

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

In the Matter of)	
)	
)	
Emmis Radio License Corporation)	File No. EB-01-IH-0121
)	NAL/Acct. No. 200232080014
Licensee of Station WKQX(FM),)	FRN 0001-5293-46
Chicago, Illinois)	Facility ID # 19525
)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: June 27, 2002

Released: June 28, 2002

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), we find that Emmis Radio License Corporation (“Emmis”), licensee of Station WKQX(FM), Chicago, Illinois, apparently violated 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, by willfully broadcasting indecent language. Based upon our review of the facts and circumstances in this case, we conclude that Emmis is apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000).

II. BACKGROUND

2. The Commission received a complaint that WKQX(FM) broadcast indecent material on March 12, 2001 between 8:00 a.m. and 8:10 a.m. during the “*Mancow’s Morning Madhouse*” (“*Mancow*”) program.¹ The complainant submitted a tape of the *Mancow* program containing the allegedly indecent material broadcast. After reviewing the complainant’s tape, we issued a letter of inquiry to the licensee that included a transcript of the tape submitted by the complainant. See Attachment.

3. In its response, Emmis states that WKQX(FM) does not routinely archive tapes or transcripts of its broadcasts and did not retain tapes or transcripts of the programming aired on March 12, 2001. Accordingly, Emmis states that it cannot verify the accuracy of the transcript. Nevertheless, Emmis argues that even assuming the accuracy of the transcript, the programming at issue is not actionably indecent.

¹ The complainant also referenced an excerpt of the *Mancow* program from the March 12, 2001 broadcast in which the program’s host offers a reward for the killing of an incarcerated pedophile. The complainant asks the Commission to determine whether the host’s remarks warrant criminal charges. Such a determination is outside the Commission’s regulatory jurisdiction, and is a matter for local law enforcement authorities.

III. DISCUSSION

4. It is a violation of federal law to broadcast obscene or indecent programming. Specifically, Title 18 of the United States Code, Section 1464 (18 U.S.C. § 1464), prohibits the utterance of “any obscene, indecent or profane language by means of radio communication.” Congress has given the Federal Communications Commission the responsibility for administratively enforcing 18 U.S.C. § 1464. In doing so, the Commission may, among other things, impose a monetary forfeiture, pursuant to Section 503(b)(1) of the Communications Act (the “Act”), 47 U.S.C. § 503(b)(1), for broadcast of indecent material in violation of 18 U.S.C. § 1464. Federal courts have upheld Congress’s authority to regulate obscene speech and, to a limited extent, indecent speech. Specifically, the U.S. Supreme Court has determined that obscene speech is not entitled to First Amendment protection. Accordingly, Congress may prohibit the broadcast of obscene speech at any time.² In contrast, federal courts have held that indecent speech is protected by the First Amendment.³ Nonetheless, the federal courts consistently have upheld Congress’s authority to regulate the broadcast of indecent speech, as well as the Commission’s interpretation and implementation of the statute.⁴ However, the First Amendment is a critical constitutional limitation that demands we proceed cautiously and with appropriate restraint.⁵ Consistent with a subsequent statute and case law,⁶ under the Commission’s rules, no radio or television licensee shall broadcast obscene material at any time, or broadcast indecent material during the period 6 a.m. through 10 p.m. See 47 C.F.R. § 73.3999.

5. In enforcing its indecency rule, the Commission has defined indecent speech as language that first, in context, depicts or describes sexual or excretory organs or activities. Second, the broadcast must be “patently offensive as measured by contemporary community standards for the broadcast medium.” *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)). This definition has been specifically upheld by the federal courts.⁷ The Commission’s

² See *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989); *Miller v. California*, 413 U.S. 15 (1973), *rehearing denied*, 414 U.S. 881 (1973).

³ *Sable Communications of California, Inc. v. FCC*, *supra* note 2, 492 U.S. at 126.

⁴ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). See also *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (“ACT I”); *Action for Children’s Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert denied*, 112 S.Ct. 1282 (1992) (“ACT II”); *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert denied*, 116 S.Ct. 701 (1996) (“ACT III”).

⁵ *ACT I*, *supra* note 4, 852 F.2d at 1344 (“Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people say and hear.”). See also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

⁶ Public Telecommunications Act of 1992, Pub. L. No. 356, 102nd Cong., 2nd Sess. (1992); *ACT III*, *supra* note 4.

⁷ In *FCC v. Pacifica Foundation*, the Court quoted the Commission’s definition of indecency with apparent approval. *FCC v. Pacifica Foundation*, *supra* note 4, 438 U.S. at 732. In addition, the D.C. Circuit Court of Appeals upheld the definition against constitutional challenges. *ACT I*, *supra* note 4, 852 F.2d at 1339; *ACT II*, *supra* note 4, 932 F.2d at 1508; *ACT III*, *supra* note 4, 58 F.3d at 657.

authority to restrict the broadcast of indecent material extends to times when there is a reasonable risk that children may be in the audience. *ACT I, supra*. As noted above, current law holds that such times begin at 6 a.m. and conclude at 10 p.m.⁸

6. The Commission's indecency enforcement is based on complaints from the public. Once a complaint is before the Commission, we evaluate the facts of the particular case and apply the standards developed through Commission case law and upheld by the courts. *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency* ("Indecency Policy Statement"), 16 FCC Rcd 7999 at 8015, ¶ 24. "Given the sensitive nature of these cases and the critical role of context in an indecency determination, it is important that the Commission be afforded as full a record as possible to evaluate allegations of indecent programming." *Id.* In evaluating the record to determine whether the complained of material is patently offensive, three factors are particularly relevant: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock. *See Indecency Policy Statement, supra*, 16 FCC Rcd at 8003 ¶ 10.

7. The complained of material, in context, refers to sexual and excretory organs and activities, and thus warrants scrutiny. *See Attachment*. We find that the material, in context, is patently offensive when considered under the three factors set out in the *Indecency Policy Statement*.

8. The first key factor concerns whether the material is explicit or graphic. The lyrics of "Smell My Finger" contain explicit and graphic sexual references, including references to fellatio, female genitalia, ejaculation and manual stimulation of the female genitalia. The song's sexual import is lewd, inescapable and understandable.⁹ The song, in context, has a sexual meaning that is unmistakable and is similar to other material found to have clearly understandable sexual references and to meet the definition of broadcast indecency.¹⁰ Moreover, under the second key factor, we find that the sexual references in "Smell My Finger" are repeated.

9. Under the third key factor of the *Indecency Policy Statement*, the material broadcast on WKQX(FM), in context, appears to have been used to pander to and titillate the audience and is similar to other material that has been found to be patently offensive.¹¹ In this regard, we reject Emmis's argument that this material is not patently offensive as measured by contemporary community standards. Emmis contends that "WKQX has been airing 'Mancow's Morning Madhouse' since July of 1998, and had received no inquiries from the Commission concerning the program's content until late last year." Emmis also asserts that the complaints about the *Mancow* program, including the complaint at issue here, were

⁸ *ACT III, supra* note 4.

⁹ *See WQAM License Limited Partnership*, 15 FCC Rcd 1475 (1999), *aff'd* 15 FCC Rcd 2518 (2000), *recon. denied* 15 FCC Rcd 12549 (2000).

¹⁰ *See, e.g., WQAM License Limited Partnership, supra* note 9 (sexual references in the song "Uterus Guy"); *KGB, Inc., (KGB-FM)*, 7 FCC Rcd 3207 (1992), *forfeiture reduced* 13 FCC Rcd 16396 (1998) ("Candy Wrapper" song, which includes lyrics such as "my Butterfinger went up her tight little Kit Kat"). *See also Great American Television and Radio Company, Inc. (WFBQ(FM)/WNDE(AM))*, 6 FCC Rcd 3692, 3693 (MMB 1990); *WIOD, Inc. (WIOD(AM))*, 6 FCC Rcd 3704 (MMB 1989).

¹¹ *See* note 10, *supra*.

initiated by a single individual or group whose standards do not accurately reflect those of the national community as a whole. The identity of the complainant and whether the complainant here is the source of other complaints about the *Mancow* program is not material to our determination under the factors set out in the *Indecency Policy Statement*. The purpose of using “contemporary community standards” is to ensure that material is not judged by its effect on a particularly sensitive or insensitive person or group.¹² In this regard, looking to a national community standard that references the average broadcast listener, we find that the material broadcast on WKQX(FM), in context, is patently offensive.¹³ Emmis does not dispute that the complained of material was broadcast when there was a reasonable risk that children may have been in the audience. By broadcasting this material, WKQX(FM) apparently violated the prohibitions against broadcast indecency.

10. Section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80(a) 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 provisions of the Act or the 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 it was taking the action in question, irrespective of any intent to violate the Commission’s rules.¹⁴ Based on the material before us, it appears that Emmis willfully violated 18 U.S.C. § 1464 and section 73.3999 of the Commission’s rules, by airing indecent programming on WKQX(FM) on March 12, 2001.

11. The Commission’s *Forfeiture Policy Statement* sets a base forfeiture amount of \$7,000 for transmission of indecent/obscene materials.¹⁵ The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as “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.”¹⁶ After reviewing all of the circumstances, we believe a \$7,000 forfeiture is appropriate in this case for the apparent broadcast of indecent material.

IV. ORDERING CLAUSES

12. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311, and 1.80 of the Commission’s rules,¹⁷ that Emmis Radio License Corporation is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the

¹² *Infinity Broadcasting Corporation of Pennsylvania (WYSPFM)*, 3 FCC Rcd 930, 932 (1987)(subsequent history omitted) citing *Hamling v. United States*, 418 U.S. 87, 107 (1974).

¹³ See, e.g., *WQAM License Limited Partnership (WQAM(AM))*, 15 FCC Rcd 2518, 2520 (2000)(explaining that the Commission uses its expertise to apply a national community standard that references the average broadcast viewer or listener). See also, *Indecency Policy Statement*, 16 FCC Rcd at 8002 note 15.

¹⁴ See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

¹⁵ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997), recon. denied 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*); 47 C.F.R. § 1.80(b).

¹⁶ *Forfeiture Policy Statement*, 12 FCC Rcd at 17110.

¹⁷ 47 C.F.R. §§ 0.111, 0.311 and 1.80.

amount of seven thousand dollars (\$7,000) for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

13. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, that within thirty days of the release of this Notice, Emmis SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

14. 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 MUST INCLUDE the FCC Registration Number (FRN) referenced above and also should note the NAL/Acct. No. referenced above.

15. 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 DC 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

16. 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.

17. 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. 20554.¹⁸

18. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to J. Scott Enright, Vice President, Associate General Counsel and Assistant Secretary, Emmis Radio License Corporation, 40 Monument Circle, Indianapolis, Indiana 46204 and to Emmis's counsel, Eve J. Klindera, Esq., Wiley Rein & Fielding LLP, 1776 K Street, N.W., Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁸ See 47 C.F.R. § 1.1914.

ATTACHMENT

EB-01-IH-0121

Radio Station: WKQX(FM), Chicago, Illinois
Date/Time Broadcast: March 12, 2001, between 8:05 a.m and 8:10 a.m.
Material Broadcast: Mancow's Morning Madhouse

M: Mancow

MV: Male Cast Member

MV2: Male Cast Member

MV3: Male Voice

MR: Male Rapper

MR2: Second Male Rapper

MR3: Third Male Rapper

FV: Female Cast Member

MV3: This is Kobey Dick and we're from Buffa (?) Roach.

MV2: You're listening to Mancow's Morning Madhouse on the Free Speech Radio Network.

MV3: Piss off. Eat a bowl of fu (bleep).

[Song: "Smell My Finger"]

MR: I've never been bashful, shy, sheepish or chivalrous when asking a lady to give me a kiss. So when she lifted up her skirt, I didn't ask what is this.

MR: Her box had some cheese so I nicknamed her Swiss. And so like Magellan I began to explore. Like Vasco DeGama I cleared the cape and went for more. Like Columbus I got lost but still managed to score. Like Ponce DeLeon I found the fountain in her core. [Unintelligible] Like Captain Cook I unearthed her buried treasure. My shot was on target like Jesse James the gun slinger. You need proof? Make like Sherlock Holmes and smell my finger.

Chorus: Smell my finger. Smell my finger. Smell my finger.

MR: Smell my finger. Smell that stank finger ya'all. [female making moaning sounds].

MR2: I like the super models with the low self-esteem, who wear the tight jeans covering up the g-strings. Tall lanky chicks who grow out their bangs. They only eat lettuce. They belong to the

machine gangs. I take her to dinner, I buy her some roses and then I part her legs like the Red Sea cuz I am Moses. We smoke the ganja. We drink from a flask. Oops, I left her a gift on her mud mask. Will you chill with super model dead ringers? Get ready. Folks come from all over to smell your fingers. [female making moaning noises]

Chorus: Smell my finger. Smell my finger. Smell my finger.

MR3: She was definitely young but she was old enough to know what God had given her a tongue. She got a rock hard body like a statue from Greece. I didn't catch her name. I don't [unintelligible] when I can reach. She lifted up her skirt when she found I was a rap singer. You don't believe me go ahead and smell the finger.

Chorus: Smell my finger. Smell my finger. Smell my finger.

MR3: Smell, baby. Inhale.

Chorus: Smell my finger. Smell my finger. Smell my finger.

MR3: Check the smell, baby. Smell my fingers, just don't smell my thumb. What's that underneath my fingernails?

[Song fades]

FV: I don't like that song Mancow.

M: Why?

FV: Because it's horrible, please.

M: Really? [unintelligible comment by Mancow].

FV: Yeah.

M: Anyone notice, whoever thinks it's funny, and I imagine it's Turd. Smell my finger don't smell my thumb. I like that lyric. That's a new group called "No Time." I don't know if it's in stores or not...

MV: Yeah, it'll be gone in no time...

M: Yeah, there you go. Ah, No Time...

MV: Should have smelled [unintelligible] leg.

M: Oh, with your wife?

FV: Oh, geeze...

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