

Before the
COPYRIGHT ROYALTY BOARD
in the Library of Congress
Washington, D.C. 20024-0977

Proposed Findings and Conclusions on behalf of
Harvard Radio Broadcasting Co., Inc. (WHRB)

Harvard Radio Broadcasting Co., Inc., is a Massachusetts eleemosynary corporation, incorporated in 1951. It is the licensee of Station WHRB (FM), Cambridge, Massachusetts, a full-power Class A FM station. The station's programming is largely simulcast at WHRB.org. The station has been student-managed and -operated by undergraduates of Harvard College since the early '40s, when it broadcast by carrier-current transmission under Part 15 of the FCC rules. The staff is comprised of almost entirely student volunteers. WHRB has no paid employees. (Testimony of Michael Papish, Day 17 Tr. 4744 [5/19/15], WHRB Exhibit 8000, admitted Tr. 4749)

WHRB is Educational in Purpose and Operations

One of the station's missions is to educate and give students a learning laboratory. As an extra-curricular activity, the station gives student staff members opportunities to gain practical, real-world experience beyond the syllabi of the college classes in such fields as management, accounting, program production, music, news and sports reporting, public affairs, writing, sales, advertising, audio and radio-frequency engineering, and programming. Besides learning from more experienced staff members, managers on the staff are exposed to formalized training from

alumni of the station, *e.g.*, C.P.A.s, radio salesmen, classical music commentators, and broadcast engineers and consultants.

The Judges Should Amend or Reject Infelicitous Drafting Errors.

The drafts of Subsections 380(f)(4) and (9) and 380.22(d) submitted by SX and CBI, October 7, 2014, and published in 79 Fed.Reg., No. 214, 65609 (Nov. 5, 2014), contain serious drafting errors that should be amended or rejected by the Judges. WHRB filed timely comments pointing out these “two presumably inadvertent drafting anomalies” in the proposal as published by the Board. (Exhibit 8001)

Subsections 380.23(f)(4) and (9) Would Frustrate Proper Certification of Usage.

Subsections 380.23(f)(4) and (9) propose to amend the 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 annually. These student officers are the only officers of the corporation recognized by the Secretary of the Commonwealth. In fact and in law they are 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 with,

for example, the performing rights organizations; etc. They should certainly be competent to sign usage reports relating to the Station's stream.

There is no alternative signatory 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 (the Harvard corporation). Moreover, under the Communications Act of 1934, as amended, and the FCC's rules, no one other than the Trustees could lawfully exercise that control over the station's operations without endangering the station's license issued by the FCC. Cf. Mark 12:17, Matthew 22:21, Luke 20:25; Thomas 100. 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."

The station organization, as an extra-curricular student activity, has designated a faculty advisor – currently the past chair of the Faculty of Arts and Science's Music Department, but he is not involved in the day-to-day 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 Pritz v. United States*, 521 U.S. 898 (1997). Neither could the Station nor, for that matter, any Collective under the Board's rules. (WHRB's Comments on SX-CBI Rate Proposal, Point I, filed November 22, 2014 [WHRB Exhibit 8001, admitted Tr. 4750])

The Presumption in Proposed Subsection 380.22(d) is Contrary to Fact.

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 post-1972 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 and the evidence of record, and it would be arbitrary and capricious and contrary to fact for the Board to approve the proposed rule as drafted.

As Mr. Papish testified at tr. 4745-46, “WHRB attempts to have a very large variety of programming, everything from sports, news, to ... music ... in different genres....” The station broadcasts a wide range of programming as reflected in its on-air departments, *viz.*, classical, jazz, The Record Hospital, the Darker Side, blues, hillbilly, sports, country music, rock, and news. Several departments, particularly the news, sports, classical, and jazz departments, broadcast live events on campus, including speeches, lectures, concerts, and Sunday services from Memorial Chapel. Most of these programs do not utilize post-1972 digitally recorded music. The station’s programming often uses instructors and professors in planning and as on-air guests. (Papish testimony, Tr. 4745-46; Exhibit 8000 at 2-3; Exhibit 8002 at 3-4)

As examples of the unique WHRB programming tradition are the Orgies ® broadcast during exam and reading periods. A notable example is the Mozart Orgy a few years ago, when the station broadcast every composition by Mozart ever recorded, virtually his entire output, on the station on 78s, LPs, tapes, and disks, and assembled by the student staff from the WHRB

library (which has approximately 30,000 non-digital 78s, tapes, and LPs in its library), other libraries, and private collectors in the Boston area. Some of the music in the Orgies ® and in other programming is derived from analogue vinyls that the station has collected over the past seventy-five years. In addition, the Mozart orgy featured commentary by a professor in the Music Department, who also prepared a handout discussing Köchel catalogue numbers for compositions by Mozart. The orgy ran eighteen hours a day during reading period and 24/7 during exam period. Similarly the Bach orgies in 1985 and 2000. (Papish, Tr. 4745-48; Exhibit 8000 at 2-3; Exhibit 8001 at 4)

Even as to more recently digitally recorded music, the proposed language in Subsection 380.22(d) would result in a substantial overstatement of ATH. To cite an extreme example, listeners to Richard Wagner's oft-recorded Ring of the Nibelungs, "after sitting through this whole operation [performance]," are "back exactly where they started twenty hours ago."^{*/}

A substantial proportion of WHRB's broadcast hours do not contain recorded music at all. By far the most-listened to programming on the WHRB stream is the varsity sports play-by-play commentary from home and away varsity games. Similarly the live broadcasts from the Saturday Metropolitan Opera matinees. (Papish, Tr. 4748-49; Exh. 8000 at 3; Exh. 8001 at 4)

^{*/} Twenty hours is somewhat of an overstatement taken from the late comedienne Anna Russell's "An Analysis of Wagner's 'Ring der Nibelungen,'" <http://www.markellisdwalker.net/music/albums/anna-russell-ring.html> (last visited 6/13/15). Various recordings of her twenty-five-minute riff can still be found on YouTube, and long-time Washington residents will remember her appearance at D.A.R. Constitution Hall in the winter of 1958-59. Depending on the conductor, actual performances tend to occupy between about fifteen and sixteen hours.

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

Conclusion

WHEREFORE, the Judges 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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