

THE ARTIST AS PHILANTHROPIST: THE COMPLEX ROLE OF ARTISTS' FOUNDATIONS

Main motivations and issues of establishing such foundations all in managing an artist's estate

Artists and their heirs increasingly dedicate time and resources to establish institutional structures that manage their legacy and estate. Those who decide to do so by means of a philanthropic foundation must navigate through the constraints and challenges of operating a foundation of public benefit, as well as the peculiarities of the art market.

1. INTRODUCTION

Artists' foundations are an important phenomenon not only because of the assets and rights they hold but also because of their place in the art market. Generally, artists' foundations hold financial assets, works of art and other collectibles, copyrights and real estate. For example, in 2012, the *Andy Warhol Foundation* put several thousand of its works on sale in the hope of receiving US\$ 100 million to finance grants to non-profit museums and institutions.

The US-based *Aspen Institute*, a non-profit think tank and worldwide pioneer in research on non-profit artists' foundations, has studied the phenomenon of artists' foundations in the United States and found a significant increase in their number since 2005, especially those with assets exceeding US\$ 50 million [1]. Most of them are posthumously created, as is the case for 63% of the foundations established between 2001 and 2010 [2]. No such detailed study exists for artists' foundations in Switzerland, despite the fact that many Swiss and foreign artists and their heirs have chosen to set up a foundation in this country, such as Alberto Giacometti, Paul Klee, Jean Tinguely and Niki de Saint Phalle, Zao Wou-Ki, Félix Vallotton, Max Bill and Cuno Amiet.

Whereas certain artists and their heirs undoubtedly choose to pursue a philanthropic goal and put their art in the service of a given cause, others have no philanthropic interest whatsoever. Further estates may have some charitable intentions

without having a philanthropic vision and a desire to set up an institutional framework that makes it possible to take a long-term view, or a clear desire to help others.

This article aims to shed light on the complexity of the activity of an artist's foundation, taking into account in particular the delicate balance it must strike between the artist's own interests and its philanthropic objectives in order to qualify as a charitable institution. It analyses the main motivations, advantages and issues of establishing such foundations in light of the peculiarities of managing an artist's estate.

2. MAIN MOTIVATIONS FOR THE ESTABLISHMENT OF ARTISTS' FOUNDATIONS

While artists may be far more likely to be on the receiving end of philanthropic initiatives, a very large number of wealthy artists are currently active, probably more than ever [3]. In fact, the growing art market is influencing the rise of the artist-endowed foundation field, since "more artists have generated personal wealth through their studio practice" [4]. Therefore, they have the means to establish and finance organisations to protect their work. In fact, the creation of a foundation is only wise for estates that have sufficient means to finance a legal structure, especially its administrative and operational costs [5]. A main *motivation* for the creation of such foundations is that many artists such as Andy Warhol or Robert Mapplethorpe have no descendants and there are, therefore, no heirs to manage the deceased artist's copyright or art collection [6]. Moreover, artists may seek to further shape their legacy and work *post mortem* through a determined framework anchored in legal structures, and thereby to restrict their heirs' scope of action [7]. The legal structure allows the creation and maintenance of a certain agenda regarding the management of the artist's legacy. It unintentionally also prevents an art collection and an artist's assets from being divided up between multiple heirs. Another major advantage to setting up a foundation is tax-based, provided



ANNE LAURE BANDLE,
PHD IN LAW, ATTORNEY-AT-LAW,
BOREL & BARBEY,
GENEVA,
ACADEMIC FELLOW AT THE
GENEVA CENTRE FOR
PHILANTHROPY,
ANNELAURE.BANDLE@
BOREL-BARBEY.CH

the foundation benefits from tax-exempt status, thereby allowing it to devote more funds to its operations. Tax-exempt artists' foundations pursue charitable goals, which means that the artist or his or her heirs wish the foundation to engage in activities of public utility. At their core, most artists' foundations seek to preserve the artistic legacy, maintain its significance and, at best, to enhance it – goals that generally qualify as charitable [8].

The *activities* of artists' foundations are multiple. Primarily, most foundations are devoted to the management and conservation of the artist's work and to the documentation and publicisation of his or her life and work. Such an activity is very consuming in terms of time and money. Some foundations have therefore turned to museums for help, especially to host the art, and to galleries for the estate's management [9].

For example, the *Musée Jenisch* in Vevey has a permanent exhibition space dedicated to the *Oskar Kokoschka Foundation*, which the artist's widow established in 1988. The Foundation holds more than 2,300 works by the artist, including paintings, drawings, watercolours and prints. As another example, the foundation of the renowned Swiss photographer René Burri was set up at the *Musée de l'Elysée* in Lausanne by the artist and his family together with the museum director who, according to the Foundation's articles of association, must permanently remain a board member.

Occasionally, artists themselves decide to transfer the property and copyright to their works to a museum with the duty to preserve and enhance the collection and to properly manage the artists' rights, as René Burri and Sabine Weiss did with the *Musée de l'Elysée*.

3. PHILANTHROPIC PURPOSES

Many wealthy artists' foundations pursue broader goals, which go beyond caring for the artist's legacy. The *Aspen Institute* has divided philanthropic artist-endowed foundations according to four main functions: (1) grantmaking foundations, (2) direct charitable activity foundations, (3) estate distribution foundations and (4) comprehensive foundations, combining multiple functions [10].

In Switzerland, these functions are reflected in the foundations' goals according to their articles of association. Only very few artists' foundations in Switzerland expressly stipulate *grantmaking* as a foundation goal. For example, the *Fondation Jan Michalski pour l'écriture et la littérature* created by the writer's widow "aims to help young writers by creating literary prizes and granting scholarships and financial assistance to writers whom it has designated and distinguished for their particularly outstanding writings" [11]. As another example, the *Fondation Théodore Strawinsky* awards "an annual fine arts prize in Switzerland to a young artist who has distinguished himself in the field of pictorial expression or any other related artistic field" [12]. Other foundations may occasionally make grants to promising artists without specifically mentioning it as part of their broader goal of supporting the arts.

An artist's foundation's typical *direct charitable activities* would be to administer and finance a study and research centre, a museum (in the artist's house), artists' residency pro-

grams or other artistic or scientific programs. Such study centre and exhibition foundations fulfil their charitable purpose "by directly conducting activities that make their art collections, archives, and other art-related assets available as scholarly, cultural, and educational resources" [13]. The *Paul Sacher Stiftung*, founded by the Swiss composer and patron of the same name, has a research centre, which facilitates scholarly research by its own staff and visitors. It also commissions third-party experts for the execution of research and publications on classical music and composers.

Other foundations have dedicated their activity to artists' residency programmes, such as the *Fondation Jan Michalski pour l'écriture et la littérature* for writers or the *Stiftung Dürrenmatt-Mansarde* for young talents in the cultural sector. The latter foundation also maintains the place where Swiss author Friedrich Dürrenmatt spent his years of study.

Finally, several museums and exhibition spaces have been set up thanks to artists' foundations. The *Espace Jean Tinguely Foundation – Niki de Saint Phalle*, created and maintained by a foundation of the same name, is located in the *Art and History Museum Fribourg* and exhibits the couple's works and related works by other artists. The *Stiftung Willy Michel* supports the *Museum Franz Gertsch* located in the Emmental in the Canton of Berne with donations and works of art (on loan or donated). Other foundations are so called «museum foundations», such as the *Zentrum Paul Klee – Maurice E. and Martha Müller Foundation* in Berne, and are specifically dedicated to operating a museum hosting the artist's works. Such foundations may «generate revenue from admissions, membership programs, and museum shop sales to the public, and in some cases also raise funds from individual donors and other private foundations» [14].

Estate distribution foundations have the limited and posthumous function of distributing the assets that they hold to other charitable cultural or artistic organisations, such as a museum, that will use the art assets as educational and cultural resources. In some cases, they may also sell their art to such organisations as partial grants or gift purchases, or to private collectors, with proceeds supporting costs to administer the foundation and its charitable activities [15].

This kind of foundation is rather rare. Most foundations are intended to exist in perpetuity, whereas estate distribution foundations terminate once their distribution task is accomplished [16]. Artists' foundations may make occasional gifts to a museum to ensure that the artist's work is part of the museum's permanent collection, which directly contributes to the artist's artistic merit.

Finally, artists' foundations may have *multiple* functions, combining aspects discussed above while pursuing a central predominant goal.

4. FORMATION OF ARTISTS' FOUNDATIONS UNDER SWISS LAW

According to Article 81 and 493 of the Swiss *Civil Code* (CC), a foundation may be established either by public deed or by a will. If established by a will, the artist must specify which goal the foundation will pursue and what assets it will hold [17]. The artist may stipulate further details in his or her

will, such as the foundation's name, location or organisation. Generally, foundations must be registered in the Commercial Register, unless it is a religious or family foundation, in which case registration is compulsory (Art. 52 CC).

The Swiss landscape of artist-endowed foundations may be divided into four main categories: foundations that are established (1) during the artist's lifetime, (2) by testamentary dispositions or contract, (3) by the artist's heirs or (4) by a third party.

4.1 During the artist's lifetime. It is more common for heirs to organise a foundation themselves following the death of an artist than for an artist to do so during his or her lifetime – which would be more desirable in order to avoid quarrels between heirs. Important Swiss artists such as John Armleder, Thomas Hirschhorn, Markus Raetz and Pipilotti Rist have not established a foundation so far. Most artists almost exclusively focus their energy on their creative activity rather than on any administrative or legal concerns of managing their oeuvre during their lifetime and thereafter. As an exception, the Swiss photographer René Burri established his foundation in 2013 before passing away one year later. Paul Sacher also created the *Paul Sacher Stiftung* during his lifetime.

4.2 By testamentary disposition or contract. Artists may also decide that a foundation shall be set up upon their death. They may do so through a will or an inheritance contract [18]. For example, the Swiss novelist and theatre and film director Anne Cuneo wrote in her will that a Swiss foundation in her name shall be established upon her death with the aim of preserving her archives and promoting her work. It is advisable that an artist chooses a person he or she trusts as testamentary executor so as to ensure that the foundation will be established and managed according to the artist's wishes.

4.3 By the artist's heirs. Commonly, foundations are established because a deceased artist left his or her heirs with a large collection of works and a legacy to manage. In a desire to keep the collection together instead of splitting the works among the heirs like any other asset, the family decides to create a dedicated foundation. Unless there is a single heir, such an undertaking may prove to be very efficient, also with regard to the management of the artist's copyright.

4.4 By a third party. While third parties more frequently establish foundations in Switzerland that benefit artists in general, certain foundations aiming to support one artist specifically do occur. For example, the *Willy Michel Foundation's* main purpose is to support and protect the oeuvre of Franz Gertsch. The founder, industrialist Willy Michel, decided after meeting with the artist to establish a collection of his works and a dedicated museum. The artist sits on the Foundation's board together with the founder, the museum's director and other members. As a further example, the *Alberto Giacometti Stiftung* was created by collectors during the artist's lifetime. Many years later, Bruno and Odette Giacometti donated 75 plasters and 15 bronzes from the artist's es-

tate. The main part of the collection is held by and exhibited at the *Kunsthaus Zürich*.

5. TAX TREATMENT OF ARTISTS' FOUNDATIONS

One of the main interesting features of establishing a philanthropic artist's foundation is tax-based. Upon request, such foundations may benefit from corporate tax exemption on charitable purposes by showing that they pursue goals that are in the public interest, such as activities of a cultural, artistic or educational nature [19]. Without such a status, a foundation is subject to profit tax on a federal and cantonal level as well as to capital tax on a cantonal level. Many Swiss art-

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ists' foundations aim to conduct and promote research, conservation, management and the development of archives on the work of the artist and issue publications about the artist's work.

Additionally, to obtain tax-exempt status, a foundation must be organised in an altruistic manner «in the sense of being devoted to communal and not to personal benefit» [20]. This requirement entails that the foundation's board members should not be paid for their function but may only be compensated for expenses incurred by their activity for the foundation according to specific thresholds.

Unlike in the case of revocable trusts, all funds dedicated to the tax-exempt purpose must be irrevocably tied to such purpose. They may not be redirected to the foundation's founders or benefactors [21]. Accordingly, most foundations' articles of association include a provision according to which their assets will be transferred to another non-profit organisation in the event the foundation is dismantled. If an artist or his or her estate decides to donate a collection of works of art to the tax-exempt foundation, the donation will not be subject to gift or inheritance tax if it is irrevocably attributed to the foundation [22]. Should the foundation not have tax-exempt status, corporate tax will apply to the donation [23]. However, tax authorities will not take into account the contribution to determine the foundation's taxable net profit [24].

6. MANAGEMENT OF COPYRIGHT AND AUTHENTICATION SERVICES

Artists' foundations may also manage the artist's copyright, which expires 70 years after the artist's death (Art. 29 (2), *Federal Act on Copyright and Related Rights*, «*Copyright Act*»). Upon an artist's death, his or her heirs inherit the copyright, which extends to both the artist's moral and economic rights (Art. 16 (1) *Copyright Act*) [25]. However, the heirs only inherit an artist's economic rights insofar as these are not already assigned to a third party. For example, the *Fondation Anne Cuneo* owns 25% of the artist's rights on her books and other works.

An artist's economic rights may be an important source of income as they entail the rights of reproduction, distribution,

communication and performance (Art. 10 (2) *Copyright Act*). Through the right of reproduction, an artist may prevent others from reproducing his or her works by any means and in any form, as a whole or in part, without permission. Artists and their heirs may choose to use a collective rights management organisation, such as *ProLitteris*, to gather and distribute royalties for the reproduction of the works. As part of the reproduction right, an artist's heirs may decide to create *post-mortem* reproductions of his or her works. In practice, such reproductions are particularly common in photography and for bronzes [26].

Several artists' foundations actively maintain a *catalogue raisonné* that lists all the known works by a specific artist, and some have expressly included this important task in their goal, such as the *Fondation CHU Teh-Chun* and the *Fondation Félix Vallotton*. These comprehensive inventories have become a major authentication reference in the art market [27]. While any expert can produce a *catalogue raisonné*, only the copyright holder has the right to reproduce the depicted works or to license such a right to a third-party editor. Hence, if a foundation does not hold the reproduction right, it must ensure it has the right holder's authorisation to include images of the works.

Moreover, artist's foundations are commonly a point of reference to confirm or negate the authenticity of works of art by the given artist. In this capacity, they issue *certificates of authenticity*, in which they confirm that a work is authentic and/or that it will be included in the artist's *catalogue raisonné*.

In doing so, they may have to comply with certain duties and be subject to legal liability [28]. Certifying a work's authenticity does not require holding any copyrights to the given works. Hence, any person or institution may conduct authentications, but only those certificates delivered by «expert authorities» will be respected in the art market.

Selling works of art, issuing certificates of authenticity against a fee and collecting royalties may qualify as commercial activities. As a result, these may be subject to VAT [29]. Additionally, if such commercial activities outweigh the foundation's charitable revenues (donations) [30], they may challenge the foundation's philanthropic (and tax-exempt) status. In this event, it might be of interest to exclude the commercial activities from the foundation's scope of action and to set up an independent legal entity specifically dedicated to these [31].

7. CONCLUSION

Artists' foundations are a relatively unknown construct in Switzerland for lawyers and artists, yet they are evolving in number, organisation and operations. Provided they are intended to be a philanthropic institution, their success seems most likely if they are set up and advised by administrators who understand the constraints and challenges of operating a foundation of public benefit, as well as the peculiarities of the art market. Additionally, artists' foundations must have sufficient resources available for achieving their philanthropic purposes. ■

Footnotes: 1) The Aspen Institute Program on Philanthropy & Social Innovation, «The artist as philanthropist: Strengthening the next generation of artist-endowed foundations. A study of the emerging artist-endowed foundation field in the U.S. Study report supplement 2013», Christine J. Vincent, Study Director, available online at https://assets.aspeninstitute.org/content/uploads/2016/07/AEF-Study-Report-Supplement-2013.pdf?_ga=2.184026213.232253628.1543067887-1607050640.1536003955 [accessed 24 November 2018], p. xiv. 2) *Ibid.*, p. 17. 3) See Loretta Würtenberger, «Artist's estate management in the 21st century», in Alessandra Donati, Rachele Ferrario and Silvia Simoncelli (eds.), *Artists' Archives and Estates: Cultural Memory between Law and Market*, Comparative Art Law Series Vol. 1, Edizioni Scientifiche Italiane, 2018, p. 183. 4) Mike Scutari, «'A New and Growing Force.' Inside the World of Artist-Endowed Foundations», *Inside Philanthropy*, 15 October 2018, <https://www.insidephilanthropy.com/home/2018/10/15/a-new-and-growing-force-inside-the-world-of-artist-endowed-foundations> [accessed 24 November 2018]. 5) See Loretta Würtenberger, *Der Künstlernachlass*, Handbuch für Künstler, ihre Erben und Nachlassverwalter, Hatje Cantz, 2016, p. 41. 6) The absence of any heirs is the reason behind the creation of an artist's foundation in 6 out of 10 cases, see The Aspen Institute Program on Philanthropy & Social Innovation, «The artist as philanthropist: Strengthening the next generation of artist-endowed foundations. A study of the emerging artist-endowed foundation field in the U.S. A reading guide to the study report for artists and their family members», Christine J. Vincent, Study Director,

The Aspen Institute Program on Philanthropy & Social Innovation, 2010, available online at https://www.giarts.org/sites/default/files/Artist_as_Philanthropist_Reading-Guide-2014.pdf [accessed 24 November 2018], p. 4. 7) See Würtenberger, *op. cit.* fn. 5, p. 36. 8) *Ibid.*, p. 42. 9) For example, the international gallery Hauser & Wirth manages many artists' estates and foundations. 10) The Aspen Institute Program on Philanthropy & Social Innovation, «The artist as philanthropist: Strengthening the next generation of artist-endowed foundations. A study of the emerging artist-endowed foundation field in the U.S. Part A: Findings: Overview of the Field», Christine J. Vincent, Study Director, November 2010 (updated December 2010 and May 2011), available online at https://assets.aspeninstitute.org/content/uploads/2010/11/AEF_Vib.pdf?_ga=2.117390414.973251691.1543739557-1607050640.1536003955 [accessed 24 November 2018], p. 27 et seq. 11) *Fondation Jan Michalski pour l'écriture et la littérature*, Articles of association, Art. 2 (transl. author). 12) *Fondation Théodore Strawinsky*, Articles of association, Art. 4.2 (transl. author). 13) The Aspen Institute Program on Philanthropy & Social Innovation, *op. cit.* fn. 10, p. 30. 14) *Ibid.*, p. 31. 15) *Ibid.*, p. 34. 16) *Ibid.*, p. 31. 17) Institut Suisse pour l'étude de l'art (SIK-ISEA), *Successions d'artistes*, Guide pratique, SIK-ISEA, 2017, p. 165. The artist is free to attribute his or her assets to a foundation within the limits of forced heirship rules (Art. 470 et seq. CC). 18) *Ibid.* 19) Art. 56 (g) Federal Direct Taxation Act and Art. 23 para. 1 (g) Federal Harmonisation of Direct Taxation Act. 20) Xavier Oberson, «The Conservation of the Art Collection in Inheritance», in Peter Mosimann and

Beat Schönenberger (eds.), *Kunst & Recht 2013/Art & Law 2013 Referate zur gleichnamigen Veranstaltung der Juristischen Fakultät Basel vom 14. Juni 2013*, Stämpfli Verlag AG, 2014, pp. 13–33, p. 20. 21) *Ibid.* 22) *Ibid.*, p. 22. 23) Art. 57 et seq. Federal Direct Taxation Act and Art. 24 et seq. Federal Tax Harmonisation Act. 24) See Oberson, *op. cit.* fn. 20, p. 22. 25) See Matthias Seemann, «Übertragbarkeit von Urheberpersönlichkeitsrechten», in Manfred Rehbinder/Reto M. Hilty (eds.), *SMI – Schriften zum Medien- und Immaterialgüterrecht Band/Nr. 86*, Stämpfli Verlag AG, 2008, p. 381 et seq. 26) By way of illustration, the *Stiftung Bildhauer Paul Roth* expressly provides in its articles of association to be entitled to have castings made from the plaster models and to sell these castings as it sees fit. 27) See Anne Laure Bandle, «Artists' rights and responsibilities when authenticating their works of art: A comparative law analysis», in Alessandra Donati, Rachele Ferrario and Silvia Simoncelli (eds.), *Artists' Archives and Estates: Cultural Memory between Law and Market*, Comparative Art Law Series Vol. 1, Edizioni Scientifiche Italiane, 2018, p. 60. 28) For more information, see *ibid.* 29) See Institut Suisse pour l'étude de l'art (SIK-ISEA), *op. cit.* fn. 17, p. 175–176. 30) *Ibid.*, p. 179, according to which commercial revenues must not exceed 10–20% of all revenues. 31) For example, the heirs of the artist Alexej von Jawlensky established a limited liability company in Locarno in 1988 which handles the artist's copyright, conducts research on his work and provides authenticity certificates. By setting up a limited liability company, the heirs are not constrained by the limits imposed on tax-exempt foundations.