Good Governance In Times Of Financial Crisis
By Barron Oda¹

“[T]he museum is there to save the collection; the collection is not there to save the museum.”
- American Alliance of Museums President Ford W. Bell, March 27, 2014.

Introduction
The Detroit Institute of Arts (DIA) and Delaware Art Museum (DAM) each recently faced crises involving monetization of their collections. The DIA, as custodian of Detroit's art collection (of which Detroit holds in trust for its citizens), was brought into the center of bankruptcy proceedings when creditors sought to remove the collection from the City to have it appraised in anticipation of liquidation. The City's Attorney General successfully fought (for the present moment) to keep the collection in situ and preserve it from being sold off.² The DAM, on the other hand, found itself in the center of controversy after its board voted to sell up to four paintings from its collection to pay its bills and actually sold one at auction.

Whereas the DIA's crisis was largely due to external forces beyond its control, the DAM's crisis was largely internal -- debt from an ambitious expansion plan implemented years ago and a dwindling endowment were factors that led its board to take the action it did. And while the DIA received an enormous show of support from the public, the DAM lost its AAM accreditation and was sanctioned by the AAMD. Although the monetization of each museum's collections was at issue in their crises, very little other comparison can be drawn. The timeliness of the two events, however, showcases just how fragile museums can be to both external and internal financial forces. This article isn't championing the City of Detroit's efforts to keep the DIA's collection intact; nor is it an indictment of the DAM's board's decision to sell off its collection to pay its bills. Rather, the timeliness of these two crises paints the moment ripe to discuss good governance practices during a financial crisis -- no matter where and how it originated.

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The Corcoran Gallery of Art, founded in 1869, is the first and largest non-federal art museum in the nation’s capital. The Corcoran’s mission is dedicated to art and “for the purpose of encouraging the American genius.” The Corcoran gallery is home to a distinguished collection of works by renowned American artists, including but not limited to, paintings by John Singer Sargent, and an extensive collection of photography by Gordon Parks.

In recent years the Corcoran has faced increasing financial difficulties in the form of mounting debts, shrinking endowment and donations, and millions of dollars in renovation costs. In early 2014 the Corcoran announced its solution for dealing with its financial troubles --- a three way merger with the National Gallery of Art and the George Washington University. In this merger, the National Gallery of Art would gain control of the Corcoran’s extensive art collection and any works not acquired by the National Gallery of Art would be sold with the preference for keeping those items in the Washington, D.C. area. The George Washington University would operate the Corcoran’s College of Art and assume responsibility for the Corcoran’s landmark building. In order for the merger to happen, all three organization’s boards must approve the plan. Under this plan, Washington’s oldest private gallery and sole art school will cease to exist independently. For that reason, the plan is also subject to approval in D.C. Superior Court. Specifically, under rules governing non-profit organizations, the Corcoran must seek a cy-pres determination from the court approving drastic changes to the original charter in order to carry out the details of the plan. The D.C. attorney general’s office, which oversees non-profits and represents the public interest, will also be a party to this proceeding.

The Corcoran began the cy-pres proceeding in D.C. Superior Court in June 2014 seeking the Court’s approval on the grounds that it is no longer possible or practicable for the Corcoran to carry on as is and the proposed merger plan is the best alternative. On July 2, 2014, fourteen plaintiffs, including an advocacy group called Save the Corcoran comprised of museum donors, current and former Corcoran College of Art students, former faculty, and Corcoran staff members formally objected to the plan and filed a motion to intervene in the ongoing cy-pres proceeding. On Monday, July 21, 2014 presiding Judge Robert Okun ruled that current students and employees of the Corcoran have standing to intervene in the cy-pres proceeding because the current means of implementing the mission have become impossible or impracticable and could potentially harm current students and staff members. He also ruled that former students and staff do not face similar potential harm and therefore do not have standing to intervene in the proceeding. The remaining intervening plaintiffs are arguing that the current Corcoran board has mismanaged the finances of the institution and that the Corcoran can be saved through other means, such as a restricted sale of certain works in the collection. The D.C. Attorney General has endorsed the Corcoran’s merger plan stating that the District of Columbia believes the proposed plan will best ensure that the Corcoran’s charitable assets remain in Washington, D.C. Judge Okun began hearing arguments and sometimes contentious testimony from all interested parties on Monday, July 28th and the hearing continued into the week of August 4-8, 2014.

AAMD Sanctions Troubled Randolph College’s Maier Museum of Art For Selling Painting

The Maier Museum of Art at Randolph College in Lynchburg, Virginia sold a 1912 George Bellows painting titled, Men of Docks for $25.5 million to the National Gallery in London to provide general operating funds for Randolph College. The Association of Art Museum Directors issued a statement and sanctioned the Museum, stating that while it appreciates the sale of the painting to a public institution ensuring the painting remains in the public domain, the “sale of works of art from museum collections for such purposes is a violation of one of the most fundamental principles of the art museum field.” The AAMD went on to say that the use of funds in this particular way is ultimately damaging to the entire field. http://www.tinyurl.com/malc035
Before a Crisis
Good governance begins with a healthy board of directors. A healthy board is more apt to successfully lead an organization through a crisis than an apathetic or worse, problematic one. Generally speaking, a nonprofit’s board has at least five major traditional responsibilities:

1. Reviewing the organization’s mission and strategic planning;
2. Defining long-term objectives;
3. Focusing on external issues to clearly identify threats to the organization;
4. Assessing the risks facing the organization; and
5. Understanding the needs of the various stakeholders.

A healthy board knows what its organization’s mission is and knows where it wants the organization to be in the long term. It has articulate objectives for fulfilling the organization’s mission. A healthy board “does not execute the day-to-day management of the organization;” rather, it enables management and staff to do their best by providing vision, guidance, and mentorship.

A healthy board should be tuned into external events and circumstances that have the potential to adversely impact the organization. For example, if the organization receives a substantial portion of its operating budget from one or a few funders, the board should pay attention to external matters affecting its funders’ ability to contribute to the organization, assess potential impacts, and ideally discuss strategies for averting or mitigating a crisis arising from those external matters.

A nonprofit, unlike a for-profit corporation, has stakeholders beyond those people directly involved with the corporation. Museums and other cultural organizations, being quasi-public institutions, should also count members of its community among its stakeholders. A healthy board understands the needs of its various stakeholders. Board composition may assist in this regard -- the board may be composed of directors affiliated with or having a background in matters important to certain stakeholders.

Although every situation is unique, an internal financial crisis will generally present itself to the board earlier than one caused by external forces – in fact, an internal crisis may have been caused by prior board decisions. However, regardless of the origin of a crisis and notwithstanding the timing of an internal versus an external crisis, good governance practices will go far to alleviate the effects of a crisis. When a board has good governance practices in place, it will be able to provide effective leadership to avert or minimize an anticipated internal financial crisis, and it will be able to identify an impending external crisis and take steps to proactively address it.

When a Crisis Hits
Whether external or internal, when a crisis hits, CYA – no, it does not mean “see ya,” nor does mean to cover your you-know-what – it means Consult Your [organization’s] Attorney! Depending on the situation and the board’s planned course of action, there will likely be legal and ethical considerations. The DIA and DAM provide good examples.

With the DIA, bankruptcy law played a controlling role. With the DAM, the deaccessioning and sale of artwork to pay its $19.8 million debt and build its endowment violated the Association of Art Museum Directors and American Alliance of Museums codes of ethics, and serious repercussions followed. An organization’s in-house counsel is there to provide invaluable guidance to navigate the legal landscape and to help the organization stay on the righteous side of any ethical issues. If the organization has no in-house counsel, the board should consult an attorney knowledgeable in nonprofit law, preferably with a background in the unique issues museums and cultural organizations present.

The board should talk about the crisis. It should listen to the organization’s stakeholders and consider their input. While respecting the division between day-to-day management and directors’ responsibilities, the board should reach out to the organization’s benefactors and the professional associations the organization belongs to and apprise them of the organization’s current crisis – they may be able to offer assistance. The board must not try to hide the fact the organization is facing a crisis and needs help. The board should be meeting frequently during the crisis but if that is not possible, “there should be a robust executive committee that is empowered, within legal limits, to discharge the duties of the board between meetings. Where there is such an executive committee, its deliberations and actions should be promptly reported to the full board for review.”
Individual directors must always remain cognizant of their fiduciary duties and commit themselves to the faithful discharge of them with respect to decisions at all stages of the crisis. State laws vary with respect to fiduciary duties of nonprofit board members and may differ from best practices and the policies of state, regional, and national associations the museum is a member of. In-house counsel can provide the board tailored guidance regarding faithful discharge of fiduciary duties.

Concluding Thoughts
In times of crisis, whether external or internal, the leadership of the board is more important than ever. Good governance practices can help to identify potential or impending crises, and competent, proactive leadership can help the organization avert or minimize impacts. If a crisis does hit, the board should keep in mind that although a positive outcome can never be absolutely guaranteed, its sound practices and leadership could certainly help to tip the scales in success’ favor. “Anyone can hold the helm when the sea is calm,” but true leadership requires unwavering commitment to save the vessel when the sea turns rough. Professional ethics and fiduciary duties comprise the compass. In-house counsel provides the map that illustrates the position of islets, reefs, currents, channels, and other elements in the sea. These are but tools in the hands of the board – impotent and ineffectual on their own, but invaluable when utilized by a proactive board to navigate the vessel through the storm.

1 Barron Oda is Vice Chair of the ABA Section of Science and Technology Law’s Museums and the Arts Law Committee. He is also Associate General Counsel of Bishop Museum and serves on the Board of Directors of the Friends of the Hawaii Judiciary History Center.
6 See Rosenthal, supra note 4 at vii.
9 Id.
11 See Association of Art Museum Directors, supra note 8 (reporting that the AAMD reached out to DAM’s leadership to help it through its crisis:

AAMD does not agree that the Delaware Art Museum had only two options to address its current financial challenges – sell works from the collection or close the museum. Over the course of more than six months prior to this sale, AAMD reached out to the Delaware Art Museum’s leadership on multiple occasions in the hope that we could offer assistance in investigating alternatives to the planned sale – including helping the museum to campaign for private funding – in order to support the museum in upholding the highest professional standards.)
12 Rosenthal, supra note 4 at 49.
13 Quote, Publilius Syrus.
In The News

Absolutely Smashing: When the Art Itself is the Victim
Maximo Caminero, a Florida artist, was arrested and charged for smashing a vase that was part of a 16 vase installation at the Perez Art Museum Miami by Chinese artist, Ai Weiwei. Caminero later stated that he had been protesting "the museum’s exclusion of local artists in its exhibitions, a charge that the museum denies." Caminero even sited Ai as an inspiration for his act, referencing one of Ai’s works in which Ai drops an ancient Chinese urn in order to emphasize “valuation of art…as well as fragility of cultural objects.” The article points out that the difference between Caminero and other artists like Ai is that artists like Ai owned the works they “ruined” to express their art. Thomas Collins, Perez Art Museum Miami director, says a balance must be maintained between public enjoyment of pieces as well as adequate protection for museum exhibitions. Read more here http://www.tinyurl.com/malc037

89plus: Emerging Artists in the Technology-driven Age
As social media’s influence in the art field grows ever stronger, European curators Hans Ulrich Obrist and Simon Castets continue to add artists to their project 89plus, a program that focuses on the works of artists born in or after 1989 during the emergence of the internet. Obrist and Castets’s 89plus has held many workshops and has received 5,000 submissions for their open call. 89plus explores the relationship between the young artists and technology as their works not only impact audiences in physical galleries but also virtual audiences through various media such as Instagram and YouTube. Read about some of the individual artists here. http://www.tinyurl.com/malc039

Brown University Resurrects Long Lost Jenks Museum
Brown University’s natural history museum, then known as the Jenks Museum, was founded by alumnus John Whipple Potter Jenks in 1871 and featured over 50,000 animal skeletons and other anthropological curiosities. After his death, the museum was closed and then most of the museum’s objects were hauled, in 92 truckloads, to a dump in 1945. Recently, a group of Brown graduates have taken it upon themselves to restore the museum’s surviving artifacts, now installed at Brown in an exhibit titled “Lost Museum.” The project aims to remind people of a bygone era, and to demonstrate “what happens when museums and natural history objects disappear,” said Dr. Lubars, Brown’s director of graduate program in public humanities. The exhibit features a collection of scattered relics and remnants in the re-imagined office of the museum’s founder. “Lost Museum” is currently open to the public until May 2015 in Rhode Island Hall at Brown University. http://tinyurl.com/n2w2fb

Night at the Museum: Adults-Only Sleepover A First
On August 1, the Museum of Natural History in New York City hosted its first adults-only overnight adventure, an event previously only offered to children. The museum has hosted Night at the Museum for over 62,000 children since the program’s inception in 2006. The idea behind the adults-only event is that museums are constantly looking for new ways to engage different demographics. The event featured a champagne reception, live jazz, a three-course dinner with wine and freedom to roam the museum’s impressive galleries. Guests spent the night in sleeping bags gazing not up at the stars, but at the 94-foot-long blue whale that is suspended in the museum’s Milstein Hall of Ocean Life. Even with a price tag of $375 per person, the 150 spots sold out within three hours. The Museum of Natural History plans to offer the event again and interested persons can sign up for notifications about future sleepover dates through the museum at sleepovers@amnh.org. http://tinyurl.com/mpuzn5f
Lost and Found

More Wahol Works
Andy Warhol's innovative work continues to impress as some "new" pieces have been discovered on floppy disks. Artist Cory Arcangel happened to be watching a YouTube clip that showed Warhol "promoting the release of the Amiga 1000 in 1985." The Amiga 1000 was released by the now defunct Commodore International. Arcangel approached The Andy Warhol Museum about searching for the files. The files have since been extracted off the obsolete media and duplicated to other formats.
http://tinyurl.com/malc042

Searching for American Art
The New Deal art program, the Works Progress Administration Federal Art Project during the Great Depression was "a transformative time for artists" according to Virginia Mecklenberg, chief curator of the Smithsonian American Art Museum. The New Deal program provided job opportunities for unemployed Americans, which included writers, painters, poets; as many as 10,000 artists, according to the article. Over time the works have been lost or stolen, and now the General Services Administration, which has taken over the program, is searching for these works that capture snapshots of this period in American history.
http://tinyurl.com/malc044
http://www.wpamurals.com/

We Want it Now!: More to the Story of Charlie and the Chocolate Factory
Roald Dahl passed away in 1990, but an earlier edit of popular book Charlie and the Chocolate Factory was recently published in The Guardian. The earlier version included a chapter that was, according to The Guardian, “deemed too wild, subversive and insufficiently moral for the tender minds of British children…” The book originally included slight variations to the well-known story and a much more graphic storyline about two additional children.
http://tinyurl.com/malc046

Upcoming Events

DePaul University College of Law
Arts Law Colloquium: Protecting Cultural Heritage From Disaster
September 22, 2014
Chicago, IL
http://www.law.depaul.edu/centers_institutes/art_museum/art_law_colloquium.asp

Federal Bar Association, New Orleans Chapter
Spoils of War: Plunder and Destruction of Cultural Heritage in the Pacific Theater of World War II
October 2, 2014
New Orleans, LA

John Marshall Law School
Art Meets Law: The Intersection of Art and Intellectual Property
October 24, 2014
Chicago, IL
http://events.jmls.edu/registration/node/589

New York University School of Professional Studies
Art Law Day
November 7, 2014
New York, NY
http://www.scps.nyu.edu/academics/departments/humanities-arts-and-writing/events/art-law-day.html
About Us

The Museums & The Arts Committee is part of the American Bar Association’s Section of Science & Technology Law. *Provenance* aims to provide news and thoughtful, brief discussion on legal topics relevant to museology and the arts. 

http://tinyurl.com/scitechmac010

Our committee undertakes a variety of projects related to all types of museums and all types of art that are being affected by new developments. Naturally, this requires an appreciation for how those institutions and communities function in general. The Committee thus welcomes active participation from those involved in museums or the arts. In addition to attorneys and law students, membership is also open to non-attorneys who may join as Associates at: http://tinyurl.com/scitechmac011

Current projects the Committee is exploring include authenticating artwork, collecting digital forms of art, digitization for archival and commercial purposes, and copyright issues in ownership, derivative use, and online distribution.

MALC News

Congratulations!

Congratulations to Anita M. Bozzi, MALC’s newly appointed Communications Vice Chair! Prior to being appointed Communications Vice Chair, Anita did wonderful work crafting forms and surveys for the Committee. Anita continues to lead MALC’s Document Archival and Electronic Communications Privacy group.

Welcome!

Please welcome Abby Zeller, new Associate Editor for *Provenance!* Abby is a second-year law student at the University of New Hampshire School of Law. Abby will be assisting Editor-In-Chief Ria De las Alas with providing news and thoughtful, brief discussion on legal topics relevant to museology and the arts.

Success!

MALC recently collaborated with the American Alliance of Museums’ Registrars Committee to produce a webinar entitled, *Copyright Licensing: Giving and Receiving*. The webinar addressed the top ten must haves in licensing and provided examples drawn from real life. Special guest attorneys in Boston, New Jersey, Washington, DC, Honolulu, Raleigh, and San Diego hosted local meet-ups and answered audience questions in person. The webinar was a huge success with close to 300 registrants!

GET INVOLVED!

**Working Groups:** MALC recently launched 4 working groups: Digitization and Archiving Collections, Document Archival and Electronic Communications Privacy, Social Media and Patents In Museums and Arts and invites you to learn more about the goals and objectives of each working group by joining our monthly committee calls.

**Monthly Committee Calls:** MALC is currently holding monthly teleconferences the last Friday of each month at 4:30pm EST. Please email Katherine at katlewis864@gmail.com for call-in information.

**Newsletter:** We’re accepting submissions for the Winter 2014-2015 Newsletter! Please email submissions, suggestions for topics you would like to see covered and/or questions to Ria De las Alas, our Newsletter Editor, at redelasalas@gmail.com.

**Website:** We are looking for volunteers to help maintain our website to keep things updated and interesting! If interested contact Barron Oda at boda@hawaii.edu for more information.

**Arts Liaison:** A major goal of the Committee is to act as a liaison between the museum/arts community and the legal profession. If you know of national, regional or local museum/arts groups we should be contacting, send an e-mail to boda@hawaii.edu.

**Suggestion Box:** We’re currently accepting suggestions for additional legal topics that would be helpful to museum audiences. Please email suggestions to katlewis864@gmail.com.