

HB 17-1092 would amend current state laws regarding contracts between proprietors and performing rights societies (PRSs). A PRS acts as an intermediary between copyright holders and parties who wish to use copyrighted material for live musical performances and recorded music; these parties are referred to as proprietors. HB 17-1092 will allow the government to interfere with contract bargaining between a PRS and a proprietor by creating market inefficiencies, unbalanced consequences, and putting an unnecessary burden on the state government. This bill should not be passed in any form.

The key terms of this bill include the following: property rights, copyright, and licensed material. A property right is a legal protection that gives ownership of intellectual or physical property to an individual. For a musical piece of work, the property right is referred to as a copyright. If a proprietor wants to use a musical work that is copyrighted, they would need to obtain a license for that piece of work. A license is a limited transfer of the right to use a musical work, granted by the owner of that musical work.

Artists can represent themselves in licensing and copyright usage, or they can hire an agency to represent them. In practice, this means that the artist's agency would have the right to license the musical works of the artist it represents, charge for the service of issuing and monitoring licenses, transfer the musical works to proprietors, and enforce the artist's property right. The artist's agent will charge a proprietor a fee for using their musical work. This fee serves as compensation to the artist for the intellectual property usage.

The bill refers to a specific type of agency that represents an artist as a PRS, but it is unclear if HB 17-1092 is referring to all agencies that represent an artist in copyright licensing. The bill's text does not clearly define the industry it is trying to regulate. There are multiple descriptors, such as performing rights organizations, copyright collective societies, and PRSs; all

of these organizations appear to perform the same function. This creates confusion since performing rights organizations, copyright collective societies, and PRSs are all terms used interchangeably. It is not clear as to what kind of organizations would be regulated by this bill.

Government intervention in the market is hard to justify unless there is a market imperfection. When unbalanced power in the market exists, the government can introduce regulation aimed to rectify this imperfection. If only a few firms owned all of the licensing rights to the majority of musical works, then the government should regulate the PRSs, performing rights organizations, and copyright collective societies, as well as monitor the contracts they enter into. However, this imperfection does not exist in the market.

The fiscal note associated with HB 17-1092 states that there are only three PRSs in Colorado. This means that there may not be a sufficient number of firms to create a competitive market for licensed musical works. However, counting copyright collective societies and performing rights organizations, as well as PRSs, there are well over a hundred of these organizations globally (Performance). Since there are more than a hundred firms globally, the bill is not fixing an imbalance of market power; there are plenty of firms to create a competitive market.

There is an argument that PRSs have unfair market power because they own the only copyright for an individual song. An individual song is a unique good, so a proprietor could be impacted by a single PRS having complete market control over the song they want. While a single PRS may own an individual song, they will not own all songs of that genre. An individual can go to another PRS and purchase a license for a song that fulfills the same or similar purpose. There is no indication that consumer choice is unduly restricted due to the existence of alternative songs within the subcategory of genre.

The government's role in creating clear laws about contracts should be restricted to defining property rights. The Coase Theorem states that once a government has established a property right then the two parties can reach a beneficial bargain. The federal government has created clear laws about the use of copyrighted musical works. HB 17-1092 allows the government to continuously interfere in the bargaining process. This action is unnecessary since the federal government has already served its purpose by defining the property right.

This bill restricts a PRS's property rights. HB 17-1092 would now require PRSs to publically publish all of the licensing costs for the music to which they own the copyrights. A PRS has a direct interest in defining and cataloging the musical pieces that are copyrighted to them. PRSs are incentivized by the compensation that they receive when someone wants to license their copyright. These organizations have created websites that allow proprietors to know what musical pieces they own licensing rights to. The government does not need to create a catalog of the licensed copyrighted musical work since PRSs already provide that service.

However, having PRSs publically post a schedule of their licensing fees (while not binding) would make it difficult to adjust copyright prices. These prices are affected by the demand of the market. Without this bill, PRSs and proprietors are able to negotiate a price that works for both of them. The PRS will have to pay to file each time they want to publically change the price of their licensing cost, which could cause market inefficiencies. The government does not need to interfere by having PRSs post their licensing costs, since normal contract negotiations between PRSs and proprietors lead to an efficient price.

HB 17-1092 would allow the government to set up specific conditions of contracts between a PRS and a proprietor. If passed, when PRSs do not file their licensing fees and a catalog of the material for which they own licensing rights with the Colorado Secretary of State

Office, then any contract would be declared void. Government meddling, by setting contract conditions, will not improve contract bargaining because it interferes with the flexibility of the licensing market. The government does not need to do this since normal contract negotiations would set mutually acceptable conditions that, if violated, would void the contract, assuming that neither party has market power.

HB 17-1092 would also benefit proprietors by restricting the licensing fee to only be applied one time, even if two proprietors use the licensed material. PRSs should get compensated each time their copyrighted material is licensed, which could be anywhere from one use to unlimited uses for a single fee charged. This bill allows for an unfair advantage for proprietors by interfering with property rights of PRSs.

HB 17-1092 demonstrates its bias in favor of the proprietor by raising the minimum statutory damages to \$2,000 if the proprietor is the winner of judicial action, but does not do the same for PRSs. This creates more risk for PRSs than for proprietors. The bill laid out two conditions: the first is that the PRSs must file licensed music with the State Department, and the second is that the PRSs have to list their fees. Both conditions place a burden on the PRS and if unmet, would void the contract. These actions must be done within 30 business days of acquiring a new piece of work; if by accident the PRSs do not do this, then they would be in violation of their contract, allowing the proprietor to get a settlement. This could happen even if the PRS had listed the licensed musical copyright on their own website. Since the government is able to set the terms of contract violation with strict rules, they increase the risk of contracts being voided, resulting in over compensatory damages for proprietors who win judicial action.

HB-17-1092 would place a burden on government agencies. According to the fiscal note, the only major impact of this bill will be on the workload of the Colorado Secretary of State

Office, who would be in charge of filing and publishing the cataloged list of works. This bill requires the Colorado Secretary of State Office staff to create a website detailing licensing fees, as well as a catalog of current licensed work owned by each individual. This duplicates effort because PRSs already catalog their musical works. While the State Department has the option of hiring a new staff member to take on the administrative burden, this bill does not specifically set aside money for this purpose. This means that employees of the State Department must add this to their current workload or, potentially their budget. HB 17-1092 puts an unnecessary burden on government time and resources, for work that the PRSs have already done.

Instead of interfering with property rights, the government should create laws that improve bargaining between two private parties. Again, Coase asserts that in order for contracts to lead to the most efficient outcomes, there must be property rights assigned. Additionally, he also states that there must be low transaction costs. Since PRSs have the rights to copyrighted material, the first condition is met. However, it is unclear if there are low transaction costs. There are fees associated with allowing an individual musician to have PRSs be an intermediary in contracts. In general, the government should enact legislation only when it would lower transaction costs in order to facilitate bargaining.

My analysis demonstrates that HB 17-1092 only interferes with contract agreements. If enacted, this bill will interfere with markets, causing inefficient outcomes. This bill would use its ability to set terms of contracts to favor the proprietor. If passed, this bill will increase the filing burden on the State Department and have no improvement on contracts between PRSs and proprietors.

Work Cited

"Performance Rights Organization." *Wikipedia*. Wikimedia Foundation, 06 Mar. 2017.  
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