

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

In the Matter of)
) File No. EB-00-IHD-0079
The KBOO Foundation) NAL/Acct. No. 200132080056
) Facility ID # 65755
Licensee of Noncommercial Educational)
Station KBOO-FM, Portland, OR)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 14, 2001

Released: May 17, 2001

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that The KBOO Foundation, licensee of noncommercial Station KBOO-FM, Portland, Oregon, apparently violated 18 U.S.C. § 1464 and 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 The KBOO Foundation is apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000).

II. BACKGROUND

2. The Commission received a complaint alleging that KBOO-FM broadcast indecent material on October 20, 1999 between 7:00 p.m. and 9:00 p.m. during the "Soundbox." The complainant submitted a tape containing allegedly indecent material that aired on the "Soundbox" on this date. After reviewing the complainant's tape, we issued a letter of inquiry to the licensee.

3. In its response, The KBOO Foundation argues that the material is not indecent, and that no sanction is warranted. In this regard, The KBOO Foundation states that the "Soundbox" program features contemporary rap and hip hop music often structured around themes that provide a larger social or cultural context, to explore, for example, topics such as "violence, racial oppression or the judicial system." The KBOO Foundation asserts that it "broadcasts rap and hip hop music not to achieve commercial success, but to fulfill its mission of 'providing a forum for unpopular, controversial neglected perspective on important local, national, and international issues,'" and to "reflect the diverse cultures we serve." The KBOO Foundation also has supplemented its response by submitting declarations of the author of the lyrics of the allegedly indecent song cited in the complaint and of a professor at a local university. These declarations are offered in support of The KBOO Foundation's argument that, in context, the material allegedly broadcast on KBOO-FM is not indecent. In addition, The KBOO Foundation states that it provides training to its local programmers, most of whom are unpaid volunteers, concerning the Commission's rules and the station's policies, including its prohibitions against the broadcast of indecent material. The KBOO Foundation supplement also includes a petition signed by listeners who support the "Soundbox."

4. The KBOO Foundation asserts, in the alternative, that the complaint should be dismissed based on the amount of time that has elapsed since the allegedly indecent material was broadcast. The KBOO Foundation states that it cannot determine with certainty whether it aired the allegedly indecent material cited in our letter of inquiry. However, The KBOO Foundation has determined that its music library contains the song “Your Revolution” that was excerpted in our letter of inquiry.

III. DISCUSSION

5. Section 503(b)(1) of the Communications Act (the “Act”), 47 U.S.C. § 503(b)(1), 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 “Your Revolution” contains indecent material and that the licensee’s broadcast thereof 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 KBOO-FM has willfully violated our indecency rule with respect to the broadcast of “Your Revolution.” The KBOO Foundation points to the length of time that has elapsed since the broadcast that is the subject of the complaint, and argues that it cannot determine whether the song aired on the date and time alleged, or whether it might have aired an edited version of the song. In this regard, the station does not possess tapes or transcripts of the “Soundbox” for the date in question. However, the KBOO Foundation does not claim that tapes or transcripts are generated and retained, or that this material would have been available earlier. The KBOO Foundation acknowledges that the station’s music library contains the song, and has provided a transcript of the lyrics of “Your Revolution.” Although the KBOO Foundation asserts that an edited version of the song may have been broadcast, it does not indicate that the station possesses such an edited version of “Your Revolution.” Moreover, the tape of the October 20, 1999 “Soundbox” submitted by the complainant contains the unedited version of “Your Revolution,” which corresponds to the transcription included in The KBOO Foundation’s response.

8. The rap song “Your Revolution” contains unmistakable patently offensive sexual references. We have considered The KBOO Foundation’s arguments concerning the context of this material. Specifically, the KBOO Foundation asserts that the rap song “Your Revolution” cannot be separated from its contemporary cultural context. In the alternative, The KBOO Foundation argues that even if context is limited to the song’s lyrics, “Your Revolution” is “a feminist attack on male attempts to equate political ‘revolution’ with promiscuous sex” and as such, is not indecent. However, considering the entire song, the sexual references appear to be designed to pander and shock and are patently offensive. In this regard, we reject The KBOO Foundation’s argument that it is erroneous, as a matter of law, to find that the song is indecent without considering the artistic merit of the rap music genre. Merit is one of the variables that are part of the material’s context, and the Commission has rejected an approach to indecency that would hold that material is not *per se* indecent if the material has merit.¹ The contemporary social commentary in “Your Revolution” is a relevant contextual consideration, but is not in itself dispositive.² The Commission previously has found similar material to be indecent, and we see no basis for finding otherwise in this case.³ In addition, although The KBOO Foundation has submitted a petition signed by listeners who support the “Soundbox,” we have previously ruled that neither the statute nor our case law permits a broadcaster to air indecent material merely because it is popular.⁴

9. Section 503(b) of the Act and 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 47 U.S.C. § 503(b), 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.⁵ In assessing a forfeiture, we take into account 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.⁶

10. The Commission’s *Forfeiture Guidelines* set a base forfeiture amount of \$7,000 for transmission of indecent material.⁷ After considering all the facts and circumstances, we

¹ See *Infinity Broadcasting Corporation of Pennsylvania, Memorandum Opinion and Order on Reconsideration*, 3 FCC Rcd 930, 932 (1987).

² *Id* at 932-33. The KBOO Foundation cites a case decided under Florida’s criminal obscenity statute as support for its argument that material with artistic merit is not indecent. *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992), *cert. denied, Navarro v. Luke Records, Inc.*, 506 U.S. 1022 (1992). The court’s determination that a lower court had not properly applied the tripartite obscenity standard of *Miller v. California*, 413 U.S. 15 (1973), does not control our indecency analysis here.

³ See *Capstar TX Limited Partnership (WZEE(FM))*, 16 FCC Rcd 901 (EB 2001); *CBS Radio License, Inc. (WLLD(FM))*, 15 FCC Rcd 23881(EB 2000)(Notice of Apparent Liability for Forfeiture), DA 01-537 (EB Mar. 2, 2001)(Forfeiture Order).

⁴ See, e.g., *CBS Radio License, Inc. (WLLD(FM))*, *supra*.

⁵ See *Jerry Szoka*, 14 FCC Rcd 9857, 9865 (1999); *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

⁶ 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*”).

⁷ *Forfeiture Guidelines*, 12 FCC Rcd at 17113.

believe the base forfeiture amount is the appropriate sanction for the violation described above and that neither an upward nor downward adjustment should be made.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED THAT, pursuant to 47 U.S.C. § 503(b), and 47 C.F.R. §§ 0.111, 0.311 and 1.80, The KBOO Foundation is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of seven thousand dollars (\$7,000) for willfully violating 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999.

12. IT IS FURTHER ORDERED THAT, pursuant to 47 C.F.R. § 1.80, within thirty days of this NOTICE OF APPARENT LIABILITY, The KBOO Foundation 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 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, Revenue and Receivables Operations Group, 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: The KBOO Foundation,

⁸ See 47 C.F.R. § 1.1914.

20 S.E. 8th Ave., Portland, Oregon 97214; with a copy to its counsel, John Crigler, Esq., Garvey, Schubert & Barer, 1000 Potomac Street, N.W., Washington, DC 20007.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

ATTACHMENT

Radio Station: KBOO-FM, Portland, Oregon
Date/Time Broadcast: October 20, 1999, on the "Soundbox," between 7:00 p.m. and 9:00 p.m.
Material Broadcast: "Your Revolution"

(Various female voices)

Your revolution will not happen between these thighs

Your revolution will not happen between these thighs

Your revolution will not happen between these thighs

Will not happen between these thighs

Will not happen between these thighs

The real revolution ain't about bootie size

The Versaces you buys

Or the Lexus you drives

And though we've lost Biggie Smalls

Maybe your notorious revolution

Will never allow you to lace no lyrical douche in my bush

Your revolution will not be you killing me softly with fujees

Your revolution ain't gonna knock me up without no ring

And produce little future M.C.'s

Because that revolution will not happen between these thighs

Your revolution will not find me in the back seat of a jeep

With L.L. hard as hell, you know

Doing it and doing and doing it well, you know

Doing it and doing it and doing it well

Your revolution will not be you smacking it up, flipping it or rubbing it down

Nor will it take you downtown, or humping around

Because that revolution will not happen between these thighs

Your revolution will not have me singing

Ain't no nigger like the one I got

Your revolution will not be you sending me for no drip drip V.D. shot

Your revolution will not involve me or feeling your nature rise

Or having you fantasize

Because that revolution will not happen between these thighs

No no not between these thighs

Uh-uh

My Jamaican brother

Your revolution will not make you feel bombastic, and really fantastic

And have you groping in the dark for that rubber wrapped in plastic

Uh-uh

You will not be touching your lips to my triple dip of

French vanilla, butter pecan, chocolate deluxe

Or having Akinyele's dream, um hum

A six foot blow job machine, um hum

You wanna subjugate your Queen, uh-huh

Think I'm gonna put it in my mouth just because you

Made a few bucks,

Please brother please

Your revolution will not be me tossing my weave

And making me believe I'm some caviar eating ghetto

Mafia clown

Or me giving up my behind

Just so I can get signed

And maybe have somebody else write my rhymes

I'm Sarah Jones

Not Foxy Brown

You know I'm Sarah Jones

Not Foxy Brown

Your revolution makes me wonder

Where could we go

If we could drop the empty pursuit of props and the ego

We'd revolt back to our roots

Use a little common sense on a quest to make love

De la soul, no pretense, but

Your revolution will not be you flexing your little sex and status

To express what you feel

Your revolution will not happen between these thighs

Will not happen between these thighs

Will not be you shaking

And me, [sigh] faking between these thighs

Because the real revolution

That's right, I said the real revolution

You know, I'm talking about the revolution

When it comes,

It's gonna be real

It's gonna be real

It's gonna be real

When it finally comes

It's gonna be real