

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

In the Matter of)	
)	
WSKQ Licensing, Inc.)	File Number: EB-07-IH-8320
)	NAL/Acct. No.: 201032080016
Licensee of Station WSKQ-FM)	FRN #: 0004976882
New York, New York)	
)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 4, 2010

Released: February 4, 2010

By the Chief, Investigations and Hearings Division, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), we assess a monetary forfeiture in the amount of \$16,000 against WSKQ Licensing, Inc. (“WSKQ Licensing” or the “Licensee”), licensee of WSKQ-FM, New York, New York, for its apparent willful and repeated violation of Section 73.1206 of the Commission’s Rules.¹ As discussed below, we find that WSKQ Licensing apparently violated the telephone broadcast rule by broadcasting a telephone conversation without giving prior notice to the individual being called of its intention to do so.

II. BACKGROUND

2. The Enforcement Bureau (“Bureau”) received a complaint (the “Complaint”) alleging that on August 23, 2007, a Station employee made a call to a woman (the “Call Recipient”) claiming to be an employee of a local hospital and told her that her husband had been seriously injured in a motorcycle accident and that he died at the hospital.² The Complaint also alleges that the Call Recipient became distraught when she received this information.³ Thereafter, the Station employee informed her that the call was a “joke.”⁴

3. The Bureau issued a letter of inquiry (“LOI”) to WSKQ Licensing on September 25, 2008, regarding the complaint at issue.⁵ In its LOI Response (“Response”), WSKQ Licensing states that its parent company, Spanish Broadcasting System, Inc., contracted with a vendor, “Rubin Ithier,” who recorded the call for a prank call feature show.⁶ The Licensee admits that Ithier initiated the call

¹ See 47 C.F.R. § 73.1206 (the “telephone broadcast rule”).

² See Complaint to Federal Communications Commission, dated August 23, 2007 (“Complaint”). Because the complainant has not authorized disclosure, the complainant’s identity will remain anonymous.

³ See Complaint at 1. See paragraph 4, *infra* (excerpt of transcript of prank call).

⁴ *Id.*

⁵ See Letter from Rebecca Hirselj, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to WSKQ Licensing, Inc., dated September 25, 2008 (“LOI”).

⁶ See Letter from Bruce A. Eisen, counsel for WSKQ Licensing, In., to Marlene Dortch, Secretary, Federal Communications Commission, dated October 27, 2008 (“LOI Response”).

broadcast by the Station, that the call was made at the call recipient's husband's request, and that Ithier performed the prank.⁷ In its LOI Response, the Licensee further admits that Mr. Ithier did not inform the call recipient that the call was being recorded for later broadcast until after the call had been recorded and played over the air.⁸ The licensee provided a transcript of the program, the content of which confirms that the call recipient was not given notice prior to the call being recorded that it was being recorded for future broadcast.⁹ The Licensee admits that the Station broadcast the call twice on August 23, 2007.¹⁰

4. The Licensee included a recording and transcript¹¹ of the broadcast of the call which included, in pertinent part, the following:

Mr. Ithier: Can I speak with Ms. Juliana please?
 Call Recipient: Who is this?
 Mr. Ithier: The Doctor Raymond Martinez, I'm just calling from [bleeped out] Hospital
 Call Recipient: Aha? Yes Juliana
 Mr. Ithier: Do you know anybody with the name Luis, Luis Miguel?
 Call Recipient: Yes

* * * * *

Mr. Ithier: OK, this person had an accident in mid afternoon.
 Call Recipient: OK
 Mr. Ithier: on a motorcycle.
 Call Recipient: How is he? How is he?
 Mr. Ithier: He cannot move his hands, he can't move his arms, he suffered because he was not wearing his helmet. He suffered, a, a on his neck.
 Call Recipient: Aha
 Mr. Ithier: And, he can't yet but the problem is that we need a blood transfusion.
 Call Recipient: A blood transfusion?
 Mr. Ithier: Yes, he needs blood because it is possible that he might even loose his sight, he is not a complete vegetable but we need a blood transfusion.
 Call Recipient: Oh my God! OK, OK. Uhhh! Who am I speaking to?
 Mr. Ithier: Raymond Martinez.

* * * * *

[The Call Recipient hands over the phone to a friend who proceeds to ask Mr. Ithier additional questions.]

Mr. Ithier: Right now he is on the operation table, because, on his neck he suffered a fracture, very serious.
 Call Recipient's Friend: OK, but he is stable?
 Mr. Ithier: No, I don't think so. I don't think he'll make it. I don't think he'll make it. Can I speak with Julian, Juliana please? I feel like you, you are interrogating me or something like that.
 Call Recipient's Friend: No, it's that she is not well and doesn't know how to explain what they told her about Luis. That's why I wanted to call.

⁷ See *id.* at 1-2 & Translation at 4-5.

⁸ See *id.* at 3, Declaration at 1 & Translation at 6.

⁹ See *id.*

¹⁰ See *id.* at 4.

¹¹ See *id.* at Translation of the August 23, 2007 call. A transcript in Spanish and an English Translation were provided.

Mr. Ithier: Give me a second, give me a second, here comes the doctor, one minute, hold on one second. Yeah doctor, what happened? On no, do I have to say that? No, no, no, ay.

Call Recipient's Friend: Yeah?

Mr. Ithier: Oh my God! He died. I'm so sorry. Too late!

Call Recipient's Friend: Excuse me?

Mr. Ithier: He died, he died already. That's what the doctor just told me now. So if you want to stop by here to pick up or identify the body or something. Hello?

Call Recipient: (can be heard crying in the background)

* * * * *

[Call Recipient's Friend then hands over the phone to the Call Recipient]

Call Recipient: Hello?

Mr. Ithier: Juliana, oh, oh I'm so sorry he just died right now.

Call Recipient: (crying)

Mr. Ithier: I will, Juliana I want to ask you something. Just two or three questions please. I can't hear you.

Call Recipient: What?

Mr. Ithier: So this is for when you come here you don't have to ask too many questions when you identify him.

Call Recipient: No, no, I'm going over there right now.

Mr. Ithier: OK, ah, Juliana?

Call Recipient: Yes

Mr. Ithier: OK, you listen to El Vacilon de la Manana?

(Ithier's cohort): Ayh No!

Call Recipient: Yes

Mr. Ithier: Well this was a joke mami. He is alive and kicking.

Call Recipient: Your [bleeped out] kidding me! (and then hangs up)

Mr. Ithier: Hello? Why are people always hanging up on me?

The Transcript indicates that the Call Recipient hung up the phone when she learned that the call was a prank, and that Mr. Ithier telephoned her again to obtain her permission to broadcast the call.¹²

III. DISCUSSION

5. Under Section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹³ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.¹⁴ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁵ and the

¹² See *id.*

¹³ See 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

¹⁴ 47 U.S.C. § 312(f)(1).

¹⁵ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

Commission has so interpreted the term in the Section 503(b) context.¹⁶ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁷ “Repeated” means that the act was committed or omitted more than once, or lasts more than one day.¹⁸ In order to impose such a penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such penalty should be imposed.¹⁹ The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has willfully or repeatedly violated the Act or a Commission rule.²⁰ As described in greater detail below, we conclude under this procedure that WSKQ Licensing is apparently liable for a forfeiture in the amount of \$16,000 for its apparent willful and repeated violation of Section 73.1206.

6. Section 73.1206 of the Commission’s Rules requires that, *before* broadcasting or recording a telephone conversation for later broadcast, a licensee must inform any party to the call of its intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast.²¹ The Commission will presume such awareness only where “the other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.”²²

7. Section 73.1206 reflects the Commission's longstanding policy that prior notification is essential to protect individuals' legitimate expectation of privacy and to preserve their dignity by avoiding nonconsensual broadcasts of their conversations.²³ The Commission specifically favored an individual's privacy interest when balancing it against a broadcaster's interest in enhancing program appeal with increased spontaneity and entertainment value using telephone conversations. The Commission found that such enhancement was not sufficiently critical as to justify intruding on individual privacy.²⁴ The Commission has held that the prior notification requirement ensures the protection of an individual's "right to answer the telephone without having [his or her] voice or statements transmitted to the public by a broadcast station" live or by recording for delayed airing.²⁵ Consistent with this reasoning, the Commission has defined “conversations” broadly “to include *any* word or words spoken during the telephone call,” and specifically has rejected arguments that “utterances made by parties called in

¹⁶ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹⁷ See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 10 (2001) (“*Callais Cablevision*”) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator’s repeated signal leakage).

¹⁸ *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388 ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362 ¶ 9.

¹⁹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

²⁰ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 ¶ 4 (2002) (forfeiture paid).

²¹ See 47 C.F.R. § 73.1206.

²² *Id.*

²³ See *Amendment of Section 1206: Broadcast of Telephone Conversations, Report and Order*, 3 FCC Rcd 5461, 5463-64 (1988) (“*1988 Order re the Broadcast of Telephone Conversations*”); *Station-Initiated Telephone Calls Which Fail to Comply With Section 73.1206 of the Rules*, Public Notice, 35 FCC 2d 940, 941 (1972); *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to the Broadcast of Telephone Conversations*, Report and Order, 23 FCC 2d 1, 2 (1970); see also *WXDJ Licensing, Inc.*, Forfeiture Order, 19 FCC Rcd 22445 (Enf. Bur. 2004) (assessing a forfeiture for failure to obtain consent before recording telephone conversation for broadcast; forfeiture paid).

²⁴ See *1988 Order re the Broadcast of Telephone Conversations*, 3 FCC Rcd at 5464.

²⁵ See *id.* at 5463.

answering the phone” are not subject to the rule's prior notification requirement.²⁶ Thus, aside from the narrowly-tailored exceptions noted above, neither of which is applicable here, before any portion of a telephone conversation is recorded for later broadcast or before any portion of a telephone conversation is initiated for simultaneous broadcast, the licensee must inform the other party that the conversation will be recorded for broadcast purposes or will be broadcast live.

8. As the record reflects, WSKQ Licensing failed to comply with the notice requirement required by Section 73.1206. WSKQ Licensing asserts that its independent contractor obtained the call recipient's permission to broadcast the call before the Station broadcast it, but acknowledges that such permission was requested *after* the telephone conversation had been recorded.²⁷ The failure to inform the call recipient *prior* to recording the call that it was intended for broadcast is a violation of Section 73.1206. Here the transcript and the Licensee's admissions establish that the independent contractor, based on its contract with the Licensee and without prior notice to the call recipient, proceeded to record the conversation with the recipient.²⁸ This is the type of behavior - entertainment at the expense of an individual's right to privacy - that Section 73.1206 was enacted to sanction.²⁹

9. We further find – contrary to WSKQ Licensing's contention – that the call's origination and recording by an independent contractor, rather than the Licensee itself, does not exculpate the Licensee from liability.³⁰ The “Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors,”³¹ and the Commission has “consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.”³² Nothing in the record here suggests that this precedent does not or should not apply. Rather, the independent contractor had a contract to provide prank call feature programming,³³ suggesting that the independent contractor was acting pursuant to a regular and ongoing agreement condoning the type of practice for which we find the Licensee apparently liable here. For the foregoing reasons, we find that the Licensee apparently willfully and repeatedly violated Section 73.1206.

²⁶ See *Hefel Broadcasting-Contemporary, Inc.*, 52 FCC 2d 1005, 1006 (1975) (holding that “conversation” was defined for the purpose of Section 73.1206 as including any word or words spoken during the telephone call and imposing \$2,000 forfeiture for failure to provide notice and obtain consent prior to recording any conversation).

²⁷ See LOI Response at 3-4.

²⁸ See *supra* paragraph 4.

²⁹ See *supra* note 26.

³⁰ See *KOFI, Inc.*, Forfeiture Order, 20 FCC Rcd 17886, 17888 (Enf. Bur., Investigations & Hearings Div. 2005) (holding that liability on employee or independent contractor's part does not excuse licensee from liability for violating telephone broadcast rule and assessing \$4,000 forfeiture; forfeiture paid).

³¹ *Eure Family Limited Partnership*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863-864 (2002). *Accord MTD, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 34 (1991) (holding that a company's reliance on an independent contractor to construct a tower in compliance with FCC rules does not excuse that company from a forfeiture); *Wagenvoord Broadcasting Co.*, Memorandum Opinion and Order, 35 FCC 2d 361 (1972) (holding a licensee responsible for violations of FCC rules despite its reliance on a consulting engineer); *Petracom of Joplin, L.L.C.*, Forfeiture Order, 19 FCC Rcd 6248 (Enf. Bur. 2004) (holding a licensee liable for its employee's failure to conduct weekly EAS tests and to maintain the “issues/programs” list).

³² *American Paging, Inc. of Virginia*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 10417, 10420 (WTB 1997) (quoting *Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1244 (1984)).

³³ See LOI Response at 2-3.

10. The Commission's forfeiture guidelines establish a base forfeiture amount of \$4,000 for the unauthorized broadcast of a telephone conversation.³⁴ In addition, the Commission's rules provide that base forfeitures may be adjusted based upon consideration of the factors enumerated in Section 503(b)(2)(E) of the Act³⁵ and Section 1.80(a)(4) of the Commission's rules, which include "the nature, circumstances, extent, and gravity of the violation . . . and the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."³⁶ In another case involving the same licensee, we proposed a \$16,000 forfeiture for very similar conduct.³⁷ The events underlying that proceeding occurred contemporaneously with the events in this case.³⁸ Given those facts, and given that we issued our earlier *NAL* well after the events of this case, we find that \$16,000 is also an appropriate forfeiture here. Accordingly, having considered the record in this case and the statutory factors identified above, we find that WSKQ Licensing is apparently liable for a forfeiture in the amount of \$16,000. Although we exercise discretion in this instance in not imposing a higher forfeiture, we warn the Licensee that future violations of this nature may result in harsher enforcement action, including license revocation proceedings.

IV. ORDERING CLAUSES

11. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended,³⁹ and Sections 0.111, 0.311, 0.314 and 1.80 of the Commission's rules,⁴⁰ that WSKQ Licensing, Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of sixteen thousand dollars (\$16,000) for apparently willfully and repeatedly violating Section 73.1206 of the Commission's rules.⁴¹

12. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules, that within thirty (30) days of the release date of this *NAL*, WSKQ Licensing, 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 must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by

³⁴ See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17115 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80.

³⁵ See 47 U.S.C. § 503(b)(2)(E).

³⁶ 47 C.F.R. § 1.80(a)(4).

³⁷ See *WSKQ Licensing, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14933 (Enf. Bur., Investigations & Hearings Div. 2008) (imposing a \$16,000 forfeiture against the Licensee for violation of the telephone broadcast rule) (forfeiture paid). See also *WXDJ Licensing, Inc.*, Notice of Apparent Liability, 19 FCC Rcd at 22447 (imposing a \$3,500 forfeiture against the Licensee for violating telephone broadcast rule) (forfeiture paid); *WCMQ Licensing, Inc.*, Notice of Apparent Liability, 15 FCC Rcd 8111 (Enf. Bur. 2000) (forfeiture paid).

³⁸ The conduct at issue in the *WSKQ NAL* occurred 35 days before the conduct at issue here. See Complaint to Federal Communications Commission, dated July 19, 2007 (EB-07-IH-8469); *WSKQ Licensing, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14933 (Investigations and Hearings Div. 2008) (EB-07-IH-8469); Complaint to Federal Communications Commission, dated August 23, 2007 (EB-07-IH-8320).

³⁹ See 47 U.S.C. § 503(b).

⁴⁰ See 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80, 73.1206.

⁴¹ See 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80, 73.1206.

overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. WSKQ Licensing, Inc. will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Ben.Bartolome@fcc.gov, Anjali.Singh@fcc.gov and Judy.Lancaster@fcc.gov.

14. The response, if any, shall be mailed to Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington D.C. 20554, and **MUST INCLUDE** the NAL/Account Number referenced above. To the extent practicable, any response should also be sent by e-mail to Hillary.DeNigro@fcc.gov, Ben.Bartolome@fcc.gov, Anjali.Singh@fcc.gov and Judy.Lancaster@fcc.gov.

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. **IT IS FURTHER ORDERED**, that the Complaint filed **IS GRANTED** to the extent indicated herein and **IS OTHERWISE DENIED**, and the Complaint proceeding **IS HEREBY TERMINATED**.⁴²

17. **IT IS FURTHER ORDERED**, that a copy of this *NAL* shall be sent, by Certified Mail/Return Receipt Requested, to WSKQ Licensing, Inc. at its address of record and to its counsel, Bruce A. Eisen, Kaye Scholer LLP, 901 Fifteenth Street, N.W., Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Hillary S. DeNigro
Chief, Investigations and Hearings Division
Enforcement Bureau

⁴² For purposes of this forfeiture proceeding initiated by this *NAL*, WSKQ Licensing, Inc. shall be the only party to this proceeding.