A Swan Song for Live Music?: Problems Facing the American Federation of Musicians in the Technological Age

Christopher Milazzo

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A SWAN SONG FOR LIVE MUSIC?: PROBLEMS FACING THE AMERICAN FEDERATION OF MUSICIANS IN THE TECHNOLOGICAL AGE

I. INTRODUCTION

Instrumental musicians are represented by the American Federation of Musicians ("AFM" or "union"). During the last decade, union members have been faced with a severe cut in job availability due to the inventions of digital audio tape and synthesizers equipped with samplers. The threat of technological unemployment is not new to the music industry. However, prior to the advent of the synthesizer and digital audio tape, machines had never before altered or eliminated the musician's function. "The machine [did] not make the music, it merely [provided] a means of preserving and giving a wider dissemination to the music made by the musician."

Today, synthesizers produce a multitude of sounds that only trained ears are capable of distinguishing from the acoustic instrument imitated.

1. The author is not disputing the fact that synthesizers are invaluable tools for amateur musicians and musicians seeking to explore new sounds that cannot be produced by acoustic instruments.
4. Id. at 239.
5. Id.
6. See Dean Freidman, Sounds of Success: Professional Sound Capabilities, Once the Exclusive Domain of High-End Recording Studios, Are Now Available to PC Users, BYTE, Sept. 1990, at 429. With the use of Musical Instrument Digital Interface [hereinafter MIDI], the computer can now communicate with synthesizers. Unlike analog tape, the playback from a synthesizer (or DAT) never degrades and is thus always "first generation." Older synthesizers generated the sound electronically, and thus were never quite able to mimic the sound of the acoustic instruments it was trying to imitate. Id. "Sampling" actually records the acoustic instrument digitally and can play it back on demand, thus sounding more like the acoustic instrument it is attempting to imitate. Id. See generally Randy S. Kravis, Comment, Does A Song By Any Other Name Still Sound As Sweet?: Digital Sampling and Its Copyright Implications, Am. U. L. REV. 231, 237-38 (1993) (explaining the general process of digital sound recording). Digital sound recording entails all of the following; (1) an engineer sending the sound through the microphone to the computer, (2) the built in or attached analog to digital converter then changes the communicated sounds into a digital code that
Thus, the machine is capable of making the music in lieu of the musician. Previously, when recordings were made on analog equipment, there was little threat that a tape could take the place of an orchestra. However, digital audio tape ("DAT") has made this possible. The recording and "jingle" industries have already lost the battle to technology, and now traditional oases of live music, such as Broadway shows and ballets, are using taped music or synthesizers to produce the music needed for performances.

The AFM has consistently been behind the times in the area of technological change, and thus has been in a poor position to limit the effects of technology on displaced union members. This Note focuses on the problems encountered by these union members as musicians face an age of automation and suggests possible solutions for the AFM as the music industry continues to make advancements in recording technology and synthesizers.

II. A HISTORY OF THE AMERICAN FEDERATION OF MUSICIANS

In 1896, the American Federation of Labor ("AFL") invited all musicians' organizations in the United States to meet in Indianapolis for the purpose of creating the AFM. By 1943, the AFM had enrolled as a member practically every professional instrumental performer in the music industry. The sampled tones are then capable of being played back on command by a keyboard.

7. "Jingle" is a term used in the music industry for music produced for commercials.

8. See Darcy Eikenberg, Commercial Music's Mid-Life Crisis: Musicians Being Replaced by Electronic Music, BACK STAGE, April 29, 1988, at 14B (reporting that many musicians who worked in these areas of the music industry have now had to find jobs in other fields because of the widespread use of synthesizers in the recording and "jingle" industries).

9. See Jeannie Wong, Ballet May Turn to Taped Music, SACRAMENTO BEE, July 9, 1994, at B1 (explaining that because of difficulty in meeting financial obligations, the Sacramento Ballet opened the season with taped music while continuing to negotiate with the musicians); see also Laurie Goldstein, The Day the Music Died; Live Performers Compete With Canned Accompaniment, WASH. POST, Oct. 15, 1989, at G1 (describing musicians Siegfried and Roy's elaborate use of live animals; including lions, tigers, an elephant, and ten unicyclist basketball players, with a prerecorded tape as opposed to a live orchestra).

10. Eikenberg, supra note 8, at 14B (interviewing a musician who agreed that the AFM has been behind the times when responding to technological changes, such as synthesizers); see also Shanthy Nambari, The Chandelier Still Falls; 'Phantom' Fans Hardly Notice Orchestra's Absence, WASH. POST, Sept. 22, 1993, at C2 (suggesting that another reason for union failure may be the public's apathy toward hearing taped music instead of live music at musicals).

United States. Its membership totaled 232,000,12 which eventually increased to the high of 331,000 members in 1976.13 Since the occupation of the musician is almost completely free from physical hazards, there was little interest among musicians, and therefore the Federation, in Workmen's Compensation laws and safely legislation.14 Also, because the musician's engagement is only about four hours per engagement, the AFM was not as concerned about maximum hours legislation as other industries of the time were.15 Because the AFM represented an atypical union member, the main goals of the AFM have only been to secure higher wages and greater employment opportunities for its members.16

A major threat to confront the AFM, practically since the AFM was formed, is the phonograph.17 From the time Thomas Edison invented the phonograph in 1877, until the early twentieth century, the phonograph was primarily a device for home enjoyment.18 At first, the phonograph created additional jobs for musicians because it created a new industry in which musicians were needed to perform.19 However, by the late 1930’s, more than half of the music played on American radio stations were that of phonograph records, which took jobs away from “staff orchestras” and casual musicians.20

In order to combat the use of recordings, James Caesar Petrillo, the President of the Chicago Local, announced early in 1937 that the Local...
would not permit its members to make recordings or transcriptions unless the union was assured "that there would be an end to the menacing threat of canned music." Petrillo recognized that technological unemployment within the field of instrumental music was different from other trades or crafts. In other trades, workers were displaced by the inventions of entrepreneurs, while in the music industry, the musicians themselves were responsible for making the recordings that displaced "their fellow artists."

In 1940, Petrillo was elected President of the AFM. During his first year as President, the AFM took a bold step by notifying the American Guild of Musical Artists that the AFM members would not perform with Guild members. In a compromise with the Guild, the two unions agreed that the Guild would relinquish all claims to jurisdiction over conductors and accompanists. The AFM, in return, agreed that the Guild would be the exclusive collective bargaining representative of soloists in the opera and concert field. Petrillo was now poised, as were the vast majority of musicians who made recordings, to institute a recording ban.

Petrillo thought a recording ban would be successful in preventing the use of recordings on radio. In June 1942, he notified the recording and transcription companies that their licenses with the union would not be renewed. In August 1942, the recording ban went into effect.

21. Id. The "electrical transcription" developed in 1930, made it possible to record fifteen minutes of radio programming on a 16 inch disk, which could be used for delayed rebroadcast, either on the same day, or years later. Id.
22. Id. at 703.
23. Id. at 702.
24. SELTZER, supra note 13, at 40 (quoting James Petrillo).
Nowhere else in this mechanical age does the workman create the machine which destroys him, but that's what happens to the musician when he plays for a recording. The iceman didn't create the refrigerator[,] the coachman didn't build the automobile. But the musician plays his music into a recorder and a short time later the radio station manager comes around and says "Sorry Joe, we've got all your stuff on records, so we don't need you anymore. And Joe's out of a job."

Seltzer, supra note 13, at 40.
25. Gorman, supra note 18, at 705.
26. The Organized Musicians I, supra note 11, at 70.
27. The Organized Musicians I, supra note 11, at 71.
28. The Organized Musicians I, supra note 11, at 71.
29. Gorman, supra note 18, at 705.
30. The Organized Musician II, supra note 3, at 265.
31. The Organized Musician II, supra note 3, at 265.
32. The Organized Musician II, supra note 3, at 265.
However, the record companies had prepared themselves for AFM’s ban by stockpiling recordings for several months. Thus, they continued to release music during the ban, lessening the economic blow of the AFM’s action. As a result, the ban failed to eliminate or even diminishing the production of phonographs. Instead, it only prevented the recording of new compositions written after August 1, 1942.

The United States government responded to the recording ban by claiming that the AFM was attempting to unlawfully restrain the commerce of phonograph records and electrical transcriptions. The government also claimed that the AFM sought to eliminate competition between live and recorded music. As a result, the Attorney General sought to use the Sherman Act to prevent "featherbedding" where mechanical methods reduced the need for labor, and to enjoin the union from continuing its ban.

The Court held that the actions of the AFM were not in violation of the Sherman Antitrust Act or any other law of the United States. The Court further found that since the union and the record companies were involved in a "labor dispute," the AFM’s actions were lawful under both the Clayton Act and the Norris-LaGuardia Act.

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33. *The Organized Musician II*, supra note 3, at 266.
34. *The Organized Musician II*, supra note 3, at 266.
35. *The Organized Musician II*, supra note 3, at 266.
37. Id. at 306.
38. *Id.* Featherbedding is "the practice of limiting output or requiring extra workers, as by union contract, in order to provide more jobs and prevent unemployment." WEBSTER'S NEW WORLD DICTIONARY 511 (2d ed. 1980).
40. *Id.* at 309; see Sherman Antitrust Act § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 et. seq. (1988)).
41. *See Norris-Laguardia Act*, ch. 90, § 13(c), 47 Stat. 73 (1932) (current version at 29 U.S.C. § 113(c)(1988)) (defining "labor dispute" as "any controversy concerning terms and conditions of employment ... ").
42. Clayton Act, ch. 323, § 20, 38 Stat. 738 (1914) (current version at 29 U.S.C. § 52 (1988)). No restraining order or injunction shall be granted by any court of the United States, or judge or the judges thereof ... And no such restraining order or injunction shall prohibit any person or persons, whether singly, or acting in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or recommending, advising, or persuading others by peaceful means so to do . . . .
43. *Id.*
Sec. 4: No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent induction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dis-
Twenty-seven months after the recording ban went into effect, full record production was finally secured in the recording industry.\(^4\) In the agreement with the recording companies, the Recording and Transcription Fund ("RTF") was created to help offset unemployment among union members which was caused by the phonograph.\(^5\) The money obtained from the RTF was used to offer free live concerts throughout the country.\(^6\)

Another concern of the AFM during the 1940s was to promote the employment of its members at radio stations.\(^7\) Petrillo and the Locals had negotiated contracts that required the stations to employ a minimum number of musicians.\(^8\) When AM broadcasts simultaneously transmitted on FM outlets, members of the union refused to perform unless a standby orchestra was employed.\(^9\) Standby members also had to be employed by radio stations when their programs featured performances by amateurs, military bands, nonunion musicians, or traveling musicians from other jurisdictions.\(^10\)

\(\text{pute... from doing, whether singly or in concert, any of the following acts:}\)
\[\text{(a) Ceasing or refusing to perform any work or to remain in any relation of employment;}\]
\[\text{(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;...}\]
\[\text{(b) Agreeing with other persons to do or not to do any of the acts heretofore specified;... [and]}\]
\[\text{(f) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.}\]

\textit{Id.}

\(^{44}\) Gorman, supra note 18, at 708.

\(^{45}\) Gorman, supra note 18, at 709.

\(^{46}\) Gorman, supra note 18, at 709; see also The Organized Musicians II, supra note 3, at 274. The RTF accumulated royalties from 1943 to 1947. The Organized Musicians II, supra note 3, at 274. The union administered these payments separately from general union funds and no part was used to pay the salaries of union officials. The Organized Musicians II, supra note 3, at 274. By 1947, $3,700,000 in royalties was in the RTF and $1,130,000 was distributed among the Locals for performances. The Organized Musicians II, supra note 3, at 274. The performances were divided relatively evenly between classical and popular music, employed more than 30,000 musicians, and played to audiences in 514 communities. The Organized Musicians II, supra note 3, at 275. A similar schedule of performances in 1948 was scheduled with the remaining money in the RTF. The Organized Musicians II, supra note 3, at 275.

\(^{47}\) Gorman, supra note 18, at 709.

\(^{48}\) Gorman, supra note 18, at 709.

\(^{49}\) Gorman, supra note 18, at 710-11.

\(^{50}\) See Gorman, supra note 18, at 711; see also SELTZER, supra note 13, at 45-48 (describing a situation where the public was outraged at the AFM and Petrillo after banning a performance by students at the National Music Camp and Interlochen).
Congress, disturbed by the aggressive tactics of the AFM, introduced the Lea Act. The Lea Act outlawed union action that forced radio stations to employ more people than they needed, pay money to a union instead of hiring more people, pay more than once for services not performed, or interfere with noncommercial educational programs. This Act was designed to defeat the AFM's attempt at featherbedding in the radio industry. Although some members of Congress recognized that the bill would make it unlawful for the AFM to engage in a peaceful strike for the objective of keeping its members employed, the bill was passed and became law.

The Lea Act seriously restricted the bargaining power of the AFM in the broadcast and recording industries. The Lea Act also seemed to make the RTF illegal, but because section 506(c) permitted the continued enforcement of existing contracts, the RTF remained in effect. There was uncertainty, however, over whether the RTF would be legal after December 31, 1947, the termination date of the contracts with the recording companies.

Shortly after the Lea Act was passed, Petrillo tested its constitution-
ality by demanding that a Chicago radio station hire three musicians. Based primarily on its interpretation of the legislature's intent, the Supreme Court found the Lea Act to be constitutional. On remand the district court held for it to find a section 506(a)(1) violation, the government would have to prove that Petrillo had knowledge that the additional musicians he requested the station to hire were not needed. Thus, the court refused to give the Act the broad power that Congress had sought. However, in any event the Taft-Hartley Act of 1947 made featherbedding an unfair labor practice.

In addition, section 8(b)(4)(B) made some of the tactics employed by the AFM unlawful as secondary activity. Section 302 of the Taft-
Hartley Act made the RTF unlawful because the fund was not going to the musicians that made the records, but to the musicians that were displaced by the recordings. Thus, Petrillo stated he would again put a ban on the recording of phonographs beginning on January 1, 1948.

The recording companies had once again "stockpiled" recordings as they had in the months before the previous ban, and both sides began a "waiting game." On December 14, 1948, an agreement was reached, and the Music Performance Trust Fund ("MPTF") was created following written assurance from the Department of Justice that the MPTF was lawful under the Taft-Hartley Act. In 1954, the MPTF spent nearly $2 million for performances in which nearly 189,000 musicians took part.

In the 1950's, the MPTF was challenged in court, and payments ceased for newly produced television films, television, radio jingles and

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Id. See also The Organized Musicians II, supra note 3, at 283-84. Tactics which would have fallen under the secondary boycott included the ban on performing for network programs in order to induce affiliated stations to hire more musicians, and the ban on making electrical transcriptions or records when the object was to induce radio stations to hire more musicians. However, section 8 (b)(4)(B) does not apply to a concerted refusal to work wherein the union is not attempting to affect the conduct of the immediate employer. The Organized Musicians II, supra note 3, at 283-84.

66. SELTZER, supra note 13, at 51.
67. SELTZER, supra note 13, at 52.
68. SELTZER, supra note 13, at 52-53. The MPTF modified or kept many of the provisions of the old RTF. Funds are obtained from the record companies based on sales, and the proceeds are distributed through the United States and Canada on a pro-rata basis in geographic locations that coincide with the AFM locals. Funds must be expended in the year following receipt and must be used for live musical performances for the public where no admission is charged and when it will increase appreciation for music. SELTZER, supra note 13, at 52-53. Musicians receive no more than union scale payment directly from the fund for services rendered, and the MPTF must approve all projects. The MPTF is administered by an independent trustee named originally by the record producers and subsequently by the Secretary of Labor, and the MPTF may employ musicians who are not members of the AFM. By 1952, the MPTF was receiving revenues from four sources: (1) record and transcription companies, (2) producers of theatrical motion pictures, (3) producers of film for television, and (4) producers of television jingles and spot announcements. SELTZER, supra note 13, at 52-53.
69. SELTZER, supra note 13, at 53.
70. See Gorman, supra note 18, at 752-80. A number of cases challenged the Trust Fund, and after an unfavorable ruling in Atkinson v. Superior Court, 310 P.2d 145 (Cal. App. 1957), aff'd, 316 P.2d 960 (1957), cert. denied, 357 U.S. 569 (1958), which attacked the MPTF as it pertained to phonographs, the AFM decided to settle the other lawsuits that attacked the Trust Fund as it pertained to theatrical motion pictures, films made for television, and electrical transcriptions. Gorman, supra note 18, at 768. The settlement now requires the musicians who play in the theatrical motion picture sound track, television film, or electrical transcription to receive residuals according to how many times the performance is aired. Gorman, supra note 18, at 780. Phonograph companies still contribute approximately one percent of the retail sale to the MPTF. Gorman, supra note 18, at 780.
spot announcements, and theatrical motion pictures released for television.\textsuperscript{71} Thus, the sale of phonographs almost became the exclusive source of income for the MPTF.\textsuperscript{72} Even today, recording companies continue to sign these agreements because it is a condition to the AFM supplying musicians during recording sessions.\textsuperscript{73}

Although Petrillo originated the trust fund concept as a way of moderating the impact of technological unemployment within the music industry, the trust funds did not at the time, nor do they today, act as a welfare or unemployment fund.\textsuperscript{74} However, the MPTF can still be an important tool for today’s musician.\textsuperscript{75} By using the fund to sponsor live concerts free to the public, it will help to educate the public in music appreciation.\textsuperscript{76}

III. PROBLEMS FACING THE AMERICAN FEDERATION OF MUSICIANS TODAY

During the first half of the twentieth century, a relatively small portion of musicians were affected by technological unemployment, but today virtually every aspect of the industry is affected, especially live performances that include music.\textsuperscript{77} The AFM’s decline in membership over the last twenty years demonstrates that fewer musicians are able to find employment in the field today.\textsuperscript{78} The cause of this problem is the

\textbf{71.} Gorman, \textit{supra} note 18, at 780.
\textbf{72.} Gorman, \textit{supra} note 18, at 780. Under today’s trust fund agreements, the performing musicians technically become employees of the trust fund, to be paid at prevailing local wage scales, and the trustee remits a paycheck directly to the individual musicians after the local administrator states that the performance in fact took place. Gorman, \textit{supra} note 18, at 780.
\textbf{73.} \textit{See generally} \textit{American Fed’n of Musicians (MMG Arena Productions, Inc.), No. 31-CB-7951, 1990 NLRB GCM LEXIS 21 (Feb. 26, 1990).}
\textbf{74.} Gorman, \textit{supra} note 18, at 782 (explaining that as of the early 1980’s, the average check was hardly more than $30, most funds were not received by unemployed musicians, and that the great majority of recipients held full time jobs as teachers or outside the field of music).
\textbf{75.} \textit{SELTZER, supra} note 13, at 241.
\textbf{76.} Gorman, \textit{supra} note 18, at 706.
\textbf{77.} \textit{See generally} Gordon, \textit{supra} note 2, at 10 (explaining that jingles are now produced mainly with synthesizers, and an increasing amount of Broadway shows and ballets are turning to taped music); Gorman, \textit{supra} note 18 (stating that the staff orchestra of television and radio stations has become virtually nonexistent); Chris Dafoe, \textit{The Synching Sensations: Read My Lips}, \textit{TORONTO STAR}, Aug. 4, 1990, at 3 (reporting that many pop musicians are now using synthesizers to produce records and taped music in live concerts).
\textbf{78.} \textit{See} \textit{SELTZER, supra} note 13, at 157 (calculating that membership in the AFM reached a high of 331,000 in 1976 for the United States and Canada and dropped to approximately 177,000 members in 1989); \textit{see also} David Robb, \textit{No Third Term For Massagli At Musicians Union}, \textit{HOLLYWOOD REP.}, Jan. 18, 1995, at 6, 50 (reporting that in 1995 the total number of members is
increasing use of and advances in recording technology and synthesizers.  

The main problem caused when producers employ the use of synthesizers in the orchestra pit, or substitute tape for some musical parts, is its effect on the number of musicians needed to produce the music for a given show. One way the AFM has attempted to combat the problem of technological unemployment has been to require a minimum number of musicians to be under contract with the theaters and touring companies. The result of technology in combination with the minimum musician requirements is that musicians now get paid for not playing.

The non-playing musicians, or "walkers" as they are called in the industry, present two major problems for the union. First, they create feelings of distrust and resentment between the union and the employers. Second, the public becomes resentful of workers who get paid for not working; thus, when the AFM strikes, there is little public support and a decrease in the AFM's bargaining power.

However, the courts have not found these provisions of collective bargaining agreements to be unlawful under the National Labor Relations Act ("NLRA"). In NLRB v. Gamble, the AFM required the defendant to employ a pit orchestra to play "overtures, intermissions and chasers" while the theater employed a traveling band. The employer

150,000).

82. See Paula Span, Broadway Vote is Today, Contract Calls For Fewer Non-Playing Musicians, WASH. POST, Oct. 6, 1993, at B2 (reporting that the producers of "The Who's Tommy" must keep on the payroll 8-10 musicians who never perform).
83. Donald G. McNeil, Jr., New Show Is First Not to Have to Pay Idle Musicians, N.Y. TIMES, Feb. 8, 1995, at C13 (explaining that the term "walkers" originated from the stereotype that musicians who do not perform only walk in to pick up their checks).
84. See Filichia, supra note 79, at 1. The League of American Theaters held a press conference to inform the public that they were required to hire musicians who did not play. During an AFM rally, President of Local 802 contended that "current technology is the knife that can be used to eliminate first this instrument, and then this section, until they have done with all the live musicians, and are left with a dead art form." Filichia, supra note 79, at 1.
85. Filichia, supra note 79, at 1.
87. 345 U.S. 117 (1953).
88. Id. at 120.
was also required to obtain the AFM's consent for local appearances of traveling bands.\textsuperscript{89}

The AFM suggested four plans during negotiations with the theater, each calling for the actual playing of music by the local union orchestra.\textsuperscript{90} The Court held that payments for standing by are not payments for services performed, and would be considered featherbedding.\textsuperscript{91} However, when an employer receives a bona fide offer of competent, relevant services, "it remains for the employer, through free and fair negotiation, to determine whether such offer shall be accepted and what compensation shall be paid for the work done."\textsuperscript{92}

In \textit{American Federation of Musicians},\textsuperscript{93} the employer produced a live traveling show, "The Wizard of Oz."\textsuperscript{94} At first, the producer intended to use a combination of live and taped music for the show.\textsuperscript{95} The producer later decided that the show would be completely prerecorded with no live music.\textsuperscript{96}

However, as part of the contract with the AFM, as a condition of the AFM supplying musicians to record the music for the show, the producer was required to hire live musicians.\textsuperscript{97} The employer refused to hire musicians in three cities on the tour and claimed that the AFM

\textsuperscript{89} \textit{Id.} The theater employed a local orchestra consisting of nine union musicians to play for stage acts at the theater. \textit{Id.} at 119. When a traveling band occupied the stage, the local orchestra played from the pit. \textit{Id.} Although the union musicians were not employed on a regular basis between 1943 and 1947, they were paid minimum union wages when traveling bands performed at the theater even though they did not play any music. \textit{Id.} at 119-120.

\textsuperscript{90} \textit{Id.} at 120. The suggestions were: (1) to play overtures, intermissions and chasers; (2) to play the music required for vaudeville acts not an integral part of the traveling band ensemble; (3) to perform on stage with vaudeville acts booked by the theater; and (4) to play at half of the theater's total shows each year. \textit{Id.}

\textsuperscript{91} \textit{Id.} at 124.

\textsuperscript{92} \textit{Id.} at 125; \textit{see also} American Newspaper Publishers Assoc. v. NLRB, 345 U.S. 100, 111 (1953). The Court held that there was no violation of \$ 8(b)(6) where the typographical union insisted that the newspaper publishers pay compositors for reproducing advertising matter, even though the publishers ordinarily had no use for such reproductions. \textit{Id.} at 101. The advent of the linotype machine took this work away from the publisher's compositors, who used to do the work by hand. \textit{Id.} at 103. The Court concluded that \$ 8(b)(6) did not outlaw the practice, and based on the legislative history, \$ 8(b)(6) was not intended to preclude the insistence on bona fide "made work" as well as work which is actually needed. \textit{Id.} at 111.

\textsuperscript{93} MMG Arena Productions, Inc., No. 31-CB-7951, 1990 NLRB GCM LEXIS 21.

\textsuperscript{94} \textit{Id.} at *2.

\textsuperscript{95} \textit{Id.} at *3.

\textsuperscript{96} \textit{Id.}

\textsuperscript{97} \textit{Id.} at *6. "[The agreement] provided that the tapes would be recorded under the PRLA, and that . . . (4) the employer must hire 15 local musicians in each of 10 major cities, and 7 musicians at all other performances. . . ." \textit{Id.}
The American Federation of Musicians' Swan Song

violated section 8(b)(6) of the NLRA.98

The Court applied the decisions of Gamble and American Newspapers and held that the action by the AFM did not violate section 8(b)(6).99 The AFM made a bona fide offer for competent performance of relevant services.100 Thus, where there is a contract with the AFM to record scores to be used in place of live music, the AFM may condition the use of the tapes on the employment of musicians. Although these contracts typically require fewer musicians than normally would be expected to perform at a live show, this may create a financial incentive for the employer to use only live music.101

Today, however, the AFM no longer possesses the bargaining power it once had because of the improved fidelity of taped music and the development of synthesizers that more accurately replicate acoustic instruments.102 Theaters can now use taped music during AFM strikes and negotiations, further weakening the bargaining power of the union.103 Thus, the AFM is frequently forced to lower its minimum number of musicians requirements each time a new collective bargaining agreement is negotiated.104

IV. POSSIBLE SOLUTIONS TO THE PROBLEM OF TECHNOLOGICAL UNEMPLOYMENT

A. Mandatory Bargaining Over Automation in the Music Industry

The decision to automate in industries other than music is based on many interests of the employer.105 Such interests include the need to

98. Id. at *8.
99. Id. at *14, *15.
100. Id. at *15.
101. Due to the additional costs; such as licensing fees, studio time, and the cost of the musicians themselves, in addition to complying with the frequently imposed PRLA time limit on the number of taped performances that may be used, and because the producer would be required to hire musicians as part of the contract, a better quality performance may be achieved, for a lower price, by hiring live musicians.
102. See generally Goldstein, supra note 9, at G1.
103. See Wong, supra note 9, at B1.
104. See Span, supra note 82, at B2 (discussing minimums lowered at smaller Broadway theaters); Las Vegas Musicians End 7 1/2 Month Strike; Hotels Replace 46 Musicians With Tapes, DAILY LABOR REP., Feb. 14, 1990, at A-7 (discussing 46 musicians in hotel show rooms who were replaced with taped music).
remain competitive with imports, increased productivity, and improved quality of products and labor costs.\footnote{Id. at 404.} In the music industry where musicians are being replaced by synthesizers or taped music, the decision rests solely on labor costs.\footnote{Id. at 10.}

Under section 8(d) of the NLRA, there is a duty to bargain in good faith with respect to mandatory subjects of collective bargaining.\footnote{29 U.S.C 158(d) (1988) provides:} To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or any question arising thereunder . . . .

Both the National Labor Relations Board ("NLRB" or "Board") and the courts have held that the decision to automate may be a mandatory subject of collective bargaining.\footnote{Id. at 203 (1964).} However, where the courts have considered the decision entrepreneurial in nature, the courts have held that the decision to automate is not a mandatory subject of collective bargaining.\footnote{Id. at 206.}

The decision to automate may be analogized to a partial closing of operations. In Fibreboard Paper Products v. NLRB,\footnote{Id. at 210.} the employer unilaterally reduced labor expenses by employing an independent contractor to perform the same tasks that had been performed by the maintenance bargaining unit.\footnote{Id. at 211.} The Court held that the statutory scope of mandatory bargaining includes those decisions that result in employees being discharged.\footnote{But see id. at 223 (Stewart, J., concurring). An enterprise may decide to invest in labor saving machinery. Id. Decisions that concern the basic scope of the enterprise are not themselves primarily about conditions of employment. Id. Justice Stewart contends that management decisions which are fundamental to the basin direction of the business should not be
In *First National Maintenance Corp v. NLRB*, the Court narrowed the mandatory bargaining requirement. The Court adopted a balancing test to determine the scope of the mandatory bargaining requirement. Under this balancing test, an employer must bargain with the union over a decision to terminate a contract for purely economic reasons only where the benefits for labor-management relations and the collective bargaining process outweigh the burden placed upon the conduct of the business.

The NLRB, when deciding *Otis Elevator Co.* (*Otis Elevator II*) in 1984, relied upon its decision in *First National Maintenance*. The NLRB held that where a decision to transfer work turned upon a change in the nature and direction of a business, rather than exclusively on labor costs, it is at the "core of entrepreneurial control" and thus not a subject of mandatory bargaining. As a result of *Otis Elevator II*, an employer is not required to bargain about a decision to automate unless the decision to automate turns exclusively upon labor costs.

However, even under the restrictive test of *Otis Elevator II*, the decision to use taped music or synthesizers in place of musicians would likely be deemed a mandatory subject of collective bargaining. The decision to automate in the music industry is based solely on labor costs. The employers in the music industry do not produce a better product, nor are they competing with lower priced foreign goods.

In fact, the final product is not as good because the performance suffers from a lack of flexibility, and musicians are not able to "play off one another." Because the decision to automate by replacing mandatory subjects of collective bargaining under section 8(d). *Id.*

118. *Id.* There was concern that requiring decisional bargaining in situations such as technological change would allow the union to be "equal partners" with management. *Id.* at 676. The Court felt that management should have unfettered ability to conduct its business operations. *Id.* at 678.

120. *Otis Elevator II*, 269 N.L.R.B. at 891.
121. *Id.*
124. When performing live, musicians are able to make slight variations and improvise; taped music does not allow for this artistic impression. Synthesizers are similarly limited because the music is be pre-programmed into the synthesizer. For example, if a singer wanted to hold a note a little longer during a particular performance, she would be unable to do so because she would then...
musicians with new technology is based exclusively on labor costs, the
employer and the union must reach an impasse in negotiations before
unilaterally deciding to use synthesizers or taped music.\textsuperscript{125}

B. The Work Preservation Doctrine

If the AFM and employers decide to place restrictions on the use of
synthesists within their collective bargaining agreements, the restrictions
may be considered secondary activity under the NLRA against companies
that produce synthesizers.\textsuperscript{126} However, the Supreme Court in \textit{National
Woodworkers Manufacturers Association v. NLRB}\textsuperscript{127} held that if a
union's conduct is directed at preserving work traditionally done by the
unit, it does not violate either section 8(b)(4)(B) or section 8(e) of the
NLRA.\textsuperscript{128} The Court also found that efforts to prevent job displace-
ment in the future was not secondary activity under the Act.\textsuperscript{129}

The Court's opinion did not construe the work preservation doctrine
narrowly.\textsuperscript{130} Rather, the existence of a preservation of work clause in
a collective bargaining agreement was held to be evidential that the
activity was motivated by a primary concern, such as an immediate job
threat.\textsuperscript{131} Thus, an agreement with theaters and employers limiting the
use of synthesizers would most likely be considered to be lawful, and not
secondary activity under the NLRA.\textsuperscript{132}

\textsuperscript{127} 386 U.S. 612 (1967).
\textsuperscript{128} \textit{National Woodworkers}, 386 U.S. at 616. The collective bargaining agreement in question
contained a provision in which union members refused to handle premachined doors. \textit{Id.} Fitting
doors had traditionally been the job of the bargaining unit workers. \textit{Id.} The manufacturer of the
premachined doors brought suit, claiming the clause violated § 8(e) of the NLRAs. \textit{Id.}
\textsuperscript{129} \textit{Id.} at 645-46.
\textsuperscript{130} Alicia G. Rosenberg, Comment, \textit{Automation and the Work Preservation Doctrine:
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{See National Woodworkers}, 386 U.S. at 612 (holding that § 8 did not include employees'
primary activity, and as such, agreements to pressure employers to preserve work traditionally done
by the employees was lawful); \textit{see also} NLRB v. Enterprise Ass'n of Steam and Pipe Fitters, Local
"it is not necessarily a violation of § 8(b)(4)(B) for a union to picket an employer for the purpose
of preserving work traditionally performed by union members even though in order to comply with
the union's demand the employer would have to cease doing business with another employer").
1. Solutions Through Collective Bargaining

An effective way for the AFM to achieve its goal of employing more musicians and slowing the trend of technological unemployment is through bargaining with the employers. The AFM must attempt to foster a better working relationship with theater owners and producers of live performances that require music. The AFM must also attempt to improve the union’s public perception.

a. Committees

One possible solution to the above mentioned problems is to create a more flexible method for determining minimum musician requirements. An arbitration committee should be created to determine how many musicians are needed for a particular performance. This would

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133. See 29 U.S.C. § 151 (1988); see also Carey v. Westinghouse Corp., 375 U.S. 261, 271 (1963) (holding that the NLRA was primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining).

134. See Ramsey v. NLRB, 327 F.2d 784, 786 (7th Cir. 1964), cert. denied 377 U.S. 1003 (1964). A primary purpose of national labor relations laws is that of settling labor problems by means of collective bargaining. Id. An increasingly recognized and important policy is the encouragement of arbitration in the collective bargaining process. Id. at 787. See also International Harvester Co., 138 N.L.R.B. 923, 927 (1963) (holding that if complete effectuation of the Federal policy is to be achieved, the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitration process as part and parcel of the collective bargaining process itself).


(1) In the event that the producer believes that there are demonstrable artistic reasons for the musical production to be presented with fewer musicians than the minimum required for the theater in which the production is to be presented, the producer shall so advise and consult with the Union as soon as possible but, in no event later than the date upon which the orchestrator’s contract for the Broadway production is filed with the Union. The Union shall have the absolute right to prohibit any such deviation from the minimum if the producer fails to consult within the time set forth.

(2) In the event that the Producer and the Union fail to agree on the appropriate orchestra size within five (5) days of the Producer’s request, the issue shall be submitted to a Committee consisting of two (2) members from the League, two (2) members from the Union and three of the following “neutral” persons . . . .

(4) Each Committee person shall have one vote by secret ballot and the decision of the Committee shall be binding upon the Producer and the Union. A majority vote shall prevail.

(5) The burden of demonstrating that the production is deserving of special
foster better communication between the employers and the AFM, which
is a primary goal of the NLRA.\textsuperscript{136}

At the present time there is resentment between the AFM and
employers.\textsuperscript{137} On the one hand, the theater owners do not want to pay
for musicians who are not going to be playing, while the musicians are
finding that their employment opportunities are being cut at an alarming
rate.\textsuperscript{138} Thus, the creation of an impartial committee may serve as a
referee between the two parties.

The committee could consist of three to five experts in the field of
music, such as composers and music scholars. The two sides could then
agree to the committee's terms and provisions in their collective
bargaining agreement. When a dispute arises with respect to the
minimum number of musicians needed for a particular score, the
committee would then review the score. By taking into account the size
of the theater or auditorium in addition to the needs of the music, the
committee would determine the minimum number of musicians required.
Each side would be bound by the determination of the committee. For
extremely small theaters, the committee would have the authority to
authorize the use of tape for all or part of the music where it would not
consideration and, therefore, should be permitted to employ fewer musicians than
the minimum required shall be upon the Producer. Any member of the
Committee may call witnesses and present evidence in support of their position
that they see fit.

(6) The Committee shall decide the issue on the basis of artistic considerations alone.
Such considerations shall include, but not be limited to, whether the production
is of a definable musical genre or of a dramatic approach which necessitates a
smaller size orchestra in order to keep its artistic integrity or, whether the show's
concept consists of a recreation of a pre-existing size band and performs on a
stage and constitutes an integral part of the production and staging concept.
Examples of productions that would have been subject to these considerations are
"Tommy", "Five Guys Named Moe", "Buddy", "Jelly's Last Jam", and
"Chicago".

\textit{See also} Span, supra note 82, at B2 (describing that in Local 802's collective bargaining agreement,
which went into effect in 1993, a committee of two union members, two League of American
Theater representatives, and three independent experts review "special situations" in which producers
want to use substantially fewer musicians).

\textsuperscript{136} See National Woodworkers, 386 U.S. at 640 (seeking to encourage labor-management
tellations to end disputes, dislocations, and changing technology). \textit{See also} Rosenberg, supra note
130, at 152 (encouraging expansion of the work preservation doctrine to allow unions to claim
technology-created new work that displaces traditional unit work).

\textsuperscript{137} See Filichia, supra note 79, at 1 (describing producer of The Who's "Tommy" as
complaining about having to pay 8-10 extra musicians who did not play). The AFM claimed that
producers used 24 musicians on the album and purposely hired 15 "walkers", only 10 were paid,
during a negotiating year so that the musicians would "look bad". Filichia, supra note 79, at 1.

\textsuperscript{138} See Filichia, supra note 79, at 1.
be practical to employ musicians.

b. Synthesizer Tax

Since, under *Otis Elevator II*, the decision to employ synthesizers is a mandatory subject of collective bargaining, under *National Woodworkers*, the AFM can bargain for a job security clause within their collective bargaining agreements. This agreement would either place restrictions on the use of synthesizers at live performances or make it less economical for producers to employ them.

A possible solution to synthesists taking away jobs from acoustic musicians is to tax employers who employ a synthesist that displaces two or more acoustic instruments. A tax proportionate to the number of acoustic musicians replaced would put the acoustic musicians on an equal playing field with the synthesist. Where the synthesizer does not

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140. Local 802 has addressed this problem in its latest collective bargaining agreement; however, it does not go far enough to solve the problem. See Collective Bargaining Agreement, supra note 135, art. XIV § A. Article XIV § A provides:

1. Recorded music or electronic instruments . . . and other devices now known, or which shall hereinafter become known may be used in performances of musical shows provided that the minimum numbers of musicians specified in Article V of this Agreement are engaged. Players of such instruments shall be engaged as performing musicians except:

   a. When the orchestra is on stage, is an integral part of the staging, and when space and scenic considerations prevent the utilization of the full complement as playing musicians;

   b. When there is a lack of room in the orchestra pit due to considerations other than those referred to in Article XIII (D) of this Agreement.

   c. If the conditions referred to in either subparagraph (a) or (b) shall occur, a specific number of understudies to be mutually agreed upon shall be employed unless at least (80%) of the appropriate orchestra minimum is engaged as playing musicians (such number not to be rounded), in which event no mutual agreement shall be rounded.

2. Electronic instruments, except for rhythm/percussion synthesizers, may be used in rehearsals for musical shows.

3. Any musician operating an electronic instrument(s) in musical shows shall receive a premium of twenty-five percent (25%) of the basic scale wage in addition thereto and shall be permitted to operate any number of electronic instruments and acoustic keyboard instruments (including modules or any other recording devices). Other than the foregoing premium, there shall be no doubling premium paid regardless of the number of electronic instruments operated by the said musician.

4. A joint subcommittee shall be appointed by the parties to explore the effect of the use of electronic musical setups in the theater.

5. In the event an electronic instrument is utilized in a production, the trade name and the model number of the instrument shall be indicated on the individual
replace any acoustic musicians, but is used to generate new sounds or sound effects, no tax would be levied.\textsuperscript{141}

The committee discussed above could determine the amount of tax owed by an employer for employing a synthesist. The committee could also be responsible for determining the number of acoustic instruments, if any, replaced by the synthesist. At the end of each year, the money collected as a result of these taxes could be used to provide free admission concerts and educational programs that educate the public on the appreciation of live music.

Many synthesists are members of the AFM and are comfortable with their place in the music industry.\textsuperscript{142} Although they might resent a synthesist-based tax, only a small percentage of synthesists perform at Broadway shows or musicals.\textsuperscript{143} With only a few viable alternatives available to acoustic musicians, the synthesizer tax is a credible attempt at restoring equality among instrumentalists in the AFM.

2. Legislation

The legislatures of seven states\textsuperscript{144} have recognized that taped music and synthesizers present a problem in the music industry.\textsuperscript{145} Under proposed legislation, the theater and promoter would be required to give the public notice when any portion of a "live" performance contains prerecorded music.\textsuperscript{146} The underlying assumptions of these legislatures are that the use of tapes is a fraud, and if the audience knew,

\begin{enumerate}
\item[musician's contract submitted to the Union.]
\item[B. The Employers shall not use or permit the use of any tapes, or recordings for any rehearsal, except with the prior written consent of the Executive Board of Local 802. Said consent shall be obtained before the first rehearsal of any production.]
\item[See also Eikenberg, supra note 8, at 14B (stating that the AFM has been vague when applying union rules to synthesized music, and that both acoustic musicians and synthesists argue that these issues should have been addressed years ago when the problem first surfaced).]
\item[141. Gordon, supra note 2, at 10. John Glazel, President of Local 802 noted, "[W]e don't object to the use of synthesizer to create new sounds, sounds human beings can't make . . . . [T]hat's like adding another color to the palette." Gordon, supra note 2, at 10.]
\item[142. See Eikenberg, supra note 8, at 14B.]
\item[143. The majority of synthesists perform in recording studios.]
\item[144. The State legislatures that have considered bills regarding the use of tapes and synthesizers in the music industry are: California, Illinois, Massachusetts, Minnesota, New Jersey, New York, and Wisconsin. See Paul Verna, AFM Raises Voice in Support of 'Non-Live Music' Measures, BILLBOARD, March 30, 1991, at 14.]
\item[145. See, e.g., New York 215th General Assembly, Bill No. 1303 (1993) (to amend § 350(c) of the General Business Laws).]
\item[146. Id.]
\end{enumerate}

http://scholarlycommons.law.hofstra.edu/hlelj/vol13/iss2/7
it would be outraged. Not surprisingly, the AFM is strongly endorses this new legislation.

Although there is support for these measures in both the legislature and the AFM, the majority of the public is not disturbed by the use of taped music at live performances. For example, during a 1993 strike in Washington D.C., "Phantom of the Opera" opened the season using taped music. Approximately ninety percent of the patrons who had bought tickets prior to the strike attended the show even though it was performed with taped music.

Although the public would be more informed if these bills were to become law, legislation itself will not likely have a tremendous impact on the ticket buying public. First, the statutory requirements are not stringent. Promoters will easily satisfy these requirements by informing the public of the prerecorded music, and the public will continue to purchase the tickets and attend the performances.

Another potential problem with the proposed legislation is determining whether the use of synthesizers falls within the statutory definition of "prerecorded music." Since music is often programmed into the synthesizer and used almost in the same manner as a tape is used, it arguably falls under such a statute. If the legislature decides to pass such a statute, it should draft the law to clearly include synthesizers within the definition of "prerecorded music."

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147. Dafoe, supra note 77, at 3.
148. Paul Vema, AFM Raises Voice in Support of 'Non-Live Music' Measures, BILLBOARD, March 30, 1991, at 14 (quoting AFM President Martin Emerson, "I am personally urging the 252 locals in the U.S. and Canada to contact the legislative parties at the state levels and ask them to introduce legislation to inform the public that when they go to these performances, they are being hoodwinked").

149. Dafoe, supra note 77, at G3 (reporting that pop music fans were not disenchanted by the use of taped music by Michael Jackson and other pop stars); Nambiar, supra note 10, at C2 (reporting that interviews during the musical "Phantom of the Opera" revealed that the public, in general, is apathetic towards the lack of live music performed at the musical); Deborah Caulfield, Taped Music at Nureyev Show Protested By Union, L.A. TIMES, Aug. 11, 1987, at 5 (discussing the use of taped music instead of a live orchestra at the ballet); Goldstein, supra note 9, at G1 (reporting that Siegfried and Roy, performers who once toured with 14-piece orchestras but now rely on taped music, are charging the same price for admission).

V. AUTOMATION IN THE MUSIC INDUSTRY VS. OTHER INDUSTRIES

The decision to automate in the music industry, as discussed previously, is based entirely on labor costs. In other industries the decision to automate may be based on the need to compete with lower priced imports, to increase productivity, or to produce higher quality finished products. Automation also eliminates unpleasant, tedious, and dangerous jobs.

Technical advances in agriculture, printing, and mining, for example, have displaced thousands of workers, and the use of industrial robots quadrupled between the years of 1979 and 1981. Although its effect on labor may be devastating, there is a strong national interest in automating American industry because it has the potential to rejuvenate the nation's economic competitiveness.

Some commentators have suggested the need for communication to reduce the mutual fear and distrust that exists between employers and employees. This will at least provide the employees with an opportunity to discuss the situation with their employers and possibly even suggest alternatives that management has not considered.

A tax on automation is another possible tool that labor organizations might employ. This tax would moderate the spread of labor saving machinery throughout the workplace by creating an economic incentive for employers to keep workers. The level of taxation could be geared to the types of goods or services produced, depending on whether

154. See supra notes 120-22 and accompanying text.
155. Moon, supra note 105, at 403.
156. Solomon, supra note 139, at 69.
158. Atkinson, supra note 110, at 438 (calculating that in 1988, manufacturers in the United States spent $17 billion on automation).
160. Atkinson, supra note 110, at 468 (arguing that if employees reasonably believe their employer will not take action to threaten their wages, hours or working conditions, or at least that there may be a remedy for such actions, the parties may alleviate the rumors and distrust that threaten to undermine an otherwise productive relationship).
161. Atkinson, supra note 110, at 468 (arguing that job security is critical where the business is undergoing major workforce restructuring and technological innovations because workers who are not in fear of losing their jobs are more apt to provide valuable advice in the design of new manufacturing systems and techniques).
162. See Solomon, supra note 139, at 88-89.
society wants to promote or deter the consumption of such goods or services.\textsuperscript{163}

However, placing a tax on automation would likely stunt the growth and development of technology, while increasing production costs.\textsuperscript{164} Because the growth and development of technology are important from a societal standpoint, taxing automation in all industries may be harmful to industry and the nation as a whole.\textsuperscript{165} However, the effects of a tax on synthesists would not have the effect of slowing technological growth within the music industry.\textsuperscript{166} The majority of synthesizers are sold for use in homes by amateur musicians, for use in recording studios, for educational institutions, and for musicians that compose electronic music from their homes.\textsuperscript{167} Thus, technology in the music industry will continue to improve with or without a tax on synthesists because of the great demand for these instruments.\textsuperscript{168}

Commentators have also suggested retraining as another possible solution.\textsuperscript{169} By retraining displaced workers to function in the newly automated workplace or retraining workers for other employment, the effects of technological unemployment would be lessened.\textsuperscript{170} However, in the future, new industries may not be able to absorb the employees from the industries that are hardest hit by the effects of automation.\textsuperscript{171}

For musicians, retraining is not a desirable solution to the problem of automation in the industry.\textsuperscript{172} Musicians are unlike the employees in many other professions because performing music is not just a job, but

\textsuperscript{163} See Solomon, supra note 139, at 89; see also INTERNATIONAL ASS‘N OF MACHINISTS AND AEROSPACE WORKERS, THE ORIGINAL REBUILDING OF AMERICA ACT, §§ 202-04 (1984) (proposing the imposition of a tax on machinery, equipment, robots, and production systems that displace workers).

\textsuperscript{164} Solomon, supra note 139, at 89. When it becomes apparent that new technologies will affect more workers, a general resistance to change may result. Solomon, supra note 139, at 90. This resistance may take the form of a stalling of the process of change, in addition to the imposition of unreasonable penalties. Solomon, supra note 139, at 90.

\textsuperscript{165} Solomon, supra note 139, at 90.

\textsuperscript{166} See Steve Metcalf, The Synthesizer: To Hear It Is To Love It, But Then You Have To Get To Know It, HART. COURANT, Aug. 1, 1993, at G1.

\textsuperscript{167} Id.

\textsuperscript{168} See generally Friedman, supra note 6, at 7.


\textsuperscript{170} Moon, supra note 105, at 419 (concluding that management should avoid displacement within the company). Where displacement is necessary, management can facilitate the employees’ adjustment by communicating this information in advance. Moon, supra note 105, at 419.

\textsuperscript{171} Solomon, supra note 139, at 72-73. Since many employees will not be absorbed by the workforce, Solomon proposes a lifetime “welfare fund” and part time employment for the majority of the population. Solomon, supra note 139, at 90.

\textsuperscript{172} See Eikenberg, supra note 8, at 14B.
a way of life. Although some musicians have successfully found jobs in other industries, the decision should not be made because a "machine" is taking their place; rather, it should be made based on the number of musicians that the market can support.

VI. CONCLUSION

Since the advent of digital technology, there has been a decline in the overall number of professional musicians because there is not enough work to support them. The AFM currently faces the biggest challenge in its one hundred year history. To make matters worse, the union is also losing the support and appreciation of the public.

However, Local 802’s collective bargaining agreement with the League of American Theatres and Producers, which went into effect in September 1993, is a step in the right direction. For the first time, an agreement is in place that gives both parties options when a producer claims the production should be performed with fewer than the minimum number of musicians for the theater. However, the distrust remains between the AFM and the League.

The argument that continues to be made by advocates of unlimited technology in music is that taped music and synthesizers will not replace live musicians because there will always be enjoyment in watching live musicians perform. While this may be true in the context of symphonies and operas, it is no longer the case in Broadway shows and other performances where the musicians are not the main attraction.

There are few remaining options available for musicians to practice their trade and earn a living.

Implementing a tax on the use of synthesizers and submitting disputes to an arbitration committee will likely bring the two parties to

173. Many professional musicians began to study music before the age of five.
175. Gordon, supra note 2, at 10. Synthesists admit that there synthetic music cannot be compared to real music. "The problem is when you listen to synthetic music all the time you begin to lose perception of what real instruments sound like." Gordon, supra note 2, at 10.
176. See supra note 136; see also McNeil, Jr., supra note 83, at C13 (discussing the committee that decided against AFM by permitting a producer to use a synthesizer instead of a string quartet for six minutes during the musical, "Smokey Joe's").
177. See McNeil, Jr., supra note 83, at C13 (quoting a producer who stated that even if he were forced to hire four string players, he would continue to use a synthesizer and hire paid "walkers").
178. SELTZER, supra note 13, at 233.
179. Even where the music is the main attraction, the musician still plays a vital role.
the bargaining table before the dispute escalates. Such negotiations to resolve these disputes will result in a solution that meets both the AFM’s and the theater owner’s needs better than those of prior years, where the AFM insisted on rigid minimum musician requirements and theater owners replaced musicians with synthesizers or taped music without considering the artistic needs of the music or the concerns of the AFM.

By improving their relations with employers and the public, the AFM should be able to enhance its bargaining power. Using funds from grants and the proposed synthesizer tax, musicians should be able to educate the public through free concerts and community outreach programs on the importance of live music as an art form. Only when the public is educated, and realizes what live music adds to a musical or ballet, will the AFM be able to win the war against synthetic and taped music in the orchestra pit.

Christopher Milazzo

180. Opposing parties are likely to be more flexible in the bargaining process where there is the threat of binding arbitration.

181. Catherine Saillant, Group Tries to Amplify Appreciation of Music; Education: Nonprofit Foundation Fosters Arts Instruction Through Free Workshops in Elementary and Middle Schools, L.A. TIMES, March 11, 1995, at B1 (discussing the efforts of the Ventura County Performing Arts Foundation, which gives free workshops to elementary and middle school children in an effort to teach music appreciation). Mark Massagli, president of the American Federation of Musicians, lauded the foundation as being “on target with what must be done throughout the country to assist and ultimately recruit young musicians into the AFM fold” and encouraged local chapters of the AFM to do the same. Id.