

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of) File No. 99090433
)
CBS Radio License, Inc.) NAL/Acct. No. 2001320800008
) Facility ID #18527
Licensee of Station WLLD(FM),) JWS
Holmes Beach, Florida)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 1, 2000

Released: December 5, 2000

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that CBS Radio License, Inc. ("CBS"), licensee of Station WLLD(FM), Holmes Beach, Florida, has apparently violated 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules, 47 C.F.R. § 73.3999, by willfully broadcasting indecent language. Based on our review of the facts and circumstances in this case, we conclude that CBS is apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000).

II. BACKGROUND

2. The Commission received a complaint concerning a September 11, 1999, broadcast on WLLD(FM), called "The Last Damn Show," which aired between 6 p.m. to 11 p.m. that night. The complaint included a tape recording of the entire show as well as a transcript and related tape of those portions of the broadcast the complainant found most offensive. The transcript contained ten discrete segments, all of which allegedly aired before 10 p.m. After reviewing the transcript and tape, we issued a letter of inquiry to the licensee.

3. In its response, CBS describes the "The Last Damn Show" as a local concert organized by the station, which featured rap and hip hop music performed by award winning artists. CBS acknowledges airing the performance and further acknowledges that performers sometimes used certain expletives. Nevertheless, CBS contends that the complaint should be dismissed because it believes the tapes supplied by the complainant are confusing, imprecise as to time and significantly edited. In this regard, CBS submits that edits are audible and that lines of otherwise unrelated material were spliced together in order to create the impression of extended bursts of profanity. Consequently, according to CBS, the transcript may not accurately represent the context in which the words and lyrics appeared in relation to the concert as a whole. In any event, CBS notes that the segments transcribed represent only nine minutes from a five-hour show.

4. With respect to the particular segments, CBS offers various corrections (which we have accepted) and submits that the final three segments of the transcript aired after 10 p.m. As for the remaining material, CBS contends it contains no indecent speech. In this regard, CBS argues that current community standards find acceptable material that regularly addresses sexual

topics and that current prime time shows use graphic language and show graphic sexual scenes in programs directed at youthful audiences. In CBS' view, the public's acceptance of such material as well as the airplay given to popular songs that contain sexual themes or expletives demonstrate that contemporary community standards have evolved to the point where the transcribed material should not be found indecent. In this regard, CBS submits that the artists' "rampant" popularity coupled with the praise coming from listeners and the absence of complaints following the broadcast are further indications that their lyrics are in step with contemporary community standards. Finally, CBS argues that the context of the material – live, spontaneous and unscripted performances by persons not under control of the station, which contained occasional expletives and which was mixed with commercials, interviews, recorded music and announcer "patter" – warrants a conclusion that the material was not indecent. In this regard, CBS asserts that WLLD(FM)'s broadcast of various expletives was not intended to be gratuitous, pandering or titillating and that, in any event, the expletives were not used to convey a sexual or excretory meaning.

III. DISCUSSION

5. Section 503(b)(1) of the Communications Act (the "Act") provides in pertinent part:

Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection to have ---

...

(D) violated any provision of section 1304, 1343, or 1464 of title 18, United States Code;

shall be liable to the United States for a forfeiture penalty.

18 U.S.C. § 1464 provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication." As explained below, we believe that portions of the "The Last Damn Show" were indecent and that the licensee's broadcast of that language was willful.

6. The Commission has defined indecent speech as language that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (*citing Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)). The Commission's authority to restrict the broadcast of indecent material extends to times when there is a reasonable risk that children may be in the audience. Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988). Current law holds that such times begin at 6 a.m. and conclude at 10 p.m. Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 701 (1996). Thus, to be actionably indecent, the material in question must not only meet the standard referenced above but also air after 6 a.m. and before 10 p.m. *See* 47 C.F.R. § 73.3999.

7. After carefully considering the record before us, it appears that CBS willfully violated our indecency rule with respect to the language appearing herein. CBS acknowledges that it broadcast the language in question before 10 p.m. The language contains patently offensive references to oral sex as well as sexual intercourse. Illustrative segments of the transcript are attached. The Commission previously has found similar material that contains unmistakable

patently offensive references to sexual activities to be indecent,¹ and we see no basis for finding otherwise in this case. In this regard, we disagree with CBS that the cited material or anything like it has ever been found acceptable under contemporary community standards for the broadcast medium.

8. As for the context of the material, we recognize that the cited language occurred in connection with a live performance of rap and hip hop artists. However, we see no reason to excuse CBS in this case. If anything, considering CBS' apparent awareness of the lyrics normally appearing in the artists' material (*see* CBS' Response at p. 12), CBS should have taken precautions to avoid airing such indecent utterances. Apparently, it chose not to do so. *Cf.* Regent Licensee of Flagstaff, Inc. (KZGL(FM)), DA 00-2041 (Enf. Bureau, released September 7, 2000) (An interview with an adult movie actress at an adult video store could reasonably give rise to indecent speech, and a licensee's failure to take precautionary measures is no bar to finding that the broadcast of indecent speech was willful). Moreover, we reject CBS' argument regarding the popularity of the artists. Neither the statute nor our case law confers upon a broadcaster the right to air indecent language simply because the speaker happens to be popular. *See* The Rusk Corporation (KLOL(FM)), 8 FCC Rcd 3228, 3229 (1993).

9. Section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, both state that any person who willfully or repeatedly fails to comply with the Act or the Commission's rules shall be liable for a forfeiture penalty. For purposes of section 503(b) of the Act, the term "willful" means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Commission's rules.² As explained above, CBS knew that it was broadcasting "The Last Damn Show" and each of the cited segments. In assessing a forfeiture, we take into account the statutory factors set forth in section 503(b)(2)(D) of the Act. Those factors include the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.³

10. The Commission's Forfeiture Guidelines set a base forfeiture amount of \$7,000 for transmission of indecent/obscene materials.⁴ After considering all the facts and circumstances, we believe the base forfeiture amount is the appropriate sanction and that neither an upward nor downward adjustment should be made.

¹ *See, e.g.,* WQAM License Limited Partnership, 15 FCC Rcd 2518, *recon. denied*, 15 FCC Rcd 15349 (2000).

² *See* Jerry Szoka, 14 FCC Rcd 9857, 9865 (1999); Southern California Broadcasting Co., 6 FCC Rcd 4387 (1991).

³ 47 U.S.C. § 503(b)(2)(D). *See also* The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 FCC Rcd 17087, 17100-01 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("Forfeiture Guidelines").

⁴ Forfeiture Guidelines, *supra* note 3, 12 FCC Rcd at 17113.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED THAT, pursuant to section 503(b) of the Act,⁵ and sections 0.111, 0.311 and 1.80 of the Commission's rules,⁶ CBS Radio License, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of seven thousand dollars (\$7,000) for willfully violating the 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

12. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's rules,⁷ within thirty days of this NOTICE OF APPARENT LIABILITY, CBS Radio License, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. referenced above.

14. The response, if any, must be mailed to the Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B443, Washington, D.C. 20554 and MUST INCLUDE THE NAL/Acct. No. referenced above.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Credit and Debt Management Center, 445 12th Street, S.W., Washington, D.C. 20554.⁸

17. IT IS FURTHER ORDERED THAT a copy of this NOTICE OF APPARENT LIABILITY shall be sent by Certified Mail Return Receipt Requested to CBS Radio License, Inc., 10220 River Road, Suite 305, Potomac, Maryland 20854, attention: Stephen A. Hildebrandt,

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. §§ 0.111, 0.311, 1.80.

⁷ 47 C.F.R. § 1.80.

⁸ See 47 C.F.R. § 1.1914.

Vice President; to H. Anthony Lehv, Leventhal, Senter & Lerman, P.L.L.C., 2000 K Street, N.W., Suite 600, Washington, D.C. 20006-1809.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

ATTACHMENT

Radio Station: WLLD(FM), Holmes Beach, Florida
Date/Time Broadcast: September 11, 1999, between 6 p.m. and 10 p.m.
Material Broadcast: "The Last Damn Show" (Rap lyrics and comments before a large crowd)

FV: Female Voice

MV: Male Voice

FV: (Rap lyrics) You know you mother fuckers can't beat. (Unintelligible) You mother fuckers can't beat. (Unintelligible) You mother fuckers can't read me. (Unintelligible) You mother fuckers, you keep (Unintelligible) Fuck your family. (Unintelligible) You take your shit, you take your shit. (Unintelligible) I'm a superior bitch, a serious bitch. (Unintelligible) A serious bitch. (Unintelligible) I won't take that shit. (Unintelligible) Niggers and your mother fucking wide mouth. (Unintelligible) Damn that bitch can pump with it. You want to bang, nigger. You want to bang, nigger. You're off the chain, nigger. We running game, nigger. You want to bang, nigger. It ain't no thing, nigger. We off the chain, nigger. (Unintelligible)

MV: We ain't going to have no more feedback problem. Fuck it. We're going to go all the way back where you all feel (Unintelligible) mother fucking noise. (Unintelligible) God damn, where are my pussy eating niggers? Any my niggers into eating pussy? Y'all make some noise. Hey, where are the girls? If you're eating pussy, where you at? That's it. Oh, they all like it. I ain't eating no pussy tonight. If you all don't like it, fuck it. I ain't going to beg you. You like it? [Edit] And my dog don't give a fuck and we'll fuck you sucking up coke, you know. Trying to explain this shit away, niggers. I don't think y'll heard me. I got MTV Best New Artist Slim Shady backstage. Slim mother fucking Shady backstage. Make some noise.