

DEPARTMENT OF FINANCE BILL ANALYSIS

AMENDMENT DATE: April 23, 2008
POSITION: Oppose
SPONSOR: Writer's Guild of America West (WGA)

BILL NUMBER: SB 1765
AUTHOR: S. Kuehl

BILL SUMMARY: Motion Picture, Television, and Radio Contracts

Under current law it is unlawful for any person engaged in business within California to sell any article or product at less than cost for the purpose of injuring competitors or destroying competition.

This bill would prohibit the holder of rights in a motion picture, television program or series, or radio program from selling or licensing those rights for less than their fair market value when a third party is entitled to receive payment based on the proceeds from the sale or license.

FISCAL SUMMARY

Finance estimates this bill would have no state General Fund impact. Provisions of this bill could negatively affect the marketability of certain types of intellectual property in California, resulting in reduced business activity in the state.

COMMENTS

Finance opposes this bill for the following reasons:

- This bill could result in reduced business activity in the state, since provisions of the bill defining "fair market value" and "most likely sale price" appear vague and subjective. Requiring a business to prove that the sale price of a commodity represents a fair market price, and to simultaneously require it to prove that another entity would not have paid a higher price, would place the business in a legally indefensible position. Placing such a stricture in law upon one industry would set a questionable precedent that could negatively impact other California businesses in future years.
- Provisions of this bill may conflict with federal copyright law.
- It is unclear that the conduct this bill seeks to regulate cannot be effectively addressed through the collective bargaining process.

Analyst/Principal (0762) C. Hill	Date	Program Budget Manager Mark Hill	Date
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Department Deputy Director	Date
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Governor's Office:	By:	Date:	Position Approved _____
			Position Disapproved _____

BILL ANALYSIS Form DF-43 (Rev 03/95 Buff)

S. Kuehl

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SB 1765

ANALYSIS

A. Programmatic Analysis

Under current law it is unlawful for any person engaged in business within California to sell any article or product at less than cost for the purpose of injuring competitors or destroying competition.

This bill would prohibit the holder of rights in a motion picture, television program or series, or radio program from selling or licensing those rights for less than their fair market value when a third party is entitled to receive payment based on the proceeds from the sale or license.

This bill would also define "fair market value" as the most likely price that the assets being sold would bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller acting prudently, knowledgeably, and in their own best interest, and a reasonable time being allowed for exposure in the open market.

We note that in order for this bill to be effectively implemented the terms used in the definition of "fair market value" such as "most likely price", "competitive and open market", "fair sale", and "reasonable time being allowed for exposure" would themselves require further definition, and would likely result in substantial litigation costs to California business because of their inherent vagueness. Furthermore, any such restrictions on the sale or licensing of copyrighted property are likely to conflict with federal copyright laws which contain preemption language. The federal courts have held in Laws v. Sony Music Entertainment that "the intention of {Federal Law} is to preempt and abolish any rights under the common law or statutes of a state that are equivalent to copyright and that extend to works within the scope of the federal copyright law."

The issues of the fair market value of intellectual property and vertical integration of the entertainment industry were addressed during the recent rounds of collective bargaining leading to the resolution of the 2007-08 WGA strike. It is unclear why this issue cannot be similarly addressed.

B. Fiscal Analysis

Finance estimates this bill would have no state General Fund impact. Provisions of this bill could negatively affect the marketability of certain types of intellectual property in California, resulting in reduced business activity in the state.

Code/Department Agency or Revenue Type	SO LA CO RV	PROP 98	(Fiscal Impact by Fiscal Year)						Fund Code
			(Dollars in Thousands)						
			FC	2007-2008	FC	2008-2009	FC	2009-2010	
0001/Major Rev	SO	No		-----	No/Minor	Fiscal Impact	-----		0001