

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

LETTER
November 29, 1990

Released: December 7, 1990

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Mel Karmazin, President	8210-AJZ
Sagittarius Broadcasting Corporation.	C5-223
Infinity Broadcasting Corporation of Pennsylvania & Infinity Broadcasting Corporation of Washington, D.C.	C11-510
Licensees, Stations WXRK(FM), WYSP(FM) & WJFK(FM)	C12-169
600 Madison Avenue, Fourth Floor New York, New York 10022	

Dear Mr. Karmazin:

This letter constitutes a NOTICE OF APPARENT LIABILITY for FORFEITURE to Sagittarius Broadcasting Corporation, licensee of Radio Station WXRK(FM), New York, New York, Infinity Broadcasting Corporation of Pennsylvania, licensee of Radio Station WYSP(FM), Philadelphia, Pennsylvania, and Infinity Broadcasting Corporation of Washington, D.C., licensee of Radio Station WJFK(FM), Manassas, Virginia, pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.¹

On October 26, 1989, we asked for your comments concerning a complaint received by the Commission alleging that portions of the "Howard Stern Show" (transcripts of which are attached) broadcast by WXRK(FM), New York, New York, and simultaneously carried on WYSP(FM), Philadelphia, Pennsylvania, and WJFK(FM), Manassas, Virginia, contained indecent material. The broadcasts at issue occurred between 6 a.m. and 10 a.m. on December 16, 1988. On December 29, 1989, you submitted a response, challenging all of the allegations on various legal and policy grounds. For the reasons discussed herein, we disagree with your arguments and find stations WXRK, WYSP, and WJFK willfully or repeatedly violated 18 U.S.C. § 1464 by airing indecent programming. Your arguments are addressed *seriatim*, under the topic headings below:

1. The Cited Material Violated the Commission's Indecency Standard Because It Was Patently Offensive.

You argue that the Stern excerpts are not "indecent" within the meaning of the Commission's indecency definition, because they are not descriptive of sexual or excretory organs or activities. You claim that the few references to "penis," "wiener," "masturbate" and other

sexual references are fleeting and isolated as well as oblique and innocent. You also claim that the references are not "patently offensive," because: 1) the term "patently offensive" is vague; 2) discussions of penis size are not *per se* prohibited; 3) "had" or "been with a man" and "hop in the sack" are no more offensive than scenes in daytime and evening television suggestive of sexual activity; and 4) the humorous context in which the comments were made does not render otherwise unobjectionable remarks "patently offensive." Finally, you assert that written excerpts exaggerate and concentrate the fleeting nature of the references which were extended throughout an entire program.

Section 1464 of Title 18 of the United States Code prohibits utterances of "any obscene, indecent or profane language by means of radio communication." Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined 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) ("Infinity"). In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court upheld the Commission's authority to regulate indecent broadcasts and rejected the argument that the Commission's definition, essentially unchanged from the one used today, was unconstitutionally vague. Using the same definition of indecency, 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 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) ("ACT I").

We find that the Stern broadcast fits squarely within the above definition of indecency. Rather than containing merely an occasional fleeting and isolated reference to sexual matters, the excerpts in the attached transcript reflect a dwelling on sexual matters, including sexual intercourse, orgasm, masturbation, lesbianism, homosexuality, breasts, nudity, and male and female genitalia. Detailed "descriptions" of those topics are not prerequisites to an indecency finding. See, e.g., *Letter to Carl J. Wagner (WFBQ (FM) and WNDE (AM), Indianapolis, Indiana)*, dated July 19, 1990 (MMB) at 3-4. Moreover, the Stern show contained frequent and explicit verbal references to sexual activities and organs that were lewd and vulgar and that, when taken in context, were made in a pandering and titillating fashion. And while a humorous context will not necessarily exacerbate the offensiveness of certain remarks, it will also not ameliorate the impact of otherwise patently offensive speech. See *Letter to Michael J. Flaherty (WIOD (AM), Miami, Florida)*, dated October 26, 1989 (MMB) at 2.

2. Comparisons with Prior and Contemporaneous Indecency Rulings Do Not Exonerate WXRK, WYSP and WJFK.

You contend that the Stern excerpts were no worse than other radio programs that the Commission has declined to find actionably indecent. You claim that this "precedent" unquestionably insulates the Stern show from

an indecency finding, and that a contrary finding would result in dissimilar treatment of similarly-situated parties, in violation of *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). Your arguments are unpersuasive. You claim that certain excerpts from programming the Commission has previously determined not to be indecent are similar to the words and topics at issue in the Stern excerpt, as cited in the Bureau's letter of inquiry in this proceeding. Such similarity, however, cannot by itself warrant the conclusion that the Stern passages are also not indecent. As the Commission has already stated, it is not the specific words or particular subject matter, *per se*, which render material indecent; rather, an indecency determination must include review not only of the express language or depiction involved and its topic but a careful consideration of the various factors that comprise the context in which the material was presented. *Infinity Broadcasting of Pennsylvania*, 3 FCC Rcd 930, 931-32 (1987) ("Infinity Reconsideration").² Because the contexts of the specific excerpts which you claim exonerate your stations vary widely from that of the Stern show, they do not provide a basis for finding the Stern material not indecent.³ In short, you have not shown, for purposes of an indecency determination, that you are similarly situated to those licensees whose broadcasts the Commission has found not violative of the indecency prohibition. You also have not shown, therefore, that a finding of indecency in your case would be inconsistent with the requirements outlined by the court in *Melody Music, Inc. v. FCC*, *supra*.⁴

Although you argue that licensees must rely exclusively on the Commission's rulings to determine the boundaries of patent offensiveness (which you assert remain unclear), the December 16, 1988, broadcast at issue here occurred before any of the rulings you cite were issued. Therefore, you could not have relied upon any of these rulings in making your determination as to whether the Stern broadcast was indecent. In fact, the most pertinent precedent available at the time of the subject broadcast was the Commission's action against your own station, WYSP, in the 1987 *Infinity* case (as upheld in *ACT I* in 1988) for a broadcast of other Stern program material which was similar in nature to the broadcast at issue here.

3. The Stern Excerpts Were Measured Appropriately By Contemporary Community Standards for the Broadcast Medium.

You argue that the appropriate standard for judging indecency for FM radio is a local one. Given that premise, you attempt to demonstrate through audience ratings that Howard Stern's broad appeal among adult listeners in the New York metropolitan area, and the number of prominent guests featured on his show, demonstrate that the show comports with the standards for the New York metropolitan area. You further argue that even if a national standard is appropriate, it is ill-defined, and that in any event, WXRK would comply because sexually oriented programming is so entrenched in radio and television programming, including talk shows and popular recorded music, that it is presumptively accepted by the average listener or viewer.

The Commission's indecency standard, as articulated in the *Infinity Reconsideration* is measured by "contemporary community standards for the broadcast medium." This standard is not a local one, as it does not encompass any particular geographic area, but rather, is the standard of

an average broadcast viewer or listener. *See Infinity Reconsideration*, 3 FCC Rcd at 933. This means that the Commission employs its own expertise in broadcast matters as well as drawing on its knowledge of the average viewer or listener. *Id.* This standard has been an integral part of the Commission's definition of indecency which has been upheld by the Supreme Court in the *Pacifica* case as well as by the Court of Appeals for the District of Columbia Circuit in *ACT I*, 852 F.2d at 1340. In this, as in every case, the Commission's determination of the average listener does not focus on the sensibilities of the complainant, as you suggest, or any single listener.

Further, Howard Stern's sustained popularity among the adult listening population in a particular community does not vitiate the broadcast's violation of federal law. *See Letter to Carl J. Wagner (WFBQ (FM) and WNDE (AM), Indianapolis, Indiana)*, dated July 19, 1990 (MMB) at 3. A program's popularity among adults does not address the Commission's objective of protecting children who may be in the listening audience. *Id.*

That sexually oriented programming may now be "entrenched" in broadcasting does not render the Commission powerless to take action against those stations that broadcast material proscribed by the statute. As already noted, the discussion of certain sexual topics is not *per se* indecent. *Infinity Reconsideration, supra*, at 932. Such broadcasts are only inappropriate when presented, as here, in a patently offensive manner during hours when there is a reasonable risk that children may be in the audience.

4. WXRK's Survey Results Purporting to Establish an Absence of Children (Aged 6 to 11) in its Audience Do Not Preclude an Indecency Finding.

You contend that through Gallup survey results, you have determined that virtually no children between the ages of 6 and 11 are present in the WXRK audience between 6 a.m. and 10 a.m. Even accepting these results at face value, they do not preclude a finding that programming aired by your stations during this time period was actionably indecent. The courts have presumed that during the hours at issue here there is a reasonable risk that children may be in the general radio audience. *Pacifica, supra; ACT I, supra*. Furthermore, as the Commission stated recently, "if children in a given market are in the broadcast audience, they may well tune into a particular station when 'grazing' through different channels. . . ." *Enforcement of Prohibitions Against Broadcast Indecency in 18 U. S. C. § 1464*, 5 FCC Rcd 5297, 5309 (1990). To adequately demonstrate, therefore, that no reasonable risk of exposing children to indecent material exists, a station would have to show that children are not in the broadcast audience on a market-wide basis. *Id.* Surveys of actual listenership of the Stern show cannot establish that children will not tune in incidentally or come across the material aired by your station. You have not made the requisite market-wide showing⁵ and in its absence, the presumptive risk to children from indecent programming aired during the hours here in question remains valid.⁶ With respect to your argument that you have implemented specific policies to safeguard against indecent broadcasts, a licensee's good faith conduct is no defense to a statutory violation for purposes of Commission enforcement action, but may affect the sanction imposed. *Infinity Reconsideration*, 3 FCC Rcd at 933. The Commission made it clear by its enforcement actions in

1987 that the kind of material before us here is actionable, and that licensees will be held responsible for erroneous good-faith judgments which stray this far afield in their indecency determinations. We note that your station, WYSP, was previously issued a warning in the 1987 *Infinity* case concerning indecent material aired on the Howard Stern show, the same program involved here.

In conclusion, it appears that on December 16, 1988, between 6 a.m. and 10 a.m., Stations WXRK, WYSP, and WJFK violated 18 U.S.C. § 1464 by airing indecent programming during daytime hours. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Sagittarius Broadcasting Corporation, Infinity Broadcasting Corporation of Pennsylvania, and Infinity Broadcasting Corporation of Washington, D.C., licensees of stations WXRK, WYSP and WJFK, respectively, are hereby advised of their apparent liability for a forfeiture of two thousand dollars (\$2,000) each. The amounts specified were reached after consideration of the factors set forth in Section 503(b)(2) of the Act, including the licensees' asserted good faith conduct.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent. 47 C.F.R. § 1.80(f)(3).

Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

ATTACHMENT

Infinity Broadcasting Corporation
Radio Station WXRK(FM).
New York, New York
The Howard Stern Show
6:00-10:00 a.m.

December 16, 1988

We're back at the Christmas Party . . . and I gotta tell you it's wild in here, Robin . . . the guy who plays the piano with his wiener is here now.

(Gay choir) We got two gay guys and a heavy-set woman lesbian (Negro). Remember you're on the radio, will you honey? I get called a fag hag. Have you ever had a man? Have you been with a man? Disappointment, hell. Oh, you like it? Well, it's not just a preference. It just doesn't turn me on as much . . . you gotta be glad about the 5-minute AIDS test. Now you guys can test each other and then hop into the sack.

What is it that men don't find me attractive? . . . men who find other men attractive . . . my uh? . . . your small penis probably . . .

How about this? "A Tuckis So Bright"?

(Gay choir) - "I'm dreaming of some light torture, some bruises just to make me moan . . . Masturbate. Humiliate. Gay sex is fun in the city. Howard Stern is going to learn how great a tuckis can be . . ."

(To Robin, about to be hypnotized by Dr. Marshall King) Just think about this. Every time I rub my ear, you'll be orgasming.

Vinnie Mazzie, ladies and gentlemen. The man who lit his penis on fire . . . and now feels that he can eat six live crickets . . .

* * *

Here's a guy who plays the piano with his penis. I'll tell you. What a weird crew!

She doesn't give me anything as far as jewelry is concerned. That's because you don't have a penis.

I think it will be worth the whole show just to hear her have an orgasm when I rub my ear.

I understand the doctor (hypnotist) explained that you would not go for that orgasm thing. Like, in other words, that you would not accept it . . . Boy, you must be difficult in bed. He says he'll hypnotize Bo the lesbian . . . and she's a good subject. She's an empty slate.

Bo, you look great. Yes . . . Bo . . . getting very aggressive. Bo just rubbed herself in my face. Juliet (one of the naked girls) getting wild. Oh, my God. Diane (another naked girl) is whipping Bo. Good, girls, excellent. The big black lesbian is out of her mind with lust. Look at her. You can't say it on the air? Were you getting excited? Fabulous. All right. That was really good. Best part of the whole Christmas Party.

I want to rub my ear and have this girl go wild for me . . . When we come back from commercial, we have a young man who wants to play the piano with his, uh, wiener . . . Howard, I'd better go into the other room and, uh, get it ready. I'll come strolling in swinging it. It's bigger than yours. I've got a rubber. Don't worry about it. And I've got a second rubber for encore. He's going to wear a contraceptive. I do safe organisms . . . orgasms. I'm going to play the Casio . . . I believe we hit two keys at the same time. You'd better give me the next segment, though. I'm going to get it going. O.K.? Go in the other room and do whatever you have to do to play it.

The doctor is now hypnotizing Bo and he wants to know exactly what it is you want her to do. The orgasm thing? I want more. I was thinking of something a little heavier like beg me to make love to her. Oh, there's an idea. You have her beg me . . . go wild for me . . . get off

her chair . . . she can't resist me. She'll come and attack you. Right. That's what I want . . . I've never had that. Let's see the Doc do that.

We'll be back right after this with a hypnotized Bo and the guy who plays the piano with his penis . . . It's a *Christmas Party!* . . . More gay Christmas Songs . . . and the burper . . . he's going to be belching for us . . . and, um . . . 'Gina Girl might even be persuaded to do the 'Gina Dance again. Is there a chance you could do the 'Gina Dance? . . .

in *ACT I* and the Commission's subsequent decision in *Kansas City Television, Ltd.*, 4 FCC Rcd 6706 (1989). The latter decision unequivocally stated the Commission's intention to continue enforcing the indecency prohibition against, at a minimum, daytime broadcasts.

FOOTNOTES

¹ Sagittarius Broadcasting Corporation, Infinity Broadcasting Corporation of Pennsylvania, and Infinity Broadcasting Corporation of Washington, D.C. are all wholly-owned subsidiaries of Infinity Broadcasting Corporation. Because the WXRK broadcast at issue was simultaneously carried on commonly owned stations WYSP and WJFK, the latter stations are considered concurrently.

² See also *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)(stating that "indecency is largely a function of context -- it cannot be adequately judged in the abstract.") (Opinion of Stevens, J., in which Burger, C.J., and Rehnquist, J., joined).

³ As a representative example, you cite the Commission's dismissal of an indecency complaint against station KTVI, St. Louis, Missouri, for a broadcast of "Geraldo" entitled "Unlocking the Great Mysteries of Sex." See *Letter to Gerald P. McAtee*, (KTVI, St. Louis, Missouri), dated October 26, 1989. Although that program involved a frank discussion about sexual technique, unlike the Stern show, it was not presented in a pandering, titillating, vulgar, or otherwise patently offensive manner. See also *King Broadcasting Company*, 5 FCC Rcd 2971 (1990).

⁴ Parties whose circumstances, including critical contextual considerations, have been sufficiently similar for purposes of indecency determinations, have been treated similarly. Licensees which have broadcast the same material under similar conditions, for example, have received like dispositions. See *Letter to Michael J. Flaherty*, *supra*, and *Letter to Legacy Broadcasting of Detroit, Inc. (WLLZ(FM), Detroit, Michigan)*, released September 29, 1989 (each radio station fined \$2000 for indecent daytime broadcasts of a musical recording entitled "Walk with an Erection.")

⁵ In fact, your own survey data demonstrate that 35% of the radio households in the New York market included children between the ages and 6 and 11 during the 6 a.m. to 10 a.m. period.

⁶ Contrary to your suggestion, the court's dictum in *ACT I* that the Commission invite comments on its channeling policy for both daytime and evening hours did not invalidate the Commission's continuing indecency policy with respect to daytime broadcasts, which the court upheld. Indeed, the court's decision in *ACT I* specifically affirmed the Commission's indecency finding against your station, WYSP, for broadcasts during precisely the time period at issue here and for the same program, the Howard Stern show. That decision also directly contradicts your contention that the Commission is unable to proceed with indecency actions against broadcasts aired during daytime hours until it adopts a new channeling policy for indecent programming. Your assertion that absent a new channeling policy "broadcasters must make decisions at their peril concerning the appropriate times for airing possibly indecent material" is also unconvincing given both the court's affirmance