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Decomposing the Precarious Future of American Orchestras in the Face of *Golan v. Holder*

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ABSTRACT

Last term in *Golan v. Holder*, the U.S. Supreme Court upheld the constitutionality of section 514 of the Uruguay Round Agreements Act, which extended copyright protection to millions of foreign works of art, literature, and music previously in the public domain. This decision will likely have a deleterious impact on America's faltering symphony orchestras.

By removing important staples of the symphonic repertoire—including works by Prokofiev, Rachmaninoff, Shostakovich, and Stravinsky—from the public domain, *Golan* dramatically increases the cost of performing these works. This is because copyright-protected music is more expensive for orchestras to perform for two reasons: The orchestral parts are generally available on a rental-only basis, which is dramatically more expensive than buying the parts, and orchestras must pay public performance license fees to perform such works. Moreover, section 514 has been implemented very inefficiently, making it both challenging and costly for orchestras to determine which works have been restored to copyright and to whom those rights belong. By making it both more difficult and more expensive to perform these works, *Golan* decreases the ability of U.S. orchestras—which are already facing serious financial difficulties—to perform these works.

This Comment argues that decreased dissemination of works restored to copyright under section 514 undermines American copyright law's purpose of "promot[ing] the Progress of Science and useful Arts." It further suggests that decreased performance of these works harms society as a whole because decreased dissemination of section 514 works robs society of cultural enrichment and societal benefits associated with involvement with the arts.

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INTRODUCTION

Patrons of symphony concerts often consider the musical works on the program when deciding which performances to attend. Some people prefer the crisp, playful Classical style of Mozart's *Jupiter* Symphony, while others gravitate toward the lush romanticism of Tchaikovsky's *Pathétique*, and still others appreciate the provocative rhythms and jarring dissonances of Stravinsky's *Le Sacre du printemps*. Yet, most concertgoers are unlikely to ponder the impact those programming selections have on the cost of staging each performance. Unfortunately, such staging expenses—including purchasing or renting the physical sheet music and paying for the public performance rights of copyrighted works[1]—can be prohibitive. As one classical pianist and blogger lamented regarding his preparations for a recital:

> In 2007, I gave a concert that included PDQ Bach as part of the program. . . . My program was 90 minutes in length. The PDQ Bach was only about 12 minutes of that . . . . It was a very small venue, and around 80 people showed up at ticket prices of [$10 to $15], which brought in something around $1040 . . . . Here's how much the PDQ Bach . . . cost to perform, and how it was calculated:
>
> (1) Add up the total minutes of the copyrighted work(s) performed (12 minutes). Disregard the total length of the concert.
> (2) Find out how many total seats there are in the venue you perform in (110 seats). Disregard how many people actually show up.
> (3) Send these figures to the royalty company so they can tell you how much you owe. 12 minutes, 110 seats—abracadabra, do the hokey pokey and turn yourself around—and it works out to almost $200.
>
> Many weeks before the concert, I did the math above and quickly saw that the presenter was already going to have a difficult time covering their costs, even if all 110 seats were filled at the maximum ticket price (which would be $1650), because they had to pay me $1200, then they had promotion costs, program printing costs, tech costs, and venue liability insurance costs on top of all that. I asked the presenting venue if they wanted me to find something else to play . . . [, e]ven

1. *See infra* Part I.A.

> though the P.D.Q. Bach was already in my fingers, and as much as I (and my audiences) love P.D.Q. Bach's music . . . .[2]

Admittedly, these sorts of budgeting constraints loom largest for nonprofit music organizations, school orchestra programs, community orchestras, youth symphonies, and similar groups with limited funding.[3] Professional orchestras, however, face programming considerations of this sort as well. American symphony orchestras are no strangers to financial hardship. An influential 1992 report on the financial condition of professional orchestras stated: "Many financial approaches have been tried over the past fifty years to improve the financial condition of orchestras. Yet, the industry as a whole appears to be in the worst financial shape it has ever been in . . . ."[4]

The situation has only grown direr in the wake of the 2008 financial crisis. In January 2010, for example, the musicians of the Cleveland Orchestra went on strike when management sought a 5 percent pay cut to reduce a burgeoning deficit.[5] Since then, the orchestras of Honolulu, Syracuse, New Mexico, and Louisville have all declared bankruptcy.[6] Musicians in Detroit went on strike for six

2. Chad Twedt, *Excessive Royalties of ASCAP and BMI*, CEREBROOM (Mar. 25, 2011), http://blog.twedt.com/archives/406.

3. All of the examples of orchestras facing financial difficulties provided in Part I.C, *infra*, relate to professional orchestras because data on the finances of community and college orchestras are difficult to obtain. Non- and semiprofessional groups, however, likely suffer from the difficulties professional orchestras face to an even greater degree, because they tend to have much smaller budgets. For instance, while in 2010 there were more than two dozen major symphony orchestras with operating budgets exceeding $15 million per year, Lawrence Golan, the named plaintiff in *Golan v. Holder*, 132 S. Ct. 873 (2012), directs a college orchestra with an annual music rental and purchase budget of only $4000. *See* Charles Grosz, *The State of Our American Symphonies: How Is Milwaukee Faring?*, EXPRESS MILWAUKEE (June 23, 2010), http://expressmilwaukee.com/article-11335-the-state-of-our-american-symphonies.html; *see also* Marc Parry, *Supreme Court Takes Up Scholars' Rights*, CHRON. HIGHER EDUC. (Wash, D.C.), May 29, 2011, http://chronicle.com/article/A-Professors-Fight-Over/127700. Many college and community orchestras have even smaller budgets. For instance, Golan also conducts a chamber orchestra with an annual budget of $300 and a ballet orchestra with no budget at all, making the ballet orchestra completely dependent on works in the public domain. *See* Complaint, Golan v. Ashcroft, 310 F. Supp. 2d 1215 (D. Colo. 2003). See *infra* note 15 for a definition of works in a public domain.

4. WOLF ORG., INC., THE FINANCIAL CONDITION OF SYMPHONY ORCHESTRAS, at vi (1992), *available at* http://www.polyphonic.org/wp-content/uploads/2012/04/The_Financial_Condition_of_Symphony_Orchestras.pdf.

5. Daniel J. Wakin, *Cleveland Settles Orchestra Strike*, N.Y. TIMES, Jan. 19, 2010, http://www.nytimes.com/2010/01/19/arts/music/20orchestra.html.

6. Tony Woodcock, *American Orchestras: Yes, It's a Crisis (Part IV)*, TONY'S BLOG (May 4, 2011), http://necmusic.wordpress.com/2011/05/04/american-orchestras-yes-it's-a-crisis. For a more thorough discussion of these bankruptcies, see *infra* notes 95–102, 112–118, and 124–125 and accompanying text.

months before conceding to major salary and personnel cuts in April 2011.[7] New York's City Opera announced in May 2011 that it could no longer afford its space in Lincoln Center,[8] and Opera Boston closed its doors permanently on January 1, 2012.[9] Perhaps most stunningly of all, the Philadelphia Orchestra—an ensemble with a long and sterling history as one of the "Big Five" American orchestras[10]—filed for bankruptcy in April 2011.[11] Furthermore, in the autumn of 2012, labor disputes rocked a slew of American symphony orchestras—including the Atlanta Symphony Orchestra, Chicago Symphony Orchestra, Indianapolis Symphony Orchestra, Minneapolis Orchestra, and Seattle Symphony.[12] Several of these strikes or lockouts resulted in delayed starts to the 2012–13 concert season, and all of the disputes that have been resolved thus far have resulted in cuts to musi-

7. Daniel J. Wakin, *Detroit Symphony Reaches Deal With Musicians*, N.Y. TIMES ARTS BEAT BLOG (Apr. 8, 2011, 2:59 PM), http://artsbeat.blogs.nytimes.com/2011/04/08/detroit-symphony-reaches-deal-with-musicians.

8. Kate Deimling, *The Fat Lady Sings: In Dire Financial Straits, City Opera Bids Farewell to Lincoln Center*, ARTINFO.COM (May 23, 2011), http://www.artinfo.com/news/story/37732/the-fat-lady-sings-in-dire-financial-straits-city-opera-bids-farewell-to-lincoln-center.

9. Olivia Giovetti, *Why Opera Boston's Closing Should Really Scare New Yorkers*, WQXR (Dec. 27, 2011, 9:36 AM), http://www.wqxr.org/#!/blogs/operavore/2011/dec/27/why-opera-bostons-closing-should-really-scare-new-yorkers.

10. The "Big Five" is a term commonly used to refer to the Boston Symphony Orchestra, the Chicago Symphony Orchestra, the Cleveland Orchestra, the New York Philharmonic, and the Philadelphia Orchestra. *See, e.g.*, *Big Five Plus One?*, TIME, Nov. 10, 1967, at 84, 84. Originally, the Big Five gained their title because they led other orchestras in this country in terms of "musical excellence, calibre of musicianship, total contract weeks, weekly basic wages, recording guarantees, and paid vacations." Robert R. Faulkner, *Career Concerns and Mobility Motivations of Orchestra Musicians*, 14 SOC. Q. 334, 336 (1973); *see also* Grosz, *supra* note 3 (claiming that the Big Five are "generally acknowledged" as having "the best contracts and highest levels of performance"). While the term is still frequently used, it has become something of an anachronism. *See* Henry Fogel, *How "Good" Is Your Orchestra? The Myth of Rank*, ON THE RECORD (Feb. 13, 2009, 1:39 PM), http://www.artsjournal.com/ontherecord/2009/02/how_good_is_your_orchestra_the_1.html (suggesting that the Big Five were never really qualitatively better than other orchestras, but only created more recordings, and claiming that "[t]oday, with music schools turning out far more highly qualified musicians year after year than there are openings in orchestras—and with major orchestra jobs being lifetime positions for most musicians, thereby minimizing turnover—the differences between orchestras have shrunk even more than was the case 30 years ago"). For example, in *Gramophone*'s 2008 ranking of the ostensible top twenty orchestras in the world, the Philadelphia Orchestra was noticeably absent while the non–Big Five Los Angeles Philharmonic, Metropolitan Opera Orchestra, and San Francisco Symphony were included. *The World's Greatest Orchestras*, GRAMOPHONE, Dec. 2008, at 36, 37, 39.

11. Daniel J. Wakin, *Details Emerge of an Orchestra's Bankruptcy Plea*, N.Y. TIMES, Apr. 20, 2011, http://www.nytimes.com/2011/04/21/arts/music/philadelphia-orchestra-papers-give-bankruptcy-details.html.

12. *See* Brian Wise, *Orchestra Watch: Seattle Symphony May Strike; Philly Saves the Day*, WQXR (Oct. 16, 2012, 10:27 AM), http://www.wqxr.org/#!/blogs/wqxr-blog/2012/oct/16/orchestra-watch-seattle-symphony-may-strike-philly-saves-day; *see also infra* notes 129–134 and accompanying text.

cian pay or personnel.[13] Clearly, America's symphony orchestras are in a precarious financial position. Yet the U.S. Supreme Court's decision in *Golan v. Holder*[14]—upholding a statute that removes many popular musical works from the public domain[15] and thereby making the performance of these works exorbitantly more expensive—will only make matters worse.[16]

The Copyright Clause of the U.S. Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[17] This short phrase has spawned much debate about the purpose of the American copyright system. Some scholars contend that copyright law is intended to be forward looking—that is, meant to stimulate learning and to benefit the public.[18] Others, however, claim that it is intended to be backward looking and meant primarily to reward and protect those who create.[19] Even if one accepts that the first part of the Copyright Clause, the so-called Progress Clause, is merely

13. *See infra* notes 129–134 and accompanying text.
14. 132 S. Ct. 873 (2012).
15. The public domain is

> [t]he universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge. When copyright, trademark, patent, or trade-secret rights are lost or expire, the intellectual property they had protected becomes part of the public domain and can be appropriated by anyone without liability for infringement.
>
> "[P]ublic domain is the status of an invention, creative work, commercial symbol, or any other creation that is not protected by any form of intellectual property. Public domain is the rule: intellectual property is the exception."

BLACK'S LAW DICTIONARY 1349 (9th ed. 2009) (second alteration in original) (quoting 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1.01[2], at 1–3 (3d ed. 1996)).

16. 132 S. Ct. at 878.
17. U.S. CONST. art. I, § 8, cl. 8.
18. *See, e.g.*, 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A], at 1-88.17 (rev. ed. 2011) ("The primary purpose of copyright is not to reward the author, but is rather to secure 'the general benefits derived by the public from the labors of authors.'" (footnotes omitted)); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (2001); *see also* Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 19 (1829) ("[T]he main object was 'to promote the progress of science and useful arts;' and this could be done best, by giving the public at large a right to make, construct, use, and vend the thing invented, at as early a period as possible . . . .").
19. *See, e.g.*, 2 JOHN TEBBEL, A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES: THE EXPANSION OF AN INDUSTRY, 1865–1919, at 640–41 (1975); VAIDHYANATHAN, *supra* note 18, at 201 n.26 ("[S]tate copyright statutes under the Articles of Confederation declared that copyright was to benefit the author primarily."); Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 56–57 (1988) ("The first and most important step which national and international lawmakers must take is to focus copyright on authors and resist the politically attractive temptation of trampling authors' rights in favor of easy access to authors' works. The individual rights of authors, including authors' personal relationship to their works, must become the central focus of contemporary efforts." (footnote omitted)).

a preamble that does not impose an actual constitutional limit on Congress's powers,[20] it seems fair to surmise that the clause at least embodies "the main explanatory of the purpose of copyright."[21] But what does it mean to promote the progress of the arts and sciences?

Common sense and a fair amount of scholarship suggest that to promote the progress of the arts and sciences means to "spread" or "disseminate" new works.[22] Under this view, copyright law's goal is to encourage access to creative and scientific works in order to increase societal knowledge and to form a pool of collective information from which new works may be created. In a disturbing trend, however, the Supreme Court—while nominally espousing this interpretation of progress—has decided several cases in recent years that tend to have the

20. In other words, under this view, copyright legislation is not per se unconstitutional for failure to "promote the Progress of Science and useful Arts." *See* 1 NIMMER & NIMMER, *supra* note 18, § 1.03[B], at 1-88.21 ("[T]he introductory phrase, rather than constituting a limitation on Congressional authority, has for the most part tended to expand such authority." (footnotes omitted)); Edward C. Walterscheid, *To Promote the Progress of Science and the Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, 29 (2002) ("This phrase is sometimes referred to as the preamble, particularly by those addressing copyright issues and is argued to be intended merely as a statement of purpose or object which does not limit the authority given to Congress." (footnote omitted)).

21. 1 NIMMER & NIMMER, *supra* note 18, § 1.03, at 1-88.17; *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'" (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8)).

22. *See, e.g.*, Golan v. Holder, 132 S. Ct. 873, 888 (2012) ("Evidence from the founding, moreover, suggests that inducing *dissemination*—as opposed to creation—was viewed as an appropriate means to promote science." (citing Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 GREEN BAG 2d 37, 44 (2002))); Elizabeth Townsend Gard, *Copyright Law v. Trade Policy: Understanding the* Golan *Battle Within the Tenth Circuit*, 34 COLUM. J.L. & ARTS 131, 132–33 (2011); Orrin G. Hatch & Thomas R. Lee, *"To Promote the Progress of Science": The Copyright Clause and Congress's Power to Extend Copyrights*, 16 HARV. J.L. & TECH. 1 (2002); Malla Pollack, *Dealing With Old Father William, or Moving From Constitutional Text to Constitutional Doctrine: Progress Clause Review of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 337, 340 (2002) ("Congress was granted power to pass only those copyright and patent statutes that promote the dissemination of knowledge and technology to the public."); Malla Pollack, *What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001); Dennis Harney, Note, *Mickey Mousing the Copyright Clause of the U.S. Constitution:* Eldred v. Reno, 27 U. DAYTON L. REV. 291, 299 (2002) ("The granting of a temporary monopoly in the form of a copyright promotes creative activity by providing economic incentive, but more importantly ensures that the public will have unfettered access to the work after a limited period of time. This unfettered access to works in the public domain provides the building blocks for the continued creation and dissemination of culturally and economically valuable work." (footnote omitted)); *cf.* Lawrence B. Solum, *Congress's Power to Promote the Progress of Science:* Eldred v. Ashcroft, 36 LOY. L.A. L. REV. 1, 47 (2002) ("The question naturally arises as to why the Framers would not have chosen more felicitous language to express the idea of dispersion . . . ."); Edward C. Walterscheid, *The Preambular Argument: The Dubious Premise of* Eldred v. Ashcroft, 44 IDEA 331, 376 (2004) ("Clearly, the grant of 'the exclusive Right' only to 'Authors and inventors' indicates that something more than merely spread or dissemination was intended to be encouraged.").

opposite effect and hinder, rather than encourage, the dissemination of artistic and intellectual works.

First, in *Eldred v. Ashcroft*,[23] the Court upheld the constitutionality of the Sonny Bono Copyright Term Extension Act (CTEA) of 1998,[24] which extended the then-existing copyright protection term (the life of the author plus fifty years) by twenty additional years for all works published on or after January 1, 1978.[25] The CTEA also retroactively extended the copyright term of works published before January 1, 1978, and that still enjoyed copyright protection on October 27, 1998, to ninety-five years total.[26] The Court determined that when "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."[27]

Yet the Court's rationale is questionable. While copyright terms have been extended periodically since the ratification of the Constitution in 1788, the current protection term—the life of the author plus seventy years—far exceeds the fourteen years of protection with the possibility of a fourteen-year renewal that authors originally received.[28] Rather than following "the traditional contours of copyright protection" and a policy of incentivizing the dissemination of creative works, the current copyright term strains the notion of copyright's constraint to a "limited Time[]" and indicates a shift in the Court's priority toward protecting creators' pecuniary interests over the public's intellectual needs.[29]

Most recently, in *Golan v. Holder*,[30] the Court again opted to protect the interests of authors over the interests of the public. It did so by upholding the constitutionality of section 514 of the Uruguay Round Agreements Act (URAA),[31] which provided copyright protection[32] for millions of foreign works of art, litera-

23. 537 U.S. 186 (2003).
24. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.); *see Eldred*, 537 U.S. at 194.
25. 17 U.S.C. § 302(a) (2006).
26. *Id.* § 304(b).
27. *Eldred*, 537 U.S. at 221.
28. ROBERT L. BARD & LEWIS KURLANTZICK, COPYRIGHT DURATION: DURATION, TERM EXTENSION, THE EUROPEAN UNION AND THE MAKING OF COPYRIGHT POLICY 7 (1999); *see* Walterscheid, *supra* note 20, at 41 ("[T]he statutory copyright term has increased by almost 580% [since 1790].").
29. *See* Todd John Canni, Comment, *Promoting Progress Through Perpetual Protection: The Struggle to Place Limits on Congress' Copyright Power*, 53 CATH. U. L. REV. 161 (2003).
30. 132 S. Ct. 873 (2012).
31. Pub. L. No. 103-465, 108 Stat. 4809 (1994).
32. While *Golan* refers to works granted copyright protection pursuant to URAA section 514 as "restored" works, the works affected by the legislation had never actually enjoyed copyright protection in the United States. *See Golan*, 132 S. Ct. at 878. For a discussion of the categories of artistic works that fall within URAA section 514's scope, see *infra* notes 200–203 and accompanying text.

ture, and music that had not previously enjoyed protection under U.S. copyright law and had therefore been within the public domain.[33] Among the restored works are many of the musical warhorses of the modern symphony orchestra: works by Sergei Prokofiev, Sergei Rachmaninoff, Dmitri Shostakovich, and Igor Stravinsky.[34] As a result, orchestras must now pay performance license fees for musical works that they previously could play without having to pay royalties. Further, when these works were in the public domain, they could be purchased relatively cheaply. Now most of the works are available to orchestras solely on a rental basis,[35] which tends to be far more expensive.[36] These added expenses further strain the budgets of many of America's already underfinanced orchestras. The result is that all but the most financially stable ensembles may be forced to forego programming choices that they otherwise would have made, which hurts America's symphony orchestras as well as their audiences. Thus, *Golan* ultimately hampers the dissemination of restored works and thereby undermines the very purpose of American copyright law.

This Comment evaluates *Golan*'s deleterious impact on the classical music community and its consequential effects on society at large.[37] Part I provides a general discussion of how American symphony orchestras operate. After explaining the costs involved in procuring the physical sheet music and the performance rights involved in staging a concert, it describes both the perilous financial situation orchestras have historically faced and the mounting difficulties posed by the recent economic recession. Part I makes clear that this is a time when America's orchestras need fostering rather than obstacles.

Part II delves into the history and nearly 225-year evolution of copyright legislation in the United States. It also provides an overview of the Berne Con-

33. *See* Brief of the ACLU as Amicus Curiae in Support of Petitioners at 9, *Golan*, 132 S. Ct. 873 (No. 10-545), 2011 WL 2578555 [hereinafter ACLU Brief]; *see also* Marybeth Peters, *The Year in Review: Accomplishments and Objectives of the U.S. Copyright Office*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 25, 31 (1996) ("The works that qualify for copyright restoration probably number in the millions.").

34. ACLU Brief, *supra* note 33, at 9.

35. For a description of what it means to "purchase" or "rent" pieces of music in this context, see *infra* notes 42–54 and accompanying text.

36. Brief of the Conductors Guild & the Music Library Ass'n as Amici Curiae Supporting Petitioners at 11–12, *Golan*, 132 S. Ct. 873 (No. 10-545), 2011 WL 2470828 [hereinafter Guild Brief].

37. Given that the Court has already held that URAA section 514 is constitutional, an analysis of whether this decision was doctrinally sound seems less important than a discussion of its significant adverse effects. Consequently, an analysis of section 514's constitutionality is beyond the scope of this Comment.

vention for the Protection of Literary and Artistic Works (Berne Convention)[38] and the United States's belated efforts to adhere to it, including the passage of URAA section 514. Part II demonstrates how modern copyright law has departed dramatically from its original purposes.

Part III traces the history of *Golan v. Holder* and summarizes the majority opinion and Justice Breyer's dissent. Part IV then condemns the ways in which *Golan* will adversely affect symphony orchestras. After explaining the administrative and financial hardships section 514 imposes on orchestras, it argues that these hardships will in turn stifle the dissemination of classical music—an effect contrary to the Constitution's desire that copyright law promote the progress of the arts and sciences. This Comment concludes by arguing that decreased performance of works restored by section 514 could have broader detrimental effects on society because attendance at such cultural events correlates with various societal benefits.

I. FACING THE MUSIC: THE FINANCIAL CONDITION OF AND PERFORMANCE COSTS INCURRED BY AMERICAN ORCHESTRAS

A. The Precipitous Price of Performance: Music Rentals and Performance Rights

Before an orchestra can stage a live performance—in fact, before the musicians can even undertake the rehearsals, dress rehearsals, and countless other activities needed to prepare for that performance—it must both (1) procure the physical sheet music for the featured pieces, either by renting or purchasing it; and (2) pay for any applicable rights to perform the pieces.

Sheet music refers to the printed material from which orchestra musicians read their musical notes while playing.[39] Sheet music collections that contain one part for each instrument in a given work of the symphonic repertoire (for example, first violin, second oboe, or harp) are known as concert editions, or parts.[40] An orchestra can buy parts outright.[41] Parts, however, are generally only available for purchase if the piece in question is no longer copyrighted.[42] Once an orches-

38. Berne Convention for the Protection of Literary and Artistic Works art. 1, adopted Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 (amended Sept. 28, 1979) [hereinafter Berne Convention].
39. *See* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 676 (4th ed. 2010).
40. *Id.* at 677–78. This Comment will generally refer to concert editions of sheet music interchangeably as parts or sheet music.
41. *See id.*
42. *See* L. TARLOW & R. SUTHERLAND, MAJOR ORCHESTRA LIBRARIANS' ASS'N, THE MUSIC WE PERFORM: AN OVERVIEW OF ROYALTIES, RENTALS AND RIGHTS 6–7 (2003), http://

tra has purchased parts for a work, the orchestra wholly owns these parts and will be able to use them again in the future without incurring additional costs.[43]

Frequently, however—and, in fact, almost always in the case of music that is still copyrighted[44]—concert editions of works are not available for purchase. In these situations, the orchestra can only rent the parts from specialized sheet music rental companies.[45] The price of any given sheet music rental depends on a number of variables. The rental company will typically calculate the rate based on a formula involving the budget of the performing ensemble, the length of the work to be performed, and the orchestration (that is, how many instrumentalists, and hence how many parts, are needed to perform the work).[46] The rental cost is also partly dependent on the popularity of the piece—frequently performed works tend to be pricier than more obscure ones.[47] In addition, orchestras that need the parts for longer than the standard rental period[48]—for example, student and

www.mola-inc.org/pdf/MusicWePerform.pdf. Some of the works that had their copyrights restored by section 514 were available for purchase before the statute was passed and the works were in the public domain. *Id.* Now most of those works are no longer available for purchase and instead can be acquired only on a rental basis. *Id.*

43. Beyond this financial benefit, an additional perquisite of owning the parts is that the orchestra can retain any markings and notations it has made in the music for future use. Before any performance, an orchestra must make many notations in each part, and this process can be extraordinarily time intensive. The string players, for example, must have the proper bowings marked into the music. Such notations enable the string players to move their bows across the strings in the same way to produce a consistent sound and create a more uniform and pleasing visual aesthetic for the audience. Furthermore, conductors often have their own stylistic markings that they would like added into the parts: For instance, if the director intends to pause at the end of a phrase, he might pencil into each part a *caesura*, which indicates a pause or breathing point between musical phrases. THE HARVARD DICTIONARY OF MUSIC 133 (Don Michael Randel ed., 4th ed. 2003). Without the *caesura* explicitly written into the parts, some members of the orchestra might inadvertently continue to play through the intended rest. Thus, owning a copy of the parts allows the orchestra to keep these important notations, which can greatly reduce the administrative costs and rehearsal time required for future performances. *See* Rich Bailey, *Lawrence Golan Speaks About* Golan v. Holder *and His Fight to Protect the Public Domain*, TECHDIRT (Oct. 7, 2011, 8:00 AM), http://www.techdirt.com/articles/20111006/12220616236/lawrence-golan-speaks-about-golan-v-holder-his-fight-to-protect-public-domain.shtml. Conversely, if an orchestra must rent the parts, these notations will have to be penciled in—and then erased upon return—each time the orchestra wishes to perform the work. *Id.*

44. *See* Karen Schnackenberg, *The Parts We Play*, POLYPHONIC.ORG (Oct. 13, 2006), http://www.polyphonic.org/article/the-parts-we-play.

45. *Id.* For examples of major music rental companies, see BOOSEY & HAWKES, http://www.boosey.com (last visited Mar. 18, 2013), ECS PUBLISHING, http://ecspublishing.com (last visited Mar. 18, 2013), and G. SCHIRMER INC., http://www.schirmer.com (last visited Mar. 18, 2013).

46. *See Rental & Licensing FAQs*, BOOSEY & HAWKES, http://www.boosey.com/pages/licensing/rentalUS.asp (last visited Mar. 18, 2013).

47. RON SOBEL & DICK WEISSMAN, MUSIC PUBLISHING: THE ROADMAP TO ROYALTIES 113 (2008).

48. The length of the standard period varies from rental company to rental company. For example, Boosey & Hawkes considers a ten-week rental period as standard. *See Rental & Licensing FAQs*, *supra* note 46. On the other hand, G. Schirmer has a much shorter rental period, as it ships parts

community orchestras, whose musicians lack the skill, training, and rehearsal time that their professional counterparts enjoy—are subject to higher rental fees.[49]

Taking all of these variables into consideration, the cost for a large professional orchestra to rent a relatively short work—like an overture of five to ten minutes' duration—might be roughly $300 to $500.[50] The cost to rent a longer work—such as a full-length symphony lasting forty-five minutes to one hour—could easily exceed $1000.[51] Moreover, if the orchestra is playing multiple performances of the work, the rental company will usually charge a separate fee for each performance.[52] This is true even if the performances are over the span of one weekend,[53] as is frequently the case for major symphony orchestras.[54]

If the musical work to be performed is still copyrighted, the orchestra must also pay public performance license fees,[55] which are entirely separate from the

six weeks before a given performance. *See Request for Rental Materials*, G. SCHIRMER INC., http://www.schirmer.com/images/news/Schirmer-Rental.pdf (last visited Mar. 18, 2013).

49. The additional cost of renting the parts for longer than the standard period can be extensive. For example, Luck's Music Library charges half of the original rental fee for a four-week extension of its customary rental period, and G. Schirmer charges an additional seventy-five dollars for each month beyond its customary rental period. *See Q&A Archive*, LUCK'S MUSIC LIBR., http://www.lucksmusic.com/experts/qanda_archive.htm (last visited Mar. 18, 2013); *Request for Rental Materials*, *supra* note 48.

50. *See* KOHN & KOHN, *supra* note 39, at 711.

51. *Id.*

52. *See* Bailey, *supra* note 43.

53. *Id.*

54. Often professional orchestras will have a run of two or three concerts of the same program over a weekend. *See, e.g.*, *Dutoit Conducts Debussy and Prokofiev*, L.A. PHILHARMONIC ASS'N, http://www.laphil.com/tickets/performance-detail.cfm?id=4691 (last visited Mar. 18, 2013) (detailing a performance by the Los Angeles Philharmonic of Stravinsky's Symphonies of Wind Instruments, Debussy's *La mer*, and Prokofiev's Suite from *Romeo and Juliet*, with performances at 8:00 p.m. on Thursday, February 23, 2012; at 11:00 a.m. on Friday, February 24, 2012; and at 8:00 p.m. on Saturday, February 25, 2012). Sometimes, the rental fee charged for these additional performances will at least be at a reduced rate. *See* Bailey, *supra* note 43.

55. According to the Copyright Act of 1976, "[t]o perform or display a work 'publicly' means—(1) to perform or display it at a place open to the public or at any place where a *substantial* number of persons outside of a normal circle of a family and its social acquaintances is gathered . . . ." 17 U.S.C. § 101 (2006) (emphasis added). The two major U.S. performance rights societies both define a public performance more broadly to encompass even more performances. Broadcast Music Incorporated (BMI), for example, defines a public performance as "any music played outside a normal circle of friends and family." *FAQ: What Is a Public Performance of Music and What Is the "Performing Right"?*, BMI, http://www.bmi.com/faq/entry/what_is_a_public_performance_of_music_and_what_is_the_performing_right1 (last visited Mar. 18, 2013). Likewise, the American Society of Composers, Authors, and Publishers (ASCAP) defines a public performance as any performance that happens "either in a public place or any place where people gather (other than a small circle of a family or its social acquaintances)." *ASCAP Licensing FAQs*, AM. SOC'Y OF COMPOSERS, AUTHORS, AND PUBLISHERS, http://www.ascap.com/licensing/licensingfaq.aspx (click on "What is a public performance?") (last visited Mar. 18, 2013).

sheet music rental fees.[56] Thus, license fees must be paid even if the orchestra owns the sheet music outright.[57] An orchestra does not have to acquire a public performance license, however, to perform music that is no longer copyrighted and consequently in the public domain.[58]

The two major licensors of performance rights in the United States are the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music Incorporated (BMI).[59] Both performance rights societies own performance rights to hundreds of thousands of works.[60] Because classical composers can sign with either society, symphony orchestras that regularly perform twentieth-century—and thus generally copyrighted—music must purchase blanket licenses from both societies so that they can play works from either catalogue over the course of the year.[61] The fee for a blanket license is variable and depends on an orchestra's gross box office receipts for the preceding year.[62] These blanket performance licenses are costly; for small orchestras this added expense can be prohibitively expensive. Indeed, even if an orchestra does not charge for admission to its concerts, the orchestra will still need to pay for performance rights.[63]

There are two kinds of performance rights that orchestras may need to license from these societies: "small (or concert) rights and grand (or dramatic) rights." TARLOW & SUTHERLAND, *supra* note 42, at 4. Small rights allow the licensee to stage a sound-only performance, such as a symphony concert. *Id.* Grand rights allow the licensee to stage a performance with extramusical aspects, such as dance, acting, and the like. *Id.* at 5. Orchestras must obtain grand rights, for instance, for performances of dramatico-musical works, such as ballets and operas. *Id.*; *see also* KOHN & KOHN, *supra* note 39, at 1304–05. All references to performance rights in this Comment will be to small rights, as those are the rights implicated in the typical symphony orchestra concert.

56. *See* KOHN & KOHN, *supra* note 39, at 711.

57. *See* Guild Brief, *supra* note 36, at 4 (noting that even orchestras that own the sheet music for copyright-protected compositions must pay public performance license fees); *see also Music Licensing for Symphony Orchestras*, BROAD. MUSIC, INC., http://www.bmi.com/licensing/entry/symphony_orchestras (last visited Mar. 18, 2013) (click on "Do we need a performance license if we own the printed score and parts or have paid a rental fee to the publisher?" under "Common questions").

58. *See* TARLOW & SUTHERLAND, *supra* note 42, at 5.

59. *See* RANDALL D. WIXEN, THE PLAIN AND SIMPLE GUIDE TO MUSIC PUBLISHING 7 (2005). A third, but lesser, American performing rights organization is the Society of European Stage Authors and Composers (SESAC). *See* SOBEL & WEISSMAN, *supra* note 47, at 34–36.

60. *See* KOHN & KOHN, *supra* note 39, at 1263.

61. *See id.*

62. RICHARD G. GREEN, AM. SYMPHONY ORCHESTRA LEAGUE, COPYRIGHT PRIMER FOR ORCHESTRA MANAGERS AND LIBRARIANS 2 (1990); *see, e.g.*, *Music License for Symphony Orchestra*, BROAD. MUSIC, INC., http://www.bmi.com/forms/licensing/gl/sym1.pdf (last visited Mar. 18, 2013); *Q&A About the ASCAP License Agreement for Symphony Orchestras*, AM. SOC'Y COMPOSERS, AUTHORS & PUBLISHERS, http://www.ascap.com/concert/~/media/Files/Pdf/licensing/report-forms/symphonic/faq.ashx (last visited Mar. 18, 2013).

63. For example, the minimum performance license fee for ASCAP is $327. *See 2012/2013 Report of Adjusted Box Office for Symphony Orchestras Which Have Annual Budgets More Than $250,000*, AM.

Clearly, the costs of simply acquiring the physical sheet music and the rights to perform that music can add up quickly. Merely renting a short piece typically costs hundreds of dollars, and putting on a full-length concert of ninety to one hundred twenty minutes[64] can quickly add up to thousands of dollars if an orchestra wishes to play more than one copyrighted piece on a program. These costs can be prohibitive for smaller professional, college, community, and youth orchestras with limited budgets. These costs, however, can be a strain on larger professional orchestras as well, as they already suffer from the so-called "cost disease" and the impact of the most recent financial crisis.

B. The "Cost Disease" and the Attendant Financial Difficulties Orchestras Face

Financial hardship is not new to orchestras. In fact, a prescient article from the *New York Times* about the financial woes of orchestras, written more than one hundred years ago, is still apt today:

> The permanent orchestra season has, as usual, been financially a bad one all over the country. . . . [T]here is always a deficit, which public-spirited guarantors are called upon to pay year after year. A permanent orchestra, it seems pretty well established by American experience, is not at present a paying institution, and is not likely immediately to become so.[65]

So why do symphony orchestras seem practically destined for financial failure? In an influential study of the performing arts, renowned economists William Baumol and William Bowen identified a phenomenon that has come to be known as the "cost disease"[66] that seemingly holds the answer.

The fundamental premise underlying the cost disease is that in most sectors of the U.S. economy, technological improvements, increasing levels of education,

SOC'Y COMPOSERS, AUTHORS & PUBLISHERS, http://www.ascap.com/~/media/Files/Pdf/licensing/report-forms/symphonic/more/2012.pdf (last visited Apr. 5, 2013). See *infra* Part IV.B for a more in-depth discussion of the costs of obtaining performance rights.

64. *See Common Questions*, CHI. SYMPHONY ORCHESTRA, http://cso.org/PlanYourExperience/Questions.aspx (last visited Mar. 18, 2013); *FAQs About Concerts at Severance Hall*, CLEVELAND ORCHESTRA, http://www.clevelandorchestra.com/23-0-FAQ/FAQs/FAQ.aspx (last visited Mar. 18, 2013).

65. Richard Aldrich, *"Permanent Orchestra" Season a Bad One*, N.Y. TIMES, May 3, 1903, http://query.nytimes.com/mem/archive-free/pdf?res=F60C16FD34591B728DDDAA0894DD405B838CF1D3, *quoted in* ROBERT J. FLANAGAN, THE PERILOUS LIFE OF SYMPHONY ORCHESTRAS: ARTISTIC TRIUMPHS AND ECONOMIC CHALLENGES 6 (2012).

66. *See* FLANAGAN, *supra* note 65, at 9; Arthur C. Brooks, Arts, Markets, and Governments: A Study in Cultural Policy Analysis 2 (Mar. 1998) (unpublished Ph.D. dissertation, RAND Graduate School), *available at* http://www.rand.org/pubs/rgs_dissertations/RGSD142.html.

and economies of scale have resulted in productivity increases.[67] The performing arts, however, have not enjoyed—indeed, cannot enjoy—comparable increases in productivity.[68] This is because, "[f]rom an engineering point of view, live performance is technologically stagnant"—the mechanics of a violin and the notation of a score have changed little since the time of Johann Sebastian Bach. Accordingly, the "hourly output yield" of performers has not changed over time.[69] Thus, while "[h]uman ingenuity has devised ways to reduce the labor necessary to produce an automobile, . . . no one has yet succeeded in decreasing the human effort expended at a live performance of a 45 minute Schubert quartet much below a total of three man-hours."[70]

This is not surprising. People buying cars do not care how many hours went into the making of the cars—they only care that the final product is sound and that its cost is reasonable. A symphony performance, on the other hand, is fundamentally different in that the musicians' labor is *itself* the purchased product. Therefore, "[a]ny change in the training and skill of the performer or the amount of time he spends before the audience affects the nature of the service he supplies."[71]

If symphony orchestras existed in a vacuum, this inherent productivity stagnation would not be an issue. Increases in productivity in other sectors of the economy, however, translate into greater bargaining power of workers and increased wages in those sectors.[72] As a result, the standard of living of orchestra musicians decreases relative to that of workers in other industries.[73] Symphony orchestras must increase their own wages to avoid losing labor to higher-paying economic sectors.[74] Because of productivity stagnation, however, these increased labor costs

67. WILLIAM J. BAUMOL & WILLIAM G. BOWEN, PERFORMING ARTS—THE ECONOMIC DILEMMA 162–63 (1966).
68. *Id.* at 163.
69. *Id.* at 163–64.
70. *Id.* at 164.
71. *Id.*
72. *See id.* at 168.
73. *See id.*
74. *Id.* Nearly all orchestra musicians are unionized, with their pay covered by collective bargaining agreements that mandate minimum weekly salaries. FLANAGAN, *supra* note 65, at 71. Since 1987, the minimum weekly salary for professional orchestra musicians has increased at an average of 4.2 percent per year. *Id.* at 76–77. Taking into account seniority payments (pay increases contingent on the player's length of service with the orchestra) and overscale payments (pay increases depending on whether the musician has a first-chair seat), the average annual salary increase has actually amounted to 4.5 percent. *Id.* at 72–73, 77. These increases considerably outpaced the pay increases in other sectors of the American economy, which rose at an average rate of 3.6 percent per year. *Id.* at 77. Thus, it is likely that at least a portion of orchestras' financial problems is homegrown. Even if orchestral pay increases merely matched those of other economic sectors, however, the cost disease would still be an issue. *See infra* notes 75–76 and accompanying text.

are not tied to correlative increases in earnings, and orchestras take on larger and larger deficits in order to continue their operations at the same level of sophistication.[75] In sum, because orchestras cannot increase their productivity, and because the cost of performance necessarily must rise if the performing arts are to survive as an industry, the cost disease cannot be "cured"[76]—as long as national productivity levels are on the rise, orchestras' performance costs will always be increasing relative to the costs of other economic activities.

While the cost disease is incurable, it could be ameliorated if orchestras devised a way to increase their revenues proportionately to their rising costs. In theory, orchestras could generate more revenue by raising ticket prices. In practice, however, increases in ticket prices tend to discourage concert attendance; such audience attrition, in turn, hurts rather than helps revenues.[77] This is in part due to the fact that a loss of season subscribers[78] actually represents a double loss for

75. *See* BAUMOL & BOWEN, *supra* note 67, at 170–71. Labor costs are significant in the classical music world. Management for the Minnesota Orchestra, for example, claims that labor costs account for 48 percent of the orchestra's $31 million budget. Graydon Royce, *Minn. Orchestra, Musicians Fail to Agree; Lockout Threat Looms*, STARTRIBUNE.COM (Sept. 30, 2012, 8:40 PM), http://www.startribune.com/printarticle/?id=172008981. Given the conditions of the orchestral labor market, this is not surprising. Most large professional orchestras employ around one hundred musicians. FLANAGAN, *supra* note 65, at 76. In many orchestras these unionized musicians are entitled to a guaranteed minimum weekly salary on a full-year contract. *Id.* at 76–77, 81. Thus, "[t]he cost of musicians dominates artistic costs," which account for 49 percent of the average orchestra's expenses. *Id.* at 36. In addition to paying regular musicians' salaries, orchestras must hire additional musicians on a per-service basis when staging works with an expanded orchestration. *Id.* at 80–81. The conductor's salary, furthermore, is often much higher than that of the musicians, and can by itself comprise up to 8 percent of an orchestra's expenses. *Id.* at 77-78. Most orchestras also stage a variety of concerts throughout the season that feature guest conductors and/or guest soloists. *Id.* at 78. The costs associated with such guest artists generally range from 3 to 14 percent of an orchestra's annual expenses. *Id.*

76. FLANAGAN, *supra* note 65, at 12.

77. *See id.* Indeed, attendance at orchestra concerts is inversely related to the ticket price charged. *Id.* at 48. From 1987 to 1997, for example, orchestras raised their ticket prices at a rate that far exceeded indices of all consumer prices. *Id.* at 46–47 (demonstrating while all consumer prices had risen by an index of less than 1.5, prices of subscription tickets to regular season and pops concerts had risen by an index that exceeded 2). Yet, despite an increase in the number of concerts per year, total concert attendance has decreased. In 1987, the median number of concerts staged by U.S. orchestras was 175, with median annual attendance of approximately 218,000. *Id.* at 42–43. By 2003, the median number of performances had increased to 197 per year. *Id.* at 42. By 2005, however, the median annual attendance had fallen to 192,000, a decrease of approximately 12 percent from 1987 levels. *Id.* at 43. Taking into account both increased concert offerings and declining annual attendance figures, the average per-concert attendance rate has declined by approximately 2.8 percent per year. *Id.* at 44–45.

78. In addition to selling tickets for individual performances, orchestras typically offer "subscription sales," or packages of tickets to a certain number of regular season concerts. *See* AM. SYMPHONY ORCHESTRA LEAGUE, AMERICANIZING THE AMERICAN ORCHESTRA: REPORT OF THE NATIONAL TASK FORCE FOR THE AMERICAN ORCHESTRA: AN INITIATIVE FOR CHANGE 84 (1993) [hereinafter ASOL REPORT].

orchestras, as subscribers are a major source of not only ticket sales revenue but also of private donations—a source of income on which orchestras must increasingly rely.[79] Accordingly, the amount of performance revenue an orchestra can hope to pull in is limited.[80] In fact, in 2005, performance revenue only accounted for 37 percent of orchestral revenues.[81]

Because orchestras are unable to bring in performance revenue at levels that equal or exceed performance costs,[82] symphonies must rely in large part on nonperformance income if they are to have any hope of balancing their books. Nonperformance income consists primarily of government subsidies, investment income, and private philanthropy.[83] Government support, however, tends to be only a small fraction of private philanthropic levels. For example, in 2005, government subsidies comprised only 5 percent of the average orchestra's revenue.[84] Investment income—in the form of earnings on endowments—is a more important source of nonperformance revenue at 13 percent of the average orchestra's revenue.[85] However, "[n]o U.S. symphony orchestra currently has sufficient endowment earnings to offset its structural deficits. More important, no orchestra has anywhere near the endowment required to finance growing deficits in the future."[86] Thus, private support—which, at 45 percent of the av-

79. *See* Pei-Yi Lin, Challenges of Developing Audiences for Symphony Orchestras in Twenty-First Century 15 (Aug. 2008) (unpublished M.A. thesis, University of Akron), *available at* http://etd.ohiolink.edu/send-pdf.cgi/Lin%20Pei%20Yi.pdf?akron1210950102. Alarmingly, as ticket prices have increased, subscription sales have steadily declined. While orchestras sold five subscription tickets for every individual ticket in 1991, by 1997 orchestras were only selling three subscription tickets per individual ticket. FLANAGAN, *supra* note 65, at 43. Meanwhile, subscribers "are among the most reliable contributors of nonperformance income to orchestras." *Id.* at 47. Sixty-seven percent of subscribers donate to symphony orchestras. Lin, *supra*, at 15. Thus, "in pricing tickets, orchestras must consider the effects on *total* revenue—not just the impact on performance revenue . . . . [The importance of subscribers' donations] argues for ticket prices that are below the level that maximizes performance revenue." FLANAGAN, *supra* note 65, at 47.

80. While some orchestras do have broadcasting or recording income to supplement ticket revenues, the vast majority of modern orchestras have no such income. FLANAGAN, *supra* note 65, at 13–14. Even for those that do, the amount of this income is fairly negligible and amounts to only about 2 percent of performance revenue, or a mere 0.9 percent of total revenue. *Id.* Furthermore, "there has been a dramatic decline in the sales of sound recordings." *Id.* at 13.

81. *Id.* at 32.

82. During the 1990–91 concert season, for example, performance revenues averaged 46 percent of performance expenses. *Id.* at 15–16. By the 2005–06 season, however, this number had fallen to 41 percent. *Id.*

83. *Id.* at 16.

84. *Id.* at 32.

85. *Id.*

86. *Id.* at 183.

erage orchestra's revenue, exceeds performance revenue—is the most important form of orchestral income.[87]

In order to generate donation income, however, orchestras need to engage in fundraising and marketing efforts, which can be costly. In 2005, for example, expenses related to fundraising and marketing accounted for 17 percent of the average professional orchestra's financial outlays.[88] Furthermore, the effect of the cost disease is such that structural deficits grow at a nonlinear rate[89] such that "[n]onperformance income that is sufficient to cover this year's performance deficit will generally be inadequate to cover next year's deficit."[90] Thus, "[t]he reluctant conclusion . . . is that nonperformance income growth alone is unlikely to cover future structural budget deficits."[91]

In sum, the financial foundation of American symphony orchestras is inherently unstable, resulting in steady financial decline. As a consequence, professional orchestras have been hemorrhaging money for years. The Wolf Report shows that in 1971, American orchestras had a national operating deficit of $2.8 million.[92] By 1991, this deficit had grown to $23.2 million.[93] Based on these trends, the report projected a disheartening $64 million budget shortfall for American orchestras in 2000.[94] These data prove that the cost disease is real and

87. *Id.* at 32.

88. *See id.* at 36. Furthermore, fundraising costs seem to be rising over time. In 1987, for instance, fundraising and marketing outlays represented only 13 percent of orchestras' expenses. *Id.* These increasing fundraising and marketing expenditures are attributable to the changing structure of the philanthropic support orchestras receive. *See* KEVIN F. MCCARTHY ET AL., RESEARCH IN THE ARTS, THE PERFORMING ARTS IN A NEW ERA 87–88 (2001), http://www.rand.org/pubs/monograph_reports/2007/MR1367.pdf. In the past, orchestras generally relied on the generous donations of a few wealthy individuals. *Id.* Today, however, greater numbers of individual donors are giving smaller amounts. *Id.* Accordingly, orchestras must engage in more fundraising and marketing to reach the greater number of donors necessary to generate the financial support they need. *See id.*

89. *See* BAUMOL & BOWEN, *supra* note 67, at 161 (claiming that, "because of the economic structure of the performing arts, . . . there are fundamental reasons for expecting the income gap to widen steadily with the passage of time."); FLANAGAN, *supra* note 65, at 15 ("The disquieting implication of the cost disease arithmetic is that orchestras will be saddled with ever-growing structural deficits . . . , [because] if the cost disease has not been neutralized, performance revenues will cover an ever-diminishing fraction of performance expenses, and structural deficits will increase.").

90. FLANAGAN, *supra* note 65, at 17.

91. *Id.* at 183.

92. WOLF ORG., INC., *supra* note 4, at A-13.

93. *Id.*

94. *Id.* at A-15. On average, orchestras in 2000 actually reached a more or less balanced budget. *See* FLANAGAN, *supra* note 65, at 2. Orchestras, however, had once again amassed a $15 million industry-wide deficit in 2001. *See* Douglas J. Dempster, *The Wolf Report and Baumol's Curse: The Economic Health of American Symphony Orchestras in the 1990s and Beyond*, HARMONY, Oct. 2002, at 1, 7, *available at* http://www.polyphonic.org/wp-content/uploads/2012/03/Wolf_Report_Dempster.pdf. While this fluctuation suggests that the well-being of orchestras is largely

has contributed to professional orchestras' increasing vulnerability to flat-out financial failure.

C. The Impact of the American Financial Crisis on Symphony Orchestras

Given the already precarious financial state of American orchestras in normal economic times, it should come as no surprise that the recession that began in 2008 has wrought tremendous additional hardship on the classical music community. A few illustrative examples will serve to demonstrate the extreme difficulties American symphony orchestras have faced in the wake of the recession.

In late 2009, the Honolulu Symphony announced that it was cancelling the remainder of its 2009–10 season and would be filing for Chapter 11 bankruptcy.[95] In December 2010, the orchestra made a last-minute decision to change its bankruptcy to a Chapter 7 liquidation proceeding.[96] Interestingly, the orchestra was reorganized and revamped after liquidation. A group of Hawaiian business leaders formed a Symphony Exploratory Committee, bought the symphony's assets at the liquidation auction, and proposed a $6 million, three-year business plan for the "new and improved Hawaii Symphony."[97] The Committee hoped to have the orchestra up and running in November 2011, but the new orchestra's debut was delayed when the Committee failed to raise the $2 million required for the orchestra's first season as quickly as it had hoped.[98] The orchestra finally had its premiere performance on March 4, 2012, in front of a packed audience.[99] The new Hawaii Symphony Orchestra, however, has had to make significant changes to achieve this revival. The orchestra's season is a short sixteen weeks,[100] orches-

dependent on the overall economy (in light of the early 2000s recession), Flanagan found that, even controlling for general business conditions, on average the ratio of performance revenues to performance expenses has been steadily declining. *See* FLANAGAN, *supra* note 65, at 20–22.

95. *See* Jacqueline Palank, *Honolulu Symphony Seeks March Auction*, WALL ST. J. BANKR. BEAT BLOG (Feb. 24, 2011, 12:11 PM), http://blogs.wsj.com/bankruptcy/2011/02/24/honolulu-symphony-seeks-march-auction.

96. *See id.*

97. Tiffany Hill, *The Honolulu Symphony Revival*, HONOLULU MAG., Nov. 2011, http://www.honolulumagazine.com/Honolulu-Magazine/November-2011/The-Honolulu-Symphony-Revival.

98. *Id.* A member of the Committee vowed that "[w]e won't have concerts unless we have money." *Id.* (internal quotation marks omitted).

99. James R. George, *Magic Returns as Hawaii Symphony Orchestra Takes Stage*, PAC. BUS. NEWS (Mar. 5, 2012, 2:31 PM), http://www.bizjournals.com/pacific/blog/2012/03/magic-returns-as-hawaii-symphony.html.

100. Jodi Leong, *New Hawaii Symphony Holds First Rehearsal: Symphony Launching Inaugural Season This Weekend*, KITV.COM (Mar. 2, 2012, 9:20 PM), http://www.kitv.com/New-Hawaii-Symphony-Holds-First-Rehearsal/-/8906042/9658142/-/giaypg/-/index.html.

tral salaries are a mere $1000 a week,[101] and the orchestra is operating on a significantly reduced budget.[102]

In the face of a looming annual deficit of $4 million, management of the Cleveland Orchestra—one of the "Big Five" American orchestras—sought a 5 percent pay cut from its musicians for the remainder of the 2009–10 season.[103] In protest, the musicians went on strike in January 2010.[104] Management and the musicians quickly struck a deal, however, that instead froze salaries at their then-existing levels for the remainder of the 2009–10 season and for the following season as well.[105] Orchestra musicians also agreed to contribute more to their health plans as a way of helping the orchestra overcome its budgetary shortfalls.[106]

In the face of a projected $6.5 million operating deficit for the 2009–10 season, the Detroit Symphony Orchestra determined that drastic actions—including significant cuts to its musicians' salaries and benefits—were needed to avoid bankruptcy when its musicians' contracts expired in the summer of 2010.[107] Unfortunately, management and the musicians were unable to arrive at a consensus on how to resolve the orchestra's financial difficulties, and the musicians declared a strike on October 4, 2010.[108] Management suspended the remainder of the 2010–11 season in February 2011, four-and-a-half months into the strike, when continued negotiations proved unfruitful.[109] Six months into the strike, the two sides finally reached an agreement that reduced musicians' minimum salaries from $104,650 to $79,000, cut the number of full-time musicians from ninety-six to eighty-one, and slashed the number of workweeks from fifty-two to forty.[110]

101. *Id.* By contrast, the median minimum weekly salary for unionized orchestra musicians in 2005 was $1125. FLANAGAN, *supra* note 65, at 71.
102. The Honolulu Symphony had an annual budget of $8 million, four times that of the new Hawaii Symphony Orchestra. Nanea Kalani, *Honolulu Symphony Promises to Emerge Smarter, Leaner*, PAC. BUS. NEWS (Apr. 4, 2010, 6:00 PM), http://www.bizjournals.com/pacific/stories/2010/04/05/story3.html.
103. Wakin, *supra* note 5.
104. *Id.*
105. *Id.*
106. *Id.*
107. Daniel J. Wakin, *Day of a Strike Dawns for Detroit Musicians*, N.Y. TIMES, Oct. 3, 2010, http://www.nytimes.com/2010/10/04/arts/music/04symphony.html.
108. Zachary Lewis, *Detroit Symphony Orchestra Strike Reverberates in Music World*, CLEVELAND.COM (Oct. 17, 2010, 12:01 AM), http://www.cleveland.com/musicdance/index.ssf/2010/10/detroit_symphony_orchestra_str.html.
109. Daniel J. Wakin, *Detroit Symphony Cancels Season as Musicians Strike*, N.Y. TIMES ARTS BEAT BLOG (Feb. 19, 2011, 6:29 PM), http://artsbeat.blogs.nytimes.com/2011/02/19/detroit-symphony-cancels-season-as-musicians-strike.
110. Wakin, *supra* note 7.

Even with these concessions, however, the orchestra anticipated that it would continue to run annual deficits of $3 million.[111]

The Louisville Orchestra filed for Chapter 11 bankruptcy in December 2010.[112] The orchestra's financial condition was so dire that management petitioned the bankruptcy court for relief from the burden of paying the musicians' salaries for ninety days, although the court denied the request.[113] While the orchestra formally emerged from bankruptcy in August 2011,[114] labor disputes had plagued the orchestra since before the bankruptcy was complete. The musicians considered themselves locked out by management's efforts to both reduce the size of the ensemble and cut the length of the orchestra's season, and thus began withholding their labor in June 2011.[115] The Kentucky Division of Unemployment Insurance, however, issued a ruling in January 2012 holding that the musicians had instead been on strike and consequently would have to pay back any unemployment benefits received while inactive.[116] After having to cancel all of its concerts through March 2012, orchestra management ultimately advertised auditions for all positions on its website.[117] On April 25, 2012, nearly eleven months after the labor dispute began, management finally struck a one-year deal with the musicians that called for a shortened thirty-week season and personnel cuts that reduced the ensemble from seventy-one to fifty-seven musicians.[118]

Most shockingly of all, in April 2011, the Philadelphia Orchestra—long considered one of the nation's preeminent orchestras—declared bankruptcy.[119]

111. *Id.*

112. Jacqueline Palank, *Louisville Orchestra Files Exit Plan, Continues Union Talks*, WALL ST. J. BANKR. BEAT BLOG (May 31, 2011, 3:16 PM), http://blogs.wsj.com/bankruptcy/2011/05/31/louisville-orchestra-files-exit-plan-continues-union-talks.

113. *Id.*

114. *See Louisville Orchestra Emerges From Bankruptcy*, LOUISVILLE ORCHESTRA (Aug. 15, 2011), http://www.louisvilleorchestra.org/louisville-orchestra-emerges-from-bankruptcy.

115. Devin Katayama, *Louisville Orchestra Musicians Considered on Strike, Not Locked Out*, WFPL NEWS (Jan. 6, 2012), http://archives.wfpl.org/2012/01/06/louisville-orchestra-musicians-considered-on-strike-not-locked-out.

116. *Id.*

117. *Now Auditioning for All Positions*, LOUISVILLE ORCHESTRA, http://www.louisvilleorchestra.org/wp-content/uploads/NowAuditioning.pdf (last visited Mar. 18, 2013). Musicians from other orchestras were so reluctant to step into the labor dispute that the Louisville Orchestra even resorted to advertising on Craigslist. *See* Bruce Hembd, *Opinion and Parody: The 'New and Improved' Louisville Orchestra*, HORN MATTERS (Dec. 2, 2011), http://hornmatters.com/2011/12/opinion-and-parody-the-new-and-improved-louisville-orchestra; *Louisville Orchestra Seeks Musicians on Craigslist*, WDRB.COM (Dec. 1, 2011, 9:50 AM), http://www.wdrb.com/story/16144605/louisville-orchestra-seeks-musicians-on-craigslist.

118. *Louisville Orchestra Labor Dispute Nearing End*, WLKY.COM (Apr. 25, 2012, 6:47 PM), http://www.wlky.com/news/local-news/louisville-news/Louisville-Orchestra-labor-dispute-nearing-end/-/9718340/11865226/-/item/0/-/14h15bf/-/index.html.

119. FLANAGAN, *supra* note 65, at 3.

In 2010, the orchestra's average attendance had fallen to a mere 65 percent of venue seating capacity, but the orchestra had been able to assemble an emergency fund of $15 million to cover its anticipated deficit for the remainder of that year.[120] In fiscal year 2011, however, the orchestra faced another whopping operating deficit of $14.5 million and was forced into bankruptcy.[121] The bankruptcy court gave the orchestra permission to terminate its pension plan, which itself had accumulated a $17 million deficit.[122] Additionally, management negotiated a labor deal that included a 15 percent pay cut for musicians and a reduction in the size of the ensemble from 105 to 95 musicians.[123] April 2011 also saw the Syracuse Symphony Orchestra[124] and the New Mexico Symphony Orchestra[125] file for Chapter 7 bankruptcy.

In September 2011, the musicians of the Colorado Symphony Orchestra agreed to a 5 percent reduction in their base pay for the 2011–12 season and two weeks of unpaid furloughs—cuts amounting to a 14 percent total reduction in pay.[126] Management estimated that the cuts would save the orchestra $530,000 in expenses annually, but permanent financial relief is unlikely because the symphony had already amassed $1.2 million in debt before the cuts.[127] These cuts came less than two years after the musicians had agreed to furloughs and pay cuts that had already reduced overall pay by 24 percent.[128]

Finally, the autumn of 2012 featured a spate of orchestra labor disputes. The Atlanta Symphony Orchestra, for example, stopped paying musicians' salaries and benefits upon the expiration of its collective bargaining agreement on

120. *See* Brian Wise, *Classical Music in 2010: Joyful Noise, Troubled Silence*, WQXR (Dec. 26, 2010), http://www.wqxr.org/#!/articles/wqxr-features/2010/dec/26/classical-music-2010-joyful-noise-troubled-silence.

121. Andrew Taylor, *Immovable Object Meets Unstoppable Force*, ARTFUL MANAGER (Apr. 20, 2011), http://www.artsjournal.com/artfulmanager/main/immovable_object_meets_unstopp.php.

122. Steve Tawa, *Bankruptcy Judge Terminates Philadelphia Orchestra's Current Pension Plan*, CBS PHILLY (Nov. 29, 2011, 8:00 AM), http://philadelphia.cbslocal.com/2011/11/29/bankruptcy-judge-terminates-philadelphia-orchestras-current-pension-plan.

123. Peter Dobrin, *Philadelphia Orchestra and Its Musicians Agree to Labor Concessions*, PHILLY.COM (Oct. 14, 2011), http://articles.philly.com/2011-10-14/news/30279549_1_philadelphia-orchestra-musicians-john-koen.

124. Caroline Cooper, *Syracuse Symphony Dissolves, Attorney General Schneiderman Seeks Inquiry*, WQXR (Apr. 4, 2011), http://www.wqxr.org/#!/articles/wqxr-features/2011/apr/04/syracuse-symphony-orchestra-dissolves-attorney-general-schneiderman-seeks-inquiry.

125. *Bankruptcy Final Note for N.M. Symphony*, KRQE.COM (Apr. 20, 2011, 4:31 PM), http://www.krqe.com/dpp/news/business/bankruptcy-final-note-for-nm-symphony.

126. Kyle MacMillan, *Colorado Symphony Orchestra Musicians Accept 14 Percent Pay Cut*, DENVERPOST.COM (Sept. 24, 2011, 1:00 AM), http://www.denverpost.com/music/ci_18966481.

127. *Id.*

128. *Id.*

August 25, 2012, in the face of a projected $20 million accumulated deficit.[129] About a month later, the orchestra announced a new agreement that would cut the number of musicians from ninety-five to eighty-eight, reduce the season from fifty-two to forty-one weeks, and cut musicians' salaries by $5.2 million over two years.[130] In September 2012, the musicians of the Chicago Symphony Orchestra went on strike for forty-eight hours when management sought pay cuts and health insurance premium increases to help offset an anticipated shortfall of $1.3 million for the year.[131] On September 10, 2012, Indianapolis Symphony Orchestra management locked out musicians and cancelled concerts for five weeks.[132] Eventually, musicians agreed to a reduction in the minimum annual salary from $78,000 to $53,000, among other concessions.[133] Lastly, management of the Minneapolis Orchestra decided to lock out its musicians on October 1, 2012, and cancel all concerts through November 25, 2012.[134] In the face of a $6 million operating loss in fiscal year 2012[135] and a rejected proposal to cut minimum salaries by 30 percent to $78,000, concerts were cancelled through April 2013.[136]

It seems clear that the lamentable fiscal situation of American orchestras that commentators have deplored for more than a century has only become direr in the past several years.[137] Orchestras are operating increasingly in the red. In order to survive, they are resorting to drastic measures, including significant pay

129. Ernie Suggs, *ASO Musicians Strike Deal, Avert Delay of Season Opener*, ATLANTA J.-CONST. (Sept. 26, 2012, 5:47 PM), http://www.ajc.com/news/news/aso-musicians-strike-deal-avert-delay-of-season-op/nSMpx.

130. *Id.*

131. Heather Gillers & Jason Grotto, *Chicago Symphony Orchestra Strike Reflects Deeper Financial Woes*, CHI. TRIB., Oct. 17, 2012, http://articles.chicagotribune.com/2012-10-17/news/ct-met-cso-finances-20121007_1_cso-bass-player-chicago-symphony-orchestra-riccardo-muti.

132. *Indianapolis Symphony, Musicians Reach New Deal*, YAHOO MUSIC (Oct. 16, 2012, 3:02 PM), http://music.yahoo.com/news/indianapolis-symphony-musicians-reach-deal-153719390.html; Tom Huizenga, *Indiana Symphony Returns, Seattle May Strike and Philly Reboots*, NPR.ORG (Oct. 19, 2012, 11:09 AM), http://www.npr.org/blogs/deceptivecadence/2012/10/19/163194377/indianapolis-symphony-returns-seattle-may-strike-and-philly-reboots.

133. *See* sources cited *supra* note 132.

134. Michael Moore, *Tale of Two Lockouts: Minnesota Orchestra Musicians Rally, SPCO Musicians Reject Contract Offer*, WORKDAY MINN. (Nov. 1, 2012), http://www.workdayminnesota.org/index.php?news_6_5365.

135. *See* Sam Black, *MN Orchestra Confirms $6 Million Deficit, Marketing Continues for New Space*, MINNEAPOLIS/ST. PAUL BUS. J. (Dec. 6, 2012, 2:55 PM), http://www.bizjournals.com/twincities/news/2012/12/06/mn-orchestra-confirms-6-million-deficit.html; Leslie Dyste, *SPCO, Minn. Orchestra Meet With Musicians*, KSTP.COM (Jan. 2, 2013, 4:52 PM), http://kstp.com/news/stories/S2882731.shtml?cat=1.

136. Vauhini Vara, *San Francisco Symphony Strike Drags On*, WALL ST. J., Mar. 24, 2013, http://online.wsj.com/article/SB10001424127887323639604578369150649193988.html.

137. *See, e.g.*, Euan Kerr, *Was 2012 the Year That American Orchestras Hit the Wall?*, CLASSICAL MINN. PUB. RADIO (Jan. 1, 2013), http://minnesota.publicradio.org/display/web/2013/01/01/american-orchestra-kerr.

cuts and dramatic reductions in personnel. Even these extreme acts, however, are not enough to save some ensembles, resulting in bankruptcy, strikes, and even permanent dissolution. It is against this bleak backdrop that the impact of the Supreme Court's decision in *Golan v. Holder* must be considered. But in order to fully understand the troubling nature of *Golan*, one must first understand the history and development of American copyright law.

II. PROMOTING THE PROGRESS OF SCIENCE AND THE USEFUL ARTS: COPYRIGHT LAW IN THE UNITED STATES

A. An Overview of Domestic Copyright Legislation's Drastic Evolution

The power to implement copyright law is among the few enumerated powers granted to Congress in the Constitution.[138] This is a clear indication of the issue's importance to the framers. Upon ratification of the Constitution in 1788, Congress acted quickly to exercise its power to enact copyright legislation by passing the Copyright Act of 1790.[139]

The framers worried that a system affording no legal protections to authors' works would dampen creativity, for in such a system publishers could merely copy works and sell them at a lower price without paying any royalties.[140] Without the promise of profiting from their work, authors and scientists may then very well forego their crafts.[141] The framers, however, thought it equally important that others be able to "use, critici[se], supplement[], and consider[] previous works."[142] Thus, in the eyes of the framers, works should be protected just long enough to encourage further creation but then should become the communal property of the public and reside in the "public domain."[143]

The original Copyright Act of 1790 struck this balance in favor of quick public accessibility to creative works.[144] It still incentivized the creation of original works by protecting new works for a period of fourteen years, with the possibility of a fourteen-year renewal.[145] Copyright protection, however, did not inhere au-

138. U.S. CONST. art. I, § 8, cl. 8 (empowering Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").
139. Ch. 15, 1 Stat. 124.
140. VAIDHYANATHAN, *supra* note 18, at 21.
141. *Id.*
142. *Id.*
143. *Id.*
144. Works originally eligible for copyright protection included "any map, chart, book or books." Copyright Act of 1790 § 1.
145. *Id.*; *see also* BARD & KURLANTZICK, *supra* note 28, at 7.

tomatically. Rather, authors had to take affirmative steps to secure their rights, including depositing a printed copy of the title of the work with the clerk's office of the local U.S. district court before publication, providing notice of their copyright with four weekly newspaper advertisements, and depositing a copy of the work with the Secretary of State within six months of publication.[146]

Congress revised the Copyright Act in 1831 to include musical compositions[147] and provide for longer periods of protection.[148] In 1870, Congress again revised the Act to centralize copyright functions in the Library of Congress.[149] Copyright protection was also extended to the visual fine arts, including painting and sculpture.[150] In 1909, Congress added protection for even more categories of works and again extended the copyright term.[151] In doing so, Congress expostulated that

> it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.[152]

Under the 1909 Act, an author could secure protection by publishing the work with a "notice of copyright . . . affixed to each copy thereof published or offered for sale in the United States."[153] Otherwise, the work became part of the public

146. Copyright Act of 1790 §§ 3–4; *see also* Benjamin W. Rudd, *Notable Dates in American Copyright, 1783–1969*, 28 Q.J. LIBR. CONGRESS 137, 138 (1971), http://www.copyright.gov/history/dates.pdf.

147. Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436, 436; *see also* Rudd, *supra* note 146, at 138.

148. The initial protection term doubled from fourteen to twenty-eight years, while the renewal term remained the same. Copyright Act of 1831 § 1; *see also* BARD & KURLANTZICK, *supra* note 28, at 7.

149. Act of July 8, 1870, ch. 230, § 85, 16 Stat. 198, 212; *see also* Rudd, *supra* note 146, at 140. "The Copyright Office became a separate department of the Library of Congress in 1897 . . . ." *U.S. Copyright Office: A Brief Introduction and History*, COPYRIGHT.GOV, http://www.copyright.gov/circs/circ1a.html (last visited Mar. 18, 2013).

150. Act of July 8, 1870 § 86; *see also* Rudd, *supra* note 146, at 140.

151. Copyright protection was now afforded to "all works of authorship." *See Copyright Timeline: A History of Copyright in the United States*, ASS'N RES. LIBR., http://www.arl.org/pp/ppcopyright/copyresources/copytimeline~print.shtml (last visited Mar. 18, 2013). In addition, Congress extended the renewal term to twenty-eight years, for a maximum possible term of fifty-six years. Copyright Act of 1909, ch. 320, § 23, 35 Stat. 1075, 1080; *see also* BARD & KURLANTZICK, *supra* note 28, at 7.

152. H.R. REP. NO. 2222, at 7 (1909).

153. Copyright Act of 1909 § 9; *see also* Rudd, *supra* note 146, at 141. Generally, notice on a "visually perceptible copy" of a work (for example, a book), consists of three elements: (1) the copyright symbol (©) or the word "copyright," (2) the year of first publication, and (3) the name of the copyright owner. U.S. COPYRIGHT OFFICE, CIRCULAR 3: COPYRIGHT NOTICE 2 (2011),

domain. Thus, "[l]ike its predecessors, the 1909 Act was replete with formal prerequisites and traps for the unwary."[154] That Congress required authors to conform to such formalities proves that U.S. copyright law was designed "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public . . . ."[155] The legislative default remained one of free public access to new works unless their authors took affirmative steps to protect their interests. Moreover, making copyright protection contingent on publication promoted copyright law's goal of disseminating knowledge to the public.[156]

Ultimately, Congress superseded the 1909 Act with the Copyright Act of 1976, which became effective on January 1, 1978.[157] The 1976 Act addressed technological innovations and anticipated the United States's adherence to the Berne Convention.[158] It again extended the copyright term from twenty-eight years with a possible twenty-eight year renewal to the life of the author plus fifty years.[159] The extension of the term not only "sav[ed] careless copyright proprietors from the often drastic and peremptory forfeitures of the 1909 Act" but also made U.S. copyright protections more analogous to those of other nations.[160] The Copyright Act of 1976 also embodied the first codification of the fair use and first sale doctrines.[161] It also extended protection to unpublished works for the first time.[162]

When the United States became a signatory to the Berne Convention in 1988, the Berne Convention Implementation Act of 1988[163] included further amendments to the Copyright Act. Those amendments more closely aligned

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http://www.copyright.gov/circs/circ03.pdf. For further discussion of acceptable forms of copyright notice, see 2 NIMMER & NIMMER, *supra* note 18, § 7.07. The 1909 Act's notice requirement was in addition to the formalities that had already been required by earlier statutes. *See* Copyright Act of 1909, *supra* note 151, § 9 (requiring publication to secure copyright); *id.* § 12 (requiring deposit of copies with the register of copyrights).

154. MELVILLE B. NIMMER ET AL., CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF ENTERTAINMENT LITIGATION INCLUDING UNFAIR COMPETITION, DEFAMATION, PRIVACY § 1.01, at 1 (7th ed. 2006).

155. H.R. REP. NO. 2222, at 7.

156. *See* Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323, 324 n.5 (2002), *quoted in* Golan v. Holder, 132 S. Ct. 873, 888–89 (2012).

157. NIMMER ET AL., *supra* note 154, § 1.01, at 1.

158. Berne Convention, *supra* note 38. See *infra* Part II.B for a discussion of the Berne Convention.

159. 17 U.S.C. § 302 (2006).

160. NIMMER ET AL., *supra* note 154, § 1.01, at 1.

161. 17 U.S.C. § 107. For a discussion on the fair use defense, see 4 NIMMER & NIMMER, *supra* note 18, § 13.05. For an explanation of the first sale doctrine, see 2 NIMMER & NIMMER, *supra* note 18, § 8.12.

162. 17 U.S.C. § 102.

163. Pub. L. No. 100-568, 102 Stat. 2853.

American copyright law with the copyright laws of other Berne signatories. Notably, "Congress at long last jettisoned the copyright notice that set the United States apart from most of the international copyright community."[164] In other words, the United States shed the formalities on which copyright protection had been contingent for over a century. Copyright protection would now inhere automatically in all otherwise eligible works instead. In 1994, the United States brought its copyright laws into further adherence with the Berne Convention by passing the Uruguay Round Agreements Act (URAA).[165]

In 1998, Congress enacted the Digital Millennium Copyright Act,[166] which aimed to update copyright law to deal with recent technological innovations, including the Internet. At the same time, Congress passed the Sonny Bono Copyright Term Extension Act (CTEA),[167] which extended the American copyright term to its current parameters of the life of the author plus seventy years.[168]

This brief survey of American copyright legislation makes clear that the fundamentals of copyright law have changed drastically in the nearly 225 years since the framers first provided the vehicle for federal copyright protection. Copyright has changed from an opt-in system with a maximum potential protection term of twenty-eight years to an automatic protection system for all works for a term of the life of the author plus seventy years. An exploration of whether these changes are normatively desirable is beyond the scope of this Comment. It is clear, however, that international pressures have influenced many of the shifts in American copyright law. Perhaps the greatest source of such compulsion was the Berne Convention.

B. Can't We All Just Get Along?: The Berne Convention for the Protection of Literary and Artistic Works

Prior to the nineteenth century, there was no uniformity of copyright laws amongst countries. Until even the latter part of the nineteenth century, this was not viewed as particularly problematic, as most authorship was intended for do-

164. NIMMER ET AL., *supra* note 154, § 1.01, at 2. The notice requirement, however, was only dropped prospectively. *Id.*

165. Pub. L. No. 103-465, 108 Stat. 4809 (1994) (providing copyright protection mandated by Article 18 of the Berne Convention to previously unprotected foreign works which otherwise would be copyright eligible). See *infra* Part II.C for a more detailed discussion of the URAA.

166. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

167. Pub. L. No. 105-298, 112 Stat. 2827 (1998). *See supra* notes 23–27 and accompanying text.

168. 17 U.S.C. § 302(a) (2006). The constitutionality of the CTEA was affirmed by the U.S. Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186, 187 (2003).

mestic consumption.[169] As copyrighted works increasingly began to be sold and distributed in foreign countries, however, authors sought to avoid piracy of their intellectual property and petitioned for the implementation of international norms for copyright protection.[170]

Accordingly, the International Literary and Artistic Association called a meeting in Berne, Switzerland, in 1883 to attempt to design a treaty that would provide greater international protection of authors' rights.[171] A draft treaty was written and approved, and the Swiss government invited other foreign governments to convene in September 1884 to create an "international copyright Union."[172] International conferences were held in Berne in 1884, 1885, and 1886.[173] Participants agreed to final treaty terms at the 1886 conference,[174] and the treaty officially began to operate after ratifications were exchanged in 1887.[175]

The original Berne Convention struck a middle ground between "natural rights" countries that wanted universal international copyright protection (such as France) and countries that wanted to leave copyright issues to national law (like Great Britain).[176] Article 1 made explicit that the objective of the treaty was to "protect[] . . . the rights of authors in their literary and artistic works."[177] In order to effectuate this goal, the treaty specified that all signatories would afford authors national treatment: That is, signatories would grant nationals of other Berne Union members the same copyright protections as their own nationals.[178] The specific protections outlined in the treaty were considered minimums; hence, a signatory country was free to provide greater protections to the nationals of other

169. *See* Burger, *supra* note 19, at 7.
170. *Id.* at 8; *see also* Sam Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9, 13 (1986) ("The widespread piracy of foreign works was the principal reason for the development of international copyright relations in the mid-nineteenth century.").
171. Ricketson, *supra* note 170, at 19–20.
172. Burger, *supra* note 19, at 12–15.
173. *Id.*
174. The 1886 conference was attended by delegates from twelve countries: Belgium, France, Germany, Haiti, Italy, Japan, Liberia, Spain, Switzerland, Tunisia, the United Kingdom, and the United States. The delegates from the United States and Japan, however, were merely "unofficial observers" and did not sign onto the original treaty. *See* Katherine S. Deters, Note, *Retroactivity and Reliance Rights Under Article 18 of the Berne Copyright Convention*, 24 VAND. J. TRANSNAT'L L. 971, 977 n.13 (1991). Signatories to the Berne Convention are often referred to as the "Berne Union." *See* Burger, *supra* note 19, at 1 n.1.
175. Burger, *supra* note 19, at 15. Of the ten initial signatories to the 1886 conference, *see supra* note 174, only Liberia failed to ratify the Convention. 4 NIMMER & NIMMER, *supra* note 18, § 17.01 n.10; Ricketson, *supra* note 170, at 30.
176. Burger, *supra* note 19, at 15.
177. Berne Convention, *supra* note 38.
178. *Id.* art. 5(1).

signatory countries if it desired, but could not provide fewer protections.[179] Among these baseline protections were a prohibition on requiring authors to meet formalities to attain copyright protection[180] and a copyright term of at least the life of the author plus fifty years.[181]

Over the next one hundred years, there were several revision conferences. At each conference, more countries joined and the protections afforded authors were expanded.[182] From its inception, the Berne Union wanted the United States to join as a signatory.[183] But the United States refused to accede to the treaty for over one hundred years, claiming that "the Convention's author focus may have violated the U.S. Constitution, which required copyright to be enacted for the benefit of the public."[184] Adherence to the Berne copyright regime would have required drastic changes in the general scope and traditional contours of U.S. copyright law.[185] The United States was understandably hesitant to undergo these radical changes. Ultimately, however, the United States capitulated to growing pressures from abroad and joined the Berne Union in 1988.[186]

C. United States Adherence to Berne: The Ill-Conceived Story of URAA Section 514

When the United States first became a party to the Berne Convention in 1989,[187] it employed a "minimalist approach, making only those changes to American copyright law that [were] clearly required under the treaty's provisions" to resolve conflicts between American and foreign copyright laws.[188] Accordingly, the United States initially did not afford copyright protection to foreign works

179. Burger, *supra* note 19, at 16.
180. Berne Convention, *supra* note 38, art. 5(2).
181. *Id.* art. 7(1).
182. *See* Burger, *supra* note 19, at 20–49.
183. *Id.* at 68 & n.461.
184. *Id.* at 68 & n.462.
185. *See* TARLOW & SUTHERLAND, *supra* note 42, at 2 (explaining that the United States's reluctance to join the Berne Union was attributable at least in part to "major changes" that would be required, including Berne's allowances for moral rights and the absence of registration requirements).
186. Largely, the United States was influenced by international trade concerns. In particular, technological advances resulted in the increasing piracy of U.S. copyright holders' works, making the Berne Treaty's reciprocal protections attractive to the United States. *See* MARK A. FISCHER ET AL., PERLE AND WILLIAMS ON PUBLISHING LAW § 22.01 (3d ed. supp. 2009). By the time the United States became a signatory to the Berne Convention 102 years after the treaty was initially passed, there were seventy-six other members of the Berne Union. Irvin Molotsky, *Senate Approves Joining Copyright Convention*, N.Y. TIMES, Oct. 21, 1988, at C5.
187. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. Although the United States became a signatory in 1988, the Act did not become effective until March 1, 1989.
188. H.R. REP. NO. 100-609, at 7 (1988).

still protected elsewhere but already in the U.S. public domain.[189] The United States agreed, however, to protect future foreign works in accordance with the Berne Convention's mandates.[190] Other Berne Union members were unhappy with this state of affairs, believing that the United States failed to adhere to the directives of Article 18 of the Berne Convention.[191] Yet the treaty did not offer credible enforcement mechanisms, and thus the Berne Union could not force the United States to change its position.[192]

In 1994, however, the United States joined the World Trade Organization (WTO)[193] and the Agreement on Trade-Related Aspects of Intellectual Property

189. Berne Convention Implementation Act of 1988 § 12 ("Title 17, United States Code, as amended by this Act, does not provide copyright protection for any work that is in the public domain in the United States.").

190. Golan v. Holder, 132 S. Ct. 873, 879 (2012).

191. Article 18 provides:

> (1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.
>
> (2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.
>
> (3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

Berne Convention, *supra* note 38, art. 18.

192. *See Golan*, 132 S. Ct. at 880–81; *see also* NAT'L TELECOMM. & INFO. ADMIN., U.S. DEP'T OF COMMERCE, GLOBALIZATION OF THE MASS MEDIA 115 (1993) (noting that the Berne Convention did not mandate implementation of enforcement mechanisms). In the event of a dispute, a provision of Article 33, added in 1948, provided that the parties should first attempt to negotiate a solution and, if failing to properly resolve the issue in this manner, take any unresolved disputes to the International Court of Justice. *Id.* at 115. No Berne Union member, however, ever took advantage of this dispute resolution mechanism. *See* Monica E. Antezana, Note, *The European Union Internet Copyright Directive as Even More Than It Envisons: Toward a Supra-EU Harmonization of Copyright Policy and Theory*, 26 B.C. INT'L & COMP. L. REV. 415, 427 (2003).

193. The World Trade Organization (WTO) is "a forum for governments to negotiate trade agreements." *What Is the World Trade Organization?*, WTO.ORG, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Mar. 19, 2013). The WTO was established in 1994 (and came into effect on January 1, 1995) as a means for nations to resolve various trade problems. It grew out of the General Agreement on Tariffs and Trade (GATT), which was established in the wake of World War II to reduce tariffs and trade barriers through "a series of multilateral negotiations" and trade rounds. *Id.*; *The GATT Years: From Havana to Marrakesh*, WTO.ORG, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Mar. 19, 2013). The last of the GATT trade rounds was the Uruguay Round. The Uruguay Round lasted seven and a half years, included 123 countries, and "covered almost all trade, from toothbrushes to pleasure boats, from banking to telecommunications, from the genes of wild rice to AIDS treatment. It was quite simply the largest trade negotiation ever, and most probably the largest negotiation of any kind in history." *The Uruguay Round*, WTO.ORG, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Mar. 19, 2013).

Rights (TRIPS).[194] The TRIPS Agreement incorporated the Berne Convention by reference.[195] Additionally, the TRIPS Agreement provided that any disputes over its provisions—including, under Article 9, disputes arising under the Berne Convention—were subject to the WTO Dispute Settlement Understanding (DSU).[196] Suddenly, the United States had to comply with all of the Berne Convention or potentially face WTO enforcement proceedings.

In response to this perceived threat of trade-based retaliation for noncompliance with the Berne Convention,[197] and after hearing testimony primarily from those with pecuniary interests in passing section 514 of the URAA,[198] Con-

194. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement], *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

195. *Id.* art. 9(1).

196. *Id.* art. 64. If an international trade dispute subject to the Dispute Settlement Understanding (DSU) arises, and if defendant also is found to be in violation of a WTO (including TRIPS) obligation, the "ideal solution" is for the disputing countries to settle the issue or for the defendant country to revoke its noncompliant measure. *See* Steve Charnovitz, *The WTO's Problematic "Last Resort" Against Noncompliance* 3 (2003), *available at* http://www.worldtradelaw.net/articles/charnovitzlastresort.pdf (citing Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter WTO DSU]). If the "ideal solution" does not come to pass, the defendant country may have to compensate the complaining country. *See id.* (citing WTO DSU, *supra*). The complaining country may also have the option of suspending its WTO concessions or obligations with regards to the defendant country, which means that a complaining country may impose otherwise forbidden tariffs on, or take other discriminatory measures against, the defendant country. *See id.* at 3–4 (citing WTO DSU, *supra*).

197. For a discussion of the unlikelihood of trade-based sanctions being applied against the United States for failure to comply with Article 18 of the Berne Convention, see Daniel Gervais, Golan v. Holder*: A Look at the Constraints Imposed by the Berne Convention*, 64 VAND. L. REV. EN BANC 147, 161–62 (2011).

198. As far as the copyright implications in passing URAA section 514 were concerned, Congress heard testimony from the International Intellectual Property Alliance, the Motion Picture Association of America, and the Recording Industry Association of America in support of the legislation, but only from the Fairness in Copyright Coalition in opposition to it. *See General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearing Before the Subcomm. on Intellectual Prop. & Judicial Admin. of the H. Comm. on the Judiciary and the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 103d Cong. 240–89 (1995) [hereinafter *Joint Hearing*]; *see also* Claire Fong, Comment, Golan v. Holder*: Congressional Power Under the Copyright Clause and the First Amendment*, 7 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1, 9 (2011) (arguing that the Tenth Circuit's second *Golan* opinion "relied heavily on industry testimony heard during the URAA congressional hearings," which testimony suggested that section 514 would encourage other countries to enact similar provisions (citing Golan v. Holder, 609 F.3d 1076, 1087–88 (10th Cir. 2010))). Indeed, as an illustration of the one-sidedness of Congress's exposure to the interests underlying section 514, Representative Howard L. Berman (D-CA) did not even know what a reliance party was when Irwin Karp, one of the witnesses on the constitutional issues of the proposed provisions, testified. *See Joint Hearing*, *supra*, at 233 ("Mr. Berman of California: . . . Mr. Karp, initially you talked about—how do you phrase it, reliance—how do you—your phrase,

gress passed the URAA.[199] Section 514 extended copyright protection to works that were protected under the copyright laws of their countries of origin but enjoyed no copyright protection in the United States for any of three reasons: lack of copyright relations between the country of origin and the United States at the time of publication, lack of subject matter protection for sound recordings fixed before 1972, or failure to comply with U.S. statutory formalities—for instance, failure to provide notice of copyright status or to renew a copyright.[200] These works[201] would now enjoy U.S. copyright protection for the remainder of the term for which they would have been protected absent one of the three disqualifying causes now removed by section 514.[202] If a work had lost protection for any other reason, however—for example, upon entering the public domain because its copyright term had expired—section 514 would not apply.[203]

Congress provided certain limited protections for "reliance parties"[204] who had previously used restored works. For example, reliance parties could continue to exploit restored works until one year after the copyright owner provided "notice of intent to

reliance— Mr. Karp: That is in the bill, the reliance party. Mr. Berman of California: The reliance party. Mr. Karp: The reliance party is either an individual or organization that has made use of a public domain foreign work which will now be restored to copyright. Mr. Berman of California: And by definition, then, a bootlegger, a person who is being protected under the law—let's talk about your reliance party in Thailand who you think is not going to be stupid enough . . . ."). For a definition of reliance party, please see *infra* note 204.

199. The Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

200. *See* 17 U.S.C. § 104A(h)(6)(B)–(C) (2006).

201. Hereinafter this Comment refers to works affected by section 514 as "restored works."

202. 17 U.S.C. § 104A(a)(1)(B).

203. *Id.* § 104A(h)(6)(B). This comports with Article 18(2) of the Berne Convention. Berne Convention, *supra* note 38, art. 18(2) ("If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work *shall not* be protected anew." (emphasis added)).

204. According to the statute,

> (4) The term "reliance party" means any person who—
>
> (A) with respect to a particular work, engages in acts, before the source country of that work becomes an eligible country, which would have violated section 106 if the restored work had been subject to copyright protection, and who, after the source country becomes an eligible country, continues to engage in such acts;
>
> (B) before the source country of a particular work becomes an eligible country, makes or acquires 1 or more copies or phonorecords of that work; or
>
> (C) as the result of the sale or other disposition of a derivative work covered under subsection (d)(3), or significant assets of a person described in subparagraph (A) or (B), is a successor, assignee, or licensee of that person.

17 U.S.C. § 104A(h)(4). Under the plain terms of the statute, this definition would include symphony orchestras that owned or performed restored works (or both) prior to the enactment of section 514.

enforce."[205] Creators of derivative works of restored works,[206] moreover, can continue to exploit their derivations if they pay the copyright holder "reasonable compensation," which will be set by a district court judge if the parties cannot agree on a royalty.[207]

Despite these concessions, the new law was met with understandable outcry from reliance parties and creators of derivative works.[208] Millions of works that had been in the public domain for decades now enjoy copyright protection. Many of these works are popular with American orchestras, such as the musical compositions of César Antonovich Cui, Reinhold Moritzevich Glière, Dmintri Kabalevsky, Aram Ilyich Khachaturian, Nikolai Myaskovsky, Sergei Prokofiev, Sergei Rachmaninoff, Dmitri Shostakovich, and Igor Stravinsky.[209] Not surprisingly, litigation challenging the constitutionality of passing URAA section 514 ensued soon after.

III. *GOLAN V. HOLDER*: UPHOLDING THE REMOVAL OF WORKS FROM THE PUBLIC DOMAIN UNDER URAA SECTION 514

A. *Golan*: The Long and Winding Road to the U.S. Supreme Court

One such lawsuit was *Golan v. Holder*.[210] The plaintiffs—"orchestra conductors, educators, performers, publishers, film archivists, and motion picture

205. *Id.* § 104A(d)(2). After notice of intent to enforce has been rendered, however, a reliance party could no longer make any further "copies or phonorecords" of restored works. *Id.* § 104A(d)(2)(A)(ii)(III), (B)(ii)(III).

206. Derivative works in the context of symphony orchestras include, for example, sound recordings and arrangements of pieces. *See id.* § 101 (defining "derivative work"). Arrangements are used either to adapt classical music for ensembles with different instrumentation (for example, by rewriting an orchestral piece for a wind symphony), or to make more challenging works accessible to less advanced ensembles (for example, by rewriting a work so that an elementary school string orchestra can play it). *See* THE HARVARD DICTIONARY OF MUSIC, *supra* note 43, at 58 (defining "arrangement" as "[t]he adaption of a composition for a medium different from that for which it was originally composed, usually with the intention of preserving the essentials of the musical substance; also the result of a such a process of adaptation"). Often, ensembles choose to record pieces that are in the public domain so that they can avoid paying royalties on the recording. Section 514 eliminated this cost reduction strategy for restored works. *See* Complaint, *supra* note 3, at 29–30.

207. 17 U.S.C. § 104A(d)(3).

208. Opponents of section 514 have argued that the Berne Convention and the TRIPS Agreement allow for significant flexibility in adhering to their mandates, thus making the drastic measures of section 514 unnecessary. *See, e.g.*, Golan v. Holder, 132 S. Ct. 873, 911–12 (2012) (Breyer, J., dissenting) (suggesting that Article 18 of the Berne Convention allows "compliance flexibility" that Congress should have attempted to bargain for rather than—or, at the least, before—passing section 514); Gard, *supra* note 22, at 206 (arguing that the government could have negotiated for an exception to Article 18, as it negotiated an exception to the Berne Convention's moral rights requirement); Gervais, *supra* note 197, at 151–52.

209. ACLU Brief, *supra* note 33, at 9; Guild Brief, *supra* note 36, at 10.

210. 132 S. Ct. 873.

distributors who . . . perform, distribute, and sell public domain works"[211]—initially filed suit in 2001, arguing that Congress had exceeded its authority under the Copyright Clause and violated the First Amendment by passing URAA section 514 and the Sonny Bono Copyright Term Extension Act of 1998 (CTEA).[212] The defendants—the U.S. Attorney General and the Register of Copyrights—moved to dismiss the lawsuit. But then the Supreme Court granted certiorari in *Eldred v. Reno*,[213] a case that also challenged the constitutionality of the CTEA. In response, the district court stayed the *Golan* proceedings until the Supreme Court had decided the CTEA issue.[214] After the Supreme Court had upheld the constitutionality of the CTEA in *Eldred v. Ashcroft*,[215] the defendants renewed their motion to dismiss in April 2003.[216] In March 2004, the district court dismissed the plaintiffs' CTEA claim,[217] but denied the defendants' motion to dismiss the URAA claims.[218]

The defendants then moved for summary judgment, which the district court granted on all remaining claims.[219] The Tenth Circuit affirmed in part, determining that Congress's aim—compliance with the Berne Convention—was not "so irrational or so unrelated to the aims of the Copyright Clause that it exceed[ed] the reach of congressional power."[220] The Tenth Circuit, however, remanded the case for further consideration of the First Amendment claim.[221] Specifically, the Tenth Circuit found that, in removing works from the public domain, section 514 had altered the "traditional contours of copyright":

> Until § 514, every statutory scheme preserved the same sequence. A work progressed from (1) creation; (2) to copyright; (3) to the public domain. Under § 514, the copyright sequence no longer necessarily ends with the public domain: indeed, it may begin there. Thus, by copyrighting works in the public domain, the URAA has altered the ordinary copyright sequence.[222]

211. Golan v. Holder (*Golan V*), 609 F.3d 1076, 1081–82 (10th Cir. 2010).
212. Golan v. Ashcroft (*Golan I*), 310 F. Supp. 2d 1215, 1216–17 (D. Colo. 2004).
213. 239 F.3d 372 (D.C. Cir. 2001).
214. *Golan I*, 310 F. Supp. 2d at 1217.
215. 537 U.S. 186, 198 (2003). *See supra* notes 23–27 and accompanying text.
216. *See* Docket, *Golan I*, 310 F. Supp. 2d 1215 (No. 1:01-CV-01854).
217. *Golan I*, 310 F. Supp. 2d at 1218.
218. *Id.* at 1218–21.
219. Golan v. Gonzales (*Golan II*), No. Civ. 01-B-1854(BNB), 2005 WL 914754 (D. Colo. Apr. 20, 2005).
220. Golan v. Gonzales (*Golan III*), 501 F.3d 1179, 1187 (10th Cir. 2007).
221. *Id.* at 1182.
222. *Id.* at 1189.

Thus, because section 514 altered the traditional contours of copyright law by removing works from the public domain, and because the plaintiffs had acquired a vested First Amendment speech interest in using the works once they had entered the public domain, the Tenth Circuit determined that section 514 required full First Amendment scrutiny in contravention of *Eldred*'s holding.[223]

On remand, the district court reversed course and granted summary judgment to the plaintiffs, reasoning that "§ 514's constriction of the public domain was not justified by any of the asserted federal interests: compliance with Berne, securing greater protection for U.S. authors abroad, or remediation of the inequitable treatment suffered by foreign authors whose works lacked protection in the United States."[224]

In the interim, Chief Judge Henry, the author of the original Tenth Circuit opinion, had stepped down to assume the position of president of Oklahoma City University.[225] After this change in personnel, the Tenth Circuit altered its ideology and reversed the district court's decision, holding that section 514 did not violate the First Amendment.[226] The court found that section 514 passed the applicable constitutional test because it was narrowly tailored to fit an important government aim—securing the interests of U.S. copyright holders in foreign jurisdictions.[227] Furthermore, the court determined that section 514 did not burden substantially more speech than was necessary, stating that "it is immaterial whether . . . the government could have complied with the minimal obligations of the Berne Convention and granted stronger protections for American reliance parties."[228] Thus, the court upheld "an indirect American interest in which the copyright law has no territorial jurisdiction over a direct American First Amendment interest covered by copyright law."[229]

The Supreme Court granted certiorari[230] to consider both the Copyright Clause and First Amendment challenges. On October 5, 2011, the Court heard oral arguments. Despite a vigorous fight that had lasted more than ten years, however, Golan and his comrades ultimately lost the battle. On January 18,

223. *Id.* at 1194.
224. Golan v. Holder, 132 S. Ct. 873, 884 (2012) (citing Golan v. Holder (*Golan IV*), 611 F. Supp. 2d 1165, 1172–77 (D. Colo. 2009)).
225. *See* Gard, *supra* note 22, at 186.
226. *Golan V*, 609 F.3d 1076, 1095 (10th Cir. 2010).
227. *Id.* at 1083.
228. *Id.* at 1091.
229. Gard, *supra* note 22, at 190 (emphasis omitted).
230. Golan v. Holder, 131 S. Ct. 1600 (2011).

2012, the Court issued a crushing 6–2 opinion[231] upholding Congress's authority to reinstate and extend copyright terms for certain foreign works under URAA section 514.[232]

B. The Majority Opinion: Protecting the Rights of Authors

The majority opinion, delivered by Justice Ginsburg, affirmed the Tenth Circuit's holding that section 514 was constitutional and declared that neither the Copyright Clause nor the First Amendment "makes the public domain, in any and all cases, a territory that works may never exit."[233]

The majority opinion began by rejecting the plaintiffs' assertion that Congress lacked the authority to enact section 514, stating bluntly that "[t]he text of the Copyright Clause does not exclude application of copyright protection to works in the public domain."[234] The Court then dismissed the plaintiffs' claim that removing works from the public domain violated the Constitution's constraint on providing copyright protection only for a "limited Tim[e]," because "[i]n aligning the United States with other nations bound by the Berne Convention, and thereby according equitable treatment to once disfavored foreign authors, Congress can hardly be charged with a design to move stealthily toward a regime of perpetual copyrights."[235]

In further support of Congress's power to enact section 514, the Court pointed out that the Copyright Act of 1790, as well as a number of nineteenth-century copyright and patent bills, had also extended copyright protection to works that had previously been freely available.[236] The Court also defused the plaintiffs' argument that section 514 discouraged the creation of new (for example, derivative) works by reasoning that incentivizing the creation of new artistic works was not the only means by which Congress could exercise its authority to promote the "Progress of Science" under the Copyright Clause.[237] Indeed, according to the majority, the Founders were more interested in furthering the dissemination of creative works, which was also the reason why "Congress made

231. Justice Ginsburg delivered the majority opinion, joined by Chief Justice Roberts and Justices Kennedy, Scalia, Sotomayor, and Thomas. Justice Breyer filed a dissent, joined by Justice Alito. Justice Kagan did not participate in the decision. Golan v. Holder, 132 S. Ct. 873, 877 (2012).
232. Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified at 17 U.S.C. §§ 104A, 109(a) (2006)).
233. *Golan*, 132 S. Ct. at 878.
234. *Id.* at 884 (citing Symposium, *Congressional Power and Limitations Inherent in the Copyright Clause*, 30 COLUM. J.L. & ARTS 259, 266 (2007)).
235. *Id.* at 885.
236. *Id.* at 885–87.
237. *Id.* at 887–89.

federal copyright contingent on publication" until 1976.[238] The majority thus concluded its analysis of the Copyright Clause portion of the opinion by holding that because it was reasonable for Congress to believe that "[a] well-functioning international copyright system would likely encourage the dissemination of existing and future works," Congress had acted within its authority in enacting section 514.[239]

The Court then addressed the plaintiffs' argument that section 514 unconstitutionally limited the First Amendment's guarantee of freedom of expression. Invoking its decision in *Eldred v. Ashcroft*[240]—which had upheld the CTEA's twenty-year extension of the terms of existing copyrights—the Court claimed that, despite the inherent restrictions copyright creates for the users of protected works, the framers "saw copyright as an 'engine of free expression.'"[241] Since copyright law includes many "speech-protective purposes and safeguards," and since "[s]ection 514 leaves undisturbed the 'idea/expression' distinction and the 'fair use' defense," section 514 did not conflict with the First Amendment.[242]

The Court also deflated the plaintiffs' argument that section 514 "impermissibly revoked [the plaintiffs'] right to exploit foreign works that 'belonged to them' once the works were in the public domain"[243] by rebutting the very foundation of the plaintiffs' claim—that works in the public domain belonged to someone. According to the majority, "[a]nyone has free access to the public domain, but no one, after the copyright term has expired, acquires ownership rights in the once-protected works."[244] The Court concluded its First Amendment analysis with words that, within days of the opinion's dissemination, had already been widely quoted[245]:

> Section 514, we add, does not impose a blanket prohibition on public access. . . .
> . . . The question here, as in *Eldred*, is whether would-be users must pay for their desired use of the author's expression, or else limit their exploitation to "fair use" of that work. Prokofiev's Peter and the Wolf

238. *Id.* at 888–89 (quoting Perlmutter, *supra* note 156, at 324 n.5) (internal quotation marks omitted).
239. *Id.* at 889.
240. 537 U.S. 186 (2003).
241. *Golan*, 132 S. Ct. at 889–90 (quoting *Eldred*, 537 U.S. at 219).
242. *Id.* at 890–91.
243. *Id.* at 892 (quoting Brief for the Petitioners at 44–45, *Golan*, 132 S. Ct. 873 (No. 10-545), 2011 WL 2423674).
244. *Id.*
245. *See, e.g.*, Joan Biskupic, *Supreme Court: Congress Within Bounds on Foreign Copyrights*, USA TODAY, Jan. 18, 2012, http://www.usatoday.com/news/washington/judicial/story/2012-01-18/court-copyright-Congress-royalties/52643872/1; Adam Liptak, *Public Domain Works Can Be Copyrighted Anew, Supreme Court Rules*, N.Y. TIMES, Jan. 18, 2012, http://www.nytimes.com/2012/01/19/business/public-domain-works-can-be-copyrighted-anew-justices-rule.html.

> could once be performed free of charge; after § 514 the right to perform it must be obtained in the marketplace. This is the same marketplace, of course, that exists for the music of Prokofiev's U.S. contemporaries: works of Copland and Bernstein, for example, that enjoy copyright protection, but nevertheless appear regularly in the programs of U.S. concertgoers.[246]

Finally, in rebutting the dissent, the majority asserted that section 514 "did not create[] the issue of orphan works,"[247] and that "resistance to Berne's prescriptions surely is not a necessary or proper response to the pervasive question, what should Congress do about orphan works."[248]

The majority opinion concluded by stating that the Supreme Court's role is "to determine whether the action Congress took, wise or not, encounters any constitutional shoal. For the reasons stated, we are satisfied it does not."[249]

C. Justice Breyer's Dissenting Opinion: Protecting the Rights of the Public

In dissent, Justice Breyer, joined by Justice Alito, suggested that, in "bestow[ing] monetary rewards only on owners of old works" while "[a]t the same time . . . inhibit[ing] the dissemination of those works," section 514 reached beyond the scope of Congress's authority under the Copyright Clause.[250] Justice Breyer claimed that the framers supported a "utilitarian view of copyrights and patents" that is naturally at odds with the "'natural rights' view underlying much of continental European copyright law," the Berne Convention, and the URAA by extension.[251] Thus, "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts,"[252] and the United States's interest in providing the private protections afforded by copyright "lie[s] in the general benefits derived by the public from the labors of au-

246. *Golan*, 132 S. Ct. at 892–93.
247. *Id.* at 893. An orphan work is a copyrighted work without a readily identifiable rights owner. *See* NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 200 (2008). When Congress extended copyright terms while simultaneously doing away with the registration requirement and other formalities, millions of more obscure works were afforded protection despite the fact that no one knows exactly who is being protected. *Id.* The fear of legal repercussions resulting from infringement in turn incentivizes would-be users to refrain from consuming orphan works. *Id.*
248. *Golan*, 132 S. Ct. at 894.
249. *Id.*
250. *Id.* at 900 (Breyer, J., dissenting).
251. *Id.* at 901–02. This accords with notes 184–185, *supra*, and accompanying text.
252. *Id.* at 902 (emphasis omitted) (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)) (internal quotation marks omitted).

thors."[253] Justice Breyer took a strong stance in favor of dissemination, rather than author protection, as the main purpose of the Copyright Clause.

Justice Breyer argued that section 514 failed to satisfy this mandate by restricting the dissemination of works with restored copyrights in two ways. First, the holders of these restored copyrights can now charge others for using works that were previously available for free, which drastically increases the price of performance and thereby denies access to restored works to those performers who are unable to afford them.[254] Second, section 514 increased administrative costs by requiring users to "determin[e] whether a work is the subject of a 'restored copyright'" and "negotiat[e] a fee."[255] Noting that 13 percent of copyrighted books in the European Union are orphan works, Justice Breyer asked: "How is a university, a film collector, a musician, a database compiler, or a scholar now to obtain permission to use any such lesser known foreign work previously in the American public domain?"[256] According to Justice Breyer, the high administrative costs caused by section 514 will either limit distribution of restored works[257] or encourage piracy.[258]

Justice Breyer suggested that, "[w]ere Congress to act similarly with respect to well-established property rights, the problem would be obvious. This statute analogously restricts, and thereby diminishes, Americans' preexisting freedom to use formerly public domain material in their expressive activities."[259] Justice Breyer did not go so far as to argue that members of the public actually possess a property interest in the public domain. But he did claim that, by taking material out of the public domain, section 514 effectively "'abridges' a preexisting freedom to speak," as "members of the public might well have decided what to say, as well as when and how to say it, in part by reviewing with a view to repeating, expression that they reasonably believed was, or would be, freely available."[260] Thus, "primarily backward looking" copyright laws, such as section 514, "reward[] rent-seekers at the public's expense."[261] Justice Breyer then suggested that, even if they did not cause a First Amendment violation in and of themselves, "these speech-related harms . . . at least show the presence of a First Amendment interest" in the

253. *Id.* (alteration in original) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)) (internal quotation marks omitted).
254. *Id.* at 904–05.
255. *Id.* at 905.
256. *Id.*
257. *Id.*
258. *Id.* at 906.
259. *Id.*
260. *Id.* at 907.
261. *Id.*

use of restored works that is hampered by section 514,[262] while at the same time section 514 failed to advance the goals of copyright.[263] Hence, Congress lacked the authority under the Copyright Clause to enact the legislation.[264]

Indeed, Justice Breyer made another interesting—and compelling—argument: The necessity of fulfilling all of the stringent obligations imposed by the Berne Convention—and thereby the consequent compulsion to significantly change American copyright law in the process—"is a dilemma of the Government's own making," as the Berne Convention "explicitly authorizes countries to negotiate exceptions to the Article's retroactivity principle."[265] Justice Breyer made clear that he was not criticizing the Berne Convention itself, but rather that, in his opinion, the "[g]overnment should have tried to *follow* the Convention and in particular its provisions offering compliance flexibility."[266] Thus, because Congress had "less restrictive, alternative possibilities" that would not have been so costly under the First Amendment, section 514 lacked a constitutional justification.[267]

Golan's circuitous path to and through the Supreme Court took more than a decade, but ultimately the Court adjudged URAA section 514 to be constitutional. While the impact surely will be felt by America's already struggling musical ensembles, it will also be felt by society more generally.

IV. A THRENODY FOR THE AMERICAN ORCHESTRA: WHAT *GOLAN* MEANS FOR THE CLASSICAL MUSIC COMMUNITY

A. Section 514's Flawed Notice System Causes Uncertainty About Which Works Are Affected and Will Lead to Abstention

One of the problems symphony orchestras face because of section 514 is uncertainty about which works are affected by the legislation. This uncertainty will adversely affect the dissemination of important works of classical music.

While it has been estimated that section 514 restored copyright protection to millions of works, the exact number is seemingly unknown.[268] Restored copyright protection provided by section 514 vested automatically in all affected works

262. *Id.*
263. *Id.* at 908.
264. *Id.* at 912.
265. *Id.* at 911.
266. *Id.* at 912.
267. *Id.*
268. *See* ACLU Brief, *supra* note 33, at 9; Parry, *supra* note 3 ("The U.S. Copyright Office estimated that the works qualifying for copyright restoration 'probably number in the millions.'"). The very fact that the number of affected works is apparently indeterminable underscores the uncertainty that exists regarding which musical works are subject to restored copyright.

on January 1, 1996.[269] For a restored copyright to be enforceable against a reliance party,[270] however, the restored copyright holder must either provide actual notice of her copyright ownership directly to the reliance party or give constructive notice by filing a Notice of Intent to Enforce (NIE) with the U.S. Copyright Office.[271] The Copyright Office has received more than fifty thousand NIEs since the passage of section 514.[272] Unfortunately, however, this form of notice is horrendously flawed.

Technically, all that is required for a valid NIE is the title or a brief description of the restored work, the name of the copyright holder, contact information for the copyright holder, and the signature of the copyright holder or the owner's agent.[273] Accordingly, a valid NIE may not include such crucial pieces of information as the name of the composer, what the copyrighted work consists of (for example, sheet music or a sound recording), or what rights the copyright holder actually has in the work (for example, whether the copyright holder is a performance rights society that has a right to control only the public performance of the work or a music publisher with only the right to control the making of copies of the work). These glaring omissions become obvious to anyone who attempts to search the NIE database to determine whether copyright has been restored in any given work.[274]

The first hurdle that one must overcome when searching the Copyright Office's database is determining what kind of work underlies a particular NIE. Section 514 restored copyright protection to any qualifying copyrightable work, not merely to musical works. Thus, the NIE database is filled with NIEs for films, works of visual art, photographs, literature, and many other types of artistic works. The NIE database, however, is not subdivided into sections according to the type of work at issue. Instead, the database is organized alphabetically by copyright owner. Accordingly, musical works are peppered throughout the database and are intermingled with other types of works. A purely descriptive title—like "Pleasures [sic] of Ruins," for example—could be a song title, a short story, a painting, or any other kind of copyrightable work. While further research may

269. *See* U.S. COPYRIGHT OFFICE, CIRCULAR 38B: HIGHLIGHTS OF COPYRIGHT AMENDMENTS CONTAINED IN THE URAA 2 (2010), http://www.copyright.gov/circs/circ38b.pdf.
270. *See supra* note 204 for the definition of a reliance party.
271. *See* U.S. COPYRIGHT OFFICE, *supra* note 269, at 2.
272. *See* ACLU Brief, *supra* note 33, at 9.
273. *See* U.S. COPYRIGHT OFFICE, *supra* note 269, at 3.
274. The U.S. Copyright Office has published lists of restored copyright works in the *Federal Register*. The lists are also available online. *See Notices of Restored Copyrights*, U.S. COPYRIGHT OFF., http://www.copyright.gov/gatt.html (last updated Dec. 28, 2012).

make clear of what type some of the works are,[275] the NIE database on its face does not identify such information.

Furthermore, even for works that are obviously musical compositions, most of the entries fail to list the composer's name and thus make it nearly impossible to determine what any given work listed in the NIE database actually is. For example, one entry is merely named "Opus 9."[276] Since opus numbers identify the works of all but a handful of composers,[277] this purported notice is worthless—it is impossible to tell which composer's ninth composition is now subject to copyright protection. Many other works are listed at similarly unhelpful levels of abstraction: "Concerto in B flat";[278] "Five Short Pieces"; "Sonata, no. 2";[279] and the like. Thus, all but the most distinctive titles—for example, Igor Stravinsky's *Le Sacre du printemps*—are practically unidentifiable within the database.

Even if the title of a work is clearly recognizable as a musical composition by a known composer, anyone searching the database must still determine what rights the person or entity who submitted the NIE is asserting. While some entries are clear enough—for instance, Boosey and Hawkes, as a well-known music publisher, almost certainly owns the sheet music publication rights for the works listed under its name—others are not so obvious. A firm named Sankyo Seiki Manufacturing Company submitted NIEs for nearly nine hundred musical works, some of which are extremely well known.[280] Only after more research did it become clear that the rights asserted by Sankyo Seiki Manufacturing Company pertained to music boxes rather than publication or performance rights.

275. It appears, for instance, that *Pleasure of Ruins* is in fact a book. *See* ROSE MACAULAY, PLEASURE OF RUINS (1953), *available at* http://ia600308.us.archive.org/34/items/pleasureofruins010331mbp/pleasureofruins010331mbp.pdf.

276. Opus means work, and often refers to a musical composition. *See* THE HARVARD DICTIONARY OF MUSIC, *supra* note 43, at 592. Generally, opus numbers are assigned to a composer's works in roughly chronological order. *Id.*

277. Prominent examples of exceptions to categorization of a composer's works by opus number are Wolfgang Amadeus Mozart, whose works are identified by Köchel numbers, and Franz Schubert, whose works are arranged by D number. *See id.* at 234, 441.

278. A concerto is any multimovement piece for one or more soloists and orchestra. *Id.* at 198. B flat is one of only twenty-four musical keys (there are twelve notes in Western music, and each note can be the source of a major or minor key). *See id.* at 442.

279. A sonata is a popular music form for one or more solo instruments. *Id.* at 795.

280. For example, some of the titles filed under Sankyo Seiki Manufacturing Company's name include "Amazing Grace," *The Blue Danube*, and "The Stars and Stripes Forever." *See* Copyright Restoration of Works in Accordance With the Uruguay Round Agreements Act; List Identifying Copyrights Restored Under the Uruguay Round Agreements Act for Which Notices of Intent to Enforce Restored Copyrights Were Filed in the Copyright Office, 61 Fed. Reg. 19,372, 19,381, 19,385 (May 1, 1996).

Moreover, ownership of the various rights that copyright protection provides for any given piece of music may be fragmented.[281] One entity may hold the publication rights for a musical work while another may hold the performance rights for the same composition. Thus, even if someone searching the NIE database is able to ascertain the identity of the person or entity who has asserted the publication rights for a piece of music, it may be unclear whether anyone has laid claim to the performance—or other—rights[282] in the work.[283]

Consequently, orchestras face great uncertainty about which of the musical works they plan to perform fall within the gambit of section 514. Even for works that an orchestra suspects or knows are affected, it may be difficult to determine who holds particular rights. In the face of this uncertainty, ensembles have strong incentives to err on the side of not using works with potentially extant copyrights,[284] as they could otherwise encounter harsh remedies for copyright infringement—including having to pay the other side's attorney's fees and statutory damages of up to $150,000 per violation if the copyright infringement is deemed willful.[285] Accordingly, section 514 has the perverse effect of incentivizing a sharp reduction in the dissemination of restored works, an outcome that is directly adverse to the main objective of copyright law.[286]

B. Section 514 Costs Bust Orchestra Budgets and Decrease Dissemination of Important Orchestral Works

Section 514 not only increases the administrative burdens associated with using restored works. It also potentially increases drastically the cost of perfor-

281. *See* 17 U.S.C. § 201(d)(1) (2006) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law."). This is why it is possible for a music publisher to own the rights to print sheet music for musical works while a performing rights society like ASCAP may have the right to license public performances of the same works.

282. Some of the exclusive rights copyright owners possess are the rights to create copies or recordings of their works, create derivative works, distribute copies or recordings by sale or otherwise, publicly perform the works, and display the works. *Id.* § 106.

283. Indeed, for some of the older works within section 514's scope, the original author may well be dead, and the rights may now belong to a descendant or some other unknown person, making efforts at compliance even more costly and time consuming. *See* Julie Hilden, *The Supreme Court's Decision in* Golan v. Holder*: Can the U.S. Government Constitutionally Pull Works Out of the Public Domain?*, VERDICT (Jan. 23, 2012), http://verdict.justia.com/2012/01/23/the-supreme-courts-decision-in-golan-v-holder.

284. Guild Brief, *supra* note 36, at 8–9.

285. *See* 17 U.S.C. § 104A(d) (applying the remedies provided in 17 U.S.C. chapter 5 to infringement of restored works). These remedies include injunctions, *id.* § 502, the impounding and destruction of infringing materials, *id.* § 503, actual damages, *id.* § 504(b), statutory damages, *id.* § 504(c), and attorney's fees and costs, *id.* § 505.

286. See *supra* notes 17–22 and accompanying text for a discussion of what it means to promote the arts and sciences per the Constitution.

mance of these works. For small orchestras with budgets of only several hundreds or thousands of dollars, the disastrous effects of any increase in performance costs are obvious. Yet even for major orchestras, which face deficits of proportions never before seen, these increased costs could very well affect programming choices and result in ensembles foregoing the performance of restored works. This, in turn, would negatively affect the standard orchestral repertoire as well as society as a whole.

For one thing, since the sheet music for most copyrighted works is not available for purchase, ensembles wishing to perform a piece affected by section 514 must now rent its parts each time they wish to play it. The cost to rent sheet music, however, is significantly higher than the cost to purchase it.[287] A letter from Luck's Music Library[288] to Senator Spencer Abraham[289] provides several illustrations of the price differential between purchasing and renting the same piece of music.

Before passing into the public domain, the parts for Maurice Ravel's suite from *Ma mère l'oye* (*Mother Goose*)—a piece that takes approximately eighteen minutes to perform—rented for $540 for two performances.[290] After passing into the public domain, the same parts were available for purchase for seventy dollars[291]—approximately 13 percent of the rental price. Likewise, Charles Griffes's *The White Peacock*—a piece of six minutes' duration—rented for $335, but now sells for forty-two dollars in the public domain[292]—about 13 percent of the rental cost. Giacomo Puccini's famous aria "O mio babbino caro" from the opera *Gianni Schicchi*—a piece with a duration of only about two-and-a-half minutes—rented for a whopping $252, but could be purchased for twenty-six dollars once in the public domain[293]—approximately 10 percent of the rental fee.

Restored works under section 514 are subject to the same pricing differentials. For instance, Prokofiev's *Peter and the Wolf*, a staple of the children's concert

287. See *supra* notes 42–54 and accompanying text for a discussion of rented versus purchased sheet music.

288. Luck's Music Library is a major seller and renter of orchestral music. *See* LUCK'S MUSIC LIBR., http://www.lucksmusic.com (last visited Mar. 19, 2013). Luck's brought a challenge to URAA section 514 that was dismissed. *See* Luck's Music Library, Inc. v. Gonzales, 407 F.3d 1262 (D.C. Cir. 2005).

289. *See* Letter From Luck's Music Library to Senator Spencer Abraham (June 28, 1996) [hereinafter Luck's Letter], *available at* http://www.public.asu.edu/~dkarjala/letters/Luck'sMusic01.html. The letter was written to inform the senator about issues surrounding legislation being considered in the U.S. House of Representatives and the U.S. Senate that ultimately developed into the CTEA.

290. This rental fee was calculated using the formula that applies to community and youth orchestras with annual budgets of $150,000 or less. The fees assessed against larger orchestras would be even higher. *See id.*; *see also supra* notes 46–47 and accompanying text for the factors music rental companies consider in assessing rental fees.

291. *See* Luck's Letter, *supra* note 289.

292. *Id.*

293. *Id.*

repertoire,[294] was one of the many musical compositions affected by section 514. When the work was in the public domain, orchestral parts could be purchased for the reasonable price of seventy dollars. It now costs $600 to rent the parts for two performances.[295] Thus, the price at which the parts could previously be bought outright was less than 12 percent of the cost to rent the piece for only two performances after section 514 took effect.

The examples just described are all based on relatively short pieces of music that would only take up a fraction of a full-length symphonic program of one-and-a-half to two hours. An orchestra looking to perform several works of copyright-protected music could thus easily spend thousands of dollars for a weekend's worth of performances. Furthermore, rented music parts must be returned at the end of the rental period, so if the orchestra wishes to play a particular piece again later, its rental fees must be incurred anew. If the parts were available for purchase, of course, the orchestra could avoid this additional expense. Accordingly, for works that are standards in the orchestral repertoire, the performance-price differential caused by section 514's removal of such works from the public domain—and thus generally from the market for sheet music purchases—accumulates with every new rental and ends up being far more dramatic than the figures provided above.

In addition to the added cost of renting rather than purchasing sheet music, orchestras must now also pay public performance license fees when performing restored works—fees that are not charged for works that are in the public domain. These costs can also be exorbitant. By way of illustration, consider the following data: In 2003, the median number of concerts given by professional American orchestras was 197.[296] From 2001 to 2003, the average per-concert performance revenue of American orchestras was $31,036.[297] This suggests, then, that the average American orchestra, in 2003, earned roughly $6,114,092 in performance revenue.[298] An orchestra with such revenue would have to pay $18,342

294. Sergei Prokofiev was commissioned to write *Peter and the Wolf* by the Central Children's Theatre of Moscow to teach youngsters about the various instruments in the orchestra, and to help them develop a taste for classical music. *See Peter and the Wolf*, BALLET AUSTIN, http://www.balletaustin.org/atb/peterandthewolf.php (last visited Mar. 19, 2013).

295. *See Statement of Timothy Phillips in Opposition to Copyright Term Extension*, OPPOSING COPYRIGHT EXTENSION, http://www.public.asu.edu/~dkarjala/commentary/PhillipsStmt.html (last visited Mar. 19, 2013).

296. *See* FLANAGAN, *supra* note 65, at 42.

297. *Id.* at 155.

298. These numbers, and those that follow, should not be considered an attempt at perfect approximation of the actual yearly revenues achieved, or fees incurred, by major symphony orchestras, but rather an illustration of the general magnitude of costs that orchestras of a given size are likely to face. While the revenue figure mentioned here looks fairly large in the abstract, note that the average per-concert

for a blanket license from BMI[299] and $58,084 for a blanket license from ASCAP.[300] Combined, these blanket licenses would cost $76,426, or 1.25 percent of annual performance revenue.

While most major symphony orchestras regularly perform at least some twentieth-century—and thus generally copyrighted—music and consequently would tend to purchase blanket performance licenses regardless, community orchestras or smaller professional orchestras have (at least historically) been unlikely to purchase these licenses as they are not cost effective for a group with a budget of only a few hundred or several thousand dollars. If these smaller orchestras wish to continue to perform restored works, however, they now have to pay for one or more performance licenses. Considering that the minimum performance license fees for BMI and ASCAP are $219 and $327, respectively,[301] these costs can easily consume a large proportion of such orchestras' limited budgets. Moreover, these fees are often necessary even if the orchestra does not charge for admission, since situations in which orchestras are exempt from having to procure a license are "narrowly-defined."[302] Thus, while a professional orchestra's blanket license fees may only represent 1 to 2 percent of the orchestra's performance revenue, the cost of such fees to a smaller orchestra may not be offset at all by ticket sales and may cause the orchestra to fall into the red. And even for major orchestras, an expense of 1 to 2 percent of performance revenue could be significant given the substantial deficits many such ensembles currently face.

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performance expense during the same timeframe was $86,153. *Id.* Hence, the total annual expense for 197 concerts would be $16,972,141, for a deficit between performance income and expense of $10,858,049.

299. For the 2012–13 season, BMI is charging a license fee of 0.3 percent of box office revenues for orchestras bringing in more than $1 million in revenues at a venue of 3500 or fewer seats. *See Music License for Symphony Orchestra*, *supra* note 62. For orchestras bringing in less than $1 million, the fee is double that rate—0.6 percent. *Id.*

300. For the 2012–13 season, ASCAP charged a fee of 0.95 percent of box office revenues with no rate adjustment for the size of the venue. *See 2012/2013 Report of Adjusted Box Office for Symphony Orchestras Which Have Annual Budgets Less Than $250,000*, AM. SOC'Y COMPOSERS, AUTHORS & PUBLISHERS, http://www.ascap.com/~/media/Files/Pdf/licensing/report-forms/symphonic/less/2012.pdf (last visited Apr. 5, 2013); *2012/2013 Report of Adjusted Box Office for Symphony Orchestras Which Have Annual Budgets More Than $250,000*, AM. SOC'Y COMPOSERS, AUTHORS & PUBLISHERS, http://www.ascap.com/~/media/Files/Pdf/licensing/report-forms/symphonic/more/2012.pdf (last visited Apr. 5, 2013).

301. *Music License for Symphony Orchestra*, *supra* note 62; sources cited *supra* note 300.

302. *Music Licensing for Symphony Orchestras*, *supra* note 57 (click on "Do we need a license if we are a non-profit organization?" under "Common Questions") ("Though there is an exemption when there is no payment or other compensation to the performers, promoters, or organizers of the event, there must also be no direct or indirect admission charge of any kind. All proceeds for the performance, after deduction of the reasonable costs of producing the event, must also be used exclusively for educational, religious, or charitable purposes."); *see also* 17 U.S.C. § 110(4) (2006).

The result of these increased costs to perform restored works is that many small orchestras will forego performing restored works altogether. For example, using the figures provided above, a community orchestra that could formerly stage an annual children's concert featuring *Peter and the Wolf* by paying $70 for the work's parts (or $0 if the orchestra already owned the parts or borrowed them from another orchestra) would now have to rent the parts for $600 and pay ASCAP at least its minimum fee of $327 for the rights to perform the piece. This amounts to a total cost of $927 to play a piece with a runtime of less than half an hour.

Indeed, many ensembles find the costs of procuring and performing copyrighted music prohibitive. The University of North Carolina Greensboro's Student Artist Competition, for example, specifies the following in its guidelines:

> Auditioning on works available on "rental only" is discouraged, as the budget situation has eliminated those resources. Students should consider works in the public domain if at all possible. If a student wins with a rental work, he/she may be asked to perform an alternate work, or to personally pay the rental fees.[303]

Thus, due to the passage of section 514, students engaging in the concerto competition would no longer be able to play staples of the solo repertoire such as Prokofiev's Piano Concerto No. 3 in C Major, Op. 26, or Shostakovich's Cello Concerto No. 1 in E-flat Major, Op. 107 if they could not personally afford to pay.

Or take Lawrence Golan, the named plaintiff in *Golan v. Holder*.[304] Golan is a conductor and professor at the University of Denver's Lamont School of Music.[305] His university's music program has an annual budget of approximately $4000 to purchase and rent music.[306] Golan himself has stated that in order to afford staging the six orchestra concerts and one opera his university ensemble performs each year,[307] he relies on the public domain for more than 80 percent of the repertoire his orchestra plays.[308] Consequently, Section 514 drastically cut the pool of pieces from which his orchestra can assemble its program.

What I have described above is not an isolated or theoretical problem; indeed, the additional financial burdens imposed by section 514 have adversely affected a majority of American orchestras. The Conductors Guild, an organization

303. *Student Artist Competition: Guidelines*, U.N.C. GREENSBORO, http://performingarts.uncg.edu/student-artist-competition/guidelines (last visited Mar. 19, 2013).
304. 132 S. Ct. 873 (2012).
305. *See* Parry, *supra* note 3.
306. *Id.*
307. Complaint, *supra* note 3, at 20.
308. *See* Parry, *supra* note 3.

of more than 1600 conductors, carried out a survey (the Guild survey)[309] of its members to determine how widespread the effects of section 514 were in actuality. The results were startling:

> The Guild survey revealed that eighty-three percent of respondents have a general practice of conserving resources by limiting their performance and recording of copyrighted works. Seventy percent are no longer able to perform works previously in the public domain—works performed regularly before the passage of Section 514—because those works are now under copyright protection. And thirty-seven percent own sheet music for these works, but are now required to pay performance fees.[310]

Clearly, section 514 has restricted the ability of many orchestras to perform, and thereby disseminate, works subject to restored copyright. While Congress justified the passage of section 514 on the grounds of protecting the interests of American copyright holders abroad, these concerns should have been more carefully balanced against the hardships placed on American consumers of the many works affected by section 514.[311] A backward-looking approach to copyright protection such as that taken by section 514 fails "to promote the Progress of Science and useful Arts."[312] What is more, by hindering the performance of restored works, section 514 may cause societal harm that reaches far past the musicians of America's orchestras.

C. The Domino Effects of Foregone Performance: How Decreased Performance of Section 514 Works Will Adversely Impact Both the Classical Music Community and Society at Large

The increased financial burdens imposed by section 514 may not themselves be fatal in the short term to the dissemination of restored works by large professional orchestras. But making these works financially inaccessible to school, youth, community, and small to midsized professional orchestras will likely have

309. The Guild survey was carried out in preparation for the filing of the Guild's amicus brief in *Golan*. *See Conductors Guild Survey*, CONDUCTORS GUILD, http://survey.constantcontact.com/survey/a07e3476wbygg78zpbq/a015ih9di8j23/questions (last visited Mar. 19, 2013) (stating that "[t]he brief is due soon, and it will be far more effective if you could answer these questions for us," and providing a form for conductors to fill out online).

310. Guild Brief, *supra* note 36, at 7.

311. *See* Gard, *supra* note 22, at 198–99 (arguing that Congress acted "recklessly or with disregard to established expectations and traditions" in passing section 514, which improperly balanced "extraterritorial trade" against "the public's cultural resources").

312. U.S. CONST. art. I, § 8, cl. 8.

detrimental long-term effects on our nation's major orchestras, and accordingly on society as a whole.

An article that appeared in the San Francisco Classical Voice aptly phrased the problem: "What people don't understand is the fact that flagship orchestras depend on the youth orchestra, the college ensemble, the community orchestra. And vice versa. We're an ecosystem, and if you take away the feeders, the whole system is weakened."[313] In other words, school and youth orchestra musicians go on to study music at universities and ultimately vie for the increasingly competitive performance jobs offered by various levels of professional orchestras. If school and youth orchestras cannot afford to play restored works, the professional musicians of tomorrow will lose familiarity with them. Indeed, one respondent to the Guild survey voiced his concern that even *Peter and the Wolf* would become "a secondary piece" because of section 514's restrictive effects.[314] Even more broadly, if young people cannot hear these pieces in concert, and if aspiring musicians do not play these pieces and come to love them, the pieces will be in danger of falling out of the repertoire, which in turn will "curtail intellectual curiosity and diminish our cultural heritage."[315]

Furthermore, "[p]ublic domain works are the bread and butter of the learning process for young musicians. Restricting access to [these works] is detrimental to their ability to learn and prepare to be professional musicians."[316] Most major American orchestras only have a very short period of time in which they can prepare for each new concert program—often an orchestra will learn a new set of works during the beginning of a week, which it will then perform two or three times over the course of that weekend.[317] Because rehearsal time is so limited, it is imperative that orchestra musicians are familiar with the standard repertoire prior to the first scheduled rehearsal. Consequently, professional orchestras typically ask auditioning musicians to prepare an extensive list of excerpts from the standard orchestral repertoire for their auditions.[318] These orchestras expect

313. Mark MacNamara, *Balancing Rights: The Future of Copyright in the U.S.*, S.F. CLASSICAL VOICE (Sept. 17, 2011), http://www.sfcv.org/article/balancing-rights-the-future-of-copyright-in-the-us.

314. *See* Guild Brief, *supra* note 36, at 8.

315. *Id.* at 13 (internal quotation marks omitted).

316. *Id.* at 12 (second alteration in original) (internal quotation marks omitted).

317. *See* Roger W. Weiss, *The Supply of the Performing Arts*, 115 MUSICAL TIMES 932, 932–33 (1974).

318. *See, e.g.*, Associate Principal Trombone Audition Packet, N.Y. PHILHARMONIC, http://allisyar.files.wordpress.com/2012/06/auditions_assoc_principle_tromobone.pdf (last visited Mar. 20, 2013) (listing repertoire for the live final audition consisting of a solo piece, seventeen orchestral excerpts, and possible sight reading from the standard orchestral repertoire); *Audition Repertoire List Spring 2012*, CHI. SYMPHONY ORCHESTRA, http://cso.org/uploadedFiles/7_Learn/CSO_ Information/Sec_Violin_RepList_2012.pdf (last visited Mar. 20, 2013) (listing an audition repertoire of six solo pieces (including at least one work restored to copyright under section 514), fourteen orchestral

auditioning musicians to have studied these pieces during their high school and university years. Students, however, traditionally learned this repertoire from excerpt books that, due to section 514's copyright restorations, are now either exorbitantly expensive or out of print, making it more difficult for these young musicians to study important works that they are expected to know.[319] Moreover, with many youth and school orchestras unable to afford to perform restored works following the enactment of section 514, students are also unable to gain familiarity with these works through actual performance experience. These decreased opportunities for students to study and play staples of the orchestral repertoire consequently have direct adverse effects on professional orchestras, which depend on these young musicians' training.

In addition, many restored works are crowd pleasers and popular repertoire favorites. Historically, Germanic-Austrian composers have dominated the standard orchestral repertoire: Mozart, Beethoven, and Brahms reign supreme, attaining the greatest amount of concert programming—measured both in time and in frequency—of all classical composers.[320] Orchestras are understandably hesitant to program against the musical tastes of their audiences, as patrons will likely abstain from attending concerts with overly atypical programs.[321] On the

excerpts (at least one of which is a restored work), and sight reading "from the standard repertoire to be determined at the audition"); *Bass Trombone Audition Repertoire*, BOS. SYMPHONY ORCHESTRA, http://www.bso.org/media/4381159/basstrombonerepertoire.pdf (last visited Mar. 20, 2013) (listing repertoire including two solo works, twenty-five orchestral excerpts, and sight reading); *Principal/Associate Principal Bass Master Repertoire List*, N.Y. PHILHARMONIC, http://allisyar.files.wordpress.com/2012/06/auditions_bass_2012.pdf (last visited Mar. 20, 2013) (listing repertoire including two solo pieces, twenty-one orchestral pieces (including at least three restored works under section 514), and possible sight reading); *Second Bassoon January 2012 Audition Repertoire*, CLEVELAND ORCHESTRA, http://www.clevelandorchestra.com/ClevelandOrchestra/media/pdfs/Audition-Repertoire-Second-Bassoon-2011-10.pdf (last visited Mar. 20, 2013) (listing audition repertoire comprised of one solo piece, nineteen orchestral excerpts, and sight reading).

319. *See* Guild Brief, *supra* note 36, at 11; *see also About Orchestra Musician's CD-ROM Library*, ORCHESTRA MUSICIAN'S CD-ROM LIBR., http://www.orchmusiclibrary.com/about.php (last visited Mar. 20, 2013) (stating that the sheet music compilations sold are restricted to works that are in the public domain in the United States); *Excerpt Books*, TALK BASS (Mar. 23, 2009–May 29, 2011), http://www.talkbass.com/forum/f6/excerpt-books-529060 (discussing the difficulty of finding string bass excerpts for works, including those by Shostakovich and Prokofiev, that are not in the public domain); *Torchinsky Tuba Orchestral Excerpt Books*, TUBENET (Jan. 19, 2010), http://forums.chisham.com/viewtopic.php?f=2&t=37381 (blog discussion about several volumes of tuba excerpt collections that are out-of-print following passage of section 514). For examples of orchestra auditions that request excerpts from restored works that publishers can no longer print in excerpt books without licensing that right from copyright holders, see *supra* note 318.

320. *See* E. Christine Hall, Survey and Analysis of the Repertory of Twenty-Six American Symphony Orchestras 1982–83 Through 1993–94, at 59–60, 154 (1997) (unpublished D.M.A. dissertation, Peabody Conservatory of Music).

321. Catherine Wichterman, *The Orchestra Forum: A Discussion of Symphony Orchestras in the U.S.*, *in* ANDREW W. MELLON FOUND., REPORT FROM JANUARY 1, 1998 THROUGH DECEMBER 31,

other hand, orchestras also want to avoid making their programming stale, which also alienates patrons. And, for better or worse, audiences tend to be skeptical of most modern classical music.[322]

Twentieth-century Russian composers, however, are a means of attaining some programming diversity that audiences actually enjoy and will pay to see performed. In the United States, Stravinsky and Prokofiev historically have been among the top ten most frequently performed composers.[323] Worldwide, Prokofiev, Rachmaninoff, Shostakovich, and Stravinsky all made the top twenty on the list of most frequently performed composers in 2010.[324] Yet works by all of these composers were restored to copyright under section 514. The effect of this, opined Michael Pastreich, president and CEO of the Florida Orchestra,

> is that both peripheral and central Russian music w[ill] be played less. Why is this important? . . . [T]hese "warhorses" are what get the audience to the hall in the first place. Remember, there are two types of people who come to the symphony hall: subscribers and single-ticket buyers. Without the first you don't have a sustainable base; without the second you don't get new donors. You need to have programming that speaks to both.[325]

With access to restored works restricted to those who can afford rental and performance license fees, the classical repertoire is in danger of losing many of these momentous works. In turn, playing them less could make it more difficult for orchestras to get audiences into America's concert halls by devising concert programs that contain music audiences enjoy but that also offer some degree of aural variety.[326] Since orchestras already cite "a lack of resources for their failure to ex-

1998, at 29, 44 (1999), *available at* http://www.mellon.org/news_publications/annual-reports-essays/presidents-essays/the-orchestra-forum-the-orchestra-forum-a-discussion-of-symphony-orchestras-in-the-us/ ("Orchestra administrators admit trepidation about programming against the familiar tastes of their core audience, yet they also see the value of performing new or unfamiliar work that does not pander to audiences.").

322. "[T]he evidence leaves no room for doubt about the effects of 'adventurous' productions. For example, when contemporary operas were presented, attendance fell, on average, from 97 to 89 per cent of capacity at the Metropolitan Opera, from 65 to 39 per cent of capacity at the New York City Center, and from 83 to 67 per cent at Covent Garden." BAUMOL & BOWEN, *supra* note 67, at 397.

323. ASOL REPORT, *supra* note 78, at 18 (measured in terms of number of concerts in which a work of the composer is played).

324. Jack Fishman, *Top Composers,* MY SAN ANTONIO (Jan. 6, 2011), http://blog.mysanantonio.com/jackfishman/2011/01/top-composers-2 (reproducing InstantEncore's annual list).

325. MacNamara, *supra* note 313 (internal quotation marks omitted).

326. *See* Mark Walter, *The Power of the Orchestra*, BEDFORD COMMUNITY ORCHESTRA, http://www.bedfordcommorch.org/index.php/bco/articles/the_power_of_the_orchestra (last visited Mar. 20, 2013) ("Well rounded orchestral programs serve their audiences by presenting music from a diverse

periment"[327]—as they have to play what the audience will pay to see to maintain what faltering grasp they have on their finances—the added financial burdens imposed by section 514 are likely to only exacerbate these programming and attendance concerns.

Decreases in box office numbers caused by stale programming would not only further hurt orchestras financially but could also have a detrimental impact on society as a whole. A study by the National Endowment for the Arts (NEA) found that young adults (ages eighteen to thirty-four) who attended performing arts events (classical or jazz concerts, operas, plays, musicals, or ballets) were 1.7 times more likely to exercise, 2.6 times more likely to engage in creative endeavors, and 2.7 times more likely to volunteer or do charity work in their communities than young adults who do not attend performing arts events.[328] According to Henry Fogel, president and CEO of the American Symphony Orchestra League, these results "demonstrate that arts enthusiasts are civically minded people who enjoy a range of personally and socially rewarding activities."[329] Other data also suggest that those who attend performing arts events are more civically involved than their peers who do not.[330]

Attendance at orchestra concerts has been shown to correlate with other positive effects on both the personal and societal level as well. Various studies have suggested that arts involvement is associated with increased academic performance and improved cognitive function and ability to engage in creative thinking, which in turn enriches society as a whole.[331] Studies have also found that involvement in the arts improves mental and physical health.[332] For instance, one study found that people who attend certain cultural events, including music concerts, tend to live longer than those who rarely do.[333] Being healthier and living longer is not only a personal benefit but also a societal one; a European report

background. An orchestra that is connecting with its community is reaching out through the music it performs, instead of excluding people because of the music it performs.").

327. *See* Wichterman, *supra* note 321.

328. NAT'L ENDOWMENT FOR THE ARTS, THE ARTS AND CIVIC ENGAGEMENT: INVOLVED IN ARTS, INVOLVED IN LIFE (2007), http://www.nea.gov/pub/civicengagement.pdf.

329. *Id.*

330. For example, performing arts attendees are more likely to be voters. NAT'L ENDOWMENT FOR THE ARTS, ART-GOERS IN THEIR COMMUNITIES: PATTERNS OF CIVIC AND SOCIAL ENGAGEMENT 4 (2009), http://www.nea.gov/research/Notes/98.pdf.

331. KEVIN F. MCCARTHY ET AL., RESEARCH IN THE ARTS, GIFTS OF THE MUSE: REFRAMING THE DEBATE ABOUT THE BENEFITS OF THE ARTS 8 (2004), http://www.rand.org/pubs/monographs/2005/RAND_MG218.pdf.

332. *Id.* at 12.

333. Boinkum B. Konlaan et al., *Visiting the Cinema, Concerts, Museums or Art Exhibitions as Determinant of Survival: A Swedish Fourteen-Year Cohort Follow-Up*, 28 SCAND. J. PUB. HEALTH 174, 177 (2000).

suggested that improved public health and longevity positively affects a country's economy beyond reductions in healthcare costs.[334] Yet another study found that "[t]he arts expand individuals' capacities for empathy by drawing them into the experiences of people vastly different from them and cultures vastly different from their own. These experiences give individuals new references that can make them more receptive to unfamiliar people, attitudes, and cultures."[335] Moreover, the study cautioned that such benefits only inhere when people engage in the arts on a long-term basis.[336]

Even if there is not a strong causal link between concert attendance and these personal and societal effects,[337] orchestras still impart many other important community benefits. Orchestras have a significant positive impact on the economies of their local communities, for example,[338] as they enrich local businesses by driving concertgoers to restaurants and other establishments near theaters. As it turns out, the average local concertgoer spends more than twenty-four dollars over his ticket price on restaurants, parking, hotels, babysitters, and other ser-

334. Marc Suhrcke et al., *Investment in Health Could Be Good for Europe's Economies*, 333 BRIT. MED. J. 1017 (2006). Healthier people are more productive at work and thereby earn more, are able to work for a longer part of their lives, can afford to educate themselves more and increase their productivity, and can save more for retirement, leading to greater investment that can help the economy. *Id.*

335. MCCARTHY ET AL., *supra* note 331, at xvi.

336. *Id.*

337. Education, for example, is a strong predictor of arts participation. *See* MARK J. STERN, NAT'L ENDOWMENT FOR THE ARTS, AGE AND ARTS PARTICIPATION: A CASE AGAINST DEMOGRAPHIC DESTINY 19 (2011), http://www.nea.gov/research/2008-SPPA-Age.pdf. Therefore, it is possible that education levels, or other demographic factors such as income levels, are the main drivers behind the societal benefits I describe and are simply also correlated with arts involvement. Research on the effects of arts involvement, however, is improving and has come much closer to establishing the requisite causal links. *See* MCCARTHY ET AL., *supra* note 331, at 19 (suggesting that the difficulty of demonstrating a causal link between arts involvement and claimed effects does not indicate "that the claimed effects are not present, but that they have yet to be empirically demonstrated. Indeed, more-rigorous studies . . . offer strong evidence for the presence of cognitive, attitudinal, and behavioral effects." (citations omitted)). Further, at least some studies on the societal benefits of arts involvement have specifically controlled for variables that traditionally also correlate with the positive behaviors described—such as gender and education—and still found a link between desirable societal behavior and attendance at performing arts events. *See, e.g.*, NAT'L ENDOWMENT FOR THE ARTS, *supra* note 330, at 10–12; BONNIE NICHOLS, NAT'L ENDOWMENT FOR THE ARTS, NEA RESEARCH NOTE #94, VOLUNTEERING AND PERFORMING ARTS ATTENDANCE: MORE EVIDENCE FROM THE SPPA 2–3 (2007), http://www.nea.gov/research/notes/94.pdf.

338. *See* MICHELLE REEVES, ARTS COUNCIL OF ENG., MEASURING THE ECONOMIC AND SOCIAL IMPACT OF THE ARTS: A REVIEW 7–8 (2002), http://www.artscouncil.org.uk/media/uploads/documents/publications/340.pdf ("[D]irect spending on the arts le[ads] to spending in other sectors of the economy, which in turn enhance[s] wealth and job creation, and ma[kes] cities appear more attractive to citizens and companies."); *id.* at 28 ("Cultural institutions, events and activities create locally significant economic effects . . . .").

vices.[339] According to one study, the Boston Symphony alone has an annual economic impact of $166.7 million on the Massachusetts economy.[340] Even smaller professional orchestras can have a multi-million-dollar economic impact.[341] And even in communities in which orchestras fail to generate a directly measurable economic impact, orchestras nonetheless enrich the community. Not only does an orchestra provide culture and entertainment value, but the presence of an orchestra in a community can draw people and businesses to that region.[342]

Accordingly, orchestras provide an important cultural, social, and economic service. Thus, if the financial difficulties imposed by section 514 cause orchestras to play restored works less, and if in turn attendance at orchestra concerts suffers, the societal benefits that result from attendance at orchestra concerts will suffer.

339. *See* Sheila Kennedy, *Music for World-Class Cities*, SHEILA KENNEDY (Sept. 1, 2012, 7:48 AM), http://sheilakennedy.net/2012/09/music-for-world-class-cities ("Nationally, nonprofit arts organizations generate $135 billion in economic activity annually, supporting 4.1 million jobs and generating $22.3 billion in government revenue. . . . The typical arts attendee spends $24.60 per person, per event, *not* including the cost of admission, on items such as meals, parking, and babysitters. Attendees who live outside the country in which the arts event takes place spend twice as much as their local counterparts. A symphony season has far more impact on the local economy than football." (summarizing data from *Arts & Economic Prosperity IV: Economic Impact of the Nonprofit Arts & Culture Industry*, AMERICANS FOR THE ARTS, http://www.artsusa.org/information_services/research/services/economic_impact/iv/national.asp (last visited Mar. 20, 2013))); *see also* Frances D'Emilio, *AP Interview: Muti Says Culture Good for Economy*, SEATTLE TIMES, Nov. 14, 2012, http://seattletimes.com/html/businesstechnology/2019677257_apeuitalymuti.html (quoting Riccardo Muti, the renowned music director of the Chicago Symphony Orchestra, as stating that "culture isn't just spiritual well-being, but when it's utilized well, when it's valued, it brings economic well-being . . . . [A] people without culture is a people that loses its identity. We haven't reached that point yet, but the danger is there." (internal quotation marks omitted)).

340. MT. AUBURN ASSOCS. & CTR. FOR CREATIVE CMTY. DEV., BOS. SYMPHONY ORCHESTRA ECONOMIC AND COMMUNITY IMPACTS: BOSTON, THE BERKSHIRES, AND MASSACHUSETTS, at i (2008), http://www.mtauburnassociates.com/pdf/Boston%20Symphony%20Orchestra.pdf.

341. For example, one report estimates that the Buffalo Philharmonic Orchestra's annual economic impact on the local community amounts to $25 million. *See* James Fink, *BPO Report Puts Orchestra's Impact at $25M*, BUFFALO BUS. FIRST (June 5, 2012, 1:00 PM), http://www.bizjournals.com/buffalo/print-edition/2012/06/01/bpo-report-puts-orchestras-impact-at.html. The Baltimore Symphony Orchestra estimates its economic impact at over $18 million. *See Economic Impact*, BALT. SYMPHONY ORCHESTRA, http://www.bsomusic.org/main.taf?p=2,8,2,1 (last visited Mar. 20, 2013).

342. *See* NAT'L GOVERNORS ASS'N CTR. FOR BEST PRACTICES, ARTS & THE ECONOMY: USING ARTS AND CULTURE TO STIMULATE STATE ECONOMIC DEVELOPMENT 6 (2009), http://www.nga.org/files/live/sites/NGA/files/pdf/0901ARTSANDECONOMY.PDF ("The arts are an important complement to community development. They provide an enhanced quality of life, enrich local amenities, and play an important role in attracting young professionals to an area."); *see also* Jennifer Stogsdill, *Orchestra Impact on Economic Growth Difficult to Determine*, LARAMIE COUNTY COMMUNITY C. WINGSPAN, http://wingspan.lccc.wy.edu/issues/May12/A&E/orchestra.html (last visited Mar. 20, 2013) (claiming that, while the Cheyenne Symphony Orchestra "doesn't really economically help Cheyenne," "[c]orporations like to base their businesses in a community where the arts are present because things like an orchestra benefit the quality of life in the community, and corporations like to see that for their employees" (internal quotation marks omitted)).

Then, not only will society be culturally less enriched due to the loss of these works but it will suffer in other ways from the loss of important benefits derived from that cultural experience.

CONCLUSION

This Comment has demonstrated how the Supreme Court's decision in *Golan v. Holder* to uphold URAA section 514 will adversely affect American symphony orchestras and their audiences. The aim of copyright is "[t]o promote the Progress of Science and useful Arts."[343] This means encouraging the dissemination and consumption of creative and intellectual works. Unfortunately, *Golan*'s likely effect is directly antithetical to this purpose.

Section 514 removes the musical works of luminaries such as Prokofiev, Rachmaninoff, Shostakovich, and Stravinsky from the public domain. By making it both more difficult and more expensive to perform these restored musical works, section 514 inhibits the dissemination of these musical compositions. Given the poor notice system provided for in section 514, orchestras face tremendous difficulties in determining what pieces have been restored to copyright—in some cases after decades of free access in the public domain—and to whom these rights belong. Orchestras that own sheet music that was formerly in the public domain must now go through the arduous process of determining who owns the performance rights for these works so that they can pay additional fees that were previously not required of them. Orchestras that do not own restored works and wish to perform them will be precluded from purchasing the parts, and will instead need to pay steep rental fees for each performance they wish to give. These changes price the performance of restored works outside the budgets of nearly 70 percent of America's orchestras.[344] Given the already precarious financial situation of many American orchestras, the added financial burdens imposed by section 514 may very well be deadly to the more vulnerable sectors of the classical music community. As one respondent to the Guild survey stated:

> [S]maller professional or part-time professional orchestras and even many of the medium-sized cities with full seasons and long and cherished reputations are hurting. Against all aesthetic reason they are forced [to] find ways to shrink their seasons and reduce the size of their full-time performing personnel. Introducing a further burden on live-music-making ensembles is a form of slow suicide.[345]

343. U.S. CONST. art. I, § 8, cl. 8.
344. *See* Guild Brief, *supra* note 36, at 7.
345. *Id.* at 8 (alterations in original).

By making restored works prohibitively expensive for many orchestras, Congress created a situation in which music students will not have access to these pieces in their school and youth orchestras. They will be unable to procure copies of this music to prepare for auditions. They will be unable to hear and fall in love with these works in performances by community and small to midsized professional orchestras, as these orchestras will be forced to give up performances of this music because of budgetary constraints. Accordingly, the pool of musicians from which America's major symphonies draw their personnel will be unprepared to play these works in the few ensembles left that can afford to continue to perform them. This may further decrease the performance and dissemination of section 514 works.

In turn, the hardships section 514 imposes on America's orchestras adversely affect society as a whole. Many of the works affected by section 514 are major works in the symphonic repertoire that draw in audiences. Failure to program these pieces could adversely affect orchestras' abilities to fill their concert halls. Studies have indicated a correlation between attendance at performing arts events and various positive societal effects, including increased health and heightened community involvement and volunteerism.[346] Thus, if decreased performance of restored works results in decreased concert attendance, the decision to uphold section 514 could have deleterious effects on society as a whole as well.

During the oral argument in *Golan*, Chief Justice Roberts admitted that there was something intuitively unfair about section 514 when he stated: "One day I can perform Shostakovich; Congress does something, the next day I can't. Doesn't that present a serious First Amendment problem?"[347] Whatever the answer to this question may be legally, section 514 creates a host of problems that will resonate throughout the classical music community during a time when we should be nurturing, rather than impairing, the arts. By effectively denying access to restored works to many members of the classical music community, section 514 works a serious injustice on orchestras in contravention of the Copyright Clause when properly read. Whether or not the legislation is unconstitutional, it is bad policy. And while it is concededly important to protect the rights and interests of American copyright holders abroad by adhering to the mandates of the Berne Convention, those concerns should not trump the injustices section 514 works on America's orchestras and their audiences, particularly when Congress had the flexibility to protect those interests.

346. *See* NAT'L ENDOWMENT FOR THE ARTS, *supra* note 328.

347. Transcript of Oral Argument at 38, Golan v. Holder, 132 S. Ct. 873 (2012) (No. 10-545), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-545.pdf.