

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

In the Matter of)	
)	
Citicasters Co.)	Control No. EB-00-IHD/99090359
)	NAL/Acct. No. X32080031
Licensee of Station KSJO(FM))	Facility #4117
San Jose, CA)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 25, 2000

Released: September 26, 2000

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture, we find Citicasters Co. (“Citicasters”), licensee of Station KSJO(FM), San Jose, CA, apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000) for a violation of 18 U.S.C. § 1464 and Section 73.3999 of the Commission’s rules, 47 C.F.R. § 73.3999, by broadcasting indecent material.

II. BACKGROUND

2. The Commission received information indicating that Station KSJO(FM), San Jose, CA, may have violated 18 U.S.C. § 1464 by broadcasting allegedly indecent material when it aired a “joke” on August 25, 1999, at approximately 1:15 p.m. Attached is a transcript of the “joke” that is the subject of this action. We issued a letter of inquiry, asking Citicasters to comment on the complaint. Citicasters responded to our inquiry on July 7, 2000.

III. DISCUSSION

3. Section 503(b)(1)(D) of the Act provides in pertinent part:

Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have – 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.

4. Pursuant to 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. §

1464, which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication."

5. The Commission defines broadcast indecency as language or material 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), *aff'd* 3 FCC Rcd 930 (1987)(subsequent history omitted)(citing *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)). The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at 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). The court subsequently concluded that a 10:00 p.m. to 6:00 a.m. "safe harbor" was justified as a properly tailored means of vindicating the government's compelling interest in the welfare of children. *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 701 (1996) (*ACT III*).

6. In response to our inquiry, Citicasters admits that the "joke" is crude, and it states that the on-air talent involved was reprimanded for airing such material. Citicasters argues, however, that the "joke" is not indecent because "it does not describe sexual activities or organs in terms patently offensive as measured by contemporary community standards." Instead, Citicasters claims that the "joke" "relies simply on innuendo, the sexual import of which is not inescapable." We reject Citicasters' arguments. The Commission has repeatedly held that "innuendo may be patently offensive within the meaning of our indecency definition if it is understandable and clearly capable of a specific sexual or excretory meaning which, in context, is inescapable." *San Francisco Century Broadcasting, L.P.*, 8 FCC Rcd 498 (1993). We believe the "punch line" of the "joke" is an inescapable reference to incest and sex with children. Citicasters does not offer any alternative interpretation under which the "joke" is not referring to sexual activities in a patently offensive manner. Under these circumstances, it appears that the excerpt contains language that describes sexual activities or organs in patently offensive terms. Because the material aired at approximately 1:15 p.m., when there was a reasonable risk that children may have been in the audience, it is legally actionable. Thus, it appears that on August 25, 1999, at approximately 1:15 p.m., Station KSJO(FM) violated 18 U.S.C. § 1464 and Section 73.3999 of the Commission's rules by airing indecent programming.

7. Section 503(b) of the Communications Act of 1934, as amended, (the "Act"), 47 U.S.C. § 503(b), and Section 1.80(a) of the Commission's rules, 47 C.F.R. § 1.80(a), 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. See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

8. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$7,000 for transmission of indecent/obscene materials.¹ 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,

¹ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, 12 FCC Rcd 17087, 17113 (1997), *recon. denied* 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*); 47 C.F.R. § 1.80(b).

ability to pay, and such other matters as justice may require.”² After reviewing all of the circumstances, we believe a \$7,000 forfeiture is appropriate in this case.

IV. ORDERING CLAUSES

9. 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,³ that Citicasters Co. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of seven thousand dollars (\$7,000) for willfully violating Section 503(b)(1)(D) of the Communications Act of 1934, as amended, and Section 73.3999 of the Commission’s rules.

10. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s rules, that within thirty days of the release of this Notice, Citicasters SHALL PAY to the United States the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

11. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to 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.

12. 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 file number listed above.

13. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Citicasters’ counsel, John M. Burgett, Esq., Wiley, Rein & Fielding, 1776 K Street, N.W., Washington, DC 20006.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

Attachment

² 12 FCC Rcd at 17110.

³ 47 C.F.R. §§ 0.111, 0.311 and 1.80.

Radio Station: KSJO(FM), San Jose, CA
Date/Time Broadcast: August 25, 1999, at approximately 1:15 p.m.
Material Broadcast: "Joke"
99090359
ksjoaa

Complainant states:

A little girl comes into the bathroom where Mommy is taking a shower. The little girl points to Mommy and asks, "what's that?" Mommy says, "that's my vagina." The little girl asks, "when do I get one of those?" Mommy says, "when you get older." The little girl comes into the bathroom where Daddy is taking a shower she points to Daddy and asks, "what's that?" The Daddy says, "that's my penis." The little girl asks, "when do I get one of those?" The Daddy says, "**as soon as Mommy goes to work.**" .