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Golan v Holder's Impact on Orchestra Performance Programming: Annotated Bibliography

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Golan v Holder's Impact on Orchestra Performance Programming: Annotated Bibliography

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“Golan v Holder’s Impact on Orchestra Performance Programming”

Annotated Bibliography

This project will examine how changes in copyright law enacted with the Supreme Court’s 2012 decision on *Golan v Holder* affect the performance programming of American symphony orchestras. The court’s decision brought many previously public-domain, foreign works under copyright protections in accordance with the Uruguay Rounds Agreement Act; among the musical works were frequently performed pieces by composers such as Prokofiev, Rachmaninoff, and Stravinsky. The result is that previously free or low-cost works would now have to be licensed or rented for performance at great expense to the performing group. I will seek to test a hypothesis proposed by legal scholar Hannah Dubina in her article "Decomposing the Precarious Future of American Orchestras in the Face of Golan v. Holder," in which she proposes that copyright restrictions on these works will make their performance prohibitively costly for large- and small-scale orchestras, resulting in stale concert programming, increased financial burdens, and poorer audience and community engagement. My project will be a comparative analysis of data from some of the largest budget American orchestras vs. that of small community orchestras in Colorado and New Mexico. While the project will recognize other factors that affect concert programming, such as tradition or identity politics, these are beyond the scope of my research and will not be examined. The resources below will be useful for this discussion. Additionally, this list can be a valuable resource for anyone conducting research on music copyright law and its history, as well as researchers seeking information on operational and financial concerns of performing orchestras.

Dictionary / Encyclopedia Articles

1. Burkart, Patrick. "Intellectual Property." *Grove Music Online*. Edited by Deane Root. Published Online: January 31, 2014. <https://doi-org.du.idm.oclc.org/10.1093/gmo/9781561592630.article.A2256872>.

Patrick Burkart is a professor of Communication at Texas A&M University, specializing in global media, communication law and policy, music industry, cybersecurity, hacking, copyright, and piracy. Mr. Burkart is also Editor-in-Chief of *Popular Communication: the International Journal of Media and Culture*. This article lays out the definitions for Intellectual Property, Copyright, Public Domain, and Fair Use. It offers a brief history of each, detailing items about the historical development and adoption of different laws that affect them. An interesting item of note: “engines of the North American culture industries produce tradable [intellectual property] goods and services valued, on average, at 18% of the US Gross Domestic Product between 1998 and 2003. After Aerospace and defense, IP trade—in software, audiovisual, and other personal cultural, and recreational service products—is the most valuable sector for the US balance of payments” (Burkart “Intellectual Property”). The final section “Critiques of Intellectual Property Law” lists (in general terms) various debates and criticisms of governance affecting IP.

Dissertations and Theses

2. Harrison, Jacob Galloway. "Conversations with Five Music Directors Regarding the Current State and Future of American Symphony Orchestras." DMA diss., Arizona State University, 2009. ProQuest Dissertations & Theses Global.

Jacob Galloway Harrison holds a DMA from Arizona State University and is currently the Director of Orchestral Activities and Associate Professor of Conducting at Texas State University. His report is a discussion of the economic state of American Symphony Orchestras, with particular attention paid to those organizations whose music directors are interviewed for the study. In addition to the five interviews, Harrison uses as evidence citations of two broad studies: the Mellon Foundation Orchestra Forum report (2008) and a report by the Knight Foundation published in 2003. Harrison's study dates 2009 and cites that "The central structural challenge to financial stability for orchestras that [the Mellon Report] found is that real performance expenses grew over the seventeen years of the study three times faster than performance revenues. The costs to perform the concert—musicians, staff, music rental, etc.—grew at a rate three times faster than the increase of revenues from the ticket sales and donations" (Harrison 5). This is similar evidence to that provided in the *Orchestra Facts* report, and in Hannah Dubina's "Decomposing" article. As Lawrence Golan points out in his interview with Luis Engelke, these rising performance costs had been a trend since the mid-90's. Harrison's report is of particular interest for our discussion as it contains interviews with music directors of various major and regional symphony orchestras, including the director of the Colorado Symphony Orchestra. While evidence can be noted as anecdotal at times, the report provides insight into the challenges faced by directors during the early 2000's and through the beginning of the 2008 financial crisis. Among the concerns of the directors are organizational management and its role on the function of the orchestras' missions; operational costs; the effectiveness of educational outreach programs; and artistic integrity, among others. Harrison finds that effective orchestra organizations exhibit a high level of community and audience awareness, asking questions of how the institutions' work converses with and addresses the needs of the community it serves.

3. Mastromonaco, Alicia Garden. "Breakdown on the Freeway Philharmonic: Understanding the Causes and Effects of Regional Orchestra Bankruptcies in the San Francisco Bay Area." PhD diss., University of California, Santa Barbara, 2020.

Alicia Garden Mastromonaco holds a PhD in Musicology from the University of California Santa Barbara. Currently she is the Education Coordinator at the Monterey Symphony. Her 2020 dissertation is a historical and economic analysis of the Oakland and San Jose Symphonies, tracing both of their trajectories toward bankruptcy: Oakland in 1986 and San Jose in 2002. Her goal is to understand the institutional failings that led to the two incidents and use the findings as a case study and lesson for other institutions. The report provides evidence from the archives of both institutions, detailing financial and managerial decisions. As well, Mastromonaco employs a musicological approach to

her study to examine external cultural factors affecting the two orchestras. While the funding organizations for the orchestras blamed the failing of these institutions on financial woes, Mastromonaco “[argues] that money problems were the result of the larger systemic issues intrinsic in the fraught relationship between the symphony and the community” (Mastromonaco 242). This statement is congruous with the conclusion reached in Jacob Galloway Harrison’s “Conversations with Five Music Directors.” Mastromonaco does not deny the role economics played in the bankruptcy filings, but she sees the financial problems exacerbated by external sociological and cultural effects.

Journal Articles

4. Dubina, Hannah. "Decomposing the Precarious Future of American Orchestras in the Face of *Golan v. Holder*," *UCLA Law Review* 60, no. 4 (April 2013): 950-1005.

At time of publication Hannah Dubina was a Production Editor for *UCLA Law Review* and J.D. Candidate at UCLA School of Law. Her Undergraduate works was in music performance. Dubina’s hypothesis states that increased costs and administrative labor required to perform previously public-domain works, after the 2012 *Golan v Holder* decision, will have a detrimental effect on symphony orchestras and their place in American culture. She foresees that these effects will have broader implications for society in general, citing evidence from surveys and studies on the cultural impact of orchestras on their surrounding communities. She proposes that a decline in the creative choices for these organizations will in turn have a negative influence on their local communities leading to cultural decline, decreased happiness, and negative health effects. The article offers detailed evidence regarding cost structures of music licensing and orchestra operations, drawn from organizational records, performing rights societies, interviews, and orchestral societies such as the League of American Orchestras. Additionally, the author presents a well detailed history of American copyright law as well the 2012 *Golan v Holder* ruling, the Burne Convention, and the Uruguay Rounds Agreement Act, all of which resulted in the retroactive copyright protection for previously public domain works. A problem with Dubina’s hypothesis is the verifiability of her claims. As well the question remains: are programming choices dictated by licensing costs to the detriment of consumer tastes.

5. Lange, Mark D., William A. Luksetich. “The Cost of Producing Symphony Orchestra Services.” *Journal of Cultural Economics* 17, no. 2 (December 1993): 1-15.
<http://www.jstor.org/stable/41810490>

At the time of publication Mark D. Lange was Director of Economic Research for the National Cotton Council, and William A. Luksetich was a professor of Economics at St. Cloud University. The authors have published several articles together, which are concerned with the economic behaviors and operations of non-profit symphony orchestras. This article seeks to clarify costs associated with the production of symphony orchestra services, and to clarify the output objective of those services. The authors cite previous studies, which focused narrowly on concerts as the product and attendance the output; essentially a for-profit economic model. As the study points out, the symphony

orchestra should be seen as a multi-product business which offers season concerts, summer festival performances, tour performances, and educational attractions as part of its offerings. Similarly, its revenue streams are not solely derived from ticket sales, and instead should include donors and government entities who see the orchestras work as unique and purposeful. Drawing on financial data from the League of American Orchestras the authors interpolate the data with the work of previous economists to derive algorithms to model the financial operations of the orchestras. Lange and Luksetich conclude that diversification of services, programming, and outreach is likely to benefit larger institutions than smaller community entities. “The results of this study indicate that the size and product mix of symphony orchestras is likely to influence the total variable costs of producing orchestra services. The evidence... suggests that gains in efficiency are not the usual results from expansion of orchestra services... Orchestras serving major markets benefit from scope economies to a far greater extent [than] those serving smaller markets” (Lange and Luksetich 13). In other words, for major orchestras, offering more services helps to create more efficiencies in their operation for meeting the end goal of higher revenues, while smaller organizations likely benefit from offering specialized services, more localized to their communities.

6. Rice, Jessica W. “‘The Devil Take the Hindmost’: Copyright’s Freedom from Constitutional Constraints after *Golan v. Holder*.” *University of Pennsylvania Law Review* 161, no. 1 (2013): 283-301.

At the time of publication, Jessica Rice was the Online Executive Editor for the *University of Pennsylvania Law Review*. She was also a J.D. & M.A. candidate, at the same university for 2014. Presently she is a Judicial Law Clerk in New York State. Rice’s article examines the potential after-effects of the 2012 *Golan v. Holder* decision. Her focus is on the implications for future copyright legislation following the precedence set by *Golan*. “The Devil Take the Hindmost” examines the context of *Golan v. Holder* along the historical timeline of U.S. Copyright Legislation, with comparative analysis alongside *Eldred v. Ashcroft*, and *Kirsteng v. John Wiley & Sons, Inc*. Rice is largely in agreement with Hannah Dubina regarding the effects of *Golan* on orchestra operations, particularly in her concern about access to retroactively copyrighted works termed “orphan works”: “[the ruling]...imposes significant administrative burdens on artists and arts organizations, including the costs of determining whether a work is subject to restored copyright, searching for the copyright holder and negotiating a usage fee. These costs are particularly acute for ‘orphan works’—older and obscure works whose copyright owners are often impossible to locate” (Rice 299). However, where Dubina presents detailed financial and sociological survey data to illustrate her grim outlook for orchestra culture, Rice looks to judicial rulings to demonstrate a trend towards the diminution of the Public Domain. In sum, she argues that the *Golan* decision sets a precedence that will provide future opportunities to diminish the public domain.

7. Tamburri, Lawrence, Jonathan Munn, and Jeffrey Pompe. “Repertoire Conventionality in Major US Symphony Orchestras: Factors Influencing Management’s Programming Choices.” *Managerial and Decision Economics* 36, no. 2 (March 2015): 97-108. <https://doi.org/10.1002/mde.2654>

At the time of publication Lawrence Tamburri was a professor of arts management at Purchase College, State University of New York. Co-authors Jonathan Munn and Jeffrey Pompe were affiliated with the Francis Marion University Department of Economics in Florence, SC. Drawing on previous work, notably Lange and Luksetich's studies on orchestral operations, as well as reports by the League of American Orchestras, this detailed analysis spans from 2001 – 2007 and discusses the effects of various income sources on the programming choices of American symphony orchestras. Of particular interest is the authors' conclusion that "a larger percentage of funding from the federal government and businesses creates greater experimentation by [symphony orchestras] and that increased funding from local government and endowments creates more conventional programming...programming decisions [are also] influenced by events that occur in a particular year such as an anniversary for a composer or the popularity of a composer" (Tamburri et al. 106). Performance data from various tier 1 (major orchestras) and tier 2 (small professional orchestras) is interpolated in a what the authors term a Repertoire Conventuality Index (RCI). Orchestras receive a number on this scale based on the works they perform and how often those works are performed nationwide. The study shows that, though rising costs have the potential to dictate an organization's access to copyrighted music, funding sources play a bigger role: a larger mix of more local and more volatile revenue sources tends to have a restrictive effect on programming choices. As Dubina, Rice, Lange, and Harrison all similarly noted, orchestra performance costs tend to rise continuously, with the largest factor being musician labor. This is because costs of living increase generally over time. Similarly, as noted in the *Orchestra Facts* report, cost of performance space also has a perpetual upward trend. Tamburri and his colleagues suggest that it is the way an organization generates its revenue and funding to pay for those rising costs that dictates what creative choices it has the license to make.

Manuscript Collections

8. Lamont School of Music. Box 30: Concert Programs, 2010 – 2012. Lamont School of Music Records. Special Collections and Archives, University Libraries, University of Denver, Denver, CO.

See the following note for item 9.

9. —. Box 31: Concert Programs, 2012 – 2013. Lamont School of Music Records. Special Collections and Archives, University Libraries, University of Denver, Denver, CO.

Though cited here separately due to their catalogue details, these two manuscript collections should be researched as a group for comparison purposes. These archives of concert programs are historical evidence of programming choices made by a small non-profit orchestra, namely one in which Lawrence Golan has been involved since 2001. The first collection dates prior to the *Golan v. Holder* decision, and the second is from the following year. Particular attention should be paid to the inclusion of retroactively copyrighted works, and whether those works were previously held in the institution's library or required licensing for performance.

Sound and Video Recordings

10. Engelke, Luis. *Interview with Lawrence Golan*, 2017.
<https://www.youtube.com/watch?v=iSDEOcVadb4>.

Luis Engelke is Professor of Trumpet at Towson University as well as Principal Trumpet for Lancaster, Kennett Symphony, and Mid Atlantic Symphony Orchestra and others. In the video he interviews Lawrence Golan, the plaintiff in *Golan v. Holder*. Currently Golan is Director of Orchestral Studies and head of the graduate conducting program at the University of Denver. He has worked as conductor, music director, and violinist for many small professional orchestras nationwide. In this interview he discusses his involvement in the supreme court case, offering insight into his motivations for pursuing the cause as well as his real-world concerns as a music director and orchestra conductor. Discussing cost structures, Golan points out how the Uruguay Rounds Agreement and the *Golan v. Holder* decision have considerable impact on smaller budget institutions and less known composers. He states that though the case was settled in 2012, the adjudication process lasted over a decade, and his concerns over the effects of the Uruguay Rounds Agreement began in his early conducting career. Golan suggests the effects of these laws are such that smaller institutions cannot afford to the prohibitively large financial or administrative cost that will now go into the performance of the retroactively copyrighted works, and therefore the rulings do not serve the interests of copyright holders or performing artists.

Websites

11. Boston Symphony Orchestra. “Boston Symphony Orchestra: Performance History Search.” Performance Listing Archive. Accessed October 31, 2021.
<https://archives.bso.org/Search.aspx>.

This searchable archive provides historical records of performances by the Boston Symphony Orchestra, indexed by a variety of criteria. This provides the possibility to find lists of performances of works by specific composers and by date range.

12. Broadcast Music Inc. “Symphony Orchestras: Music Licensing.” BMI.com. Accessed November 2, 2021. https://www.bmi.com/licensing/entry/symphony_orchestras.

Broadcast Music Inc. or BMI is a performing rights society that collects performance royalties on behalf of the artists it represents. This page is a repository of frequently asked questions as they pertain to performing symphony orchestras. Answers to questions such as “Do we need a performance license if we own the printed score and parts or have paid a rental fee to the publisher?” can be found here. The answer to that particular question is: “Yes. The Copyright Law identifies the print right, or the right to reproduce and distribute printed music, as distinct from the performing right. As a result, the cost of purchasing or renting performance materials for a copyrighted work, whether published

or unpublished, does not include public performance rights” (Broadcast Music Inc. “Symphony Orchestras”)

13. Buffalo Philharmonic Orchestra. “BPO Classics Repertoire by Season – BPO Archives.” Performance Listing Archive. Accessed October 29, 2021. <https://bpo.org/archives/classics-repertoire-by-season/>.

Concert archive for the Buffalo Philharmonic Orchestra, a mid-size regional orchestra in Buffalo New York. The listings here date from 1935 to the present and are catalogued by year. The database is not searchable, but provides easy navigation, nonetheless. In a footnote Hannah Dubina references this organization as a major contributor to its local economy: one report estimates that the Buffalo Philharmonic Orchestra’s annual impact on the local community amounts to \$25 million (Dubina 1003).

14. Devin Patrick Hughes. “Devin Patrick Hughes Conductor: Programs Concerts.” Performance Listing Archive. Accessed October 29, 2021. <https://devinpatrickhughes.com/previous>.

Devin Patrick Hughes serves as conductor and music director for the Boulder Symphony and the Arapahoe Philharmonic Orchestra in Colorado. This is an archive by date of his past performances with both those small professional orchestras as well as other organizations.

15. New York Philharmonic. “New York Philharmonic: Performance History.” Performance Listing Archive. Accessed October 31, 2021. <https://archives.nyphil.org/performancehistory/#program>.

This searchable archive contains performance records related to the New York Philharmonic since December 7, 1842. Users can search by program date, specifying the specific orchestra or affiliate group, performance location, season, event type, multimedia content, composer, and guest artist. See the following annotation on the archive of the Pittsburgh Symphony Orchestra as these both relate to comments made by other authors involved in this discussion.

16. Pittsburgh Symphony Orchestra. “Pittsburgh Symphony Archives.” Performance Listing Archive. Accessed November 1, 2021. <https://archive.pittsburghsymphony.org/>.

A searchable archive of performance records related to the Pittsburgh Philharmonic. The search function contains advanced search filters which can allow a researcher to filter results by date, composer, performance location, guest soloists, and even guest conductors. The final two filters are of particular interest, as “determining program choices is not the sole purview of the music director...Indeed, oftentimes the music director conducts less than 50% of the concerts for the [orchestra] for which he or she is the principal conductor. Others, such as the artistic administrator, executive director, marketing director, or guest conductors, have as much influence on programming, especially in major orchestras” (Tamburri et. al 99).

17. Roberts, Ken Schwencke, Mike Tigas, Sisi Wei, Alec Glassford, Andrea Suozzo, ProPublica, and Brandon Roberts. “Nonprofit Explorer.” ProPublica, May 9, 2013. <https://projects.propublica.org/nonprofits/>.

This searchable database references publicly available IRS records filed by 501c3 organizations. The same records are available through IRS.gov, though the interface provided by ProPublica is more accessible to navigate. Within the database a user can search by organization name, location, and year in order to view financial information recorded at tax filing. This is useful to see, for example, an orchestra or non-profit organizations revenue vs. expenses, and, depending on the level detail in the organization’s filings, specific expenses. An example search would be “Arapahoe Philharmonic” for the filing year 2013. From the retrieved data, a researcher could see if the organization includes music rental or licensing fees, and cross reference that evidence with the orchestra’s performance archive from the same year.

White Papers

18. The League of American Orchestras. “Orchestras at a Glance: January 2020 (Reporting on FY2016-17).” New York: League of American Orchestras, January 2020. <https://americanorchestras.org/wp-content/uploads/2020/11/Orchestras-at-a-Glance-2020.pdf>.

The only American organization of its kind, The League of American Orchestras, is a network of national orchestras, educators, and other participants in orchestra culture. This brief report is for the fiscal year 2016-2017. The details here suggest growth in classical music interest, orchestra performances, economic growth in the sector, and community participation. For example, vs *Orchestra Facts*, which analyzed data from 2006-2014, this report shows an increased total economic impact of \$2.1 billion in 2016-2017 vs the data from prior years which states \$1.8 billion in 2014. These figures are drawn from 501c3 tax filings of nearly 1000 participating members in the data survey. Findings suggest contrary outcomes to Dubina’s hypothesis, or other dismal outlooks from late 20th century and early 21st century commentators. The data does not present specifics concerning costs arising from licensing of specific music for performance. However, the data here reflects growth in performance income from 30% in 2014 to 36% in 2017.

19. Voss, Dr. Zannie Giraud, Dr. Glenn B. Voss, Dr. Karen Yair, and Kristen Lega. “Orchestra Facts: 2006-2014: A Study of Orchestra Finances and Operations, Commissioned by the League of American Orchestras.” New York: League of American Orchestras, November 2016. https://americanorchestras-fontevacustomer.force.com/CPBase__item?id=a230b00000DGUD9AAP.

Also published by the League of American Orchestras, this report provides very detailed information similar to “Orchestras at a Glance,” but is a more comprehensive longitudinal study with data spanning from 2006-2014. The lead researchers have extensive experience conducting similar reports for a similar organization, Theatre Communications Group, which publishes *Theater Facts*, offering analogous information

on the non-profit professional theater sector. The overview presented in *Orchestra Facts* draws on datasets from member orchestras who elected to participate in various surveys detailing operations, performance offerings, educational outreach, and financial data. Additionally, the report draws on financial reports and tax filings available via the Internal Revenue Service. The comprehensive information presented in this report is valuable to establish income and expenses for American symphony orchestras. Hannah Dubina's 2013 article foresees an increase in costs due to the retroactive copyright imposed on foreign works, but interestingly, this report shows that non-personnel costs amounted to 35% of total expenditure, while concert production (including music licensing) made up only 12% of non-personnel costs (*Orchestra Facts* 16). Of particular note is that costs that increased the most during the survey period were facility rental, marketing and fundraising, and "professional fees." It is not noted whether these fees can be associated directly with music licensing. Donor funding from individuals, government and other institutions actually increased. Overall data suggests something of a recovery in the orchestra sector, though this is not indicated by strong ticket sales, as revenue growth from that component decreased. Instead, a trend is seen of orchestras diversifying their offerings and creating more educational and free performance outreach to broaden access to their services.