

Before the  
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in the  
Library of Congress  
Washington, D.C. 20559-6000

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Digital Performance Right in Sound )	Docket No. 2014 CRB-0001WR
Recordings and Ephemeral )	(2016-2020)
Recordings and Digital Performance )	(Web IV)
of Sound Recordings )	
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**WHRB’s COMMENTS ON SX-CBI RATE PROPOSAL**

The Harvard Radio Broadcasting Company, Inc., a Massachusetts eleemosynary corporation, the licensee of Station WHRB (FM), Cambridge, and a party to this proceeding, files these comments herein to call the Board’s attention to two presumably inadvertent drafting anomalies in SX-CBI’s rate proposal tendered to the Board on October 7, 2014. Notice thereof was published in 79 Federal Register, No. 214, at 65609. The proposal, if not corrected, might render the proposed rates inapplicable to WHRB’s simulcast stream.

I.

Subsections 380.23(f)(4) and (9) propose to amend the certification requirement of monthly certification of usage by “an officer or another duly authorized faculty member or administrator of the applicable educational institution” by eliminating the word “officer” and substituting “representative of

the applicable educational institution”. The existing wording authorized student officers of the corporation with personal knowledge of the facts to certify usage. WHRB’s corporate officers are the President, Vice President, Clerque, and Treasurer, elected semi-annually. These student officers are the only officers of the corporation listed with the Secretary of the Commonwealth. In fact and in law they constitute the only officers of the corporation authorized to sign the annual report filed with the Commonwealth; they sign the periodic ownership reports and applications for renewal required to be filed with the Federal Communications Commission; they sign the Forms 990 required to be filed annually with the Internal Revenue Service; they or their designees sign all leases and other legal contracts; etc. They should certainly be competent to sign usage reports relating to the Station’s stream.

There is no alternative signer clearly available. The members of the corporation’s Board of Trustees are solely responsible to the Federal Communications Commission for control of WHRB (FM)’s compliance with the Commission’s rules and regulations. But none of them sits as a representative of the President and Fellows of Harvard College. Moreover, under the Communications Act of 1934, as amended, and the FCC’s rules, no one other than the Board of Trustees could lawfully exercise that control over the station’s operations without endangering the license issued by the FCC. Therefore, it

would appear doubtful that any member of the Board of Trustees could meet the proposed requirement of being “a duly authorized representative of the applicable educational institution.” Cf. Mark 12:17, Matthew 22:21, Luke 20:25; Thomas, 100.

The station organization, as an extra-curricular student activity, has designated a faculty adviser – currently the past chair of the Faculty of the Arts and Science’s Music Department, but he is not broadly involved in the operations of the radio station so as to be able to certify under proposed Section 380.22 (f)(9) that the “statement of account ... is true, accurate, and complete to [his] knowledge after reasonable diligence....” The Librarian of Congress cannot compel the College to appoint such a representative, any more than the Federal government may “commandeer” the resources of a state institution. *See, e.g., Mack and Printz v. United States*, 521 U.S. 898 (1997). Neither can the Station nor, for that matter, any Collective.

## II.

Under the proposed amendments to the rules the proposed calculation of ATH ignores the distinction between webcast hours containing recorded music and webcast hours not containing digitally recorded music. The distinction is most prominently ignored in proposed Subsection 380.22(d), which embodies the “*assumption* that the number of sound recordings performed is 12 per hour”.

(emphasis supplied). That assumption is contrary to fact. As the Papish affidavit points out, “By far the most-listened to programming on the WHRB stream is the sports play-by-play commentary from home and away varsity games”,<sup>\*</sup>/ which generally contains no digitally recorded music. With the possible exception of Music Department classes and lectures, the same would generally be true, as would be the case with live broadcasts of concerts and of the Sunday services from Harvard’s Memorial Church and broadcasts of analogue recordings from WHRB’s own record library and those from which the station borrows. Cf. Subsections 110(2) and (4) (exemption of certain performances and digital transmissions for educational and related purposes), as amended.

The practical effect of the proposed blurring of this distinction between performances with and without digitally recorded music would be a potential overstatement of ATH in Subsections 380.21(c) and (g) and 380.22 with all the attendant consequences.

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\*/ The operation of WHRB by its student staff are described in the affidavit of Michael Papish, a trustee of Harvard Radio Broadcasting Company, Inc., dated October 7, 2014, and filed herein.

Conclusion

WHEREFORE, the Board should not adopt the rules in the form proposed in SX and CBI's joint petition without correcting the foregoing drafting anomalies.

Respectfully submitted,

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