

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

In the Matter of ) File No. 99090433  
)  
Infinity Radio License, Inc.<sup>1</sup> ) NAL/Acct. No. 2001320800008  
) Facility ID #18527  
Licensee of Station WLLD(FM), ) JWS  
Holmes Beach, Florida )

**FORFEITURE ORDER**

**Adopted: February 28, 2001**

**Released: March 2, 2001**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this Order, we impose a forfeiture of \$7,000 on Infinity Radio License, Inc. (“Infinity”), licensee of Station WLLD(FM), Holmes Beach, Florida, for a willful violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. This action is taken pursuant to 47 U.S.C. § 503(b)(1)(D) and 47 C.F.R. § 1.80(f)(4).

**II. BACKGROUND**

2. By *Notice of Apparent Liability*, DA 00-2724, released December 5, 2000 (“NAL”), we determined that certain material apparently broadcast over WLLD(FM) on September 11, 1999, was indecent. After considering the context, we opined that the language from two discrete excerpts from the live rap and hip hop concert, “The Last Damn Show,” contained patently offensive references to oral sex as well as sexual intercourse. *NAL* at ¶ 7. Because the station broadcast the cited material between 6 p.m. and 10 p.m., we concluded that the broadcast occurred at a time when there was a reasonable risk that children might be in the audience. *See* 47 C.F.R. § 73.3999. After considering the circumstances in light of the Commission’s forfeiture guidelines,<sup>2</sup> which provide a base forfeiture for indecency of \$7,000, we proposed a forfeiture of \$7,000 for the indecent broadcast. Infinity has submitted a response, which we address here.<sup>3</sup>

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<sup>1</sup> The licensee changed from CBS Radio License, Inc. to Infinity Radio License, Inc. following the grant of a *pro forma* application on December 14, 2000 (File No. BTCH-20001204AGT). Consequently, we will refer to the licensee by its current name.

<sup>2</sup> *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*”).

<sup>3</sup> In responding to a letter of inquiry from the staff, Infinity advanced a number of arguments. Because we believe that we adequately addressed those arguments in the *NAL*, we do not repeat them here notwithstanding their appearance in Infinity’s response.

**III. DISCUSSION**

3. 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.”

4. 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.

5. Infinity argues that we erred in concluding that the excerpts contained indecent material. With respect to the first segment, Infinity submits that, in context, the words “pump” and “bang” conveyed no sexual meaning. According to Infinity, “the rap world” uses “pump” to signify the playing of loud music or the pump of a pump-action gun. Likewise, although Infinity allows that “bang” can be a slang term for intercourse, Infinity submits that “bang” more commonly means “to fight to kill” as it relates to gang activity. Thus, Infinity submits, there is significant doubt as to whether the excerpt described sexual activities. As for the second segment, Infinity contends that its sexual import would not be inescapable to children, that the material is consistent with contemporary community standards, and that it was so fleeting and isolated that no sanction is warranted. Finally, Infinity argues that our indecency standard is unconstitutional on its face.

6. As explained below, we reject Infinity’s arguments regarding the second segment, which we have attached hereto. We find that this material was actionably indecent and, by itself, warrants imposition of the \$7,000 forfeiture. Consequently, there is no need to address Infinity’s arguments with respect to the material broadcast in the first segment.

7. In the second segment, the speaker repeatedly and unmistakably asks the audience in patently offensive terms whether they perform and/or enjoy a type of oral sex. While the segment arguably constituted a relatively minor portion of the five-hour concert, it was hardly fleeting. As detailed in the *NAL*, it was explicit, graphic, offensive and repetitive. We have found similar material to be indecent, and we see no reason to find otherwise with the material at issue. *See WQAM License Limited Partnership*, 15 FCC Rcd 2518, *recon. denied*, 15 FCC Rcd 15349

(2000); *The Rusk Corporation (KLOL(FM))*, 8 FCC Rcd 3228 (1993). See also *Back Bay Broadcasting (WWKX(FM))*, 14 FCC Rcd 3997 (Mass Media Bureau 1999); *LBJS Broadcasting Company, L.P. (KLBJ(FM))*, 13 FCC Rcd 20956 (Mass Media Bureau 1998). For these reasons, we also disagree with Infinity’s contention that the sexual import of the material would be inescapable to children.

8. Nor do we find that the cited utterances in the second segment are consistent with contemporary community standards. Among other things, Infinity points to the popularity of “The Last Damn Show” as well as the popularity of the event’s performers. However, the relevant test is not the popularity of the speakers or the event but whether the material broadcast is patently offensive as measured by contemporary community standards for the broadcast medium. *The Rusk Corporation (KLOL(FM))*. In applying that criterion, the Commission does not employ a local standard, but one that references the average broadcast listener. *WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV)*, 15 FCC Rcd 1838, 1841 (2000); *Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 933 (1987). While standards and mores certainly change over time, we cannot accept Infinity’s contention that the second excerpt, which contains repeated, explicit and offensive references to a sexual activity, is consistent with contemporary community standards for the broadcast medium. We thus conclude that Infinity’s reliance on *Mr. Peter Branton*, 6 FCC Rcd 610 (1991) (subsequent history omitted), and *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987), is misplaced. Both *Branton* and *Pacifica* (relative to the program, “Shocktime, U.S.A.”) focused on the broadcast of expletives. The Commission excused the licensee in *Branton* after considering the context of the material, while in *Pacifica*, the Commission did not have sufficient information to determine the context of the offensive speech or whether its use was isolated. In the case before us, we have properly considered both the offensive material and its context prior to concluding that WLLD(FM) aired indecent speech.

9. Finally, Infinity’s argument that the Commission’s indecency standard is unconstitutional on its face lacks merit. In addressing a similar argument, the Commission observed that the Supreme Court, in *Reno v. ACLU*, 521 U.S. 844 (1997), “indicated that our broadcast indecency regulations were justified because of the significant differences between the Internet and the broadcast medium.” *WQAM*, 15 FCC Rcd at 2519-20.

10. 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. In this connection, 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.<sup>4</sup> As explained above, Infinity knew what it was broadcasting. 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.<sup>5</sup>

11. The Commission’s *Forfeiture Guidelines* set a base forfeiture amount of \$7,000 for transmission of indecent/obscene materials.<sup>6</sup> After considering all the facts and circumstances,

<sup>4</sup> See *Jerry Szoka*, 14 FCC Rcd 9857, 9865 (1999); *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

<sup>5</sup> 47 U.S.C. § 503(b)(2)(D). See also *Forfeiture Guidelines*, 12 FCC Rcd at 17100-01.

<sup>6</sup> *Forfeiture Guidelines*, 12 FCC Rcd at 17113.

we conclude that the base forfeiture amount is the appropriate sanction and that neither an upward nor downward adjustment should be made.

**IV. ORDERING CLAUSES**

12. 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, Infinity Radio License, Inc. FORFEIT to the United States the sum of seven thousand dollars (\$7,000) for willfully violating 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999.

13. Payment of the forfeiture shall 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, within thirty days of the release of this Forfeiture Order. See 47 C.F.R. § 1.80(h). The payment should note the NAL/Acct. No. referenced above. If the forfeiture is not paid within that time, the case may be referred to the Department of Justice for collection pursuant to 47 C.F.R. § 504(a).

14. IT IS FURTHER ORDERED THAT a copy of this FORFEITURE ORDER shall be sent by Certified Mail Return Receipt Requested to Infinity Radio License, Inc., 10220 River Road, Suite 305, Potomac, Maryland 20854, attention: Stephen A. Hildebrandt, Vice President; to H. Anthony Levy, 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" (Comments before a large crowd)

MV: Male Voice

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'all heard me. I got MTV Best New Artist Slim Shady backstage. Slim mother fucking Shady backstage. Make some noise.