U.S. Symphony Orchestra Bylaws: Policy Anomalies And Trends

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U.S. SYMPHONY ORCHESTRA BYLAWS:
POLICY ANOMALIES AND TRENDS

by

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ABSTRACT

Bylaws serve as the skeleton of any nonprofit organization's administrative culture. They are the laws and rules that govern the internal affairs of an organization. (Pickett 2000) Since the primary function of bylaws is to support the effective management of operations, the examination of bylaws content is particularly relevant when looking for evidence of innovative adaptations to organizational change. As students of arts administration, the focus of the researcher's investigation centered on cultural organizations; symphony orchestras in this instance. Symphony orchestras, like other cultural organizations, must adapt to survive internal and external change. The reason for choosing to examine bylaws content was to look for business adaptations being made at the core of nonprofit business operations, where the framework for decision-making by the Board of Directors, Officers and administrators resides.

There were two key research questions driving this investigation of symphony orchestra bylaws content. The first was; what governance policies are currently emerging in the symphony orchestra industry? The second was; what conditions prompted the emergence of these policy anomalies? The research design included a review of the literature relevant to the development of bylaws as used by U.S. symphony orchestras; qualitative and quantitative document analysis of bylaws obtained from a select group of participating organizations; and an opinion survey of several orchestra administrators whose organizations were found to contain unusual bylaws content.

Contrary to the literature, the content and structure of bylaws that were examined varied a great deal. Policy anomalies were discovered as hypothesized, and some of these unusual policies offer solutions to current governance issues that other arts organizations may find beneficial as well. Included tables illustrate provision topics and their frequency of occurrence.

Several recommendations for further study are indicated, and we conclude that bylaws are usually an underutilized, valuable and occasionally innovative tool for effective governance.

for Paul

ACKNOWLEDGMENTS

The topic of bylaws has received little attention in the past. There are a few rare and valuable publications available to those researching governance relative to arts organizations and the work of their authors is much appreciated. I hope that the addition of this research effort, which examines the actual content of bylaws documents in current use, will broaden the understanding of governance practices in cultural administration. I would like to thank Dr. J. Pherigo of the University of Central Florida in particular for his unwavering support of my research efforts. Without his enthusiasm, wisdom and recognition of the potential value that this small study may hold, the research would likely not have developed. I would also like to acknowledge and thank all of the participating organizations for sharing their governance documents with me for the purpose of this study. Your extraordinary support and cooperation were inspiring and indicated a genuine curiosity and interest in orchestral governance practice. I do hope that this research serves you well.

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LIST OF ACRONYMS/ABBREVIATIONS

ASOL	American Symphony Orchestra League
Board	Board of Directors
Board Members	Members of the Board of Directors
Chairman	Chairman of the Board or Directors
Director	Member of the Board of Directors or Board of Trustees
E.D.	Executive Director
M.D.	Musical Director
IRB	Institutional Review Board
NEA	National Endowment for the Arts
UCF	University of Central Florida

CHAPTER ONE: INTRODUCTION

Admittedly, bylaws do not make for exciting reading. In fact, they are often ignored by the people they are written for: those who govern organizations. Yet, one should have a care about the content and utilization of his or her organization's bylaws because these documents contain the policies that were drafted to guide the actions and decisions of the membership. Since the primary function of bylaws is to allow for effective management, the examination of current bylaws content is particularly relevant when one is looking for examples of governance policies that work effectively in current situations.

Symphony orchestra bylaws became an area of interest for this researcher when, during a performing arts management class, the executive director of a local orchestra explained how poor governance had been at the root of a local orchestra's bankruptcy a few years earlier. In its place, a new orchestra was formed which addressed the problematic governance issues of its predecessor through the institutionalization of a new and innovative governance model. Since its rebirth, the new orchestra has enjoyed enormous growth and success, both as a business and as a cultural resource for the community. A unique approach to governance, embodied in the organizations bylaws, is credited with a great deal of these successes.

Bylaws are, in essence, the Board of Director's toolbox, and the bylaws are the tools, that give members the power and freedom to take action within the legal boundaries of their established corporate structure. Through these policies, successful organizations are able to adapt to internal and external environmental changes and survive. To borrow from Mulcahy, it is a matter of *Cultural Darwinism* for arts organizations; and policies, being the sum of participant activities, are the vehicles through which adaptation occurs (Mulcahy, 2003).

As a student of arts administration, my focus as a researcher centers on cultural organizations, and symphony orchestras in this instance. Symphony Orchestras, like other nonprofit organizations, traditionally have a constant flow of members moving onto and off of their Boards of Directors or Trustees. Hence, bylaws serve most noticeably as stabilizing agents. As newcomers are brought into the fold they are acquainted with the required organizational rules laid out in the bylaws. Particularly in the arts, where creativity may be the greatest asset, bylaws offer not only an operational framework but a valuable mooring that can anchor the actions of the Board while more subjective or heated decisions regarding service, performance and aesthetics issues are made. Internal and external environmental factors are always changing, and are challenging organizations to do the same.

Bylaws may be the stabilizing rules of the house, but they too need to adapt and change periodically. Though bylaws have a reputation for being difficult to amend and a nuisance to review, they are far easier to alter than Articles of Incorporation, which are filed with the state. Some amendments, such as allowing for the use of teleconferencing, are practical and fairly painless policy changes that organizations are expected to make. But do highly unusual policies or provisions exist in bylaws? If so, they probably reflect emerging industry issues or take a new tack on long unresolved problems. Wouldn't the authors of innovative provisions have valuable insights to offer other administrators and stakeholders dealing with similar issues? It seems reasonable to expect that innovative and original policies must exist, especially in the creative industries. The researchers hypothesized that some current symphony orchestra bylaws would contain provisions that are anomalous. The researchers also speculated that the nature of these highly unusual policies must have developed in response to socio-economic and political changes that challenged the success of the organization in some manner. The null hypothesis stated that no anomalies would be found as the literature suggests. If unique policies are present the researchers are interested in *why* the policies emerged. In testing the researcher’s theory, two key research questions guided the investigation of symphony orchestra bylaws content. First, the researchers sought to find out if there are any policy anomalies that exist in the bylaws of U.S. symphony orchestras. Secondly, if anomalies do exist, what did their content indicate about current industry problems and potential solutions? It was hoped that the examination of existing policies would yield information that other organizations might consider beneficial in governing themselves more effectively.

The method of inquiry consisted of three parts; a review of the literature, the quantitative analysis of bylaws policies, and the gathering of qualitative data from key administrators. First, a review of the literature was conducted to gain knowledge not only about the historic development of bylaws used by U.S. corporate entities, but also about bylaws use specific to symphony orchestras. The search for empirical research related to bylaws in cultural organizations yielded few results. As cultural administration is a fairly new and developing field, the lack of reporting was not a surprise. Traditionally, American nonprofit business literature mentions bylaws but concentrates its discussions on advice for board member relations rather than the functionality of the policies. Cultural arts literature provides advice on governance issues, and some authors provide guide books for the drafting of bylaws (Mancuso, 2004; Stephens, 2000; Tesdahl, 2003; O. Williams, 1999). However, most materials offer limited, rote sample forms and advise readers to customize policies according to their organizational mission. The materials do not provide information about policy issues inherent within this or other arts industries.

Parliamentarian J. Stephens and attorney A. Mancuso have published useful books on the writing and amending of nonprofit bylaws (Mancuso, 2004; Stephens, 2000). The material offers advice and fosters the understanding of bylaws' role in a corporate environment. As noted by Lester Salamon, much has been written advising boards on how to act, but there is scant empirical information available about governance practices in the field (Lehman, 1995; Saidel, 2002; Salamon & Geller, 2005). Johns Hopkins' Listening Post Project offers useful survey data on current governance policy practices for a variety of nonprofits, forty-five percent of which were cultural institutions. However, no symphony orchestras participated in that project. One secondary policy study on American symphony orchestras, Policies & Procedures of Orchestra Governing Boards, was conducted by the American Symphony Orchestra League (ASOL) in 1991 (League, 1991). This study, based on survey data collected from executive directors of symphony orchestras, offers a good deal of statistical data on orchestra board governance practices (Salamon & Geller, 2005). The data was collected from the executive directors of organizations and does not take the perspectives of other organizational members into account. This is a shortcoming of much arts organization research, due mainly to the limited access to other participant groups. Two reports lending a rare view of practitioner's and musician's perspectives were the Andrew Mellon Foundation's 1998 Report on The Orchestra Forum and the recent white paper from the Association of Performing Arts Presenters: U.S. Classical Music Leadership Think Tank 2005 (Massey, 2005; Wichterman, 1998). Lastly, case studies of orchestra bankruptcies were examined during the literature review to inform the evaluation of policy content (Beene, 1988; Mendelson, 1988; Olson *et al.*, 2005; Phills Jr., 2004; Santoro, 1996; O. Williams, 1999). This information also influenced the bylaws analysis.

Following the literature review the collection of bylaws documents was analyzed. The bylaw documents were provided by a select group of symphony orchestras. Details of the sampling process are addressed in the methodology section of this paper. Using federally reported revenue data and the researcher's screening criteria, a group of comparable symphony orchestras was selected and invited to participate in the study. These organizations were asked to provide a copy of their current set of bylaws for examination. The obtained documents were read and their content was categorized and coded for quantitative analysis. Contents were read several times to glean data, record impressions and note unusual language or practices. Analysis of the quantitative data yielded information about provision topics and their frequency, while the qualitative review of bylaw content allowed the truly unusual policies to emerge. Several anomalies were found, and the administrators of these bylaw provisions were contacted for interviews. Representing their respective organizations, participants were asked questions concerning the nature and origins of the unusual policies found. Select quotes from their open-ended responses are anonymously included in this paper.

Our investigation found policy anomalies within symphony orchestra bylaws. As the literature had suggested that bylaws structure and content is essentially the same from one organization to the next, it was surprising to find not only variety in bylaws structure but a wild range of topical content, language and tone in these documents. This was an exciting discovery that supported the first part of the researcher's hypothesis. It was exciting not only because the creative energy present in the arts seems to extend to the core of the organization, but also because a concern existed that the study might provide evidence of administrators and board members not managing their business affairs in a professional manner. Since almost all governance literature is normative there was no way of knowing what governance methods were or were not actually being practiced in the field. Fortunately, the group of documents exhibited due care in their drafting, so doubts about the professionalism of the industry's governance practices were put to rest. With regard to identifying current policy issues, several major areas of concern emerged. Not all of these issues are new to the industry, but many should be of interest to cultural organizations.

CHAPTER TWO: LITERATURE REVIEW

Not all orchestras are alike. Since the New York Philharmonic Society was established in 1842, a wide variety of American symphony orchestras has been established. According to the American Symphony Orchestra League, there are now approximately 1800 symphony, chamber, collegiate and youth orchestras across America. During the 2003-2004 concert season, some 635,000 musicians, conductors, staff members, board members and volunteers delivered 36,000 concerts to nearly 28 million listeners in the United States. Symphony orchestras are cultural organizations that affect the lives of a large portion of the U.S. population and by extension affect the nation’s economy. Many of these organizations have thrived over the past 164 years, and many have failed.

Like most U.S. cultural organizations, orchestras are usually recognized as 501(c)(3) nonprofit organizations primarily supported by charitable donations. As such, they have been especially challenged by rapid changes in America’s socio-economic environment over the past twenty years. Technology, increasing cultural diversity and the financial and political policy arenas are a few of the environmental elements that are ever-shifting. In navigating through challenging situations, the policy framework that supports an organization’s administration can buffer the impact of those changing forces on stakeholders. For the nonprofit entity, this supporting policy framework exists as a set of bylaws. Usually set down at the time of incorporation, bylaws are the rules by which the board of directors governs. And, as policies, the bylaws are meant to be a living document amended as necessary in order to allow an organization to operate efficiently and effectively in the service of the public (Herman & and, 2005; Hirzy, 1997; Leifer & Glomb, 1997; Mancuso, 2004; Robinson, 2001; Roche &

Whitehead, 2005; Salamon & Geller, 2005; Tesdahl, 2003; Tschirhart, 1996; O. Williams, 1999; Woehike, 2004; Wolf, 1999).

The purpose of this literature review is to establish a different kind of framework; one that informs the analysis of arts organization bylaws within the context of nonprofit cultural organizations. Drawn from a variety of disciplines, this review is intended to provide a bridge between the history of bylaw origins and the institutionalization of bylaws in American symphony orchestra governance.

The search for empirical research related to bylaws in cultural organizations yielded few results. Parliamentarian J. Stephens and attorney A Mancuso have published useful instruction books on the writing and amending of bylaws (Mancuso, 2004; Stephens, 2000). Their material offers advice and fosters the understanding of bylaws' role in a corporate environment. As noted by Lester Salamon, much has been written advising boards on how to act, but "precious little empirical information about what they actually *are* doing" has been written (2005, p.1). This sentiment is echoed by Murray who puts it plainly, "The study of the process of nonprofit governance is of great importance but suffers at present from the wishful thinking of normative writers and the general lack of knowledge about what really goes on." (2001, p.11). The Johns Hopkins' *Listening Post Project* study sought to gain an understanding of current governance policy practices for a variety of nonprofits, forty-five percent of which were cultural institutions. However, no symphony orchestras participated in that project. One policy study on American symphony orchestras, *Policies & Procedures of Orchestra Governing Boards,* was conducted by the American Symphony Orchestra League (ASOL) in 1991 (League, 1991). This information provided valuable material for use in the bylaws analysis (Salamon & Geller, 2005).

Aside from the ASOL survey, which gathered secondary resource material about the content of bylaws through the lens of orchestra executive directors and the few case studies that will be reviewed later in this paper, all of the remaining literature on the subject of bylaws was gleaned from a wide variety of historical literature and normative theory on governance. With no historical framework specific to the orchestra industry's policy development, and only one fifteen-year-old empirical research study to inform the bylaws analysis, the lack of attention to this subject called for the development of a knowledge base on which further studies might build. That is not to claim that governance is not addressed in the literature. There are abundant resources for the study of nonprofit governance, including many texts that address most board of trustee activities and responsibilities. The most concise text was offered by J. Steven Ott, whose books provided excellent and well explained material on various aspects of nonprofit governance (Ott, 2001b, 2001c).

Bylaws evolved under a variety of social, political, cultural and economic conditions over the centuries. In reading about the various characteristics of bylaws, one is struck by the flexibility, power and rich history of these documents. A multi-disciplinary approach to constructing a knowledge framework drew upon corporate legal history, nonprofit law, public administration governance, orchestra history, performing arts management, and cultural administration literature. Elements of these various disciplines, relevant to bylaws, were intended to encompass the artistic, business, and public service dimensions of bylaws function in orchestral administration. Moreover, by not limiting the examination to the internal environment of the organizational culture and by adopting an open system perspective, it became possible to offer a view of these internal policies through a broad cultural lens. Because of the rapidly changing global community, failing to place bylaws analysis within a broad cultural context would lead to limited and short-sighted evaluations.

Traditionally, American nonprofit business literature mentions bylaws but concentrates its discussions on board member relations rather than the functionality of the policies. Cultural arts literature provides advice on governance issues, and some authors provide guide books for the drafting of bylaws (Mancuso, 2004; Stephens, 2000; Tesdahl, 2003; O. Williams, 1999). However, most materials offer limited, rote sample forms and advise readers to customize policies according to their organizational mission. They do not tell us what policies work or which policy issues are inherent within a field. By examining policies in active use, the researchers hoped to discover something useful that organizations can benefit from.

The focus that guided the selection of materials reviewed was decidedly financial. The rationale for this focus may seem inappropriate for a nonprofit because it is the mission of the organization that compels its participants. But history has demonstrated that the fiscal health of an organization allows the active pursuit of the mission to continue. Longevity of nonprofit organizations requires a mission that fills a social need and prudent fiscal management. The struggle to balance these dynamic aspects of administration is present in all nonprofit service organizations.

At the end of this literature review, case studies of orchestra bankruptcies will be discussed to illustrate the more common bylaw and governance issues that played a significant role in the fiscal demise of some organizations. This information will provide the reader with a richer understanding of the potential dangers of problematic bylaw policies.

What are Bylaws?

The word bylaw, at first glance, is often assumed to refer to some secondary set of laws. The word has a variety of historic spellings and was defined in text in 1283 as “a body of customs or regulations, as of a village, manor, religious organization, or sect.” (Pickett, 2000, p.256). Originating from Old Norse, the meaning of *by-* is associated with the names of towns, villages or estates settled by Viking invaders of British territories around 800 A.D.. The towns of Whitby, Derby, and Prestby reflect this convention. In the historic literature on governance, the most common spelling is the hyphenated *bye-laws, or by-laws*, a historic fact that is useful in researching this topic. Contemporary Parliamentarians now use the unhyphenated spelling, bylaw (O. Williams, 1999). Americans commonly define bylaws as “a law or rule governing the internal affairs of an organization.” (Pickett, 2000, p.256). This provides us with a definition of the word bylaw, but what purpose do bylaws serve and how did this convention of public governance develop? Bylaws are described as a primary instrument of organizational governance. Ott offers several definitions of governance in a thorough compilation of governance concepts. Governance may be defined as “a general term referring to the collective actions of a board trustees in its governing of a tax-exempt organization.”(Ott & Shafritz, 2001, p.2).

Historical Origins

As stated in the introduction, orchestras are a cultural institution with a long history, but it is only long relative to other fine arts organizations established in America. Corporate law, the bylaws’ legal domain, has a much longer history which is rooted in the Roman Republic (Williston, 1888). Since the primary concern with bylaws lies within the context of cultural administration and orchestral administration, a review of bylaws legal origins serves to fill the gap between the etymology of the term and its current application in nonprofit administrative use.

Medieval Beginnings

Bylaws have existed as a form of legal regulation since the medieval period in Europe. Details about their relationship to Anglo-Saxon, Byzantine, Norse, Icelandic and Teutonic cultures are unclear and accompany the establishment of guilds. The richest sources for journal articles on this topical area were found through the Harvard Law Review. While there is no agreement about the technical status of bylaws or *bye-laws* in Roman corporate law, law scholars have written that the Romans applied the concept of fictitious legal entities in the formation of villages, towns and colonies, and that gradually this application extended to groups of citizens such as blacksmiths and bakers (Williston, 1888). The corporate legal system that now exists in America formally evolved in Europe during the medieval period. It further evolved through the English parliamentary legal system, which made extensive use of corporate law. The Christian church-state made wide use of the ability to create corporations (Williston, 1888). The Charter, now commonly referred to as Articles of Incorporation, was the legal document used by the realm to officially recognize corporate entities. The Charter of Abbot Anselm’s rule of Suffolk, England, dates to the tenth century A.D. (Round, 1897). Scholars have debated whether the charter technically contains *bye-laws* or special privileges, but all agree that local provisions existed in the document. It may be the oldest set of written bylaws in existence.

The two earliest types of chartered corporate associations were guilds (companies), and municipal corporations (associations). Municipal corporations regulated the trade of their memberships. Guilds were smaller organizations restricted to a regional territory, and created bye-laws to govern trade activity for multiple professions within the region (Round, 1897). The weavers were the first to receive a charter from Henry II, circa 1160a.d, "with all the freedom they had in the time of Henry I," (Round, 1897, p.688). Other professions followed as commerce developed. These were some of the first arts organizations to legally organize and be recognized by government entities.

English Parliamentary Law

In 1601 Queen Elizabeth accepted two statutes that would affect America by provoking the American Revolution and by creating regulations that would later become federal requirements of American nonprofit corporations. Accepted into law were the *Statute of Charitable Uses* and the *Poor Law* (Hammack, 1998). The Charitable Uses Act called for the use of bishops of the Church of England to enforce civil laws and collect taxes in England. This law also applied to the American colonies years later. The taxes collected were supposed to address the needs of the increasing populations of poor in the cities. More pointedly, the tax collection was intended to remind the American colonists, who had spent previous decades developing their own political culture, that they were still subjects of the Church of England. At the time of this renewed English attention the American colonies were quite religiously diverse and local governments had become well established by the Quakers. The authority of the bishops was unwelcome.

The *Charitable Uses Act* escalated conflict with the American colonies, but more importantly for this discussion, it officially listed charitable institutions that would be "objects" or recipients of the tax's charitable distribution and exempt from paying the tax themselves. Among the recipients listed were schools, the sick, the poor and the Church. These first non-taxable cultural institutions were called eleemosynary corporations under parliamentary law. In addition, the Act made the unprecedented acknowledgement that trustees sometimes misuse charitable assets, and it called for the establishment of public accountability measures. Though originating as English law, three precedents reached American soil in the late 1600s. The underprivileged were provided with government support from taxed income; the need for fiscal accountability on the part of charitable administrations was recognized; and the request for accountability measures was left to the discretion of local authorities.

The Poor Act was similarly significant. It mandated that "church parishes must care for those who can not care for themselves.", although it stipulated that this requirement applied only to parish residents (Hammack, 1998, p.9). This placed considerable strain on church facilities and on the members of churches, who were expected to "pay what was necessary, or be liable to have their property seized and sold (section IV)." (Hammack, 1998, p.14). In addition, the act financially obligated local communities to contribute to the welfare of the needy population. While not bearing directly on the researcher's bylaws analysis, this historic literature reveals the intentions of some unusual legal elements found in bylaws and the parliamentary codes still used by nonprofits.

Mission Driven Corporations

Together, the *Poor Act* and the *Statutes of Charitable Uses* set precedents for public support of social welfare and public accountability of public assets by charitable institutions. In addition, corporate events of 1600 in London also shaped American nonprofit law. In this year, Queen Elizabeth chartered what would become the East India Trading Company (Round, 1897). When voyages were more costly than expected, the company countered by allowing outside investors to purchase shares of common stock, thus creating the first publicly traded corporation. Under its charter, the company operated like a guild, excluding nonmembers from trade benefits, and distributing trade profits until it eliminated private trading in 1692. Also in 1692, the Hudson's Bay Company began operating under its new charter. However, the Hudson's Bay Company was seen as a public agency. Its charter's mission statement declared that it would regulate foreign trade. If the company failed to conduct trade according this stated mission the entity would be dissolved. These corporate entities introduced voluntary corporate investors as stakeholders in an organization's holdings, and the concept of operations being limited to the mission activities as stated in an organization's founding documents.

Public Service Organizations in America

In 1630, the Massachusetts Puritan leader, John Winthrop, delivered a speech declaring that Puritans had unified "by mutual consent" to create an equal society and to assist the poor not out of obligation to a church-state, but on moral grounds.(Hammack, 1998) In the early 1700s American colonial writers were actively publishing works that addressed social issues of public charity and doing public. In 1710, Cotton Mather wrote *Bonifacius: Essays to Do Good*. His essays appeared when England was trying to re-assert her authority in America by unseating the Puritan political authorities in power and replacing them with bishops of the Church of England. Mather’s popular writings urged the Puritans to *do well* in spite of their loss of political power. Mather’s writings may have been the springboard for the creation of America’s nonprofit sector since *reforming societies* were just beginning to emerge at the time (Hammack, 1998). Collectively, these publications and actions shaped American values about public service. Hammack provides a well documented survey of the socio-political developments surrounding the evolution of the U.S. nonprofit sector. His work includes original texts from many of the historical documents referenced.

The next major events to shape corporate law and to establish nonprofits in America were the American Revolution and the activities of Benjamin Franklin (Hammack, 1998). When the United States of America created its constitutional charter and became an entity under its own authority, the power to create and recognize corporate entities was left to the individual states as it remains today. Prior to the American Revolution the Free Library, the Philadelphia Hospital and the University of Pennsylvania were established. These first publicly supported American institutions were created to provide society the means for free self-improvement. The social and political activities of America’s patriots are well documented and are not the subject of this review, but it should be noted that a number of the not-for-profits started around the time of the American Revolution are still in operation today.

Cultural Policy and Economics in America

Collectively, the historic events previously mentioned shaped American social norms and values. Popular theory asserts that the rise of the U.S. nonprofit sector evolved out of the unmet needs of society. The Failure of Government theory offered by economists posits that the failure of government and the for-profit sector to provide services desired by a population creates a gap to which the public responds. Public volunteers take matters into their own hands in response to their own unmet needs (Ryan, 1999). Because the nonprofit sector responds to unmet needs, it possesses characteristics that neither government nor the private sector exhibits (Ben-Ner, 1993). Chief among these differences are:

1. The primary stakeholders control the organization
2. The stakeholders control the goods supplied
3. Assets gained can not be distributed to individuals and must be perpetually invested
4. Control rights are vested in the collective stakeholder group
5. Transparency of financial activity is required

As the author points out, there are significant differences between nonprofits and other types of entities. However, the second characteristic is challenged because situations surrounding arts organization differ. Stakeholder's aesthetic preferences can be expressed, but they can not control the manifestation of artistic expression. This is a preview of the art vs. money issue which is address later.

Recent reports on pubic opinion about the arts in America were reviewed for use in considering bylaw policies (DiMaggio & Mukhtar, 2004; DiMaggio & Pettit, 1999). Social scientist Paul DiMaggio has provided for many years highly valuable and valid research material on the creative sector. The influence of the public cannot be ignored in this discussion, because the arts exist in a highly political arena. Financial backing in the arts is very subject to public opinion. Beyond demographic research reports on public values, the researchers examined statistical data in the current nonprofit almanac which provided useful information about spending and funding in the arts sector.

Trustees and Other Stakeholders

Throughout the review of the literature on nonprofit organization governance, stakeholders received the majority of attention, second only to board trustees. This reflects the fact that the trustees are the representatives of the community that an orchestra serves. For a trustee, there are significant legal responsibilities and duties that accompany the position(Leifer & Glomb, 1997). Ott states that, Accountability for any nonprofit organization ultimately rests with its board of directors (sometimes called trustees). Although the board may delegate management authority to a paid person…the board can never be relieved of its legal and fiduciary responsibilities. Governing boards are the stewards of the public interest." (Ott, 2001a, p.5). The distinction between responsibilities and duties is shown below.

Table 1 - Table differentiating board member duties from responsibilities.

Board Member Duties	Board Member Responsibilities
Duty of Care Duty of Loyalty Duty of Obedience	Protecting the organization from legal action Promoting a safe working environment Promoting an ethical working environment Guarding the organization's integrity

The *duties* refer to federally imposed restrictions or limitations associated with tax exemption. The *responsibilities* refer to conduct standards imposed at the state level where non-profit status is awarded.

It is safe to assert that under some circumstances, board members can be personally liable for their board activities. In America's litigious society, this possibility can elevate the anxiety a board member feels about the organization's activities and his or her personal involvement.

Leifer and Glomb explain the legal aspects of board membership clearly and thoroughly in their publication, The Legal Obligations of Nonprofit Boards (1997).

Board members, musicians and staff members are not the only people who are considered when drafting or reviewing bylaws. Some bylaw policy effects extend beyond the internal operations of an orchestra. Tschirhart predicts potential concerns from external or community sources (Tschirhart, 1996). The stakeholder map below offers a found useful in the bylaws analysis.

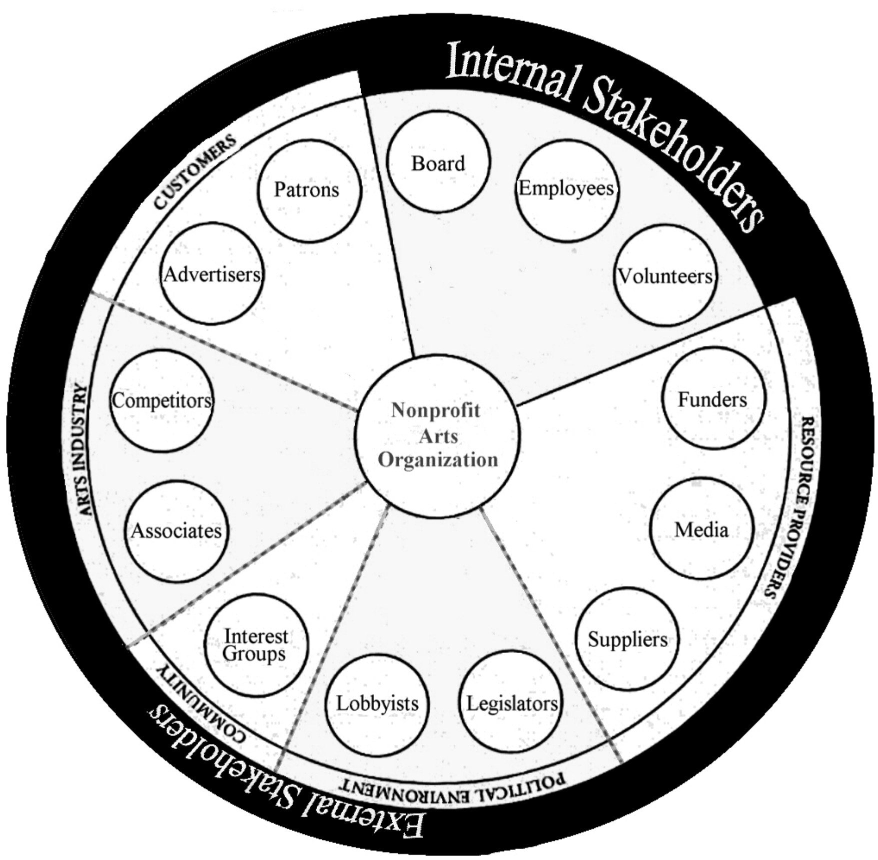

Figure 1: Stakeholder map for nonprofit arts organizations. Modified from Tschirhart model.

Legal Matters

In order to understand bylaws, it is necessary to become familiar with some of the basic laws that frame the powers and limitations of bylaws functionality. To that end, some legal qualifiers that exist on the federal and state levels need to be mentioned.

From the time the U.S. Constitution was signed, the right to legally recognize corporate entities was assigned to the individual states. Therefore, each nonprofit organization must comply with its state's individual legal requirements (Leifer & Glomb, 1997). Once corporate legal documents are created and officially filed within a state, a for-profit or non-profit entity is created. Orchestras and other arts organizations are usually classified by IRS tax code as nonprofit 501(c)(3)s, but are not automatically granted federal tax-exemption. The exemption must be applied for separately with the U.S. Internal Revenue Service.

Federal Tax Exemption for Nonprofits

Because orchestral organizations were forming in America forty years before the first federal income tax was imposed, how did tax exemption come to affect the American orchestral industry? The Internal Revenue Service makes information about this subject readily available to the general public. Earlier this year, in preparation for a House Ways and Means Subcommittee meeting concerning charitable organizations, a historical report of the development of the U.S. non-taxable corporate regulations was prepared. This document summarizes the events that lead to current federal tax arrangements. The first federal income tax was not imposed until 1862 when funds were needed to finance war debt. At that time some public service institutions such as veteran's hospitals were automatically granted tax exemption. It was not until enactment of the Tariff Act of 1894 that educational organizations became eligible for tax exempt status (Taxation, 2005). The federal definition of educational organization has always been vague and not limited to schools. The educational qualifier applies to organizations that provide desired knowledge to a substantial group of citizens, hence musical and artistic nonprofits became eligible for exemption if they provided educational value to the public.

The first modern income tax was introduced in 1913. A few years later orchestras began applying for exemption in order to take advantage of the financial benefits, though it meant that educational programming had to be adopted by institutions. The Boston Symphony Orchestra received its federal tax-exempt status in 1920.

Benefits and Qualifiers

The primary benefits of 501(c)(3) tax-exempt status are:

- The ability to accept donations
- The ability to claim exemption from income tax
- The ability to claim exemption from the payment of sales tax
- The ability to claim social status as a public service organization

Rules and limitations exist with regard to the benefits listed above. There are federal requirements that orchestras must adhere to if they wish to maintain tax-exempt status. These requirements are listed by numerous sources with consistency and are included here to inform the researcher's findings. According to the Internal Revenue Service (Service, 2004), a Form 990 filing of financial activity is required of all legally recognized corporate organizations whose annual revenue exceeds $25,000. Other requirements pertain to the activities of an organization's board members. The primary Federal requirements of tax-exempt 501(c)(3)s are:

- Private inurement, or the distribution of assets for personal gain, is strictly prohibited
- The entity must operate for the primary purpose stated in its Charter or Articles of Incorporation
- Involvement in political campaigns is forbidden
- Engaging in legislative activities, such as lobbying, is restricted
- Non-exempt earnings can not be substantial (i.e. gift shop earnings)

Violation of any of these requirements would result in the immediate revocation of tax-exempt status prior to 1996. Since that time, a new policy has been in place which allows an organization time to cease and to correct the non-compliant activity and it then assesses a penalty fee for the violation.

Statutory Regulations for Nonprofits

Because states hold the ability to grant nonprofit status, most states impose some general requirements. State laws vary in language and content, but all require that Articles of Incorporation, or Charter, be filed with the state. States also require that minutes of all board activity be kept, and that the bylaws adopted by trustees become effective immediately upon acceptance. Generally, the investment of a charitable organization’s funds is regulated at the state level as well. In all instances the assets of charitable organizations are not the property of board members but are held in charitable trust by board members for the benefit of the public (Herman & and, 2005). Bylaws are neither required by state law, nor are they filed with the state if they do exist (Service, 2004). For corporate entities, a valid copy of the Articles of Incorporation filed within the appropriate state is required, but submittal of a copy of the organization’s bylaws is only advisory.

As a convention of prudent corporate business practice, bylaws are voluntarily drafted by most institutions since the documents are created to facilitate organizational operations. The following diagram illustrates the common corporate nonprofit model that exists today (Weitzman *et al.*, 2002).

Formation of the American Symphony Orchestra

The current organizational form of the American Symphony Orchestra did not migrate from Europe. Begun as a self-organized co-op by musicians who wished to provide performances, Boston’s Handel and Haydn Society was among the first to establish a formal musical organization (Hirzy, 1997). As a choral society, the members hired orchestra musicians for their performances. After musicians were paid, proceeds from ticket sales were split among all the members, deficits were covered by the society membership dues, and any remaining deficits were covered by the elected board members. Though the Handel and Haydn Society was established as a legal corporation in 1816, it was not granted tax-exempt nonprofit status until 1930 (Guidestar, 2006). The delay was related to the eligibility of educational organizations to qualify for federal tax-exemption.

Aside from the Handel and Haydn Society, other organizations such as the Philharmonic Society of New York became corporate entities late in the nineteenth century. In 1881, Major Henry Lee Higginson established and financially supported the Boston Symphony Orchestra, which was the first orchestra to operate on a full-time basis (Hirzy, 1997; Wichterman, 1998). As the Industrial Revolution continued, cities grew and a new class of wealthy industrial capitalists emerged. At the same time, European immigrant workers arrived in search of opportunity and brought European classical music traditions. Social and economic changes challenged orchestra's management systems to evolve. For the Philharmonic Society of New York, now the New York Philharmonic, organizational changes occurred in 1909 after the cost of producing performances had become prohibitive for its self-managing musicians. Reorganized, a group of guarantors agreed to assume responsibility for funding deficits and managing the orchestra (Hirzy, 1997). A similar situation developed in Chicago. In 1891, the Orchestral Association was established solely for the purpose of underwriting start-up costs and providing administrative services for a newly established Chicago Symphony Orchestra. Since the power struggles between funding sources and artists are rooted in these organizational beginnings, this background is germane to the discussion of bylaw content that will follow the review of the literature.

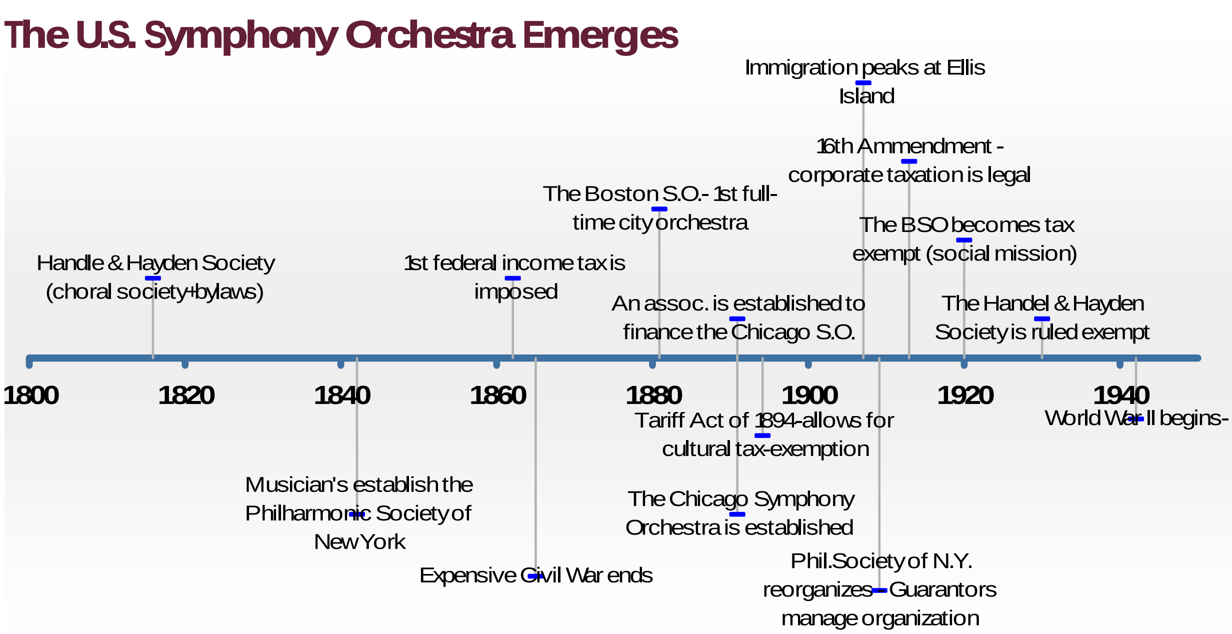

Figure 2: Timeline framing the emergence of symphony orchestras in the U.S.

Writing Bylaws

Bylaws are the rules by which an organization's members agree to be governed (O. Williams, 1999). They comprise an internal document that is not filed with the state. Prior to 1980, it was common practice for corporations to house their organizational rules within two separate documents; the charter and the by-laws. The charter consisted of policies that were not to be overridden by less than a two-thirds vote of the membership. In contrast, the by-laws contained more common business procedures, and these regulations were and are amended as necessary (O. Williams, 1999). It is now common practice to combine the provisions into a single *bylaws* document. The provisions in a set of bylaws can be amended as circumstances change. However, the process for amending bylaws must be followed as defined within the bylaws themselves, or the change will be invalid (O. Williams, 1999). Bylaws are not always utilized. Moreover, it is not unusual for the bylaws document to be misplaced altogether. This illustrates a lost opportunity to utilize bylaws as a productive tool for good governance. Bylaws should be used for the following purposes:

- As leadership's administration manual
- As amendable rules that can respond to environmental change
- As a guide for conduct in the pursuit of current best practices within the industry
- As a strategic framework from which mission oriented activities are carried out
- As a conflict reducing measure by defining rights and responsibilities that apply to all members

In the unfortunate event that the organization fails, the bylaws also must define the protocol for the organization's dissolution.

Rules of Order

Bylaws and Rules of Order are two separate things. Bylaws, as stated earlier, are the operational rules of the organization. Rules of Order are a specific code of protocol for managing an official meeting. The most commonly used codes appear in Robert's Rules of Order and Sturgis' Standard Code of Parliamentary Procedure (DeVries, 1998; Sturgis, 2001; O. Williams, 1999; Woehike, 2004). Such rules are intended to maintain meeting order, preserve the rights of individuals not present at meetings, provide guidelines for matters that bylaws fail to address, and facilitate fair and productive communications. Not all organizations follow parliamentary procedure in the normal conduct of business. Many smaller organizations have no problem operating without such formality.

Whether board members use *Robert's Rules* or not, a nonprofit organization occasionally needs professional advice with regard to its bylaws. Advice from an attorney is needed when bylaw issues intersect with state laws. If an issue is related to meeting protocol, for example, it should be referred to a parliamentarian (Woehike, 2004). Doing so is advisable because votes and decisions made in an improperly called meeting may be overturned. Bylaws that are not written or followed are a potential source of problems if they are in conflict with statutes or the organization's Articles.

Restricted Activities

Misunderstanding or misusing bylaws may result in the loss of tax-exempt status. There are five organizational activities that the federal government prohibits or restricts (Service, 2004).

1. Distibution of assets for personal gain is forbidden
2. Organizational activities must reflect the purpose stated in the Articles of Incorporation
3. Involvement in political campaigns is forbidden
4. Engaging in legislative activities is restricted
5. Non-exempt earnings can not be substantial

These restrictions seem broad and simple, but violations threaten nonprofit status. For example, earning too much through the organization's gift shop may endanger tax-exempt status.

Some guide books on establishing nonprofits imply that the creation of bylaws can be a simple matter of filling out a form. Simply completing forms is not advisable. Misunderstood bylaw language may carry shades of meaning that can compromise interpretation. For example, the accidental misuse of simple words like *should* (meaning advised action) and *shall* (meaning required action) could have unintended consequences for organizational members if misused (O. Williams, 1999).

One other concern is that corporate law and parliamentary rules are subject to change. There are now legal bylaw issues pertaining to internet communication and board activity. As board meetings move into cyberspace, internet communications are changing the way organizations meet and vote (Freeman, 2002). These changes need to be reflected in bylaws.

What Should the Bylaws Contain?

Based on data obtained from the literature and evaluation of the bylaws submitted for this study, the most common elements are these:

1. Official name and location of the organization
2. The mission or purpose, and the corporate status of the entity
3. Types or classes of membership
4. All State and Federal requirements that apply to the members
5. For the Trustees and Officers: Powers, qualifications, duties, number, terms, vacancies, removal, elections and personal liability should be addressed

6. For general operational policies: Indemnification, fiscal and financial policies, amendments, dissolution, voting, quorums, proxies, notices, ethics and conduct, committees, communication technologies and any restrictions specific to operations in state jurisdictions.

If a contradiction exists between the bylaws and some other legal authority, the superseding authority prevails (Tesdahl, 2003). For example, a resolution may be written to clarify a bylaws provision. However, if the resolution is in conflict with the bylaws or a statute, it is void. You shown below, bylaws must be in compliance with all higher order regulations in order to remain valid.

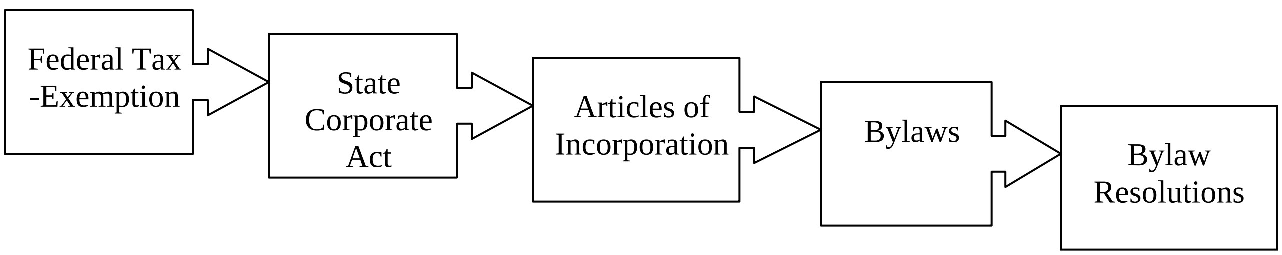

Figure 3 - Illustration of policy hierarchy.

Who Has a Stake in the Bylaws?

Since bylaws are a document that guides the operations of the entire organization, one might argue that any stakeholder with a vested interest in an organization is affected by its bylaws. As nonprofit organizations, symphony orchestras possess characteristics not shared by many other types of charitable organizations. The symphony orchestra is generally composed of a large body of creative artists, an administrative support team, and a smaller governing body of board members who represent the community audience. This triad works together in pursuit of a common mission. The people with the greatest interest are the trustees and the executive administrators who deal directly with the bylaws. However, the executive director, music director and the board of trustees each view governance issues through different lenses. Depending upon their roles, responsibilities and liabilities, their respective perceptions of issues may vary greatly. The literature provides background on each of these three roles (Byrnes, 2003; Dempster, 2002).

Orchestra Governance

According to Executive Directors surveyed, the six most prevalent roles of directors of cultural organizations are listed below (Salamon & Geller, 2005).

- Setting the organizational mission 93%
- Setting the CEO's compensation 88%
- Establishing and reviewing budgets 87%
- Setting organizational objectives 87%
- Reviewing audits, accounting policies and accounting practices 83%
- Approving major financial transactions 81%

It should be noted that research conducted on nonprofit board member activity indicates that organizations use their boards in different ways (Salamon & Geller, 2005). For example, theatre boards invest more time in fundraising than do other types of industries such as health care.

Cyril Houle developed a model for nonprofit governance that has undergone little challenge over the years. This governance model describes a tripartite system composed of a board of directors, executives, and staff members (Duca, 1996). This model is referred to often when the roles of nonprofit members are described. Mehta also describes a tripartite model when framing the responsibilities of the orchestra's Executive Director (Mehta, 2003).

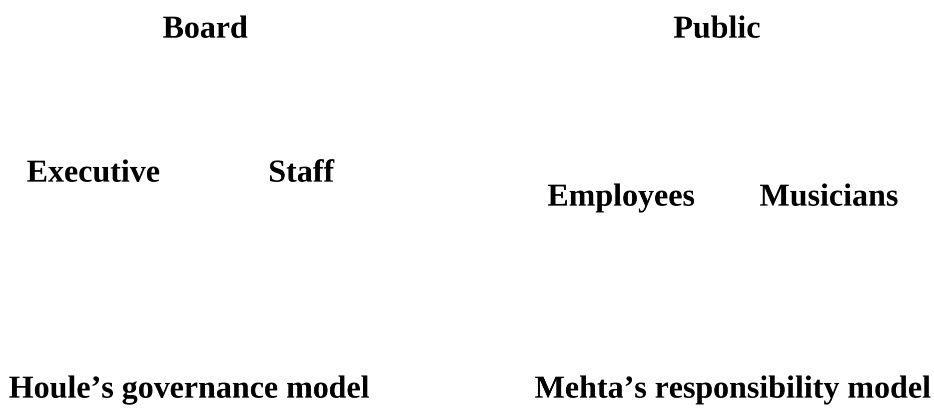

Figure 4: Diagrams comparing Houle's governance and Mehta's responsibility models

Mehta describes the relationship between the executive director and the music director as a marriage. This is appropriate to the collaborative nature and common responsibility for leadership that the two share. Mehta's discussion of mutual respect as a motivational theme is made more credible by the fact that he is the Executive Director of the New York Philharmonic. This partnership between music director and executive director is also addressed by the American Symphony Orchestra Leagues guidebook, which is designed to advise board members how to work with music directors (Alsop *et al.*, 1994).

In theory, the three legs of the orchestra's mission hold equal weight. In practice, public representation overshadows artistic and financial priorities. Musicians are allowed little or no voice in decision-making (Fogel, 2000). Fogel provides an excellent overview of the history and dynamics of the musician-conductor and musician-employer relationship. The battles over mission ‘turf’ and forces that shaped the culture of the orchestra industry are discussed. Two critical questions that Fogel posed are;

- Does the three legged stool model leave important elements out of orchestra governance and policy setting?
- Why has the basic organizational structure of American orchestras been unexamined and unchallenged for more than 100 years? And, more importantly, if change is desirable, how can it be brought about?

Priorities: Art vs. Money

In 1881, Major Higginson’s philosophy prioritized the Boston Symphony Orchestra’s duties as artistic quality first, public service second and fiscal accountability third (Hirzy, 1997). As his funding supported the organization, he could impose any principles he chose. Higginson’s philosophy established a hierarchical power model within the orchestral industry that remains a source of internal conflict for orchestras.

Twenty-five years the Higginson model was established, another model was introduced. When the Philharmonic Society of New York reorganized in 1909, creating a board of public citizens as its financial backers, the dynamics of power shifted (Wichterman, 1998). The artists, once self-organized, were becoming dependent upon groups of financial backers, and had in fact become their employees. Politics began to play a major role in programming and orchestral activities. As most newly arriving musicians were non-English speaking German immigrants, they were at a disadvantage when making business arrangements. The musicians needed the help of English-speaking representatives. At first, small groups of wealthy supporters and financial backers filled this need. Later, as productions became larger and more frequent, the small groups of supporters evolved into formally organized boards. With social prestige and financial clout as leverage, the board members began to influence programming of orchestral productions.

The artistic interference of governing boards quickly became a common problem for orchestras. When trustees gained power over artistic programming a flattening of the organizational structure occurred. Artistic quality and fiscal responsibility became competitive priorities. The models shown in Figure 7 illustrate the shifts in mission priorities over time. The struggle between artistic and financial interests that exists today started in the late 1800s. Suddenly two-tiered, the orchestra's new dependence on public patronage illustrates an early case of the long-running battle between art and money in the orchestra industry. As the performances at this period in time were primarily for white European socialites, and tax-exempt status had not yet become a mission-altering incentive, the public interest remained a low priority.

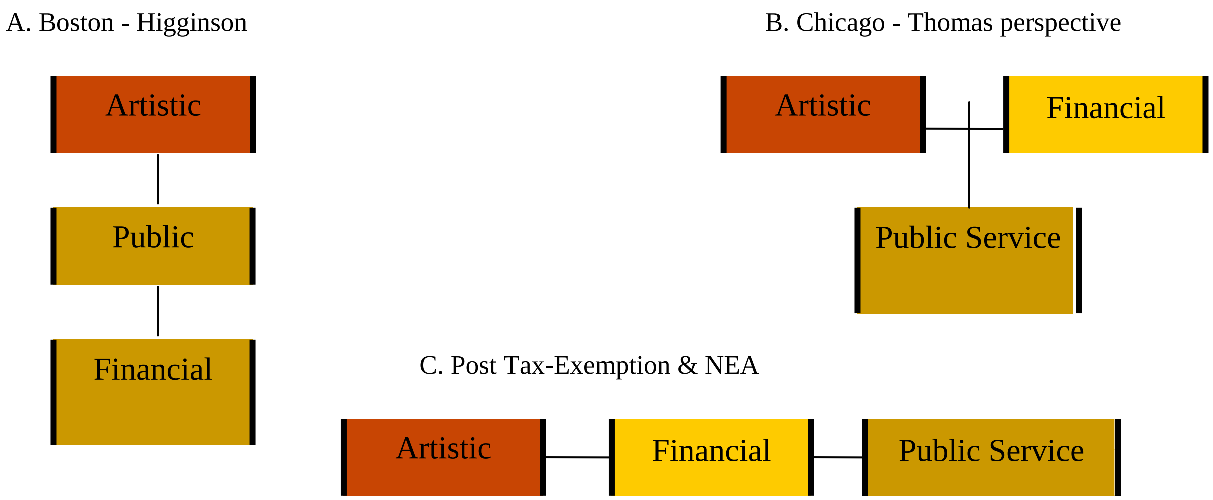

Figure 5 - Changing models of mission priorities

When the option to apply for tax-exempt status became available, orchestras applied. As major metropolitan orchestras suffered throughout the Depression they relinquished some control in order to maximize the tax and donor privileges of exempt status. As part of the package, orchestras adopted the charitable mission of educating the public sector, and as the contributions from the wealthy diminished, the mission again expanded horizontally. The orchestra relied increasingly on general public support for operating funds and became mission-bound to serve the public as well as its backers. The orchestras' interest in public service was weak when tax exemption was first gained. Public service priorities grew strong in the 1960s.

In 1965, all cultural arts organizations entered a new socio-political arena when President Lyndon B. Johnson created the National Endowment for the Arts (NEA) (Wichterman, 1998). The primary mission of the NEA was to make America's cultural institutions available to, and representative of, all U.S. citizens. Using government grants as a policy instrument, the NEA offered matching grants to cultural organizations in states that had established official state arts agencies. These agencies sprung up to administer the cultural sector's growth.

As the number of art organizations grew, so did the organization's dependence on public and government support for sustained funding. Grants tied to public service prompted the missions of orchestras and other cultural organizations to change. Education and public service became a primary feature of programming for most cultural institutions and effected governance. As arts organizations became more dependent on NEA funding mission priorities equalized.

Dysfunctional Governance

The 1998 Mellon Report on the Orchestra Forum identified a deterioration of artistic leadership as a primary problem for orchestral administration (Wichterman, 1998). Notably, the music director has artistic responsibility with limited personnel authority. Conversely, the executive director has authority in personnel decisions without responsibility for artistic performance. This report cited the most common leadership problems in orchestra governance, declaring that:

- Orchestras have vague mission statements
- Leadership is weak
- There has been a shift from long-term artistic goals to short-term financial objectives
- Outreach usually refers to marketing rather than an institutionalization of community values
- Grants focus on capacity building but are difficult to obtain for sustained operations
- Communication problems between musicians and staff members persist
- Cash-flow problems persist
- Musicians have not taken leadership roles due to labor union influence

Williams offers additional findings based on her evaluation of several performing arts organizations (J. Williams, 1993).

- Economic downturns
- Deadwood on the board – nonproductive board members
- Aggressive and or financially unrealistic growth plans for the organization
- Overleveraging the arts agency
- Lack of reliable revenue sources to sustain operations
- Board in-fighting
- Executive Directors who manage (put out fires) but do not lead (guide long-term vision)
- Mission drift
- Lack of professional skill in the performers or other administration
- Too short staffed to operate efficiently or effectively
- Inactive board of directors - rubber stamp or yes/no type

Any of the aforementioned problems can seriously damage or destroy an orchestra or other performing arts organization. The review of a few case studies in board governance follows.

Case Studies in Dysfunctional Orchestra Governance

The case studies included in this literature review provided valuable insights into the problems that symphony orchestras face. Collectively, these examples of *mis-governance* indicate a common set of circumstances that weakened or destroyed the subject organizations. Typically, patterns of negligent behavior were set by members of the Board. Access to the bylaws for these organizations was unavailable. It would be interesting to see if bylaws were in place, were not enforced, or were poorly written at the time these organizations failed.

American Conservatory of Music

An extreme example of poor management appeared in the case of the American Conservatory of Music in Chicago which filed under Chapter 11 of the Federal Bankruptcy Code in 1987 (Mendelson, 1988). At that time the school was losing $1000 per day in operating costs and had no accounting books. There was an internal power struggle among staff members. The organization’s problems were remedied by employing for-profit business practices. Aside from instituting standard accounting practices, the hired consultant who identified the organization’s problems also discovered in-fighting about the mission. The consultant to the conservatory found that, “The financial problems were only a symptom, not a cause. They were symptoms of demographics, changing values, growing competition, and changing marketing techniques. The students' interests were less classical, more commercial and jazz." (Mendelson, 1988, p.36).

The remedy included a balancing of the books, downsizing the staff, and a greater dependence on volunteers. It also required the board to redefine its mission and address the needs of its changing community. The members identified their organization's strengths and weaknesses in the process and collaboratively developed new goals and objectives. The following year, the organization emerged from Chapter 11.

Denver Symphony

The Denver Symphony, planned to cease operations in 1989 after accumulating over $4 million in debt (Reiss, 1992). Years of short term solutions to operating problems, such as salary cuts and the shortening of season programming, did not solve long-standing problems that stemmed from poor management and weak leadership. In response, the musicians came together to form the Colorado Symphony to keep music in the community. Their initiative drew community support. The musicians also hired a seasoned executive director from the corporate business world who guided them to a state of healthy organizational function. The new operational model required that one third of the board consist of musicians. It mandated a balanced budget that carried no deficit, and drawing on the endowment was strictly forbidden. These measures and others have served the organization well. In reviewing its 990 report for 2004, the organization reported a healthy $ 14.8 million in revenue for the year (Guidestar, 2006).

Florida Symphony Orchestra

The Florida Symphony Orchestra filed for bankruptcy in 1993 after several months of failed negotiations with its musician. The orchestra was carrying a $4 million budget and had borrowed from its endowment fund to cover operational cost over runs. When musicians requested higher wages, management refused. Communication between the board and the musicians was poor. After concerts were cancelled several backers withdrew support and the organization filed for bankruptcy.(Stevens, 2003) Within a year of the FSO's bankruptcy, the musicians and remaining supporters of the orchestra formed the Orlando Philharmonic Orchestra. The bylaws of the newly formed organization required that musicians comprise 25% of the board of trustees and that the musicians also serve of standing committees. As a budget control measure musicians salaries were eliminated. Musicians are paid per performance. In addition, a balanced operating budget is required annually and borrowing from the endowment fund is strictly forbidden. The OPO has had a budget surplus each year since its formation in 1994.

Oakland Symphony Orchestra

Several problems plagued the Oakland Symphony Orchestra. The following issues was identified by the consultant hired by the financial supporters of the organization following its bankruptcy in1986 (Beene, 1988).

Issues and conditions present in the Oakland Symphony Orchestra organization:

- The board did not fill a vacant marketing position from 1976-1982
- There were no marketing records to track participation by
- The organization's charismatic leaders died unexpectedly
- Marketing expenses were double the industry average for a comparable agency

- There had been eight different development directors between 1976-1986
- The organization was known as a ‘difficult place to work’, and the pay was low
- There was a history of drawing on the endowment
- The board denied knowing the extent of the debt and did not communicate
- The board had 86 members, twice the average
- An attempted reorganizing effort resulted in much in-fighting
- There were labor conflicts between the musician’s union and the board
- The board did not personally contribute to the financial support of the organization
- The board was inactive (deadwood) and did not solicit funding for support
- Budgeting was not based on project costs, but on plugged in figures
- The organization could not support the cost of its’ building

It seemed that the board was not cognizant of its responsibilities. The board needs to, “carry the cultural values and voice of the community…”(Beene, 1988, p.86), rather than pursue board members’ personal agendas. By failing to set policy or operate in a fiscally responsible manner, and by not holding the executive director or themselves accountable, board failed the community. The organization began its rapid deterioration following the untimely death of its charismatic leader (Phills Jr., 2004). The mission drifted as the vision faded. An overly ambitious approach to expansion weakened the organization. Unmanageable debt forced the organization’s doors to close.

San Diego Symphony Orchestra

The San Diego Symphony Orchestra suffered similar problems and also failed. Again, it was financial mismanagement that led the organization to file for Bankruptcy in 1996, carrying a $ 3 million dollar deficit (Santoro, 1996). The board was accustomed to raising funds to address emergency budget crises, but it did not have a long-term strategy to address the need for sustained funding.

Orchestras as Corporate Cultures

The purpose of this section is to approach orchestra bylaws from a global perspective. The broader scope allows a more comprehensive approach to bylaws analysis. A review of the literature on governance in the arts by Ouellette and Lappierre noted that among approximately 60 studies addressing arts organizations, leadership was a recurring issue(Fitzgibbon, 1997). Tension between organizational and artistic leadership was a common theme. The case study of the Barcelona Symphony Orchestra highlights issues that arise when different role related roles clash. Between 1979 and 1995 no music director's tenure lasted beyond five years, due to power struggles between the board of directors and the artistic leadership (Castañer & Campos, 2002). Castañer attributes music director turnover to five primary reasons:

- Retirement or death
- Dismissal by the board for poor performance in a financial or programming capacity
- Resignation due to conflict with the board or management
- Resignation driven by outside opportunity for professional development
- Change of organizational structure

In considering the juxtaposition of art and commerce, and of internal and external forces that affect art organization members, it is important to note that political, economic and demographic dimensions play a key role in determining bylaw relevance. Keeping pace with external change is increasingly difficult due to rapid change. Among current orchestra problems, several authors listed broadened audience tastes due to cultural diversity; the surge in technological channels that allow greater access to music; and the removal of music education from schools. The outcomes include a loss of subscribers (Dempster, 2002; Massey, 2005; Scholz, 2001). Population surveys of American attitudes toward the arts have offered consistent evidence of strong and stable support over the years (DiMaggio & Mukhtar, 2004; DiMaggio & Pettit, 1999). However, the support for the spending of tax dollars on the arts has elicited ambivalence.

Ethics

One governance topic that dominated public attention over the past ten years is ethics. Financial and ethical scandals at Enron, Arthur Anderson and other large public corporations drew considerable attention and concern which resulted in the signing into law of the Sarbanes-Oxley Act in 2002. This act, "requires publicly traded companies to conform to new standards covering governance, financial transactions, audit procedures, conflicts of interest and other matters of ethics".(Waleston, 2004) Though nonprofits have not been required to comply with the regulations, corporate supporters favor those organizations that mimic their best practices. Therefore, the act has indirectly influences the way arts organization and other nonprofits operate(Hymowitz, 2005).

Political, Economic and Demographic Trends

In 2000, *Harmony* reported on trends and conditions that orchestras should expect to encounter (Boaz, 2000). The following are some of the environmental conditions that are expected to impact orchestras:

- Community taste will continue to change
- Funding models may need to change
- Communication will increase in importance
- Service needs to be delivered faster
- Technology's impact will expand
- Orchestras need to become teaching centers

- Human Resource practices need to improve
- Entrepreneurial innovation should increase

In addition, the Boaz paper recommended that musicians be more involved in core decision making and that the music director be more involved in orchestra business decisions. These proposed changes require more well informed staff members and board members. As arts management becomes cultural administration, arts organizations should be more flexible and better able to pursue their mission-based work with fiscal savvy (Dewey, 2004). Failure to adapt to a changing environment will subject an organization to extinction (Mulcahy, 2003).

Solomon also offers a perspective on the primary social issues that will continue to have a profound effect on the arts for years to come (Salamon, 2001). The four key areas of concern for nonprofit arts organizations are fiscal health, economic stability, effectiveness and legitimacy. The current fiscal crisis in the arts is exacerbated by the severe drop in federal funding support and the increased public demand for services. Furthermore, economic pressures threaten to compromise artistic quality in order to attract dollars; artistic innovation does not attract public support as do more familiar works. As for effectiveness, grant offices increasingly seek quantitative proof of value for experiences offered to the public which can not reasonably be measured. Demands for assessment and accountability are sparked by dwindling public faith in nonprofit organization services. With the credibility of nonprofits and their missions challenged by public interests through the media, and the nonprofit's increasingly limited ability to engage in advocacy, the voluntary sector suffers.

Under present conditions, it seems that nonprofit status and tax-exemption are not always advantageous. One look at the Disney empire and the phenomenal growth of Cirque du Soleil and the value of nonprofit corporate status in today's society seems questionable. The success of these entities demonstrates that arts organizations can flourish as for-profits and maintain their artistic mission, vision and values. Perhaps the restrictions and declining benefits of nonprofit status will prompt arts organizations to organize under other structures in the future.

CHAPTER THREE: METHODOLOGY

The nature of this investigation was emergent, therefore a mixed method was used to approach bylaws analysis. Bylaws documents were obtained from selected organizations and a quantitative analysis of policy or provision content was performed. This analysis identified common and uncommon bylaw provisions by frequency. Provision content was reviewed using subjective criteria in order to assess the nature of its policies. Those bylaw provisions that deviated from the present norm were examined further. Data from the quantitative and qualitative examinations were combined to reveal policy anomalies. Questions about the origins and nature of the anomalies found were developed and administered to their originating organizations in order to gain better insight about the effectiveness of the policy anomalies found.

U.S. symphony orchestras were purposely chosen for this bylaws research for several reasons. Symphony orchestras are among the oldest arts organizations in American culture, having originated around 1816. Characteristically, orchestras are comprised of creative artists, community members, and local business men and women, and operate under a formal set of Articles of Incorporation and Bylaws. More importantly, orchestras have a tri-part mission to manage that is frequently the source of internal conflict. Most nonprofit arts organizations share this feature.

Choice of Participants

The rationale for selecting orchestras followed a financial premise. Organizations that fell within a midrange of annual revenue in the orchestra industry were the focus. According to ASOL literature, in 2004 there were approximately 1800 symphony orchestras in the U.S. A list of orchestras whose annual revenue for 2003 in categories 3, 4 & 5 of the 2004 American Symphony Orchestra League's report on the industry was utilized. A search of publicly available 990 federal tax reports for the 110 symphony orchestras on the list revealed annual revenues of between $ 0.7 and $ 10.8 million in the category. A narrower midrange of this group was selected to approach for participation. The 34 organizations reporting annual revenue of between $ 2.0 and $ 5.0 million were selected to provide a manageable sampling of midsized organizations. Smaller organizations might not have fully developed sets of bylaws, and those organizations with the greatest annual revenue were said to have many unwritten policies according to a previous study.

Obtaining Primary Documents

Bylaws documents were requested from each of the 34 organizations. Administrators were invited to provide copies of their orchestra's current bylaws for examination. Four weeks after the initial request, a formal request was mailed to the executive directors of orchestras that did not respond initially. A positive response rate of over 73% was realized which exceeded the pre-set 60% threshold needed in order to proceed. Of the 34 organizations invited to participate, 25 provided a current set of their bylaws.

Document Analysis

Upon arrival, each set of bylaws was filed separately and given an identification code. The first step in analysis consisted of reading through the content of each set and annotating the documents with initial reactions to the provisions they contained. Upon the second reading, Article and Section titles were transferred to a spreadsheet for comparison of structure and topic areas.

A	B	C	D	E	F	G	H
					SECTIONS		
Participants	Article I	Article I	Article I	Article I	Article I	Article I	Article I
	Section 1	Section 2	Section 3	Section 4	Section 5	Section 6	Section 7
C1	Offices	XXX	XXX	XXX	XXX	XXX	XXX
C18	Name	Charitable Purpose	Artistic & Cultural Purpose	Federal Restrictions	Charitable Activities	XXX	XXX
C19	Scope (as nonprofit bylaws)	Purpose of the Corporation	Nonprofit Status	Music School	XXX	XXX	XXX
C20	State of Incorporation	Gender & Number	Headings as an index	XXX	XXX	XXX	XXX
C21	Name	Purpose	Names of Auxiliary Guilds	Fiscal Year	XXX	XXX	XXX
C22	Name & Status of Society	Domicile (location)	Membership	XXX	XXX	XXX	XXX
C23	Powers of the Board	Number of Directors	Classes of Directors	Election of Directors	Vacancies of Directors	Board Meeting Presider	Regular Meeting

Figure 6: Sample of provision coding spreadsheet.

Analysis of the topical content followed. To facilitate comparison of content a review form was created. A check-list type form was created using recommended provisions. The ASOL's Guide to Orchestra Governance (Hirzy, 1997) provided a base list of provision categories. Criteria were added or removed as necessary during examination. Bylaws sets were reviewed in their entirety on a consecutive basis. Content was categorized and recorded by participant code. Frequent variance in language was found as expected and taken in to consideration when coding. For example, the titles trustee and board member were used interchangeably. The word Member was used in a variety of contexts and required careful consideration. Data from each review form was then entered into a spreadsheet version of the review form as shown below.

Indemnification &/or Insurance of Directors, Officers. Et	1		1	1	1	
Location of offices	1		1	1	1	
Maintaining Corporate Records	1		1	1		
Membership - Has Members other than Board		1				1
Membership - No Members other than Board			1	1	1	
Mission, Purpose			1	1	1	
Official Name	1	1	1	1	1	1
Rules of Order		1		1	1	
Director Attendance/Participation required		Y		Y		
Director Duties	1			1	1	
Director Elections		1	1	1	1	1
Director - Required Financial Support of Org.		1	1			
Director Number Limit	40	40	39	69	39	66
Director Powers / Qualifications	1	1	1	1	1	1
Director Removal	1	1		1	1	
Director Responsibilities	1	1	1	1	1	

Figure 7: Spreadsheet section showing an example of review form criteria used in analysis.

All data did not fit neatly into the review form's 87 categories. Provisions that were judged to contain unique content were treated as special cases and logged separately for further scrutiny.

Following the categorization for quantitative review, data were transferred to a spreadsheet. The provisions that had been logged separately were reexamined to determine whether their content was truly unique. If it was not, the provision was recoded into an existing category. If it was, the provision or unique feature of the provision was treated as an anomaly. The data describing highly unusual policies was recorded in a separate table along with respective participant codes. An example of the logged data utilized in qualitative analysis is shown below.

	Topics Requiring Further Examination (from sheet 1)	
	Topic	Descriptive Context and Notes
%	TITLE	DESCRIPTION
4%	Amendment by Members or Trustees (not Board)	Some organizations allow committees to alter and ammend the bylaws, other do not. There was also an instance (c25) where the members also have the power to alter the bylaws.
4%	Balanced Budget Mandatory	Surprisingly few included a balanced budget in their bylaws. Considering the unstable nature of nonprofit funding, particularly in the arts, a balanced budget was expected.
8%	Board Guidelines	Provisions that make reference to other organizational document that contain instruction on required actions, duties and or reponsibilities for members of the Board.
4%	Board Workshops	One organization arranges educational workshops for board members annually. These workshops offer information on board governance and managerial topics that are intended to improve the board's effectiveness.

Figure 8: A section of the anomaly qualitative data table.

The criterion used to identify policy anomalies was two-fold. Anomalies consisted of coded provision topics with lower than an 8% rate of frequency, meaning they occurred only once, therefore deemed unique. Provisions with a frequency between 8% - 25% were labeled Rare; those with a frequency between 26% - 50% were labeled Uncommon; those with a frequency of 56% - 75% were labeled Popular; and the remaining 76% - 100% were labeled Common. Once the anomalous policies were identified, qualitative data about the anomalies was pursued using questionnaires.

Questionnaires

From the nonprofit organizations that participated in part one of our investigation, the three that were found to have the greatest policy anomalies were selected for qualitative data collection. Using the participant codes, the originating organizations were identified. A series of interview questions pertaining to the anomalous policies for each organization were developed. The questions, a set of six for each of the three different organizations, were administered to the executive director, music director and board president or chair of each organization. The names of the people holding these positions were provided publicly on the nonprofit organization's websites. Open-ended questions were designed to gather information about the origins, pros and cons of each policy anomaly. After the questions and protocols were approved by UCF's IRB board, questions were administered. By inviting responses from three key administrators from each organization, it was hoped that responses would reflect a variety of perspectives about each policy anomaly. Submitted opinion data is reflected in the findings as anonymous quotes.

Inherent Limitations

Several limitations are inherent in each phase of the research described above. As data was gathered from volunteer sampling, the bylaws examined represent only the organizations that participated. With regard to the analysis of bylaws, the interpretation of language and content was subjective. While there was an attempt to compensate for varied use of terminology, room for error existed since the researcher could not be aware of regional and cultural norms. Bias is likely both on the part of the researcher who interpreted data, and on the part of participants providing opinion data. Accessibility also affected opinion data gathering. Quantitative responses were only received from Executive Directors, and the sampling size of qualitative responses was too small to yield statistical data. In addition, no adjustment was make to account for the tenure of the selected interviewees in their present position.

CHAPTER FOUR: FINDINGS

Overall, the bylaws documents exhibited common language that was easy to interpret. Only two sets of bylaws exhibited notable legalese. Of the 34 organization invited to participate, 25 provided a set of their current bylaws: a positive response rate of over 70%. For reporting purposes, policy topics found in the provisions are presented by category below in order of frequency. Except for the anomalies, roughly the same numbers of policies were found in each category. An uncategorized list by frequency is provided in Appendix A.

Due to the difference in sampling criteria and reporting and analysis methods it was not possible to make direct comparisons findings between this study and the 1991 ASOL governance survey (League, 1991). Similarities in the findings were supported. The findings of the ASOL survey demonstrated that policies are often unwritten, especially in larger organizations. This condition should be taken into consideration when viewing statistical data.

Common provisions or policy topics appeared throughout bylaws sets at a rate of 76% or higher and most were associated with board meeting activity and self-governance of the board of directors or trustees. *Popular* policy topics represent policies with a 51 to 75% rate of frequency. The concentration of these policies focused on the details of board membership as well as operational matters.

Table 2 - Table of the most commonly found provision topics

Common policies (76% or higher)	
	Amendments
	Director Elections
	Director Elections
	Director Powers / Qualifications
	Director Tenure or Term Length - Yrs.
	Director Vacancies & Resignations
	Ex-Officio, Life, Honorary, Emeritus, members
	Fiscal Year
	Indemnification / Insurance of Directors, Officers. Etc.
	Meetings: Annual/Regular/Special
	Notices:
	Officer Removal, Vacancies, Elections
	Officers Duties & Powers
	President / CEO
	Secretary
	Treasurer / CFO
	Official Name
	Quorum - Director/Officer/Trustee/Members

Table 3 - Table of popular provision topics found

Popular policies (51% - 75%)	
	Annual Audit
	Annual Budget
	Auxiliary / Associate Organizations
	Budget / Finance Committee
	Checks/Drafts/ Deposits
	Contract Authorization
	Corporate Seal
	Director Consecutive Term Limits
	Director Removal
	Executive Director - Qualify/Duty/Powers
	Location of offices
	Manner of Acting
	Mission, Purpose
	Music Director - Qualify/Duty/Powers
	No Compensation of Officer or Director
	Nominating Committee
	Officer: Vice President(s)
	Voting
	Waiver of Notice

The policies in the *uncommon* and *rare* categories were dominated by standing committee designations, director and officer performance matters and issues related to non-profit status.

Table 4 - Table of uncommon provision topics found.

Uncommon Policies (26% - 50%)	
	Indebtedness Limits , Loans
	Actions Without Meeting
	Advisory Council or Board
	Committee : Development / Fund Raising
	Committee: Education
	Committee: Long Range Planning
	Committee: Marketing
	Communication Tech. (if Participation Simultaneous)
	Director - Required Financial Support of Org.
	Director Attendance/Participation required
	Director Duties
	Director Responsibilities
	Gifts
	Maintaining Corporate Records
	Membership - Has Members other than Board
	No Private Inurement - Distribution of Assets
	Officer: Chair Elect or Pres. Elect
	Officer: Chairman
	Proxies: Directors
	Rules of Order

Table 5 - Table of rare provision topics found.

Rare Policies (8% - 25%)	
	Bonding
	Action on Stocks Held by the Corp.
	Annual 990 Report
	Committee: Ad Hoc / Task Force
	Committee: Administrative / Personnel
	Committee: Artistic Advisory
	Committee: Foundation - Endowment
	Committee: Governance
	Committee: Investment
	Committee: Volunteer Services
	Conflict of Interest; Interested Directors
	Conflict of Provisions - Construction & Terms
	Copy of Bylaws kept in office for Directors
	Director Number Limit
	Dissolution
	Membership - No Members other than Board
	Officers: Past Chair or Past Pres.
	Officers: Vice Chairman
	Restricted Political Activity
	Standards of Conduct
	Tax Exempts Status

Anomalies were found as policy topics and as characteristics of provisions. There were relatively few anomalous provision topics, as shown in the following table. Anomalous characteristics, found within the context of provisions and logged separately, were much greater and are presented in Table 6.

Table 6 - Table of anomalous provisions topics found.

Anomalous Topics (single occurrence)	
	Balanced Budget
	Board Member Workshops
	Bylaws Review
	Employee Contracts
	Implies Rights
	Severability
	Several Standing Committees
	Volunteer Association recognition

Table 7 - Logged provision characteristics; anomalies.

Anomalies – logged characteristics
Amendment by Members or Trustees (not Board Members)
Balanced Budget Mandatory
Board Guidelines or Manual as a separate document
Board Workshops – Annual board development event
Bylaws Review – required on a regular basis
Conflict of Interest – ethics
Director – contingencies of board positions acceptance
Director - required organizational support; various requirements
Discrimination Policy – ethics
Dissolution
Employee Contracts – mandatory for all employees
Government Restricted Funds – grant restrictions imposed on board membership
Implied Rights (none)
Indebtedness – fiscal limitations
Independent Audit (yes or no)
Interested - Directors actions; related to conflicts-of-interest
Legalese
Musician's Representatives
Non-Profit Status stated
Performance Review of Executive Director and Music Director
Phone Conferences – technology use
Private Inurement – clearly stated; no private inurement
Professional Relationship – interrelationship of duties; E.D. & M.D.
Prohibited Activity- restrictions on Board Chair resignation; notify Attorney General
Restricted Activity –
Severability – One invalid provision does not negate the value of all
Standards of Conduct - ethics
Term Limits for Directors
Unions – duty assignment relative to musician union negotiations
Volunteer Association Recognition – separate association for volunteers

Several topical interest areas emerged from the investigation. There areas are:

- Ethics
- Fiscal Responsibilities
- Legal Obligations of Trustees
- Musician Representation
- Organizational support obligations of Trustees
- Topics of weakest and strongest presence

Topics relative to ethics and their frequencies are presented below. Cross-referenced to determine the predominance of the policy topics as a group, 44% of the organization addressed the ethics related issues. Ethics issues were addressed in weak manner by some. For example, one conflict of interest provision stated only that its members should avoid conflicts, without defining or providing examples of conflicts of interest.

Table 8 – Table of ethics issues and their frequency of occurrence.

	Ethics Issues
28.0%	Conflict of Interest
32.0%	Discrimination
60.0%	Director Responsibilities
64.0%	Restricted Political Activity
68.0%	Standards of Conduct
72.0%	Director Duties
44.0%	Cross referenced issues - Bylaw sets addressing 2 or more items from above

With regard to the group of fiscal responsibility issues listed below, 80% of organizations addressed 2 or more. Most of the issues were related to bookkeeping matters. Balanced budgets were an anomaly; and only three of the bylaws sets addressing annual audits specified that they be performed by an independent certified public accountant (CPA). The presence of independent audit policies is interpreted as a recent development. Over the last several years, voluntary adoption of Sarbanes-Oxley requirements, such as the independent CPA audit, has become a growing practice among nonprofits.

Table 9 - Table of financial issues and their frequency of occurrence.

	Fiscal Issues
4.0%	Balanced Budget
8.0%	Endowments
12.0%	Annual 990 Filing addressed
28.0%	Loans & Indebtedness
32.0%	Gifts
60.0%	Responsibility for Checks/ Drafts/ Deposits
64.0%	Annual Budget
68.0%	Annual Audit
72.0%	Contract Negotiation / Authorization
80.0%	Cross referenced issues - Bylaw sets addressing 2 or more items from above

Topics relative to legal obligations of members due to the organizations non-profit or tax-exempt status were weakly addressed in most cases. The topic was included, but the language did not clearly delineate obligations. These topics define limitation of actions that, if violated, risk the organization's non-profit or tax-exempt status. Violation may also result in the personal liability of trustees, a ramification mentioned in only one case. To some degree, 76% of the participant's bylaws addressed two or more of the issues in this category. Director duties were separated from director responsibilities in coding. The duties refer to the specific federal requirements that all 501(c)(3) organization trustees observe duty of care, duty of loyalty, and duty of obedience. Director responsibilities refer to the self-imposed activity requirements that an organization places on its trustees.

Table 10 - Frequency of policies related to legal obligations

	Legal Obligation of Trustees
56.0%	Non-profit Status / 501(c)(3)
16.0%	Tax Exempts Status
16.0%	Restricted Political Activity
32.0%	No Private Inurement - Distribution of Assets
48.0%	Director Duties
44.0%	Director Responsibilities
64.0%	Compensation of Officer or Director
76.0%	Cross referenced issues - Bylaw sets addressing 2 or more items from above

Musician representation was addressed within provisions specifying composition of the board of trustees. Though 40% of the organizations specify that musician representatives shall hold board positions, these board members are not always given voting privileges. The average number of musicians on a board was two, excepting the one organization requiring 25% of its board consist of voting musicians.

Table 11 - Detailed table of musician representative qualifications

Musician Representation	
# of Reps.	**Conditions of Representation**
3	musician employees are nominated by other contracted musicians
2	Representative chosen must meet local music union requirements
1	Musicians are elected to the board within local music union parameters
10	Musicians are voted in by other contracted musicians
1	A representative is allowed to participate in board meetings
3	Non-voting seats on the board for musicians
1	Musician's representative allowed - treated as an ex-officio member
1	Musician liaison is elected by contracted musicians
1	Representative of local music union is allowed to attend meetings unless employed by the organization
2	Orchestra members serve on the board

The various personal obligations of board membership, though addressed in a number or bylaw sets, may alternately be contained in other organizational documents. The obligations of board members are listed below.

Table 12 - Board member obligations to support the organization.

	Board Member Support
4.0%	Participate in special events
4.0%	Contribute to the endowment
4.0%	Observe a confidentiality provision
8.0%	Show public support - Attend performances
8.0%	Solicit funds to meet a personal development goal
12.0%	Comply with the Director's handbook
12.0%	Attend meetings as required
12.0%	Assist in fundraising activities
16.0%	Purchase one or more season subscriptions
16.0%	Serve on one or more committees
24.0%	Pledge an agreed upon financial support amount
32.0%	Cross referenced issues - Bylaws sets defining support obligations

The following list contains observations of shared characteristics among the more common provisions.

- One organization provided a method for its non-board members to amend bylaws by popular vote.
- The fiscal year and official organization name were not declared in all sets
- Indemnification and insurance issues were given the greatest attention to detail and afforded more space than any other provision type
- Not all organizations include a mission statement in their bylaws

The following list contains observations of shared characteristics among the rare or anomalous provisions.

- One organization required a balanced budget
- One set required members to attend annual board member development workshops
- One set required all that all employees work under a contract
- One set called for the regular periodic review of bylaws
- Dissolution was addressed by 24% of the organizations
- Use of technology was addressed by 28% of the organizations

Responses to the questionnaires administered for the collection of qualitative data provided insights to specific anomalies. Confidential opinion data, in essay form, was received from two of nine invited participants. To preserve confidentiality the responses are not presented here, but quotes are presented in the conclusions chapter where appropriate.

CHAPTER FIVE: CONCLUSION

The findings indicated that the content of symphony orchestra bylaws varies more than expected. This finding supports the hypothesis that bylaws in this arts industry are not essentially the same. There is a clear gap between the normative literature on bylaws content and the content of bylaws in use. The findings also suggested to the researcher that a number of policy anomalies developed in response to organizational issues inherent in the industry. Some of the anomalies have had a direct and positive affect on the financial and operational success of their respective organizations. These effects are addressed in the interest areas that follow.

The questionnaire portion of the investigation did not yield measurable results. The sample size or participants was too small and there were few replies to the questionnaire. Still, the character and content of the responses received offered valuable information.

Taken as a whole, the documents reflected the general sense that bylaws are used and understood as a governance tool to varying degrees. Some documents seemed to include every possible provision conceivable, while others included a minimum of content or had not been revised for many years. This is not intended to imply that uniformity is needed, but to suggest that the basic legal and functional purpose of bylaws was not well addressed in some sets. Lack of revisions suggests that some bylaws were not actively used as governance tools, but the creativity and individuality of these documents reflected the unique character of organizations and their membership, and all reflected an effort to govern their orchestras in a responsible manner.

Bylaws as a Governance Tool

The heavy use of legal terminology or phrasing has its place, but bylaws are intended to be used as guides for members and lay people. Care to use common language in the writing of bylaws should be taken. Few instances of legalese were found in the investigation, which seems to indicate that most organizations write their bylaws for use as a reference guide. Related to this characteristic is document structure. Most documents were efficiently organized and had an easy-to-reference structure. In contrast, one set was written in the form of a long letter with many paragraphs. Accessibility for the trustee should be considered when bylaws revisions are made.

Only 64% of organizations include their mission statements in the bylaws. This is partly attributed to the traditional practice of keeping the mission or purpose statement in the separate Charter or Articles of Incorporation. If bylaws become more recognized as an active tool of governance, the mission statement will likely appear in bylaws more commonly.

Choice of provisions to include in an organization’s bylaws has clearly been a key concern, and the wide array of provisions suggests that the choices are not easy. The normative literature suggested that a bare minimum of provisions be included in bylaws so that activity may be restricted as little as possible. This is good advice as long as all included policies are relevant, valid and written in a clearly understood manner. Several interest areas, or policy groups, emerged from the bylaws analysis for discussion. These policy interest areas are ethical and legal interests, fiscal matters, musician representation, and organization management.

Ethical and Legal Interests

Core content recommended for bylaws includes the state and federal mandates by which an organization must abide. Surprisingly, 76% (see Table 9) contained provisions addressing the legal obligations imposed on members, and only 44% addressed ethics issues that are of similar obligating nature. Regardless of the literature, is seems common sense to inform trustees about legal obligations that can affect personal liability. A representative of one organization with anti-discrimination and conflict of interest policies clearly written into their bylaws stated that, "Such policies protect both the organization and the volunteer." More often, legal and ethical matters were approached from a different angle. Indemnification, bonding and insurance provisions were addressed by 80% of organizations. This priority may point to a tendency among board members to put out fires as opposed to taking care to avoid them in the first place. Of course, insurance-related policies are necessary for the protection of organizations, but in a number of cases efforts to prevent legal and ethical problems from arising in the first place seem to be of secondary importance. Including mandated trustee duties and responsibilities is one way to educate board members about activity related risks, but revising bylaws content is not the only way to educate trustees. Providing annual board member workshops was one organization's creative way of promoting board development and trustee education. In another case, board candidates were required to sign a statement that they had received, read and understood the bylaws and trustee obligations that they were accepting with a board position. Board development measures support good governance and offer effective safeguards.

The most cautious organizations covered legal and ethical issues from both angles by including bylaws provisions addressing board education, defined obligations and indemnification. This safety through redundancy assures that strategic measures (see Table 7) educate trustees, and tactical measures are in place to respond to legal action. In some cases, conflicts of interest, discrimination, and issues such as private use of organizational property were not addressed. It is hoped that a separate document exists to makes these types of general policies clear for board members. As bylaws are intended to serve as the trustee's operational reference guide, those policies should be made clear in its content.

Fiscal Matters

Provisions did not reflect a great concern for transparent fiscal accountability. Though 80% of organizations addressed annual audits, only 20% specified that the audit be performed by an independent certified public accountant. In the wake of ENRON and other scandals and subsequent enactment of the Sarbanes-Oxley Act, this measure is becoming a norm. Most Sarbanes-Oxley regulations do not apply to non-profit arts organizations. However, many non-profits are voluntarily adopting the financial as well as the ethical transparency measures imposed by Sarbanes-Oxley, either as a show of good faith toward the public or to gain an advantage when competing for grants. The 20% seemed like a small percentage, but it is not known when those who require independent CPA audits adopted their policies. If these 20% represent new policies, then the change represents a significant improvement.

Other fiscal policies were scant. Less that 29% addressed loans or an organization's policy on assuming debt. Two cases strictly forbade the use of endowment capital to cover operating expenses. Given that all participating organization qualified for this study based on their comparable revenue status, it seemed unusual that more fiscal policies were not present in the bylaws of this presumably fiscally sound group. Strategic planning and other forms of performance management are growing popular, so some fiscal policies may have found their way into organizational documents other than the bylaws. However, bylaws are intended to spell out the trustees responsibilities, and trustees are ultimately responsible for the organization's fiscal activity. Therefore, more fiscal policies were expected.

Related to fiscal matters are the support obligations of trustees. The list of obligations for organizational support are shown in Table 11 and reflect flexible and creative approaches to making the best possible use of trustees as a resource. As a group, 32% of organizations state their trustee's obligations in the bylaws. Almost half of the obligations called for financial contributions. Required attendance of events and board meetings was second in importance. Though most requests seemed timid, the defined requests for time and financial support from community representatives demonstrated an understanding of the need for actively supporting board members. These obligations help avoid the problems of dead wood on the board. It seems unlikely that there are cases in which trustees are not expected to make financial contributions, because it is difficult to imagine that solicitations by the non-supporting board members would be taken seriously. It is hoped that organizations that opted not to include such member obligations in the bylaws have published their expectations of trustee participation elsewhere.

One anomaly that warrants discussion is the balanced budget provision. Clearly, running a balanced budget has its advantages. Better public image, grant worthiness, financial security and stronger board support are all benefits of demonstrating fiscal responsibility to stakeholders. Yet, only one orchestra required an annual balanced budget. Further examination showed that this organization has run with a balanced budget or surplus for over a decade, so the policy has been successfully implemented. A representative stated that the policy is rooted in financial stewardship. It is made possible, in part, by paying musicians on a performance basis rather than the traditional annual salary. This was a decision made jointly with the musicians.

Musician Representation

Musicians are the creative life blood of the orchestra, yet they are rarely represented in orchestra governance. In the organizations that do offer musicians a voice in the decision making process, that voice is often quite limited either by union regulations or the organization's governors. It is no wonder that the history of orchestras includes numerous labor disputes; there are few open communication channels between the artists and community representatives they serve. In this industry the employees seem especially disconnected from the governing body. Bylaws content reflecting a lack of musician representation seems to indicate that trustees either fear or have little regard for the opinions of performers. This is clearly an extension of the history of orchestra governance practices and the tension between mission priorities, but change is indicated in this study and elsewhere. Fogel's article (2000) reflects current participative management trends and growing recognition that more inclusive governance practices in the orchestra industry are overdue. While most of the bylaws examined still seem barr musicians and other employees from the governance process, a few have allowed for communication and participation. Of the bylaws examined, 40% offered musicians an opportunity to have a voice on the board, with most allowing for one representative. As mentioned previously, prior data is unavailable to determine if this figure represents a recent or significant improvement.

One organization presented an anomaly in requiring that 25% of its board of directors be comprised of musicians. These musicians are voting members, and at least one musician sits on each board committee. When asked how this form of musician representation has worked over the years, one representative stated that; “[This organization’s] key component for improvement rests with its unique collaborative relationship with its musicians.” “We operate within a shared musician/management governance structure, encouraging and promoting cross consultation and shared decision-making at every level.”

Wherever employees sit on boards of directors there are concerns over conflicts of interest. Potential conflict of interest issues may have been one reason to keep musicians out of the board room, but the benefits of participative governance seem to have outweighed the risks where musician representation is strong. Perhaps a trend to allow all three parts of the orchestra’s mission a more balanced voice is growing. It is interesting to note that the organization that requires that 25% of it board consist of musician employees is not the only organization to operate successfully with such strong musician representation. Orpheus Ensemble of New York has operated as a highly successful group of self-governing musicians since 1972. Perhaps a return to the original organizational structure of the orchestra of the 1800s in which the musicians operate their own organization as a for-profit will return.

Organization Management

64% of bylaws included provision related to the hiring and responsibilities of executive directors, and 60% included provisions addressing music director’s responsibilities. In one instance, the collaborative nature of two positions was briefly outlined. A representative stated that the executive director and music director roles were adequately addressed in the bylaws, and that the best place to address these matters is in the employee agreements. Performance evaluation was addressed for these positions. However, directives did not designate parties or indicate criteria for carrying out the evaluations. With this information absent, evaluations may not be carried out.

As mentioned, concern for relations with management and employees was not reflected in most bylaws content. Like the organizational models offered in the literature review, a segregated organizational structure is still reflected in much of the current bylaws content. We have seen that the tri-part mission of nonprofit orchestras pulls interests in different directions, and that the weight of each interest is unclear. What does seem clear, as evidenced by the light treatment of provisions related to artistic and financial matters, is that most bylaws content remains focused on trustee regulations rather than broader organizational governance issues. However, the anomalies seem to indicate that changes are ongoing. They exhibit efforts to operate in a more fiscally sound and transparent manner, to include musicians in decision making in a significant way, and to address ethical concerns before they become potential legal problems. All of these anomalies seem to indicate a gradual adoption of for-profit business policies, and a break from long-standing orchestra governance practices.

Recommendations for Future Study

This examination of bylaws documents revealed that each symphony orchestra strives for professional standards of governance in its own unique way. Even if many policies are unwritten, as the ASOL Policies and Procedures survey reported, the examples provided for this study reflected an effort to address current ethics issues and encourage board members to participate actively in the governance of orchestras. It is hoped that attention to fiscal policies, ethics and more equitable musician representation will grow over time, and that orchestras will continue to find creative ways to operate in the best interests of all their stakeholders.

Several recommendations for future study are indicated. Since the examination of policies from the field yielded such rich information, a similar study may be undertaken to examine bylaw policies across different types of nonprofit arts organizations in order to see if they exhibit comparable policies. For example, a review of bylaw policy content for museums may indicate whether similar policy issues exist in that arts industry as well. Perhaps the representation of visual artists in governance is also an issue for museums.

A longitudinal study could extend the value of this research project by following the development of policy changes over time. Another option would be to broaden the study to include participating organizations from a wider band of revenue categories, or to examine the triggers for bylaws revision. Since few fiscal and ethical accountability policies were found, focused research into these areas may also be undertaken at a later date. These interest areas are expected to be of particular relevance when looking for links between written policy and funder preferences.

APPENDIX: DATA TABLES

Table 13 - All provision topics with frequencies

16.0%	Action on Stocks Held by the Corp.
36.0%	Actions Without Meeting
40.0%	Advisory Council or Board
92.0%	Amendments
12.0%	Annual 990 Filing addressed
68.0%	Annual Audit (5 specify independent CPA)
64.0%	Annual Budget
64.0%	Auxiliary / Associate Organizations
20.0%	Bonding
48.0%	Chair Elect or Pres. Elect - Officer Duty
40.0%	Chairman - Officer Duty
60.0%	Responsibility for Checks/Drafts/ Deposits
12.0%	Committee - Ad Hoc / Task Force
20.0%	Committee - Administrative / Personnel
24.0%	Committee - Artistic Advisory
4.0%	Committee - Audit
4.0%	Committee - Board Affairs
64.0%	Committee - Budget / Finance
4.0%	Committee - Bylaws
36.0%	Committee - Development / Fund Raising
40.0%	Committee - Education
88.0%	Committee - Executive
20.0%	Committee - Foundation - Endowment
20.0%	Committee - Governance
12.0%	Committee - Investment
36.0%	Committee - Long Range Planning
36.0%	Committee - Marketing
68.0%	Committee - Nominating
4.0%	Committee - Outreach / Public Affairs
4.0%	Committee - Programming
4.0%	Committee - Property Management
4.0%	Committee - Recognition
4.0%	Committee - Special Events
8.0%	Committee - Volunteer Services
28.0%	Communication Tech. (if Participation Simultaneous)
64.0%	Compensation of Officer or Director
28.0%	Conflict of Interest; Interested Directors
12.0%	Conflict of Provisions - Construction & Terms
72.0%	Contract Authorization
16.0%	Copy of Bylaws kept in office for Directors
56.0%	Corporate Seal is addressed
32.0%	Director - Required Financial Support of Org.
36.0%	Director Attendance/Participation required
64.0%	Director Consecutive Term Limits
48.0%	Director Duties

All provision topics with frequencies

84.0%	Director Elections
24.0%	Director Number Limit
96.0%	Director Powers / Qualifications
64.0%	Director Removal
44.0%	Director Responsibilities
92.0%	Director Tenure or Term Length - Yrs.*
92.0%	Director Vacancies & Resignations
24.0%	Dissolution
64.0%	Executive Director - Qualify/Duty/Powers
76.0%	Ex-Officio, Life, Honorary, Emeritus, members
80.0%	Fiscal Year is defined
32.0%	Gifts
28.0%	Indebtedness Limits , Loans
80.0%	Indemnification / Insurance of Directors, Officers. Etc.
52.0%	Location of offices
44.0%	Maintaining Corporate Records
56.0%	Manner of Acting
96.0%	Meetings: Annual/Regular/Special (#=reg)
44.0%	Membership - Has Members other than Board
64.0%	Mission, Purpose
60.0%	Music Director - Qualify/Duty/Powers
40.0%	Musician Representation
32.0%	No Private Inurement - Distribution of Assets
56.0%	Non-profit Status / 501(c)(3)
96.0%	Notices:
76.0%	Officer Removal, Vacancies, Elections
76.0%	Officers Duties & Powers
92.0%	Official Name
20.0%	Past Chair or Past Pres. - Officer Duty
76.0%	President / CEO - Officer Duty
28.0%	Proxies: Directors
100.0%	Quorum - Director/Officer/Trustee/Members
16.0%	Restricted Political Activity
48.0%	Rules of Order
96.0%	Secretary - Officer Duty
4.0%	Severability
20.0%	Standards of Conduct
16.0%	Tax Exempts Status
96.0%	Treasurer / CFO - Officer Duty
24.0%	Vice Chairman - Officer Duty
56.0%	Vice President(s) - Officer Duty
56.0%	Voting powers
60.0%	Waiver of Notice

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