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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. C 03-04598 SI

Plaintiff,

v.

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
AND DENYING CLAIMANTS' MOTION  
FOR SUMMARY JUDGMENT**

ANY AND ALL RADIO STATION  
TRANSMISSION EQUIPMENT . . . LOCATED  
AT 4521 20TH STREET, SAN FRANCISCO,  
CALIFORNIA 94114,

Defendant.

SAN FRANCISCO LIBERATION RADIO,  
MATT GONZALEZ, BEN MANILLA, BRENT  
ROBERTSON, STEVEN SHUBERT, SUMNER  
WINSHIP, and LISTENERS TO S.F.  
LIBERATION RADIO,

Claimants/Real Parties in Interest.

On March 11, 2005, this Court heard argument on the parties' cross-motions for summary judgment. Having considered the arguments of the parties and the papers submitted, the Court hereby GRANTS plaintiff's motion for summary judgment and DENIES claimants' motion .

**BACKGROUND**

On October 10, 2003, plaintiff filed under seal a civil action *in rem* pursuant to the Communications Act of 1934, 47 U.S.C. § 510, for the forfeiture of radio transmission equipment, radio frequency power amplifiers, radio frequency test equipment, and any other equipment used and possessed with willful and

1 knowing intent to violate 47 U.S.C. § 301. Section 301 states, in pertinent part, that “[n]o person shall use  
2 or operate any apparatus for the transmission of energy or communications or signals by radio . . . except with  
3 a license” issued by the FCC. The government contends that Richard Lewis Edmondson and others have been  
4 operating an apparatus for the transmission of signals by radio, on a frequency of 93.7 MHz on the FM  
5 broadcast band, from 4521 20th Street, San Francisco, California 94114, and that the FCC has not issued  
6 Edmondson, or any other person, a license to operate any apparatus for the transmission of signals at that  
7 location.

8 47 U.S.C. § 510(b) provides that property subject to forfeiture under this section may be seized  
9 “pursuant to the supplemental rules for certain admiralty and maritime claims by any district court of the United  
10 States.” Thus, on October 10, 2003, the government obtained under seal a warrant of arrest *in rem* pursuant  
11 to Federal Rules of Civil Procedure Supplemental Rule C(6) and Rule C(3)(a) of the Supplemental Rules for  
12 Certain Admiralty and Maritime Claims. On October 15, 2003, agents of the United States Marshals Service  
13 seized the defendant property.

14 Claimants filed their claims in response to the notice of forfeiture action on December 18, 2003.  
15 Claimants include San Francisco Liberation Radio (“SFLR”), representatives of SFLR and/or partial owners  
16 of defendant property, and SFLR listeners. Claimants thereafter filed motions seeking dismissal of the  
17 forfeiture action, suppression of any evidence obtained as a result of the seizure of the defendant property, and  
18 return of the seized property to claimants. Their motions were based on the argument that the government  
19 failed to afford claimants notice and an opportunity to be heard prior to the issuance of warrants to seize the  
20 property, warrants claimants contended were in violation of their First Amendment rights and therefore invalid.  
21 On May 4, 2004, this Court denied claimants’ motion to dismiss, finding that the government’s actions in  
22 conducting the seizure without a hearing were consistent with Calero-Toledo v. Pearson Yacht Leasing Co.,  
23 416 U.S. 663, 94 S.Ct. 2080 (1974) and United States v. Any and All Radio Station Transmission Equip.,  
24 218 F.3d 543 (6th Cir. 2000) (“9613 Madison Ave.”). In its Order, the Court deferred ruling on claimants’  
25 First Amendment claims, finding that they “would be best addressed at the summary judgment stage.” As a  
26 result, plaintiff and claimants submitted motions for summary judgment on January 7, 2005.  
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## LEGAL STANDARD

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party, however, has no burden to negate or disprove matters on which the non-moving party will have the burden of proof at trial. The moving party need only point out to the Court that there is an absence of evidence to support the non-moving party’s case. See id. at 325.

The burden then shifts to the non-moving party to “designate ‘specific facts showing that there is a genuine issue for trial.’” Id. at 324 (quoting Fed. R. Civ. P. 56(e)). To carry this burden, the non-moving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). “The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

In deciding a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor. Id. at 255. “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [when she] is ruling on a motion for summary judgment.” Id.

## DISCUSSION

### 1. Seizure of property under 47 U.S.C. § 510(a)

In its May 2004 Order, this Court found that “[s]eizure in this case was undertaken in accordance with the governing statutes, which call for application of the admiralty and maritime rules.” Order at 4. In a civil forfeiture, “the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture.” 18 U.S.C. § 983(c)(1). Plaintiff has presented substantial evidence demonstrating that SFLR willfully and with knowing intent operated an unlicensed broadcast in violation of 47 U.S.C. § 301 from 4521 20th Street, San Francisco, California. See Doon Affidavit submitted with

1 Complaint. Claimants present no evidence that the broadcast from this location did not occur or was licensed  
2 by the FCC.<sup>1</sup> Therefore, the Court finds that summary judgment is proper regarding SFLR’s violation of 47  
3 U.S.C. § 301.

4 Given this finding and the Court’s ruling that the seizure complied with the governing statutes, summary  
5 judgment in favor of plaintiff is required unless the Court finds that some exception to the governing statutes is  
6 warranted. Claimants argue that the government’s seizure of the equipment without notice and the opportunity  
7 to be heard violates their due process rights because the seizure involved instrumentalities of First Amendment  
8 expression.<sup>2</sup> Claimants also argue, in the alternative, that claimants’ Fourth Amendment rights were violated  
9 and that the Radio Broadcasting Preservation Act is unconstitutional. The Court will address each argument  
10 in turn.

11  
12 **2. First Amendment**

13 Claimants argue that “the First Amendment presumptively protects communicative instruments and  
14 materials from seizure,” Claimants’ Mot. at 7, and that a heightened standard of review is therefore required  
15 when seizures of First Amendment materials are involved because of the risk of prior restraint. Fort Wayne  
16 Books v. Sappenfield, 489 U.S. 46, 63-64 (1989). Claimants argue that the ex parte seizure of the radio  
17 equipment violated claimants’ due process rights because the equipment “constitutes instrumentalities used for  
18 expressive activity.” Claimants’ Mot. at 8.

19 Claimants cite to numerous cases in support of the general assertion that instruments of communication  
20 are protected under the First Amendment. See Claimants Mot. at 7-8. However, none of these cases involved  
21 instrumentalities of radio broadcasting or discussed First Amendment implications in that context. See Fort  
22 Wayne Books, 489 U.S. at 63-64 (sale of books and films); Saia v. New York, 334 U.S. 558, 561

23 \_\_\_\_\_  
24 <sup>1</sup>The parties discuss at length whether plaintiff’s requests for admission should be deemed admitted,  
25 given claimants’ responses. The Court finds that a determination of this issue is not necessary, as plaintiff has  
demonstrated that a violation of 47 U.S.C. § 301 occurred without relying on claimants’ responses.

26 <sup>2</sup>Claimants, in their papers and at oral argument, argue that the government’s seizure violates the due  
27 process clause under United States v. James Daniel Good Property, 510 U.S. 43 (1993) because of the unique  
28 factual circumstances of this case. However, the Court already rejected this argument in its May 4, 2004  
Order under Calero-Toledo and 9613 Madison Avenue. For purposes of this motion, the Court will only  
consider whether additional procedural safeguards were required because of the First Amendment.

1 (loudspeakers); Jacobson v. Peterson, 728 F.Supp. 1415 (D.S.D. 1990) (newspaper rack); Miller  
2 Newspapers, Inc. v. City of Keene, 546 F.Supp. 831, 836 (D.N.H. 1982) (same); Cantwell v. Connecticut,  
3 310 U.S. 296 (1940) (distribution of books and pamphlets).

4 To the contrary, Courts have routinely rejected comparable First Amendment protection for the right  
5 to engage in radio broadcasts: “[I]t is idle to posit an unabridgeable First Amendment right to broadcast  
6 comparable to the right of every individual to speak, write, or publish.” Red Lion Broadcasting Co. v. United  
7 States, 395 U.S. 367, 387 (1969). See National Broadcasting Co. v. United States, 319 U.S. 190, 227  
8 (1943) (“[t]he right of free speech does not include. . . the right to use the facilities of radio without a license”);  
9 9613 Madison Avenue, 218 F.3d at 549-550 (same).

10 Claimants attempt to overcome the clear language of the Supreme Court cases by arguing that they  
11 seek to enforce not the broadcasters’ right to broadcast, but rather the listeners’ First Amendment right to hear  
12 the SFLR radio broadcasts. Claimants assert that “SFLR’s broadcasts provide news and information to the  
13 community, foster communication among local residents and neighbors. . . and contribute to the marketplace  
14 of ideas.” Claimants’ Mot. at 10. Claimants cite to a single sentence in Red Lion in support of the listeners’  
15 asserted First Amendment right: “It is the right of the viewers and listeners, not the right of the broadcasters,  
16 which is paramount.” Red Lion, 395 U.S. at 390.

17 However, when read in its entirety, Red Lion clearly does not convey a First Amendment right to hear  
18 unlicensed broadcasts. Red Lion recognized that “[n]o one has a First Amendment right to a license.” Id. at  
19 389. Thereafter, courts have found that “nobody has a First Amendment right to hear radio broadcasts from  
20 a station that does not have a First Amendment right to broadcast them.” United States v. Any and All Radio  
21 Stations, 204 F.3d 658, 665 (6th Cir. 2000) (“Maquina Musical”). If listeners did have a First Amendment  
22 right to hear unlicensed radio broadcasts, anyone could operate an unlicensed radio station under the protection  
23 of its listeners’ First Amendment rights and the extensive case law holding that there is no protected right to  
24 broadcast radio transmissions would be irrelevant. Such an interpretation would effectively require this Court  
25 to overturn the Supreme Court’s holdings in Red Lion and National Broadcasting Company. This Court cannot  
26 do so, and it therefore finds that the seizure of SFLR’s radio equipment did not trespass the First Amendment.

1 Based on this finding, the Court finds that claimants were not entitled to any procedural protections  
2 beyond the statutory procedure under Federal Rules of Civil Procedure Supplemental Rule C(3)(a) of the  
3 Supplemental Rules for Certain Admiralty and Maritime Claims.<sup>3</sup>

4  
5 **3. Fourth Amendment**

6 The warrant authorizing the search of SFLR provided for the seizure of “any and all radio station  
7 transmission equipment, radio frequency power amplifiers, radio frequency test equipment and any other  
8 equipment associated with or used in connection with the transmissions on frequency 93.7 MHz located at  
9 4521 20th Street, San Francisco, California, 94114.” Claimants assert that the provision authorizing the seizure  
10 of “any other equipment associated with” the radio transmissions is overbroad because 47 U.S.C. § 510 does  
11 not authorize the seizure of equipment “associated with” radio transmissions.

12 However, the Court does not need to address Claimants’ Fourth Amendment claim because “an illegal  
13 seizure does not immunize the goods from forfeiture. Although any evidence which is the product of an illegal  
14 search or seizure must be excluded at trial. . . forfeiture may proceed if the Government can satisfy the  
15 requirements for forfeiture with untainted evidence.” United States v. An Article of Device “Theramatic”, 715  
16 F.2d 1339, 1341 (9th Cir. 1983). Claimants do not address this argument in their reply. Plaintiff has presented  
17 substantial evidence without the “product of the search” to demonstrate that SFLR was in violation of 47  
18 U.S.C. § 301. See Doon Affidavit.

19 Claimants argue – without presenting any evidentiary support -- that the two computers seized during  
20 the search were not involved in the transmission of radio signals in violation of 47 U.S.C. § 301. However,  
21 plaintiff presented evidence that both computers were connected to the radio station’s communication path and  
22 the FCC agents believed the equipment “was being used or intended to be used in connection with the radio  
23 operation of SFLR.” See Van Stavern Decl. at ¶ 3, Doon Decl. at ¶¶ 4-9, Hartshorn Decl. at ¶¶ 3-7.

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25 \_\_\_\_\_  
26 <sup>3</sup> Claimants argue that additional procedural safeguards were required because the seizure took place  
27 in a home. See Claimants’ Mot. at 10-11. However, aside from arguing that the government devoted  
28 unnecessary resources to the search, Claimants’ argument is not clear. It appears that claimant asserts that  
a warrant is required to conduct a search at a residence. However, the government did obtain a warrant in  
this case. See Fed. R. Civ. P. Supp. Rule C(3)(a) of the Supplemental Rules for Certain Admiralty and  
Maritime Claims.

1 Claimants point out that there was a note taped to the “Data Master” computer stating: “I am the webcast  
2 computer. Please don’t unplug my ethernet.” Hartshorn Decl. at 3. This note would demonstrate, at most,  
3 that this computer was involved in internet broadcasts; it does not supply evidence that the Data Master  
4 computer was not involved in the unlicensed radio broadcasts.

5 Plaintiff presented evidence that the computers were involved in unlicensed broadcasting; since  
6 claimants have presented no testimony in dispute of this assertion, forfeiture is appropriate.

#### 8 **4. Radio Broadcasting Preservation Act**

9 Claimants argue that SFLR was unable to bring a constitutional challenge to the validity of the F.C.C.  
10 licensing scheme because it was denied notice and an opportunity to be heard. Specifically, claimants challenge  
11 the Radio Broadcast Preservation Act of 2000 (“RBPA”), 114 Stat. 2762, § 632, which directed the F.C.C.  
12 to “prohibit any applicant from obtaining a low-power FM license if the applicant has engaged in any manner  
13 in the unlicensed operation of any station in violation of section 301 of the Communication Act of 1934.” This  
14 overturned the Commission’s prior practice, which was to allow unlicensed broadcasters to obtain a license  
15 if they ceased unlicensed broadcasts by a certain date. Creation of Low Power Radio Serv., 15 F.C.C.R.  
16 2205, ¶¶ 53-54, 2000 WL 85304 (2000). After enactment of the RBPA, the F.C.C. adopted regulations  
17 consistent with the Congressional mandate. 47 C.F.R. § 73.854. Claimants argue that this “character  
18 qualification” violates the First Amendment because it is overbroad and underinclusive, relying on Judge Tatel’s  
19 dissent in Ruggiero v. Federal Communication Commission, 317 F.3d 239, 252 (D.C. Cir. 2003) (en banc)

20 .  
21 Claimants seek an order from this Court finding the RBPA and the F.C.C.’s regulation invalid.  
22 However, this Court does not have jurisdiction over claimants’ challenges.

23 F.C.C. orders may only be reviewed by the court of appeals. 28 U.S.C. § 2342(1); 47 U.S.C. §  
24 402(a). Claimants’ challenge to the regulation is the same as its challenge to the RBPA itself, since the  
25 regulation was effectively required by the RBPA. Indeed, the case on which claimants primarily rely, Ruggiero  
26 v. Federal Communication Commission, was brought in the District of Columbia Circuit in the first instance.  
27 See Ruggiero v. Federal Communication Commission, 317 F.3d 239, 252 (D.C. Cir. 2002) (en banc rejection  
28

1 of First and Fifth Amendment challenges to RBPA for being overinclusive or underinclusive). Finally, the  
2 jurisdictional limitations “apply as much to affirmative defenses as to offensive claims.” United States v. Dunifer,  
3 219 F.3d 1004, 1007 (9th Cir. 2000). Therefore, if claimants wish to challenge the RBPA and the F.C.C.’s  
4 regulations, they must do so in the court of appeals.

5 Claimants’ only alternative is to challenge the F.C.C.’s denial of SFLR’s license. See Claimants’ Ex.  
6 O. The F.C.C.’s decision may only be reviewed by the United States Court of Appeals for the District of  
7 Columbia Circuit. 47 U.S.C. § 402(b)(1). SFLR could have appealed the F.C.C.’s decision in this manner.  
8 SFLR’s failure to do so does not give this Court jurisdiction over their constitutional challenge in the forfeiture  
9 action currently before this Court.

10 The Court finds that it does not have jurisdiction over claimants’ challenge to the constitutionality of the  
11 RBPA and the subsequent regulations.

12  
13 **5. Summary**

14 The Court finds that the claimants are not entitled to protection under the First Amendment for the  
15 seizure of radio equipment used to broadcast without a license, because substantial precedent establishes that  
16 the First Amendment does not protect unlicensed broadcasts or listening to such broadcasts. Therefore, no  
17 additional procedural protections are required and the government’s ex parte seizure was appropriate under  
18 Calero-Toledo and 9613 Madison Ave. The Court also finds that the claimants’ Fourth Amendment claim  
19 is ineffective because wrongfully seized property is subject to forfeiture if the government can prove the validity  
20 of the forfeiture by other evidence, and it has presented substantial evidence beyond the equipment seized.  
21 Finally, the Court does not have jurisdiction over claimants’ constitutional challenge to the RBPA and F.C.C.  
22 regulations.



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**CONCLUSION**

For the foregoing reasons and for good cause shown, the Court hereby GRANTS plaintiff's motion for summary judgment and DENIES claimants' motion for summary judgment. [Docket ## 49, 51.]

**IT IS SO ORDERED.**

Dated: March 11, 2005

S/Susan Illston  
SUSAN ILLSTON  
United States District Judge