

Extra Legal

Use and Abuse of Joinder in Copyright Infringement Actions

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Chapter 156E of Massachusetts General Laws became effective on December 1, 2012, enabling the formation of benefit corporations, entities that incorporate concern for public welfare into private enterprise.[[2]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn2%22%20%5Co%20%22) Massachusetts is the eleventh state to adopt benefit corporation legislation, with the District of Columbia recently following[[3]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn3%22%20%5Co%20%22) and other states planning similar statutes.[[4]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn4%22%20%5Co%20%22)

Roughly speaking, Chapter 156E is an attempt to create a corporate form that enforces investors’ social and public welfare concerns.[[5]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn5%22%20%5Co%20%22) As this article will demonstrate, Chapter 156E represents an imperfect effort at best.

Chapter 156E provides some enabling law for socially-conscious entrepreneurs and investors by writing corporate social responsibility into the enterprise’s architecture. Benefit corporations are a professional or business corporations – organized under Chapters 156A and 156D, respectively – modified to accommodate social benefits.[[6]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn6%22%20%5Co%20%22) Chapter 156E requires a corporation adopt a purpose of “general public benefit” in its articles of incorporation.[[7]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn7%22%20%5Co%20%22) The statute broadens the scope of factors that directors must consider in executing their duties.[[8]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn8%22%20%5Co%20%22)  The benefit corporation must also measure its efforts to promote its general public purpose against a third-party standard[[9]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn9%22%20%5Co%20%22) for “defining, reporting and assessing overall corporate social and environmental performance.”[[](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn10%22%20%5Co%20%22)[10]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn10%22%20%5Co%20%22) The duties of directors are also broadened. In addition to traditional business concerns, directors must consider local “community and societal factors,” local and global environmental concerns, and its customers interests as beneficiaries of its public benefit missions before taking action.[[11]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn11%22%20%5Co%20%22)

The third-party standard, in combination with required annual reporting of the benefit corporation’s public purpose efforts,[[12]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn12%22%20%5Co%20%22) provides socially-minded investors with the means to ensure that their investments advance social aims while generating a return. This is the principle effect of Chapter 156E: to create a vehicle that promotes the identification of investment opportunities that promote social causes or, at the very least, temper corporate profit-maximization with concern for larger social consequences.[[13]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn13%22%20%5Co%20%22)

While the relaxation of directors’ duties to maximize shareholder value and the imposition of reporting requirements represent steps towards a corporate form tailored to social investment, additional provisions of the statute prevent the Massachusetts benefit corporation from effectively serving the needs of either entrepreneurs or investors. The two largest issues emerge from the third-party standard and the statute’s sole enforcement provisions, the “benefit enforcement proceeding.”

Chapter 156E requires that benefit corporations benchmark their efforts to promote a public purpose against a “standard for defining, reporting and assessing overall corporate social and environmental performance” issued by an independent third-party.[[14]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn14%22%20%5Co%20%22) The standard must be comprehensive, independent, credible, and transparent; and the statute lays out a series of provisions specifying what is required.[[15]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn15%22%20%5Co%20%22) For example, to be comprehensive, the standard must measure the effect a business‘s operations have on the interests of its (1) employees, (2) customers as beneficiaries of its public purposes, (3) community and societal factors including the local communities of its offices, subsidiaries, or suppliers, and (4) the local and global environment.[[16]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn16%22%20%5Co%20%22)

These requirements appear intended to ensure that benefit corporations employ credible measures of social impact. However, in effect, the specificity of the requirements burdens organizations with identifying a suitable issuer and monitoring that issuer to ensure that it remains within the statute’s requirements. For example, a benefit corporation must ensure that not more than one third of the governing body of the standard-issuing organization are active in an industry subject to the standard.[[17]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn17%22%20%5Co%20%22) These provisions thus have the adverse effect of raising the transaction costs related to a benefit corporation’s third-party standard. Additionally, applying a standard can insert costs that are not transparent in Chapter 156E. An example here is the “B Corporation” certification issued by the non-profit B-Labs, which requires that the benefit corporation pay annual fees between $500 and $25,000, depending on its annual sales.[[18]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn18%22%20%5Co%20%22) All of this serves to increase the costs of incorporation under Chapter 156E in ways that are not related to the organization’s promotion of social benefits, handicapping the form as a vehicle of both social enterprise and social investment.

More problematic is Chapter 156E’s enforcement provision, which has dubious usefulness to investors and introduces potentially significant obstacles to efficient management of the enterprise. Shareholders may initiate a benefit enforcement proceeding when they believe that the directors of a benefit corporation have failed in their duties to its general or specific public benefit purposes.[[19]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn19%22%20%5Co%20%22)  In this respect, Chapter 156E is not devoid of teeth,  but the vague wording of the provision results in a enforcement provision that suits neither shareholders nor directors.

The statute provides little detail about the benefit enforcement proceeding beyond making it available. It cannot provide monetary damages. It appears intended to result in injunctions forcing directors to reconsider actions that do not further public benefits, but even this is vague.[[20]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn20%22%20%5Co%20%22)  The statute offers no guidance or standards to make sense of the benefit enforcement proceeding. Directors’ duties under Chapter 156E are satisfied simply by considering the corporation’s public purposes; a director would not be in violation of a duty if she considered the public purpose, but then decided to act against it in service of the profit motive. The proceeding’s value to shareholders is thus uncertain.

This uncertainty also leaves the benefit corporation vulnerable to interference. Any shareholder may bypass corporate governance proceedings and potentially exercise a disproportionate amount of control. The notion that a watchdog or activist unsatisfied with a benefit corporation’s efforts to further its public purpose would acquire a share of a publically-traded benefit corporation simply to bring an action. While these suits would not result in monetary damages, they could delay operations while the matter was pending. In the same way that the statute fails to provide an effective tether for socially-conscious investors, it creates a critical obstacle, preventing the benefit corporation from serving as an effective business vehicle.

 Whatever it may aspire to, Chapter 156E’s enforcement and self-assessment provisions create significant obstacles that prevent Massachusetts benefit corporations from serving as an effective structure for social enterprise and investment. These weaknesses mean that the benefit corporation will likely remain an unused form and stand out as a misstep in the promotion of social enterprise and the development of hybridized non-profit and for-profit corporations. A form that preserves the modified duties of directors and reporting requirements would likely better serve the needs of social enterprise and see broader adoption.[[21]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftn21%22%20%5Co%20%22) Enabling social enterprise will otherwise require organizations to exercise their own creativity inserting provisions preserving social goals within the articles of incorporation and operating agreements of traditional forms.

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[[2]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref2%22%20%5Co%20%22) H.R. 4352, § 100, 2012 Gen. Court, 188 Sess. (Ma. 2012).

[[3]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref3%22%20%5Co%20%22) District of Columbia, Benefit Corporation Act of 2012.

[[4]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref4%22%20%5Co%20%22) Ben Schreckinger, Virtue, Inc.: Can the new ‘benefit corporation’ charters give companies a conscience?, Boston Globe (Nov. 25 2012),available at [http://bostonglobe.com/ideas/2012/11/25/virtue-inc/sMNhJRcOIgZ0rqjpLTALr...](http://bostonglobe.com/ideas/2012/11/25/virtue-inc/sMNhJRcOIgZ0rqjpLTALrN/story.html). The benefit corporation statutes of other states largely track the language of the Massachusetts law and are thus vulnerable to many of the same criticisms discussed here. See e.g., California Corporations Code §§ 14550–14631. However, the author makes no assertions about these other laws.

[[5]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref5%22%20%5Co%20%22) See, e.g., Matt Sledge, Benefit Corporations Aim to Help Save Capitalism Itself, Huffington Post (Jun. 27, 2012, 7:28pm; updated Aug. 20, 2012, 5:12pm), [http://www.huffingtonpost.com/2012/06/27/benefit-corporations-patagonia-...](http://www.huffingtonpost.com/2012/06/27/benefit-corporations-patagonia-greyston-bakery_n_1632318.html) Jamie Raskin, The Rise of Benefit Corporations,The Nation (Jun. 27, 2011), available at [http://www.thenation.com/article/161261/rise-benefit-corporations#](http://www.thenation.com/article/161261/rise-benefit-corporations).

[[6]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref6%22%20%5Co%20%22) Mass.Gen.Laws ch. 156E §§ 3–4 (2012). Existing corporations organized under Chapters 156A and 156D may also convert to a benefit corporation. Mass.Gen.Laws ch. 156E § 5 (2012).

[[7]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref7%22%20%5Co%20%22) Id.at § 9(a). The statute also permits entities to add specific public benefit objectives that are relevant to its operations. Id.at § 9(b).

[[8]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref8%22%20%5Co%20%22) Ch. 156E § 10(a)(1).

[[9]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref9%22%20%5Co%20%22) Id. at § 15(a)(2).

[[10]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref10%22%20%5Co%20%22) Id. at § 2.

[[11]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref11%22%20%5Co%20%22) Id. To remove any potential inconsistency, the statute explicitly states that directors do not violate their duties to shareholders when considering these factors. Id. at § 10(c). The benefit corporation must also include an independent benefit director who is largely responsible for managing the organization’s public purposes and disclosure efforts. Id. at § 11.

[[12]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref12%22%20%5Co%20%22) See id. §§ 15–16 (detailing the annual benefit report recording and filing duties of the benefit corporation).

[[13]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref13%22%20%5Co%20%22) The Massachusetts statute appears to be particularly concerned with this function, prohibiting benefit corporations from advertising as such without complete compliance with the provisions of Chapter 156E, potentially opening up vulnerability to a deceptive business practice claim. Id.at § 7.

[[14]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref14%22%20%5Co%20%22)  Id. at § 2.

[[15]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref15%22%20%5Co%20%22) Id.

[[16]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref16%22%20%5Co%20%22) Id.

[[17]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref17%22%20%5Co%20%22) Id.

[[18]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref18%22%20%5Co%20%22) SeeTerm Sheet for B Corporations, B Lab, [http://www.bcorporation.net/sites/all/themes/adaptivetheme/bcorp/pdfs/te...](http://www.bcorporation.net/sites/all/themes/adaptivetheme/bcorp/pdfs/term_sheet_constituency_states_llcs_llps_3.pdf). B Corporation certification is a reliable method of satisfying the third-party standard requirement, as B-Labs generally conforms with the statute’s terms. Certification also permits organizations to use B-Labs’s “B Corporation” service mark, in a model similar to Fair Trade or Organic  certification.Id. For more information on B-Labs and the certification process, see How to Become a B-Corp, B Lab, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp>.

[[19]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref19%22%20%5Co%20%22) Id. at § 14(a)(1)–(2). A benefit enforcement proceeding may also be initiated by the benefit corporation itself, a director, any person or group of persons owning 5% or more of the equity of the benefit corporation’s parent, or any other person identified in the benefit corporation’s bylaws, shareholder agreement, or articles of incorporation. Id. at § 14(b).

[[20]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref20%22%20%5Co%20%22) Mass. Gen. Laws. ch. 156E § 14(a)(3). It is unclear why Chapter 156E includes the benefit enforcement proceeding at all when its reporting requirements can permit investors to monitor the organization’s socially beneficial activities and exercise their disapproval through traditional mechanisms or by removing their investments.

[[21]](http://nulj.org/extralegal/summer2013/who-benefits%22%20%5Cl%20%22_ftnref21%22%20%5Co%20%22) Such a model has been implemented under Maryland law, which eschews the benefit enforcement proceeding. See Md. Corp. & Ass'n Code § 5-6C-01et seq. Even in Maryland, however, the benefit corporation appears to have seen little adoption, with analysts suggesting that a major factor is a misalignment between the goals that motivate organizations to consider benefit corporation status and those that are embodied in the statute.See Megan Burkhart et al., Change Matters, Maryland Benefit Corporation Act: The State of Social Enterprise in Maryland 13, Jan. 2013, available at: <http://www.slideshare.net/changematters/maryland-benefit-corporations-analysis-full-report>.