

THE COOPER UNION ALUMNI PIONEER

Fact-checking the Findings of Fact

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Abstract

Are the investigative findings of the Attorney General “incorrect and incomplete in numerous respects” (NYSCEF Doc. No. 148)? In a material way, no, but, for the record, Barry Drogin, the fact-checker *par excellence*, provides these errata.

On September 2, 2015, the Attorney General of the State of New York, representing the people of the State of New York and acting as an intervenor in the petition of the Committee to Save Cooper Union against the Board of Trustees of The Cooper Union (Index No. 155185/2014), proposed a Cross-Petition (NYSCEF Doc. No. 139) with the Supreme Court of the State of New York (<http://www.notnicemusic.com/Cross-Petition_OCR.pdf>). At the heart of the Cross-Petition, with paragraphs numbered 1 through 225, are the results of a year-long investigation conducted by the Charities Bureau of the Office of the Attorney General from August 2014 through August 2015, entitled “Investigative Findings” and comprising paragraphs 12 through 180, pages 6 through 46 of a 56 page document.

According to confidential sources, the Investigative Findings were originally twice as long as what was finally submitted to the Court. There are multiple reasons why the length of the Investigative Findings was cut. This document does not analyze or explicate those reasons or attempt to add back in findings that were deleted. The Investigative Findings also alternates between named individuals and unnamed individuals who are easily identified.

The existence of the Cross-Petition and its Exhibit 1, the Consent Decree (NYSCEF Doc. No. 140, <http://www.notnicemusic.com/Amended_Consent_Decree.pdf>), was an “open secret” to many members of the Cooper Union Community, although the final wording and contents were being negotiated until the last minute. On September 1, 2015, at 7:30pm, *The Alumni Pioneer* broke the story, followed, at 9:00pm, by “exclusives” in *The New York Times*, *The Wall Street Journal*, and simultaneous press releases and e-mails from the Committee to Save Cooper Union, [The] Cooper Union, and the Cooper Union Alumni Association (although “The Cooper Union” is correct, this errata, which contains many direct quotations, adopts the usage in the Cross-Petition and Consent Decree). Cooper Union and the Board of Trustees stipulated to the *cy pres* petition (seven modifications to the Trust Deed), but, in their Response to the Cross-Petition (NYSCEF Doc. No. 148), stated they “neither accept nor agree with the Investigative Findings set forth in the Cross-Petition which, in addition to being incorrect and incomplete in numerous respects, fail to adequately credit the Board’s commitment and initiative in addressing the issues raised in the Cross-Petition” (this language was quoted in *The Times* and *The Journal*, although the official press release merely “noted that they neither accept nor agree with the factual findings”).

An analysis of the Investigative Findings reveals that there are only two findings, paragraphs 52 and 53 within the main body of the findings of fact, as well as the Summary of Investigative Findings, paragraphs 171 through 180, that would amount to the Board admitting that they did not fulfill their “duty of care” (their fiduciary responsibility). The statement, presented to the Court and widely reported in the media, that the Investigative Findings are “incorrect and incomplete,” cannot be allowed to stand unchallenged. The vast majority of the Investigative Findings are completely correct and only incomplete for reasons of length.

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What follows, then, are a set of errata, for the record, on those findings which are, in some way, incorrect or incomplete. These corrections in no way reverse the Summary of Investigative Findings, but they are presented for the historical record, for those disturbed (or comforted) by the statements in the media, and for those who have asked that the findings of fact be fact-checked. They are presented in the order of the Investigative Findings.

23. In Cooper Union's Charter and Deed of Trust, Peter Cooper outlined his goals for the school. They included immediate provision of a free night school to educate working people in practical sciences, a free art school for women,¹² and a free reading room for the public. They also included aspirational goals of establishing a degree-granting polytechnic school and an organization of "Associates" to support Cooper Union's mission.

¹²For most of its first fifty years, Cooper Union allowed a small number of "amateur" art students to be admitted to the Art School on a tuition-paying basis. These paying "amateurs" never made up a substantial portion of the overall student body.

There were many hands in the drafting of the Charter. The final draft was in Abram Hewitt's handwriting and included insertion of a clause pertaining to a potential merger with Columbia University that Abram Hewitt desired and attempted to implement but that never came to fruition. Edward Cooper, Peter Cooper's son, also had a hand in the Charter, as well as Peter Cooper's lawyer, John E. Parsons.

On numerous occasions, Bharucha and the Board have made statements to numerous media and to the Cooper Union Community that, prior to 1902, Cooper Union charged tuition. This has led to repeated statements in the press that Cooper Union has only been free for 100 years rather than since 1859, as stated in 3, which refers to "the 150-year-old free-tuition policy." It is true that, when the pre-existing School of Design for Women was given space in the Foundation Building and then included in the Charter, it had a policy of admitting "amateurs" who paid for the classes they attended, plus a small contribution to the college for expenses. In the academic context of tuition and fees, fees are construed as payment for instruction, tuition as payment for other college uses. These students did both pay for instruction and paid tuition. However, the amateurs were not full-time undergraduate students of the art school, could not earn certificates or diplomas, and were not required to attend all classes or take exams or perform all assignments. Students applying to Cooper Union's School of Design for Women had to indicate whether they wished to be admitted as amateurs, as "industrial" students, or as students interested in pursuing careers in teaching art. Based on their application, different rules applied to their conduct, treatment, and requirements. In modern parlance, these amateur students would be considered part-time auditors, and their payments would not be considered as tuition. It is important to recognize that Cooper Union was "completely gratuitous" since its founding for all full-time and, except for the amateurs, part-time students of the art, architecture, and engineering school (some students, such as Thomas Edison, only wanted to attend one class), that the charging of lab or studio fees did not start until 1940, and the charging of "student fees" did not start until 1962.

24. For the first 24 years of its existence, Peter Cooper personally oversaw Cooper Union as its first President and Founding Trustee. During that time, Cooper Union grew steadily both as a school and as a civic institution.

Abram Hewitt, as Secretary and Founding Trustee, personally oversaw the operations of Cooper Union, in continuous contact and creative dispute with Peter Cooper, its first President and Founding Trustee, its founding Trustees, Edward Hewitt, Peter Cooper's son, Daniel F. Tiemann, Peter Cooper's nephew, John E. Parsons, Peter Cooper's lawyer, and Wilson G. Hunt, Treasurer and Peter Cooper's business associate, and the twelve members of the Advisory Council of the School of Design for Women.

26. Peter Cooper died in 1883, and was succeeded in turn by his son Edward Cooper and his son-in-law Abram Hewitt. They continued his personal style of oversight for the next twenty years. They funded the school's deficits, and were intimately involved in the school's academics and management.

Peter Cooper's nephew, Daniel F. Tiemann, also succeeded Peter Cooper, and the surviving Founding Trustees turned from creative dispute with Peter Cooper to increased defense of Peter Cooper's Charter and Deed of Trust, including explicit preservation of the concept that the entire college be "open and free to all."

It may be of interest that while serving as Trustees of Cooper Union, Peter Cooper's son, Edward Cooper, son-in-law, Abram Hewitt, and nephew, Daniel F. Tiemann, served as Mayors of the City of New York.

29. Also in 1902, Andrew Carnegie gave the school a large cash gift, and the Board of Trustees announced that earnings on this endowment would be sufficient to fund Peter Cooper's ambition of a "thorough polytechnic school," "equal to the best."

Prior to 1902, Andrew Carnegie gave the school a large gift of the same amount, to help vacate revenue-generating businesses from the top floors to make room for the "thorough polytechnic school." In 1902, H.H. Rogers gave an anonymous gift almost equal to Andrew Carnegie's gift.

30. Between 1902 and the 1960's, the income from the Lexington Avenue property and the Carnegie endowment funded the creation and expansion of the undergraduate engineering, art and architecture programs that the school is known for today.

Until the end of the Great Depression, the Carnegie endowment supplemented by the anonymous gift was sufficient to fund the creation and expansion of the undergraduate engineering, art and architecture programs, as there was little income from the Lexington Avenue property.

32. In the late 1960's and early 1970's, general economic conditions and the school's unique financial structure collided to produce substantially larger and more persistent deficits. In order to address this problem, at least temporarily, Cooper Union sold its Green Camp property, which had served as a retreat and recreation space for the community.

In 1972, the Court agreed to a *cy pres* petition to amend the Charter to meet the Laws of 1969 to remove personal indebtedness of the trustees for Cooper Union deficits but also, separate from the Laws of 1969 and contrary to the intent of Peter Cooper, to allow the college to incur indebtedness larger than \$5,000. The sale of Green Camp was accompanied by a loan from the Dormitory Authority of the State of New York that Cooper Union used to modify the interior of the Foundation Building, guaranteed by proceeds from "student fees" charged to the students and placed in an escrow account for that purpose.

34. During the remainder of the 1980's and 1990's, Cooper Union's income from its investments and from the Chrysler Building lease were sufficient to maintain general fiscal stability, notwithstanding occasional years of deficit spending.

Additional loans from the Dormitory Authority of the State of New York were used to build a Residence Hall and renovate the exterior of the Foundation Building. The building of the Residence Hall provided no economic benefit to Cooper Union, instead incurring more indebtedness to Cooper Union and more economic burden on the students.

36. George Campbell became President of Cooper Union in 2001. One of his first initiatives was to design a Master Plan for fundraising and for the development of Cooper Union's real-estate

holdings in a way that would maximize their value and utility for the school, while eliminating deficit spending.

The major elements of the Master Plan were described in 1998 by prior President John Jay Iselin and Vice President Robert Hawks to the Middle States Association, as reflected on pages 16 through 18 of the Report by its Evaluation Team < http://www.notnicemusic.com/1998_MSA_Letter_OCR.pdf >. It is true that George Campbell was given the task of designing the Master Plan.

37. President Campbell's Master Plan called for the school to raise \$120 million to build a New Academic Building ("NAB") at 41 Cooper Square, the site of the former Hewitt Building, a property Cooper Union leases from the city on a long-term basis. When 70% of the funds were in hand, the school would begin construction.

The use of the term "President Campbell's Master Plan" pertains only to the details of the design of the Master Plan and does not relieve the Chair, Robert Bernhard, or the other trustees from responsibility for their approval and support for the details of the design of the Master Plan.

45. The Board then decided to explore options for putting Cooper Union into debt to finance the building. But the Board's attempts to locate financing in the market yielded only one offer that met the plan's needs.

Cooper Union was already still in debt due to the second loan used to build the Residence Hall, as referenced in 48.

75. The loan plan did not fail because of construction-cost overruns on the new building, which were modest. Nor did it fail because of any problem with the revenue generating 51 Astor Place commercial lease transaction, which was actually very successful as a stand-alone negotiation. The plan failed because its four key, inadequately-assessed assumptions all went unrealized.

A problem with the revenue-generating 51 Astor Place commercial lease transaction was that the 40,000 square feet of academic space required by an ULURP not be provided to Cooper Union free thereby allowing there to be an increase, not a reduction, in useable classroom space as stated in 41 or allowing for rented academic space at 30 Cooper Square to be vacated for free space at 51 Astor Place.

85. President Campbell's reported statement that Cooper Union had balanced its budget was technically true, in that for the first time in 25 years Cooper Union did not need to dip into its existing investment pool to cover an actual \$10 million operating deficit, but only because it received \$175 million in loan proceeds that year. President Campbell's reported statement that the value of the endowment had been increased from \$138 million to more than \$600 million was based on an accounting change, not an actual increase in value. Prior to 2002, the Chrysler Building land was carried on the school's books at its 1902 price of \$600,000. The increase in the endowment reportedly cited by Mr. Campbell came from changing that value to reflect the property's actual modern appraised value, which exceeded \$400 million.

It has been inferred that the accounting change was used to allow Cooper Union to invest in riskier hedge funds.

96. President Bharucha did not take office until months later, in July 2011. It is not known what information concerning the school's financial condition was shared with him by the Board either in the two days of contacts with him prior to his hiring, or in the interim between the hiring and his investiture.

Although, as a source, his statements are suspect, information concerning the school's financial condition was shared with Bharucha prior to his hiring, according to a racist statement made by Chair Epstein in a public forum on November 7, 2011: "When we narrowed down the search to a few finalists, they were all given full disclosure about the school's finances. We didn't want to have somebody hired as president, not knowing where we were and then saying, 'Well, you didn't tell me this,' and buying the first ticket to Nepal and disappearing."

100. On November 2, 2011, President Bharucha announced in a letter to the community that he had a "reinvention plan" for Cooper Union. He did not specifically mention charging tuition, but he did reference the *New York Times* article in which he discussed that possibility.

The "reinvention plan" did mention charging tuition but hid it under the term access: "Access means enabling students of merit to benefit from a fine education that would otherwise be out of reach." Switching from not charging tuition to access was a change in the scholarship policy, something that, in the interview with the *New York Times* President Bharucha said would be considered only as a "last resort."

104. In July 2013, the occupation ended when President Bharucha and the Board agreed to the formation of a "Working Group" that would be charged with exploring alternatives to tuition. The Working Group would consist of students, alumni, administrators, and trustees. In the meantime, tuition would not be charged for undergraduates entering the school that fall.

Cooper Union continued to tell undergraduates entering the school that fall that they would be charged tuition. However, the Cooper Union Alumni Association launched an initiative to reduce or even completely eliminate the charging of tuition for the incoming class. The Board reserved the right to re-direct the funds raised for that purpose to additional financial aid to the "most needy" rather than to increasing the full-tuition scholarship across the board for all students.

105. The Working Group was given seven weeks in October and November 2013 to figure a way out of the debt-and-deficit trap created by the failure of the 2006 loan plan without resorting to tuition.

One reason the Working Group had only seven weeks was because Bharucha delayed appointing his representatives.

106. The Working Group did not have direct access to Cooper Union's books and records, despite the fact that two trustees who had the right to such access were participants. Instead, Working Group requests for information were relayed through consultants hired by the administration, and were subject to limitation on unknown bases and to an unknown extent.

Bharucha further inhibited access by firing the Vice President of Finance and hiring the consultants mentioned.

108. When the Working Group forwarded its plan to the Board, President Bharucha's three representatives, led by the Engineering Dean, forwarded to the Board their own "minority report," the contents of which had never been discussed with or disclosed to the other members of the Working Group.

The "minority report" also contained the name of a trustee selected by Chair Epstein.

109. The "minority report" disputed the accuracy of figures and the viability of concepts cited in the Working Group report, based on information provided by the administration's consultants.

The Working Group plan was approved as accurate by the same consultants who provided information to Bharucha's representatives.

110. In December 2013, the Board received the Working Group report and determined that the issues it raised required additional study. The Board stated that it would not take the "minority report" into account in evaluating the Working Group report.

The consultants provided criticisms of the Working Group plan to the Board that were never provided to the Working Group and that were against the charge of the Working Group.

138. Mr. Epstein's statement that only 20 percent of alumni traditionally give to Cooper Union on a regular basis was not accurate. As of 2000, when the capital campaign began, over 30% of alumni gave to the annual fund. That percentage did go down over the decade, but did not go under 25% until after the 2008 market crash, and did not fall to 20% until 2012. In any event, in addition to annual fund giving, the alumni donated more than \$50 million to the capital campaign over the years 2000-2010, an average of \$5 million a year, or about three times the alumni yield from the annual fund.

The use of the term "regular basis" is vague and attaches to the percentages the notion that some alumni give regularly while other alumni do not give at all, when Cooper Union has acknowledged in a prior donor report that on a three-year cumulative basis, over 70% of alumni give to the college, a fact supported by an independent analysis of a later donor report in which it was determined that there is no such thing as a "regular basis," as alumni giving is evenly distributed between those who never give and those who always give, the extremes being rare, and the transition from parental giving for young alumni not being factored in. Similarly, there is evidence that the alumni percentages are distorted by undercounting of Cooper couples, the assignment of donations to a fiscal year not in alignment with donors' tax year, and competition between solicitations to give to the Building Fund and solicitations to give to the annual fund. Finally, it is public knowledge within higher education that alumni giving rates have been declining due to improvements in database management denoting an improvement in contacting alumni not a fall in alumni support.

For further information concerning the death of the "Blame the Alumni" narrative, see the following two analyses:

"Michael Borkowsky and Alumni Giving" <<http://www.notnicemusic.com/giving.pdf>>

"The 'Regular Contributor' and Other Myths" <<http://www.notnicemusic.com/giving2.pdf>>

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The Alumni Pioneer, <<http://www.notnicemusic.com/Cassandra/cooper.html>>, was a virtual newspaper with breaking news stories and links to analyses, sources and the media. It was written and formatted in an inverted-pyramid newspaper style to facilitate quick access to what is deemed the most important information. It is now a news archive.