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### Symphonic metamorphoses

*Variations on vulnerability: orchestral musicians' employment in times of crisis*

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## PART I BACKGROUND TO ORCHESTRAL JOURNEYS

### 4. FAQs: answers to questions regarding the orchestral workplace

*“One may think of the orchestra as a large instrument that is capable to produce simultaneously or in succession a multitude of sounds of different kinds. The performers who together make up the orchestra are quite simply the strings, tubes, boxes, flat surfaces, of wood or metal, they are like machines endowed with intelligence activated by a vast keyboard played by the conductor under the direction of the composer.”<sup>109</sup>*

*“An anachronistic picture of the arts begins to emerge. Uncertainties turn out to be typical for the arts.”<sup>110</sup>*

*“In the wild, an orchestra would more closely resemble an antebellum cotton plantation or a feudal estate than it would a modern workplace.”<sup>111</sup>*

While this research delves into a field at the heart of classical music that is considered to be alt modish, and by some critics even stodgy, the space that this deliberation occupies moves into a new, somewhat out-of-the box terrain of inquiry, thanks to substantial contributions from musicians in the Netherlands and the United States. To come to grips with the vulnerabilities within the orchestral profession calls for an understanding of the orchestral musician in the largest sense of the term, embracing both the ‘fully employed’ and the freelance substitute players who augment orchestral ranks with regularity. The history of this profession, its similarities to other performance fields including sports, and a deeper look into what defines the profession in the 21<sup>st</sup> century (stimulated by comments and questions posed by hundreds of musicians on both sides of the Atlantic) exposes not only embedded assumptions and vulnerabilities but stimulates a call for legislative and in some cases enforcement action. Value of culture debates and the #metoo *movement* might seem to be, pun written blushing, strange bedfellows: however, orchestral musicians in the here and now as ‘employees’ find themselves drawn into the vortex of these present-day vulnerability-related concerns.

As this research shows, the contrast between support for the arts in the last decades of the 20<sup>th</sup> century and the massive cutbacks post-2007-2008 financial crisis in the Netherlands and the U.S. is striking. Cultural funding in the U.S. was encouraged

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<sup>109</sup> Hector Berlioz. *Grand Traité d’Instrumentation et d’Orchestration Modernes* (rough translation from the original French text, revised version 1855, p. 406.

<sup>110</sup> Hans Abbing. “The Artistic conscience and the production of value” in Arjo Klamer’s *The Value of Culture* 1996, p. 145.

<sup>111</sup> Frequently reiterated by Robert Levine, principal violist Milwaukee Symphony; Chair Emeritus International Conference of Symphony and Opera Musician (ICSOM).

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by the National Endowment for the Arts (NEA) that has all but closed its doors in recent years. Post-crisis, endowments have drastically diminished: philanthropists have turned to other forms of giving far beyond the orchestral sector and subscription sales have lagged. The precarious situation is marked by acrimonious collective bargaining negotiation, bankruptcies, and a marked increase in industrial action in the U.S. In the Netherlands, post-crisis subsidy cuts have decimated the field of funded orchestras “leaving the rest of us to wonder not if but when we will be the next orchestra to go.”<sup>112</sup> Freelancers in the orchestral world face deep doubts as to the financial viability of their chosen musical occupation, yet despite this pessimistic portrayal, the music does play on. “It has always played on, especially in times of adversity, that is what makes culture so vital: when all else fails, it is there to provide solace and even at the worst of times, music communicates the promise of triumph.”<sup>113</sup>

Lawyers confronted with complex fact patterns pre-litigation often set the scene with ‘the facts’ and attempt to find answers to basic questions before delving further into the subject matter at suit. This *movement* marks an attempt to answer essential questions; a series of FAQs to lay the groundwork for the *movements* to follow. Questions were gleaned from inquiries posed by outsiders, including colleagues and music-lovers from all walks of life as to what, why, and who in the orchestral profession. FAQs roam a wide territory, from questions regarding the size of an orchestra to an attempt to explain collective bargaining culture in the sector with other essential questions focused on the hierarchy that is part and parcel of orchestral organization. On the path to cull and organize scores of inquiries concerning the orchestral profession, I found that a single comparative question predominated: can one possibly compare the orchestral collective to any other sort of ensemble or team? Before cutting to the proverbial chase and getting down to the FAQs, a tempo change takes us to orchestral musicians and athletes to draw thought-provoking parallels between music and sports. Subsequently, recurrent themes and variations that differentiate orchestras from other employment organizations will be discussed. FAQs closes with crisis chronicles from orchestral frontlines.

#### 4.1 Of orchestral musicians and sports team players

*“The athlete to orchestral musician comparison is really quite apt. In many ways, assembling an orchestra is similar to a pro ball franchise fielding a team. And just like a top sports team...you have to pay for quality if you’re going to play at the big-league*

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<sup>112</sup> Conversation with Roland Kieft, at present Managing Director, Stichting Omroep Muziek (SOM) Dutch Broadcasting Foundation; former Artistic Director of the Hague Philharmonic, March 2016.

<sup>113</sup> Conversations with famed composer Gian-Carlo Menotti, founder Spoleto Festival dei Due Mondi.

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*Sports -although they do not qualify as art in the narrow sense—they offer a commonly observed stage to a world of many diverse and specialized performances.*<sup>115</sup>

*“Football is like life: it requires perseverance, self-denial, hard work, sacrifice, dedication and respect for authority.”*<sup>116</sup>

*“This collaboration is like the football field, a coach and the players, we do not have an opponent, but we grapple with ourselves if we do not get the spirit of the composer just the composer.”*<sup>117</sup>

Historians, sociologists, and economists who have turned their attentions to orchestras argue as to whether orchestral musicians operate in a unique collective<sup>118</sup> or whether musicians should be taken off the ‘exceptional’ pedestal and placed on par with any other member of the labor force required to exchange specific services for remuneration. Most musicians balk at the generic classification and are quick to point out that the career trajectory of a professional orchestral player is analogous to a member of a sports team, a parallel that deserves more than peripheral scrutiny. Top team players and orchestral musicians are recruited, undergo complex audition/acceptance procedures, and are compensated for public performance. Whether kicking a football or wielding a cello bow, athletes and musicians have endured long hours of individual practice and professional training starting from early childhood.

Competition is a central component to orchestral career trajectories with tough entry requirements at the vocational entrance stage. In 2014, both Harvard and Yale accepted approximately 6% of applicants<sup>119</sup> while America’s leading conservatories, the Juilliard School of Music and Curtis Institute admitted a mere 4% of those who auditioned.

A comparative examination of a leading sports team, a prize-winning restaurant and the Royal Concertgebouw Orchestra (RCO) published in 2006 offers a heady mix of components that link the seemingly disparate ‘teamwork professions’ from one another. The RCO’s managing director Jan Raes, one of the book’s co-authors, found commonalities between the three professions that lead to success at the highest level

<sup>114</sup> Manny Laureano principal trumpet in the Minnesota Orchestra, quoted in “What does it take to be a professional musician.” Scott Chamberlain’s blogpost. Available at: <https://maskoftheflowerprince.wordpress.com/2016/09/30/what-does-it-take-to-be-a-professional-orchestra-musician/>

<sup>115</sup> Tyler Cowan, *supra* at fn. 39 p. 35.

<sup>116</sup> Attributed to the great American football coach, Vince Lombardi, legendary coach of the Green Bay Packers 1960s. Available at: <https://everydaypower.com/vince-lombardi-quotes/>

<sup>117</sup> Emmanuel Pahud, principal flute Berlin Philharmonic Orchestra interviewed on *Kirill Petrenko & Berliner Philharmoniker: Dawn of a new era*, August 23, 2019. Available at: <https://www.youtube.com/watch?v=jnKhE5ij1GI>

<sup>118</sup> See, Jutta Allmendinger, J. Richard Hackman and Erin Lehman. “Life and Work in Symphony Orchestras” 1986. Also, Paul Judy supports a ‘unique’ classification in “The Uniqueness and Commonality of American Symphony Orchestra Organizations” *Harmony* October 1995.

<sup>119</sup> <https://college.harvard.edu/admissions/admissions-statistics>

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of collective ‘performance.’<sup>120</sup> Leaving the restaurant business out of the equation as the connections in terms of audience and performance are not as apparent as the sports-orchestra analogy, this section examines two subject areas whose boundaries in terms of employment/labor law may well be closer than first meets the eye. Bringing the sports and music together at least anecdotally, the introductory paragraphs chart similarities between these two categories of professionals. Cross-referencing sports and music is not anathema to academic circles as economists and sociologists have delved into comparative studies in terms of behavior and earnings. David Throsby and Ruth Towse selected the two areas of endeavor as examples of controlled and single-minded environments in their quest to expand the boundaries of cultural economics. Subsequent studies on achievement in diverse professions concentrate on the distinctiveness of ‘talent and skill driven activity’ in music and sports.<sup>121</sup>

Like many arts-related vocations, the orchestral profession is shrouded in mystery and apt either to be overly romanticized or conversely dumbed down to a more in your face reality: ‘you musicians play, while real, hard-working citizens work.’ A comparison to professional team sports provides a thought-provoking point of departure as it brings the orchestral musician into a perspective understood by a wider public. In addition to the feel-good factor that makes the orchestral musicians seem more real to a general public keen on sports but not classical music, other factors of convergence related to employment factors in the two professions ‘playing fields’ will be discussed along with several important differences.

#### **4.1.1 Parallels**

The parallels between team sport practitioners and orchestral musicians are pardon the football pun, striking. To perform music with highly trained colleagues in an orchestra requires high levels of individual skill and group coordination: each musician contributes to a collectively created artistic result. The legendary American football coach, Vince Lombardi, was revered particularly for his ability to take a losing team and turn it around to create a winning team. His firm conviction in the power of individual practice as an indispensable ingredient in team success echoes the words of leading music instructors. Compare his adage “[p]ractice does not make perfect. Only perfect practice makes perfect,” to Dorothy Delay, the Juilliard School’s

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<sup>120</sup> In Dutch, *Toonaangevend: wat bedrijven kunnen leren van Het Concertgebouworkest, een toprestaurant en een rugbyploeg* 2006.

<sup>121</sup> For a populist, non-academic read on the subject see, Daniel Coyle *The talent code: unlocking the secret of skill in maths, art, music, sport, and just about everything else* 2010.

legendary violin pedagogue, “[y]our practice is so much a part of your life throughout your performing career that it has to be perfect. And enjoyable, that’s the trick.”<sup>122</sup> The mention of two greats from the past, Vince Lombardi and Dorothy Delay, highlights another similarity in music and sports training: the lineage, a reverence for the greats who preceded present-day players, is central to practitioners in both professions.

Entry into an orchestra is highly selective driven by an extremely competitive audition process followed by rigorous review preceding tenure. Like sports practitioners, musicians spend hours each day using the same muscles repetitively to perform the physical tasks necessary to play an instrument at a high level. Like sports practitioners, musicians play because they love the physical and tactile act of playing their chosen instrument just like athletes are addicted to certain motions. “To play the recorder, you must love the feeling of pushing air through a tube to create sound, it’s that simple. Wasn’t it the wizard footballer Johan Cruyff who said:

*‘I really dislike a player who moves but doesn’t know where he is going?’ Any musician should be able to relate to that as if we become obsessed with what we do on the instrument, or for that matter as a conductor on the podium. Knowledge and obsession lead to knowing where you are going.’<sup>123</sup>*

Both sports and orchestral professionals sacrifice a great deal of their young years to reach a high level of performance: for both groups, focused training takes place at a young age. Depending on the instrument, musicians start serious training between the ages of three and twelve.<sup>124</sup>

*“Like athletes who work out at young ages, serious musicians leave childhood behind at a comparatively young age. With so much emphasis placed on perfection and becoming a great musician both technically and musically right from the beginning, there is a lot left behind in terms of other forms of personal development during early years.”<sup>125</sup>*

Another analogous point is the importance of the coach or pedagogue in shaping the individual athlete/musicians. Both sports and music performance provide fascination

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<sup>122</sup> For more Vince Lombardi’s quotes, see *supra* at fn. 116. Dorothy Delay quote, courtesy of the author.

<sup>123</sup> Conversations with the late, great Frans Brüggen, recorder virtuoso extraordinaire, one of the founders of the informed performance practice movement, founder *Orkest van de 18de Eeuw/Orchestra of the Eighteenth Century*. The original quote attributed to Johan Cruyff: “Ik heb een vreselijke hekel aan iemand die beweegt, maar niet weet waar naartoe.”

<sup>124</sup> While there is no compulsory starting age, the rule of thumb is that professional violinists start studies between the ages of four and seven while string bass players start in their early teens. “There is no perfect age to start bass lessons” recounts youth bass teacher/professional orchestral musician Norma Brooks, “so much depends on size, physical strength and stamina.” Brass players concur as most start to learn their instruments between the ages of eight and fourteen.

<sup>125</sup> Instructor, Juilliard School of Music, anonymity assured.

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and fixation for the wider public as consumers, passionate hobbyists, and armchair experts.

#### ***4.1.2 Talent-based careers***

Success in the orchestral profession, akin to success at the pitch, calls for special abilities. Almost all of the orchestral musicians interviewed make mention of a combination skills that could easily be translated to the sports world. Focused, professional training from a young age, a single-minded focus on ‘perfection,’ the ability to perform at peak level under stress, and the wherewithal to block out stress are commonalities shared by musicians and athletes, indispensable to longevity in their professions. This section seeks to examine and highlight the similarities between the two professions with the intent to legitimize the discourse concerning orchestral musicians and their employment/labor law related issues. If an informed academic public is cognizant of the similarities, perhaps the orchestral musicians’ employment travails will garner greater attention from legal scholars and practitioners. Although sports law is a recognized field of enquiry, the law pertaining to musicians’ collectives is not significant within legal research, with the notable exception of the law applicable to performance rights and royalties. Part of the explanation for this phenomenon might rest on the perception of musicians and the subset of orchestral musicians as an ‘atypical’ category of workers and small proportion of musicians within the general labor market.<sup>126</sup>

#### ***4.1.3 A caveat: there is a paucity of reliable statistics and data-based empirical research***

Like sports teams, orchestras have provided scholars from a wide array of disciplines with food for thought: economists, historians, musicologists, public policy analysts, psychologists, and sociologists have scrutinized the orchestra. In recent years, researchers and commentators have conducted many interesting studies on orchestra financing, with special focus on the nonprofit sector and the changing nature of state subsidies in Europe. Yet, despite the wealth of research, comparatively little research has been undertaken with a focus on labor relations and the institutional dynamics at play within orchestras.

There are several reasons as to why there is a paucity of research concerning the musicians’ employment/labor situations. First, unlike sports professionals or rock

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<sup>126</sup> Performing artists account for less than 1% of U.S. workforce with twelve states unable to report any significant statistics, see the Bureau of Labor Statistics 2016 report available at: <https://www.bls.gov/oes/current/oes272042.htm - nat>

stars, orchestral musicians are not high-profile wage earners or media celebrities. Their ‘teams’ the orchestras might well garner some modicum of fame, much of that status, however, is based on the maestro’s drawing power or the appearance of a superstar soloist ‘backed up’ by the orchestra. Even orchestras that have gained star status, such as the Royal Concertgebouw Orchestra (RCO) are praised for their so-called collective output, not for the star players that are members of the ensemble as a whole. Second, culture generally occupies a small percentage of public expenditure with lower percentages for orchestras as a component within the larger ‘culture’ category.<sup>127</sup> This relatively small percentage matches a “general lack of concern for the orchestra unless of course we indulge in cultural economics or look at ensembles from the point of view of collective behavior.”<sup>128</sup> One might argue that an insignificant public expenditure would provide some form of shelter/immunity from financial cuts. The Dutch and U.S. examples central to this research show, however, that even if arts spending amounted to a fraction of other public expenditures, cutting arts budgets is as easily done as it is said with little general outcry on the part of the public.<sup>129</sup> “Orchestras are not perceived to have much importance whatsoever: the loss of an orchestra passes almost unnoticed while any movement within the sports world receives pages of print media attention, tv and radio coverage and social media commentary.”<sup>130</sup>

Third, for all the broad similarities between sports and music, there are enough differences between the professions to cloud comparison. Economic conditions always influence employment terms and working parameters set forth in collective bargaining agreements. There are no million-dollar trading fees for orchestral musicians, and certainly no bonuses for musicians who perform on the equivalent of a football club such as Ajax or Chelsea (pay scales at Amsterdam, and for that matter London orchestras fall far short of the six-figure range: while the average professional footballers weekly salaries often are higher than annual salaries for orchestral musicians (with the exception of a few U.S.-based top-tier orchestral principals<sup>131</sup> whose salaries fall within

<sup>127</sup> Eurostat groups cultural expenditure (country-by-country) together with expenditure on recreation and culture, see, <http://ec.europa.eu/eurostat/web/culture/public-expenditure-on-culture-recreation-and-religion> whereas the U.S. federal funding for the National Endowment of the Arts (NEA) is roughly 1/40 of Germany, Europe’s leader in terms of arts spending, see, <https://www.alternet.org/culture/culturally-impooverished-us-nea-spends-140th-what-germany-doles-out-arts-capita>

<sup>128</sup> Conversation with cultural economist, Ruth Towse.

<sup>129</sup> *Follow the money* on orchestral finance provides detailed information concerning funding and subsidies in the orchestral sector in the two countries selected for comparison.

<sup>130</sup> Conversations with Hein Glaubitz, former Managing Director, Netherlands Radio Philharmonic (RFO) and Netherlands Radio Chamber Philharmonic (RKF) 2006-2008.

<sup>131</sup> Sources at Football Today present the statistic of Ajax year salaries starting at €400,000 per annum, see, <https://www.ajaxshowtime.com/tag/ajax-spelers-salarissen#>; Chelsea’s lowest paid player earns 25,000 pounds per week, one tenth of most of his colleagues, see, <https://www.sportsindus.com/football/chelsea-players-salaries/>. As facts and figures brought to the fore in the Rowe case (see, *On Rowe and race*) show, top-tier U.S. orchestra principals can earn a yearly salary of approximately \$300,000 in these orchestras.

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the €100,00-500,00 range).<sup>132</sup>

As mentioned above, generally the salaries of top athletes are considerably higher than those of top orchestral musicians. Nevertheless, there are comparable factors between the two professions in remuneration: top club athletes earn considerably more than minor league players.<sup>133</sup> Similarly, orchestral musicians in the U.S.'s top eight orchestras earn as much as four times more than orchestral professionals in regional symphonies.<sup>134</sup> Taking a closer look at the underbelly of professional sports, the high percentage of players in every sport who do not take home six-figure salaries share similarities with musicians. FIFPro reported that almost fifty percent of professional football players worldwide earned less than \$1,000 a month.<sup>135</sup> “It is much like any other talent-based career: actors, too, have extremely poor job security, and their careers can be cut short by injury or illness. Talented individuals are treated like pawns and are constantly competing with other talented people. The path of a professional footballer is one of high reward, but also high risk.”<sup>136</sup>

## 4.2 Across the ocean in the Netherlands

The comparison breaks down somewhat when taking pay differentials among state-subsidized orchestras in the Netherlands into consideration. Members of leading orchestras in Berlin and Vienna earn salaries commensurate with the top U.S. orchestras:<sup>137</sup> orchestral musicians in the Netherlands earn substantially less. “The explanation relates to the state and/or municipality’s consideration of the orchestra’s importance in the largest ‘national’ sense. For Vienna, its orchestras are its lifeblood. For Amsterdam, its great orchestra is just another cultural jewel, like its museums, opera etc., special, yes but not deserving of sizeable ‘extra’ support.”<sup>138</sup> The internationally renowned RCO occupies a unique status within the Dutch constellation of orchestras:

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<sup>132</sup> Compare the salary structure for the highest paid Dutch orchestra, the Royal Concertgebouw Orchestra (RCO) with an average pre-tax monthly *income of €5.040*, to Chelsea players’ salaries: <https://sillyseason.com/salary/chelsea-players-salaries-67985/>

<sup>133</sup> For fascinating insights into earnings at top (eredivisie) Dutch football clubs, see, Voetbalzone’s report, *Gemiddelde jaarsalaris van Eredivisie-voetballer stijgt met tweeduizend euro* (in Dutch), <https://www.voetbalzone.nl/doc.asp?uid=332101>

<sup>134</sup> See Top-Tier Orchestral Compensation. Available at: <https://adaptistration.com/2018/05/25/top-tier-musician-compensation-2018/>

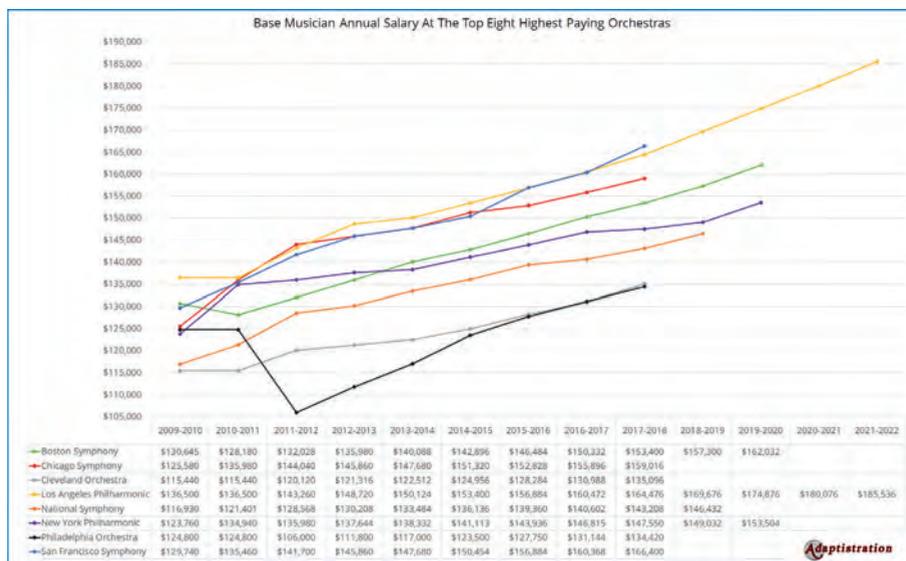
<sup>135</sup> Fifpro Global Employment Report 2016, available at: <https://fifpro.org/news/2016-global-employment-report-top-findings/en>

<sup>136</sup> Ben Cisneros in *Keep Calm and Talk Law* at: <http://www.keepcalmtalklaw.co.uk/fix-term-contracts-in-football-foul-play-or-fair-game/>

<sup>137</sup> The section or rank-and-file players in the Berlin Philharmonic earn a monthly base salary (extra holiday bonuses and many other financial perks including a 13<sup>th</sup> month payment) just under the equivalent of \$10,000 per month.

<sup>138</sup> Conversations with Harald Eggebrecht, Munich-based musicologist, and critic.

its musician members earn approximately 20% more than colleagues in the remaining subsidized (BIS) orchestras.<sup>139</sup> To compare orchestral salaries in the Netherlands to U.S. orchestral salaries becomes even more complicated when taking into account the costs of different taxation schemes, cost of living indices and earning potential. As ‘semi-civil servants’ whose musical activities are state subsidized, Dutch orchestral salaries fall under governmental salary controls. To quote a section player in the RCO: “I have been a member (section) for about twenty years. Before tax, my monthly income is €5.040 (U.S. \$6,000). Of this, almost half goes to taxes. Extras are €1.000/year (before tax) for recordings and radio/tv recordings, 8% ‘holiday money’ (of course that is taxed as well) per diem when on tour plus an occasional extra compensation/bonus.”<sup>140</sup> Ballpark analysis: RCO members earn less than half of their major league U.S. orchestral counterparts.



There are no winners in the ‘champions league’ of orchestras, just survivors who hope that the upcoming season will lead to solvency and a solid future without the threats of the ‘dark theater.’ Although some media attention has been paid to lists of the world

<sup>139</sup> The principal subsidized orchestras in the Netherlands are granted a ‘basic infrastructure subsidy’ (BIS). To compare salary rates, see *Epilogue: Appendix 3*.

<sup>140</sup> See, page 44 in the RCO’s CBA 2016-2017, corroborates the musician’s quote. As quoted on May 4, 2018, available at *Slipped Disc*, <https://slippedisc.com/2018/05/what-a-player-earns-in-the-concertgebouw/>

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top ten orchestras<sup>141</sup> and most of the orchestras on that list count amongst the best-paid orchestras worldwide, there is no direct connection between orchestral fame and high remuneration for several of the top groups. For example, members of the RCO ranked #2 on the Gramophone list are paid almost 50% less than the #9 ranked Boston Symphony Orchestra (BSO).<sup>142</sup> In Germany, the world's leading purveyor of orchestras, ensembles are ranked according to 'cultural importance and exposure': although salaries are of great importance, status is of equal value.<sup>143</sup>

### 4.3 Justification for high compensation packages for athletes and musicians

While high salaries in professional sports are rarely questioned, those who are directly concerned with nonprofit financing (in the U.S.) have questioned how to justify compensation packages for orchestral musicians. Several answers spring to mind: sports events attract larger audiences, and sport teams' function on a star system kept in place and encouraged by media, and exponentially expanded by social media in the last decades. Sports teams are extraordinary businesses that earn their keep through multiple spinoffs such as multimedia and marketing package deals. Orchestras cater to a smaller audience and are too often typecast as elitist.<sup>144</sup> Musicians' salaries at top-tier orchestras are earned by a select few top performers who work out with the same intensity as athletes and have spent not only hours to prove themselves but often have spent small fortunes to purchase the priceless tools of their trade.

*"Musicians work out with the intensity of athletes, but this is unseen, unheard labor. Teams at the top of the ladder are neither government subsidized nor nonprofits by in large, so we don't question salaries of team members: our sports stars both as individuals and team members are considered to be worth fortunes while classical music performers are sadly expendable."<sup>145</sup>*

#### 4.3.1 Managerial productivity

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<sup>141</sup> A 2015 selection chosen by a small list of music journalists excluding North American critics offered a not-so-surprising Eurocentric list of the 'toppers' whereas *Gramophone* magazine chose the Hong Kong Philharmonic as the best of all orchestras in 2019. See, <https://bachtrack.com/worlds-best-orchestra-best-conductor-critics-choice-september-2015>

<sup>142</sup> RCO base salary €4.018,39 – €5.014,10 per month, for rank and file see, p. 44, AR Orkestleden 1 januari 2016 t/m 31 december 2017. The highest ranked U.S. orchestra on the list, the #9 ranked Boston Symphony Orchestra paid a base yearly salary of \$142, 896 or almost \$12,000 per month, at least double the RCO salary without considering benefits, see International Conference of Symphony and Opera Musicians, (ICSOM) 2014 statistics at: <https://icsom.org/orchestras/index.php?orchID=4&g=1>.

<sup>143</sup> See, Dr. Gerald Mertens for additional information concerning the 133 German orchestras. Symphony and Chamber Orchestras at: [http://www.miz.org/musical-life-in-.../06\\_Symphony\\_and\\_Chamber\\_Orchestras.pdf](http://www.miz.org/musical-life-in-.../06_Symphony_and_Chamber_Orchestras.pdf)

<sup>144</sup> Culture debates will be briefly touched upon in *Requiem for an orchestra*.

<sup>145</sup> Conversations with Rick Finlay, jazz musician (percussionist) and vice-chair, Executive Committee, The Musicians Union (MU) U.K.

Other comparisons between sports pros and orchestral musicians focus on similarities between the two in performance stress and career longevity far beyond the call of this research. Managerial productivity in sports (think of the revolving door metaphor applied to football coaches who are easily removed after a team goes through a disappointing season) are not as easy to compare to maestros in terms of career longevity. Most contemporary music directors spend comparatively little time, on average between 6-12 weeks per season with their 'home' orchestras thus their measure of success cannot be monitored by keeping score with regard to the comparatively low number of weeks spent with the 'home front.'

#### **4.3.2 *Impresarios and agents***

The Dutch artist and economist Hans Abbing pointed to parallels between the role of sports agents and music impresarios as gatekeepers who exercise control over their respective fields.<sup>146</sup> Not only is it impossible to test the veracity of the comparison, but it is also paramount to point out that the role of impresarios is negligible when the discussion centers on orchestral musicians. An area of comparison that does deserve further research is the sizable differences between payments and bonuses for the highest paid members of the 'team' and the rank-and-file players who perform on the same team. This issue is central in the analysis of the Rowe (2018) case which informs *Of Rowe and race*.

#### **4.3.3 *Global business in sports and music***

Sports leagues have developed into mass-market businesses holding substantial market monopolies and lucrative links to media/internet dissemination akin to the U.S. top orchestras with multimillion budgets and substantial media contracts. As one of the world's most influential art collectors commented concerning global tendencies in cultural arena, "art in today's society has risen to become a new dominant culture, anchored like sport and showbiz in the system of international companies and the mass media."<sup>147</sup> By extension, if orchestras can become 'players' in the field and compete with multimedia offerings, they have a heightened chance for survival. Endeavors by the Los Angeles Philharmonic that embrace multimedia as well as the orchestra's

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<sup>146</sup> See for further elucidation of this comparison, Hans Abbing. "The Autonomous Artist Still Rules the World of Culture" 1996 pp. 55-66.

<sup>147</sup> See, Harald Falckenberg. "The art world we deserve?" *Financial Times* April 11, 2014. Available at: <https://www.ft.com/content/498f5cca-bfce-11e3-b6e8-00144feabdc0109>

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considerable social justice projects,<sup>148</sup> and the Berlin Philharmonic's Digital Concert Hall<sup>149</sup> prove that some orchestras are investing in global coverage.

In terms of replacing individual players, while the market in both competitive sports and orchestral music is glutted with players eager to join the 'big leagues,' the highly competitive nature of the top teams and orchestras, and the selection systems that lead to a coveted position make it difficult to gain entry. The specificity of a career in sports entails short-term careers based on the physical demands of the sport; careers of short duration mean that athletes need to maximize their earning potential over a relatively short time period. Orchestral careers for the most part span longer time periods depending on the instrument played and, as *Greener Pastures*, the *movement* on aging points out, a performer's general condition and proclivity to certain performance-related ailments is directly linked to career span.

By and large, team employment arrangements and the legal status of athletes is somewhat similar to that of orchestral musicians. Athletes most often provide their services to a team while orchestral musicians provide their services to the orchestra. Yet, beyond this simple statement lies the different employment status accorded to many of the freelance substitutes in both fields. Interestingly, the U.K. courts characterized a professional athlete's occupation in a comparative association with an actor/actress' work as "peculiar," and, by and large, within a field in which "success entirely depends on pleasing the public and constantly being before the public."<sup>150</sup> There are differences between collective bargaining agreements (CLAs in the U.K.; CBAs in the U.S.)<sup>151</sup> that regulate the terms and conditions of contracted sports from orchestral musicians' CBAs, taking into consideration the fact that a musician will more often than not become a 'lifer' in the orchestral workplace in contrast to the short-lived careers of professional sports practitioners. CBA clauses dealing with revalidation insurance in case of prolonged injury, reintegration into other professions and topics such as transfer rules and prohibitions on match-fixing do not play a role in the orchestral world. Although several of the aforementioned subjects are of no relevance to musicians, matters related to 'the healthy musician' and injury prevention are becoming commonplace issues for human resource discussions and contractual consideration at the orchestra.

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<sup>148</sup> For more information on Maestro Gustavo Dudamel's El Sistema-inspired projects surf to: <https://www.laphil.com/about-2/gustavo-dudamel-2/>

<sup>149</sup> See, [https://www.digitalconcerthall.com/en/home?utm\\_source=www.berliner-philharmoniker.de&utm\\_medium=website&utm\\_campaign=dropnav&a=bph\\_webseite&c=true](https://www.digitalconcerthall.com/en/home?utm_source=www.berliner-philharmoniker.de&utm_medium=website&utm_campaign=dropnav&a=bph_webseite&c=true)

<sup>150</sup> *Herbert Clayton and Jack Waller Ltd v Oliver* [1930] AC 209.

<sup>151</sup> The Dutch equivalent to a Collective Bargaining Agreement (CBA) is the Collectieve arbeidsovereenkomst (CAO).

## 4.4 Special employment relationships?

Special employment relationships, a major theme in fixed-term sports contracts in the decades following the enactment of the ‘fixed term directive’ Directive 1999/70/EC<sup>152</sup> lead to speculation concerning the parallels between the professional sports application and orchestral ‘fixed term’ contracts discussed with regard to the *Pintus* case in a subsequent *movement*. The intention here is not to kickstart an in-depth analysis of the prominent case: *Heinz Müller v 1. FSV Mainz 05*,<sup>153</sup> but instead to observe the importance of consideration of ‘special circumstances’ inherent in the professions under scrutiny. In *Müller*, the labor court at first instance examined the employment relationship between a top-tier (Bundesliga) club and a professional football player finding that there are many specific features that lead to a characterization of special status.

### 4.4.1 Müller facts in brief

The 36-year-old goalie Heinz Müller was employed by the Bundesliga team Mainz 05 on a fixed-term contract from July 2009 to June 2012. His contract was extended by two years with an option to renew for an additional year contract under the condition that the goalie would play 23 times with the club’s first-level team in 2013-2014. Demoted to the reserve bench in December 2013, Müller never played as a member of the first team in the years to follow. He sued the team for loss of salary and loss of the extra non-accrued benefits, monies that he could have earned had he remained on the A-list at Mainz 05’s top team. The crux of the dispute between Müller and his employer, FSV Mainz 05 was whether his fixed-term employment contracts, agreements that are the rule rather than the exception in professional football teams breached German legislation influenced by the aforementioned EU directive.<sup>154</sup> According to the claims mounted by Müller’s legal team, the goalie was never provided with the obligatory objective justification for demotion.<sup>155</sup>

At first instance at the Mainz Labor Court, Müller was granted an indefinite contract.<sup>156</sup> The court clarified that although all employment relationships could be construed

<sup>152</sup> Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175/43.

<sup>153</sup> At first instance at the Mainz Labor Court, ArbG Mainz, AZ: 3 CA 1197/14, 13.03.2015; Final judgment at the German Federal Labor Court *Heinz Müller v 1. FSV Mainz 05* 7 AZR 312/16 (16 January 2018).

<sup>154</sup> *Ibid.*,

<sup>155</sup> See, TzBfG 2000, Section 24 (the German Part-Time Work and Fixed-Term Employment Act 2000).

<sup>156</sup> *Müller v, 1, FSV Mainz 05* 3 Ca 1197/14.

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as ‘special,’ professional sport transcended the level of ‘normal’ employment. “It therefore must be a specificity, the nature of which transcends in an exceptional way the particularities inherent to every (normal) employment relationship, wherein also industry specific features have to be considered.”<sup>157</sup> One of the specific features applicable to Müller was the high degree of uncertainty concerning the amount of time a player could pursue his career successfully at the club. If a player could not meet the high expectations of his coach, the team and the wider circle of supporters, the economic consequences were considerable. Uncertainty with regard to an individual players’ performance has always been an inseparable element of not only football but sports in general and for the sake of comparison, for orchestral musicians as well. To digress for a moment down the musical track, it is entirely possible for a superlative musician to win an audition and gain a coveted seat in an orchestra only to be dismissed within the probationary period, customarily between one-three years.

*“That’s why orchestras will only offer tenure after a trial period and strict regulations to vet a player before the permanent contract is signed. It is really in everyone’s best interest to find a match not only in terms of virtuosity but more importantly, to find a real team player to lend and also to inspire.”<sup>158</sup>*

Back to Mainz 05: an important ‘missing consideration’ that ultimately swayed the decision in another direction on appeal lay within a discussion of the expectations of the club and its fans and financial supporters. Top-tier sports practitioners must perform consistently at the highest level. If a player cannot meet the high-level demands both mentally and physically ‘on the pitch,’ this shortcoming could lead to discontent on the part of stakeholders and the public-at-large.

Following the Mainz Labor Court decision stating that the team had limited Müller’s contract unlawfully, both the district Rhineland-Palatinate State Labor Court and the German Federal Labor Court overturned the initial ruling confirming that the special nature of performance-related work in professional sports mandated fixed term contracts. Among the many factors that passed judicial scrutiny, age-related physical decline was construed as a disproportionately important factor for top sports professionals. The potential and competence of a player to perform at the highest level could not be disregarded as a specific justification for a reliance on fixed-term contracts.<sup>159</sup> Another argument that proved successful on appeal was that if teams

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<sup>157</sup> Ibid., see (in German) *Eigenart der Arbeitsleistung*.

<sup>158</sup> Conversations with Valerie Heywood, principal viola Buffalo Philharmonic 1991-2017.

<sup>159</sup> See, *Heinz Muller v 1. FSV Mainz 05* 7 AZR 312/16 (16 January 2018).

provided players with indefinite contracts this practice would hinder the chances of young talent for career advancement, thus effectuating a ‘freeze’ in terms of the relevant employment market.

#### **4.4.2 Is there competition between orchestral teams?**

Aside from media rankings of world orchestras that lead to enhanced revenue in the form of tours and marketing deals for the top-ranked orchestras, there is no such thing as direct confrontational competition between musical entities. “Well, we do have reputational competition which does garner business opportunity but whether we can really compare that to the economic situation of professional league sports is certainly debatable.”<sup>160</sup> Exception could be made in Europe where state subsidies still dominate the financing for orchestras. “Orchestras compete for funds from the same subsidy pool as other orchestras. Especially at times of economic crisis we become competitors, this does not create a healthy situation in terms of solidarity.”<sup>161</sup> Perhaps of more benefit to a comparison of sports and music at the professional level would be a consideration of cooperation between different clubs aka orchestras.

*“In a professional sports league, a club competes against other clubs in some areas—for example, in the labour market for players’ service—but must collude with those competitors within the structure of a league on other commercial aspects of the competition such as the negotiation and sale of media rights, league sponsorship or advertising arrangements.”<sup>162</sup>*

### **4.5 One last sports-music related stopover with relevance to collective bargaining**

In the U.S., multiple employer bargaining encompasses employment situations in which several (a minimum of two) independent employers collectively bargain or negotiate jointly, through an agent, committee, or association, with one or more labor organizations who represent all of the employees of the ‘multiple’ employers regarding the mandatory subjects of collective bargaining. The pages devoted to the *FNV KIEM* case in the movement entitled *En route to the FNV KIEM case: competition and labor law* describe the legal possibilities for multiple-employer bargaining units to negotiate on behalf of orchestral musicians as a broad category that includes freelance substitute players in the Netherlands.

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<sup>160</sup> Conversation with David Bazen, Director of Business Affairs and Media, Royal Concertgebouw Orchestra (RCO).

<sup>161</sup> Conversations with Kees Dijk, Manager Netherlands Radio Philharmonic Orchestra (RFO); Netherlands Radio Chamber Philharmonic (RKF) 2008-2013.

<sup>162</sup> Leanne O’Leary. *Employment and Labour Relations Law in the Premier League, NBA and International Rugby Union* 2017 p. 10.

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Before considering if the non-statutory exemption could be reinterpreted to apply to collective bargaining in the orchestral field, a definition of the term will be followed by a discussion of a leading U.S. precedent, *Brown*.<sup>163</sup> The paragraphs to follow attempt to scrutinize and reassess a particular labor exemption, the non-statutory exemption that is commonplace in the U.S. when multi-employer bargaining takes place. Sports leagues such as Major League Baseball Players Association (MLB), the union that represents major league baseball players, and the National Football League (NFL) the bargaining units engaging in collective labor agreements usually do not reach beyond an organization or company's employees/staff members. Rarely do bargaining units embrace multi-employer bargaining, which involves simultaneous bargaining actions with multiple employers.

The collective bargaining agreements resulting from multi-employer bargaining arrangements are binding on all employees. It is important to note that there are in fact two labor exemptions in U.S. law. Firstly, the statutory labor exemption permits workers to join unions and organize with the goal to minimize competition regarding the terms and conditions of their work. Secondly, the non-statutory labor exemption that to paraphrase Kenneth W. Starr,<sup>164</sup> sweeps antitrust laws off the books applies to labor relations in professional sports, if certain specific conditions have been met. Collective bargaining in good faith must take place and cover judicially approved mandatory subjects<sup>165</sup> such as hours, wages and other central terms and conditions of employment. If these conditions were bargained for, antitrust scrutiny is held at bay. Implicit in the judicial recognition of this exemption is that competition must be restrained to enable groups of employees to bargain for the benefit of the entire group even if their agreements are putatively restrictive to competition. As an antidote to antitrust, the non-statutory labor exemption entered the sports arena thanks to the judiciary: the brightest star in that constellation was *Brown*.

U.S. courts had long struggled to delineate the boundaries of the non-statutory labor exemption as it relates to the sports sector where leagues have been embroiled in longstanding litigation related to multi-employer bargaining units. *Brown* involved

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<sup>163</sup> *Brown vs. Pro Football, Inc.*, 116 S. Ct. 2116 (1996).

<sup>164</sup> Kenneth W. Starr is a former United States Federal Court of Appeals Judge, U.S. Solicitor General, and Independent Counsel. Famous, to some infamous, for his investigations of President Clinton, including Whitewater and impeachment investigations.

<sup>165</sup> For a pre-*Brown* judicially sanctioned lineup of mandatory subjects see, *Amalgamated Meat Cutters and Butchers Workmen Local 189 vs. Jewel Tea Co.*, 381 U.S. 676 (1965) at 689-690.

groups of rookies (recruits) taxi squad (TS)<sup>166</sup> professional football players who collectively rejected a proposal by the powerful NFL management to cap their salaries. The NFL team owners proposed to cap salaries at \$1,000 a week, a decrease that was quite significant: approximately 75% for most of the players. Despite for protests and threatened legal actions on the part of the rookies, the NFL imposed the salary cap. The rookies sued claiming that the NFL was conspiring to restrain trade in violation of federal antitrust law.

In a country where football is lifeblood, it came as no surprise to legal pundits that the Supreme Court of the United States (SCOTUS) granted certiorari. The majority holding went to the core of national non-statutory exemptions. For the majority, Justice Breyer opined:

*“[t]he non-statutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law could never be achieved if this effect on business competition were held a violation of the antitrust laws.”*<sup>167</sup>

Citing precedents, SCOTUS underlined the relevance of the non-statutory antitrust exemption that is imperative, ‘that applies where needed to make the collective bargaining process work.’<sup>168</sup> Beyond the playing fields, multi-employer bargaining was deemed an efficient, effective, and above all legal means to level the playing field in terms of work conditions and keep what the SCOTUS termed an “industrial peace.”<sup>169</sup> Repercussions from *Brown* were felt in other areas of activity in which employers that could be construed as competitors offered common contract terms to their employees. In *Brown*, a relatively small group of employers, who in most other respects are competitors, collaborated successfully to offer parallel contract terms to their employees.

Stepping out on a comparative limb, this collective approach to offer employees common contract terms bears a similarity to the Dutch system of orchestral bargaining where musician-employees state subsidized orchestras are contracted under comparable

<sup>166</sup> In the complex vernacular of American football at the NFL, from taxi squads are: “ten- man squads are where you would place players who are not ready to play on the gridiron. These guys need more time to develop and adjust to the NFL but can only be held for three seasons. What they gain is valuable practice time with the active roster that helps mold or break them.” Available at: <https://dynastyfootballfactory.com/taxi-squads-and-how-they-improve-your-league/>

<sup>167</sup> See, *Brown*, *supra* at fn. 163 at 237.

<sup>168</sup> See, e. g., *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 622 (1975).

<sup>169</sup> See, *National Labor Relations Board vs. Truck Drivers Local Union Nr. 449*, 353 U.S. 87 (1957) and *Charles D. Bonanno Linen Service vs. National Labor Relations Board*, 454 U.S. 404 (1982) at 412.

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terms. In the Netherlands, collective bargaining for most orchestras<sup>170</sup> takes place between social partners (unions) and the *Vereniging van Nederlandse Orkesten* (Association of Dutch Orchestras, VvNO).<sup>171</sup> With regard to their U.S.-colleagues, collective bargaining for orchestras is individualized and painstaking “none of us seem to be created equal when it comes to the bargaining table, although rest assured, the top orchestras are all acutely aware of what goes on elsewhere in the country especially when it comes to salaries and benefits.”<sup>172</sup> Taking into consideration the distinct nature of orchestral financing in the U.S. that finds one orchestra in solvency and another in financial peril, a consideration of a more collaborative, unified approach to collective bargaining that mirrors the Dutch approach could be beneficial. “Personally, from experience at the bargaining table, this idea seems like another academic exercise, we had several of those at the San Francisco Symphony with consensus-building experiments back in the early years of 2000. I remain skeptical about applying CBAs to more than one orchestra at a time.”<sup>173</sup> The conclusion to a section that sought to underscore connections between professional sports and professional music at the orchestra drew attention to multiple-party bargaining, a topic that will return in concluding *movements*. The FAQs to follow describe ‘how we play,’ before subsequent *movements* explore ‘how they pay.’ But first, ‘what’s in a name?’

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<sup>170</sup> The CAOs for the last remaining Dutch radio orchestras, the Radio Philharmonic Orchestra (RFO) and the Metropole Orchestra are bargained separately from the other subsidized orchestras reflecting their different source of financing, a subject that will be discussed at length in the *movement, Requiem for a radio orchestra*.

<sup>171</sup> For more information, see the VvNO website at: <https://vvno.nl/english.html>

<sup>172</sup> Conversations with Jonathan Sherwin, Cleveland Orchestra contrabassoonist, and Chair of the Cleveland Orchestra Committee responsible for negotiating on behalf of the musicians.

<sup>173</sup> Conversations with Steven Braunstein, contrabassoonist San Francisco Symphony, active member negotiating committee.