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

In the Matter of	)	
	)	
Infinity Broadcasting Corporation of Los Angeles	)	Control No. 97050319
	)	NAL/Acct. No. 818ed0017
Licensee of Station KROQ-FM	)	
Pasadena, California	)	
Facility ID # 28622	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 2001 **Released: March 22, 2001**

By the Chief, Enforcement Bureau:

1. In this *Memorandum Opinion and Order*, we deny a petition for reconsideration filed on July 13, 2000, by Infinity Broadcasting Corporation of Los Angeles ("Infinity"), licensee of Station KROQ(FM), Los Angeles, California. Infinity seeks reconsideration of a *Forfeiture Order*[1] which issued a monetary forfeiture in the amount of two thousand dollars ($2,000) against Infinity for willful violation of 18 U.S.C. § 1464, which prohibits the broadcast of indecent material.

I. BACKGROUND

2. On August 24, 1998, the Mass Media Bureau, by delegated authority, issued a Notice of Apparent Liability for Forfeiture to Infinity in the amount of two thousand dollars ($2,000), for the broadcast of indecent material. *Infinity Broadcasting Corporation of Los Angeles (KROQ-FM)*, 13 FCC Rcd 25349 (Mass Media Bur. 1998) ("*NAL*"). Specifically, the Mass Media Bureau found that the broadcast of "You Suck" by the group Consolidated on March 28, 1997, at approximately 9:10 p.m., violated 18 U.S.C. § 1464. Infinity filed a response to the *NAL* on September 23, 1998. Thereafter, in the *Forfeiture Order*, we found, after considering the licensee's response, that the issuance of the proposed forfeiture was warranted.

3. In its response to the *NAL*, Infinity admitted that a version of the "You Suck" song was aired at approximately 9:10 p.m. on March 28, 1997. It asserted that Station KROQ-FM possessed at least two versions of the song, one of which Infinity contended does not contain any indecent material. One of the versions possessed by KROQ(FM) was the original version, a transcript of which is attached to the *NAL*. A second version was made by the station because an announcer "thought the unedited version was not acceptable for broadcast." Infinity asserted that it was unable to determine which version of the song was aired. In support of its position, Infinity filed an affidavit from a station announcer who admitted that he played some version of the "You Suck" song on the day in question. The announcer stated that he did not recall which version of the recording he aired and that he did not actually listen to the entire recording

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[1] *Infinity Broadcasting Corporation of Los Angeles*, 15 FCC Rcd 10667 (Enf. Bur. 2000).

when it aired. The announcer and the station's General Manager also indicated that it was their opinion that numerous complaints would have been forthcoming if the unedited version had been played. However, they stated, no complaints other than that of the complainant were received. Further, Infinity states that the station does not retain copies of its broadcasts. The record reflects that the difference between the versions consists of the deletion of the words "pubic," "dick," "pussy," and "clit" in the edited version. The licensee did not dispute the finding of the *NAL* that the unedited version of the song would be indecent.

4. Because the Mass Media Bureau did not have a tape or transcript of the actual broadcast, on April 1, 1998, before it issued the *NAL*, it sent a letter to the complainant with a copy of the edited version of the "You Suck" song. The Mass Media Bureau asked the complainant to confirm whether she heard the edited version or the version on the CD that was submitted with her complaint (the original unedited version). The Mass Media Bureau also asked her to explain the basis of her belief as to which version she heard broadcast on Station KROQ-FM. The complainant responded by a signed written statement indicating that she recalled hearing the words "pubic," "dick," "pussy," and "clit" in the broadcast she heard, none of which were contained in the edited version of the song provided by Infinity. The complainant's response was not referenced in the *NAL* and the licensee was not asked to comment on it. It was first discussed in the *Forfeiture Order*.

5. In its petition for reconsideration, the licensee argues that it was denied due process because the *NAL* was issued on the basis of information supplied by the complainant that was not disclosed to the licensee until after the issuance of the *Forfeiture Order*, thereby depriving it of the opportunity to rebut the additional evidence. It contends that the *Forfeiture Order* erred in relying on the untested recollection of an individual whose character, demeanor, memory, and motivation are unknown. It further urges that the *Forfeiture Order* improperly ignored the countervailing evidence proffered by it. Infinity also reiterates its contention advanced in response to the *NAL* that no forfeiture is appropriate because no tape, transcript or significant excerpt of the song as actually broadcast by KROQ(FM) was provided, as, it contends, is required by Commission policy. The licensee argues that a tape, transcript or significant excerpt is a requirement to protect licensees against unsubstantiated or spurious indecency complaints. It also characterizes the action here as reflecting a new policy insofar as it dispenses with the tape, transcript, or significant excerpt requirement. It therefore urges that at most a warning, and not a forfeiture, is warranted, citing *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987). In that case, the Commission found actionable indecency, but issued only a warning because prior rulings might have suggested that it had a different view of what would be considered indecent.

II. DISCUSSION

6. First, we will address the licensee's arguments pertaining to the complainant's supplemental response indicating that she heard the unedited version of the song because the licensee was unaware of this fact prior to the *Forfeiture Order*. Given that we will now fully consider the licensee's comments concerning this matter, the question as to whether it was denied due process by virtue of the failure to elicit its comments at an earlier stage of this proceeding is moot.

7. The licensee does not submit any new evidence in light of the complainant's statement. It rather contends that we should not accord it any evidentiary significance because of the untested nature of the complainant's claim. However, it is undisputed that the licensee had both the edited and the unedited versions of the song. It is also uncontested that the distinction between the versions is the inclusion in the unedited version of the words "pubic," "dick," "pussy," and "clit." In the circumstances of this case, the complainant's uncontradicted statement that she in fact heard those words in the song broadcast is probative evidence that the unedited version was broadcast. The circumstances here are unlike those in *Mr. Steve Bridges*, 9 FCC Rcd 1681 (Mass Media Bur. 1994), relied upon by Infinity. That case involved a brief, live and unscripted

comment by a caller. The complainant provided a transcript, but not a tape, of the alleged broadcast. The licensee contended that the entire transcript had not been broadcast, which was not contradicted. Under the circumstances of that case, the Mass Media Bureau found that the evidence was insufficient to determine the precise nature of the caller's arguably indecent remark. Here there are two versions of the song distinguished by the presence or absence of the pertinent words. We believe that the complainant's recollection that she heard those words provides sufficient probative evidence to conclude that the unedited version of the song was broadcast, particularly in the absence of any evidence to the contrary.

8. It is, of course, true that the complainant's statement is "untested," in that no evidentiary hearing has been held. However, the Communications Act of 1934, as amended ("Act") permits the imposition of a forfeiture without an evidentiary hearing.[2] The Act also protects the rights of parties subject to a forfeiture assessed without a hearing by providing that such a forfeiture cannot be used to the prejudice of the party unless it is paid or a court of competent jurisdiction has issued a final order after a trial *de novo* requiring that the forfeiture be paid.[3]

9. We also find that the licensee has offered no evidence contradicting the complainant's statement. It relies principally on its ignorance as to which version of the song was broadcast. However, the licensee's ignorance as to what was broadcast on its station does not constitute evidence that the station in fact broadcast the edited version. Moreover, the station was aware of the inappropriate nature of the unedited version of the song. Indeed, that is why an edited version existed. Given this fact, the licensee should have taken precautions to ensure that the version of the song that the licensee itself recognized to be inappropriate was not inadvertently broadcast. A licensee is ultimately responsible for the programming of its station. *Mr. Steve Bridges*, *supra*; *Trustees of the University of Pennsylvania*, 69 FCC 2d 1394, 1397 (1978). Under these circumstances, it would be particularly inappropriate to accord evidentiary weight to the licensee's ignorance that was the product of its failure to take precautions to prevent the inadvertent broadcast of the unedited version of the song, let alone to give the licensee's ignorance greater weight than the signed statement of a listener.

10. The licensee further relies upon the opinions of station personnel that there likely would have been multiple complaints if the station had aired the unedited version. However, we find this claim to be speculative, especially since the station personnel do not explain the basis for their opinions. Accordingly, we do not find that this argument amounts to evidence contradicting the complainant's recollection.

11. Finally, we disagree with the licensee's contention that, by not requiring a tape, transcript or significant excerpt, the *Forfeiture Order* creates new policy that makes the assessment of a forfeiture inappropriate. First, we note that the case law cited by the licensee stated that the Commission would ordinarily require a complainant to provide a tape, transcript or *significant excerpts* of the programming.[4] The complainant substantially complied with this procedure. Specifically, the complainant provided a copy of the unedited version of the CD including the language that she alleged to have heard during the broadcast. The complainant's submission constituted a "significant excerpt" of the programming that she alleged to be indecent, albeit not one that she transcribed herself. This, along with the date and time of the

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[2] Section 503(b) of the Act, 47 U.S.C. § 503(b).

[3] Section 504(a) and (c) of the Act, 47 U.S.C. § 504(a) and (c).

[4] *See Infinity Broadcasting Corporation of Pennsylvania*, 3 FCC Rcd 930, 938 n. 49 (1987).

broadcast and the call sign of the station in question, provided a sufficient basis for identifying a violation of the indecency prohibition. In any event, we note that our practice that complainants provide a tape, transcript or significant excerpt is not a requirement, but a general practice used by the Commission to assist in the evaluation of indecency complaints.

12. We have fully considered Infinity's contentions concerning the complainant's statement confirming her recollection as to the version of the song she heard. However, we do not find that the licensee has raised any new matter, or demonstrated any material error or omission, that warrants modification of the result reached in the *Forfeiture Order*. Therefore, we will deny its petition for reconsideration.

III. ORDERING CLAUSES

13. **ACCORDINGLY, IT** IS **ORDERED** that, pursuant to Section 405 of the Act[5] and Section 1.106 of the Rules,[6] Infinity Broadcasting Corporation of Los Angeles' petition for reconsideration **IS DENIED**.

14. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules[7] within thirty (30) days of the release of this *Order*. If the forfeiture is not paid within the specified period, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.[8] Payment may be made by mailing a check or similar instrument, payable to the order of the "Federal Communications Commission," to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. 818ed0017. Requests for full payment under an installment plan should be sent to: Chief, Credit and Debt Management Center, 445 12th Street, S.W., Washington, D.C. 20554.[9]

15. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by certified mail, return receipt requested, to counsel for Infinithy., Steven A. Lerman, Esq., Leventhal, Senter and 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

[5] 47 U.S.C. § 405.

[6] 47 C.F.R. § 1.106.

[7] 47 C.F.R. § 1.80.

[8] 47 U.S.C. § 504(a).

[9] *See* 47 C.F.R. § 1.1914.