



NEWS

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See MCI v. FCC, 515 F 2d 385 (D.C. Circ 1974).

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COMMISSION PROPOSES STATUTORY MAXIMUM FORFEITURE OF \$357,500 AGAINST INFINITY BROADCASTING FOR APPARENT VIOLATIONS OF INDECENCY RULES

Washington, D.C. - Today, the Commission issued a *Notice of Apparent Liability for Forfeiture* against Infinity Broadcasting Operations, Inc. for apparently willfully and repeatedly broadcasting indecent material during the afternoon of August 15, 2002, in connection with the Opie & Anthony Show. The Commission proposed a fine against Infinity of \$357,500, which is the highest amount permitted by the Communications Act on the facts of this case.

The Commission proposed a forfeiture for the maximum statutory amount because of the egregious nature of the material, the involvement of many Infinity employees and managers in planning the marketing event, and Infinity's recent history of the airing of indecent or apparently indecent broadcasts, including the Opie and Anthony Show, over Station WNEW(FM) in November 2000 and January 2001.

The Commission based its action on more than 500 complaints regarding Infinity's August 15, 2002, broadcast of an Infinity-hosted contest entitled "Sex for Sam," which involved participants having sex in "risky locations" throughout New York City, including St. Patrick's Cathedral, a zoo, Rockefeller Center, and a toy store. The object of the contest was for each participating couple to earn the maximum number of points by having sex in as many of the places specified by the station as possible. The Commission concluded that the material in these broadcasts appeared to meet the Commission's indecency definition. Specifically, the program material included repeated, graphic and explicit sexual descriptions designed to shock, pander and titillate listeners.

Action by the Commission, October 2, 2003, Notice of Apparent Liability for Forfeiture (FCC 03-234). Chairman Powell, Commissioners Abernathy and Adelstein. Commissioner Copps issuing a dissenting statement. Commissioner Martin issuing a concurring statement. Commissioner Adelstein issuing a separate statement.

Enforcement Bureau contacts: Suzanne Tetreault, at (202) 418-7450; William Freedman, at (202) 418-1415.

**Statement of Commissioner Michael J. Copps,
Dissenting**

Re: Infinity Broadcasting Operations, Inc., Licensee of Stations WNEW(FM), New York, New York; WYSP(FM), Philadelphia, Pennsylvania; KYCY(AM), San Francisco, California; Infinity Radio Operations, Inc., Licensee of Stations WBUF(FM), Buffalo, New York; KSFN(AM), North Las Vegas, Nevada; WXTM(FM), Cleveland Heights, Ohio; WAZU(FM), Circleville, Ohio; KUPL(AM), Portland, Oregon; Infinity Radio Subsidiary Operations, Inc., Licensee of Station KXOA(FM), Roseville, California; Infinity Broadcasting Corporation of Dallas, Licensee of Station KLLI(FM), Dallas, Texas; Infinity Broadcasting Corporation of Washington, D.C., Licensee of Station WJFK-FM, Manassas, Virginia; Infinity Holdings Corporation, Licensee of Station WCKG(FM), Elmwood park, Illinois; Hemisphere Broadcasting Corporation, Licensee of Station WBCN(FM), Boston, Massachusetts, Notice of Apparent Liability for Forfeiture; AMFM Radio Licenses, Licensee of Station WWDC-FM, Washington, D.C., Notice of Apparent Liability for Forfeiture

I dissent from the Commission's decisions to provide no more than a slap on the wrist to Infinity (owned by Viacom) and Clear Channel rather than take serious action to address indecency on our airwaves. Today, the majority proposes a \$27,500 fine for each incident of airing what the majority agrees appears to be indecent programming at a time when children likely composed a significant portion of the audience.

In the case of Infinity/Viacom, thirteen stations ran the "Opie & Anthony Show" which contained a broadcast of sexual activity at St. Patrick's Cathedral in New York as part of an on-air stunt. In this stunt, called "Sex for Sam," couples received points for having sex in public places. In addition to St. Patrick's Cathedral, the broadcast described sexual activity at restaurants, at the Disney Store and at FAO Schwartz. In the case of Clear Channel, one of its stations, WWDC-FM, broadcast an "Elliot in the Morning" show which included a station-sponsored promotion to which female high school students called in for the opportunity to audition to dance in a cage at an upcoming rock concert. The show's hosts questioned the girls about their sexual activities at their school -- Bishop Denis J. O'Connell High School -- actively solicited other high school students to call, and made repeated and graphic references to oral sex.

Neither of these cases is a difficult call. Both are outrageous and both were run by stations whose owners knew better and whose parent companies have had previous indecent broadcasts brought before this Commission. I believe we should designate these cases for a hearing on the possible revocation of these stations' licenses, as provided for by section 312(a)(6) of the Communications Act.

I am particularly troubled by the decision on the "Opie and Anthony Show." I defy anyone to read the transcript and argue that this broadcast does not violate the statutory prohibition against airing indecent material. And I defy anyone to argue that a \$27,500 fine to each of the stations owned by a multi-billion dollar conglomerate is adequate to address this clear violation of federal law.

Infinity/Viacom could pay this entire fine by tacking just one more commercial onto one of its prime-time TV shows and probably pocket a profit to boot. Some punishment!

The majority admits that each of these stations appears to have egregiously and extensively violated the statutory ban on broadcast of indecent material. The majority claims further to recognize the seriousness of the offense. And it even concedes that the Commission has the option of the license revocation process. But then it turns timid and decides that the appropriate recourse for this filth is a \$27,500 fine against each station. In other words, the majority determines that these stations deserve yet another chance before the Commission even considers revoking a license. When, I ask, will this end?

This is not the first action against a station owned by Infinity. Infinity stations paid \$1.7 million in 1995 to settle a series of indecency cases. As part of that settlement, Infinity agreed to take steps to prevent further broadcast of indecent material. More complaints involving other Infinity broadcasts followed. Last April, this Commission issued another tepid proposed fine against another station owned by this same company – WKRR-FM in Detroit – which had aired some of the most vulgar and disgusting indecency that I have had the misfortune to examine. In that decision, the majority warned that repeated serious violations by Infinity could result in the revocation of station licenses. The majority repeats that same warning again in this decision.

Yet, two months prior to the airing of “Sex for Sam” on the “Opie and Anthony Show,” this agency cited the same show for three separate apparent violations of the indecency statutes. These shows aired between November 2000 and January 2001. In one instance, a graphic song about a father having oral sex with his young daughter was broadcast. In the second instance, the “Opie and Anthony Show” aired another graphic song by a man seeking girls between the ages of two and three for sex. In the third instance, the show provided detailed instructions to a teenager and then broadcast her rubbing a telephone between her legs.

If this situation does not meet the majority’s test for repeated violators, I fail to understand what would. The message to licensees is clear. Even egregious repeated violations will not result in revocation of a license. Rather, they will result only in a financial penalty that doesn’t even rise to a serious cost of doing business.

I wonder when this Commission will finally take a firm stand against the “race to the bottom” on our airwaves. The time has come for us to send a message that we are serious about enforcing the indecency laws of our country and that we will be especially vigilant about the actions of repeat offenders such as those cases before us here. Instead we turn an apparently incurable deaf ear to millions of Americans who are fed up with the patently offensive programming sent into their homes so regularly. Today’s decision does nothing to discourage such programming.

It all comes down to this: station owners aren’t given licenses to use the public’s airwaves to peddle smut. They are given licenses to serve the public interest.

Separate Statement of Commissioner Kevin J. Martin

Re: Infinity Broadcasting Operations, Inc., Licensee of Stations WNEW(FM), New York, New York; WYSP(FM), Philadelphia, Pennsylvania; KYCY(AM), San Francisco, California; Infinity Radio Operations, Inc., Licensee of Stations WBUF(FM), Buffalo, New York; KSFN(AM), North Las Vegas, Nevada; WAZU(FM), Circleville, Ohio; WXTM(FM), Cleveland Heights, Ohio; KUPL(AM), Portland, Oregon; Infinity Radio Subsidiary Operations, Inc., Licensee of Station KXOA(FM), Roseville, California; Infinity Broadcasting Corporation of Dallas, Licensee of Station KLLI(FM), Dallas, Texas; Infinity Broadcasting Corporation of Washington, DC Licensee of Station WJFK-FM, Manassas, Virginia; Infinity Holdings Corporation of Orlando, Licensee of Station WCKG(FM), Elmwood park, Illinois; Hemisphere Broadcasting Corporation, Licensee of Station WBCN(FM), Boston, Massachusetts, Notice of Apparent Liability for Forfeiture

I support the finding in this Notice of Apparent Liability that the licensee apparently violated our rule against the broadcast of indecent content, but I would have proposed a higher fine. I note both that we have taken issue with this licensee in past broadcasts of this radio show and that the licensee subsequently removed the show.¹ As I have said in similar cases, we could have found that each time the show's hosts started talking about an indecent topic or had a separate distinct conversation, the ensuing conversation constituted a separate violation.² In prior cases, the Commission has acknowledged that we have the discretion to consider each indecent utterance a separate violation.³

¹ In June 2002, for example, the Enforcement Bureau issued a Notice of Apparent Liability for \$21,000 for the Opie and Anthony Show willfully and repeatedly broadcasting indecent language on several occasions. *See Infinity Broadcasting Operations, Inc., Licensee of Station WNEW(FM), New York, New York*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 27711 (EB 2002). The final outcome of this case is still pending.

² *See* Separate Statement of Commissioner Kevin J. Martin, *Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 6915 (2003) (*Infinity Detroit NAL*).

³ *Infinity Detroit NAL* at para. 13 (clarifying that the Commission could pursue enforcement action for each indecent utterance). *See also* 18 U.S.C. § 1464 (specifying that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”).

**SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Infinity Broadcasting Operations, Inc., Notice of Apparent Liability for Forfeiture

This Notice sends the unmistakable message to Infinity and other broadcasters who violate our indecency rules: We are stepping up our enforcement. Once again, we give fair warning that the Commission can and will avail itself of a range of enforcement sanctions, including the initiation of proceedings that could result in the revocation of these stations' licenses. I will not hesitate to consider such revocation proceedings for serious violations that occur after the explicit notice we provided in April in WKRK-FM, another case involving Infinity. Similarly, as broadcasters were explicitly notified in April, I will also support on a going-forward basis an approach that treats each indecent utterance, such as distinct conversations or program segments, as a separate violation under our rules. This will substantially increase our fines, which by statute are capped at an inadequate level, so they will be more commensurate with the offenses.

The Commission reached the obvious conclusion in this case that the broadcast material was indecent and Infinity should be liable for the full statutory maximum forfeiture amount. It took far too long for us to reach this conclusion, and I hope we will act more swiftly in the future to send a clear message.

Infinity's actions here were unquestionably willful and egregious. Program hosts Opie & Anthony held numerous conversations on the air with station spotters describing and encouraging sexual activity. Station and program employees participated actively in the "Sex for Sam" contest by planning the event, arranging the spotters, encouraging the most provocative locations like toy stores and churches likely to expose innocent children and worshippers to unwelcome sexual conduct, and instructing the contestants to go inside St. Patrick's Cathedral. These callous actions show a high degree of culpability and a deliberate attempt to heighten the shock to listeners. They clearly offended community standards.

Unfortunately, the statutory constraints on our ability to level fines are currently inadequate, as the low fines can be considered by broadcasters as a cost of doing business and not a serious deterrent. In this case, a fine below the statutory maximum would not accurately reflect the circumstances and Infinity's culpability. I believe strongly that our fines, or other appropriate enforcement actions, should be sufficient to deter broadcasters from broadcasting indecent material on the public's airwaves at a time when children are listening. Today's action, while an important step in that direction, must be followed by more stringent, swifter and stricter enforcement of our statutory obligation to prevent indecent broadcasts over the public airwaves.