed a Ph.D. in Cinema Studies at New York University in 1999. Wallace is Faith Ringgold's first daughter.