

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member, Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Re: S. 379/H.R. 848 – Performance Rights Act

Dear Chairman Leahy and Ranking Member Sessions:

When Congress created the digital sound recording performance right, songwriters and music publishers voiced concern that they would be harmed by the new right. They claimed that digital radio licensees would have less money available to pay musical works royalties if they also had to pay sound recording royalties. Songwriters and music publishers asked Congress for protection against reduced royalties, and Congress enacted a savings clause in the Digital Performance Right in Sound Recordings Act that prohibits any government rate-setter from considering sound recording public performance royalties when setting or adjusting musical works public performance royalties. That provision, codified at 17 U.S.C. 114 (i), states unequivocally:

License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works.

This provision has succeeded. DiMA is not aware of a single instance in which a musical works rate-setting proceeding has considered or otherwise taken into account the fees payable for sound recording performance royalties. Musical works performing royalties have never been reduced as a result of the sound recording performing royalty.

Nevertheless, songwriters and music publishers are now asking Congress to amend this provision so that it specifies that sound recording performance rates or fees cannot be cited for the purpose of “adversely affecting” the rates and/or fees payable for musical works royalties. DiMA is not opposed to the songwriters and music publishers’ goal, but we are opposed to the provisions in S.379 and H.R. 848 that would codify this proposal, because the introduced provisions imply that sound recording performance rates or fees could in the future be permissibly cited for the purpose of increasing rates and/or fees payable for musical works royalties. This contrasts directly with current law which prohibits the consideration of sound recording public performance royalties for any reason whatsoever.

To the extent that the Committee wishes to specify that sound recording performance royalties may not be cited for purposes of diminishing musical works royalties, DiMA respectfully requests that an amended provision maintain the fairness that exists in current law by also prohibiting the citation of sound recording royalties for the purpose of increasing musical works royalties. In the absence of this balance, copyright licensors would be permitted to submit information to a rate-setter and argue that it justifies royalty increases, but licensees would be prohibited from submitting the very same information and argue that it justifies royalty decreases.

Thank you for the opportunity to clarify DiMA's position on this important provision in the Performance Rights Act. DiMA and our member companies look forward to working with you to advance creators' rights and to modernize our copyright system.

Very truly yours,

Jonathan Potter

Executive Director