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# DO OZZY OSBOURNE AND JUDAS PRIEST CONTRIBUTE TO THE MARKET PLACE OF IDEAS?

Richard Fitzer<sup>1</sup>

## Introduction

*Welcome to the grand illusion  
come on in and see what's happening  
pay the price get your tickets for the show.*<sup>2</sup>

For over thirty years American kids have listened to rock and roll<sup>3</sup> and throughout this period parents have been trying to turn off rock's rebellious messages. From its very inception, rock music has had the uncanny ability to annoy, even frighten, parents. Twenty or thirty years ago parents were shocked by the pelvic thrusts of Elvis Presley, the lyrics of the Rolling Stones and the politics of the Grateful Dead.<sup>4</sup> Today, the sixties generation has become the parents of the nineties. These same people who went to Woodstock, protested Vietnam, and smoked marijuana at Berkeley are now horrified by the music to which their children listen. Instead of Elvis Presley, the Rolling Stones, and the Grateful Dead, today's youth listen to Madonna, 2 Live Crew, and Guns 'N Roses. Is there any real difference between the music of the sixties and that of the nineties?

From its inception, rock and roll has been "consistently identified with rebellious attitudes towards sex and other moral issues[.]"<sup>5</sup> In fact, many believe that the sacred mission of all rock and roll performers is to offend as many parents and political leaders as possible.<sup>6</sup> Rock musicians are constantly pushing "the envelope of acceptance[.]"<sup>7</sup> As society becomes more and more accustomed to rock's bohemian ways, however, the task of offending becomes "an increasingly arduous assignment[.]"<sup>8</sup> If the Rolling Stones' "Let's Spend The Night Together"<sup>9</sup> were released in 1991, it would probably not offend anyone but the most staunch adherents to puritanical values. The song certainly would not prompt radio and television broadcasters to require Mick Jagger to change the lyrics to "Let's Spend Some Time Together" in order to get air-play.<sup>10</sup>

Some parents thought rock had gone too far thirty years ago. In the fifties it was the music's implicit reference to sex which first alarmed parents.<sup>11</sup> By the mid-sixties the taboo subject matter had switched from sex to drug use. Drug use was glorified and presented as the solution to any and every problem.<sup>12</sup> But even songs about drugs no longer shock many parents. In order to shock the "Comfortably Numb"<sup>13</sup> parents of today, bands have

adopted sexually explicit or vulgar names,<sup>14</sup> and written extremely violent or sexual lyrics.<sup>15</sup>

Today, the forbidden subjects are porn rock and satanic worship. The term porn rock loosely refers to any song with lyrics which graphically describe sexual acts or which glorify deviant sexual behavior. Examples of such songs include the Scorpions' "Rock You Like A Hurricane,"<sup>16</sup> Def Leppard's "Pour Some Sugar On Me,"<sup>17</sup> and Prince's "Darling Nikki."<sup>18</sup> "Porn rock" first received national attention in 1985 when the wives of several United States congressmen formed a group called Parents' Music Resource Center (PMRC).<sup>19</sup> In the past six years, the PMRC has put considerable pressure on the recording industry to warn parents about "porn rock." Many in the recording industry quickly succumbed to the pressure and began placing warning labels on records containing sexually explicit or otherwise "immoral" lyrics.<sup>20</sup> Significant governmental action was not taken, however, until the summer of 1990, when the state of Florida declared the rap group 2 Live Crew's album, "As Nasty As They Want To Be," legally obscene.<sup>21</sup> The state then successfully prosecuted a record store owner who sold the album after its sale had been prohibited.<sup>22</sup> The group itself was later arrested for performing the banned material. The trial judge in that case, however, dismissed the charges against the group stating that the music was not constitutionally obscene and was therefore protected by the First Amendment.<sup>23</sup>

Some rock groups have found that even sexually explicit lyrics are not sufficient to shock today's parents and have turned to writing songs about such horrifying topics as nuclear holocaust,<sup>24</sup> suicide,<sup>25</sup> violent sex,<sup>26</sup> and even satanic worship.<sup>27</sup> Some of the nightmares these groups sing about allegedly have escaped the subconscious minds of their listeners and have become reality. The public got its first hint of the potentially destructive influence of heavy metal music in 1985 when police apprehended California's notorious Night Stalker, a purported AC/DC fan who had become obsessed with Satanism.<sup>28</sup> Two civil actions against heavy metal artists decided in 1988 and 1989 contained the accusation that heavy metal music inspires its adherents to turn its nightmares into reality. In California, the parents of a nineteen year old boy, who had killed himself while listening to Ozzy Osbourne's "Speak of the Devil" album, sued the

singer and his record company.<sup>29</sup> Just a few months later, the parents of two boys who had entered into a suicide pact after smoking marijuana and listening to Judas Priest's album, "Stained Class," sued the band and its record company in a Nevada court.<sup>30</sup> In both cases, the parents alleged that the artists' songs contained lyrics and subliminal messages that compelled their sons to take their own lives. The artists in both cases successfully raised the shield of the first amendment to ward off the imposition of liability for the ideas their supraliminal lyrics conveyed.

Many parents and legislators are asserting that the present state of rock music warrants the stripping of its first amendment protection. This article will evaluate this issue in light of the two suicide cases, focusing on the parents' legal theories of liability and the question of whether the first amendment was properly found to prohibit the imposition of such liability. In addition, the paper will discuss the distinction, made by the Nevada court, between supraliminal messages, which are fully protected by the first amendment, and subliminal communications, which are not. Finally, the article will look at the potential chilling effects of self-imposed industry regulations.

## First Amendment Background

*What would you think if I sang out of tune,  
Would you stand up and walk out on me.  
Lend me your ears and I'll sing you a song,  
And I'll try not to sing out of key.*<sup>31</sup>

The first amendment guarantees all Americans that "Congress shall make no law . . . abridging the freedom of speech[.]"<sup>32</sup> In *Palko v. Connecticut*, Justice Cardozo wrote that the freedom of expression must be protected above all other rights because it is an indispensable condition of nearly every other freedom.<sup>33</sup> The first amendment protects more than merely pure speech.<sup>34</sup> "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television and live entertainment, such as musical and dramatic works, fall within the first amendment guarantee."<sup>35</sup> While the Supreme Court has not directly addressed the issue, several circuit courts have held that musical forms of expression fall under the protective umbrella of the first amendment.<sup>36</sup>

Even Justice Cardozo would admit, however, that freedom of expression is not absolute. In certain circumstances, the government's need to regulate or prohibit speech must take priority over an individual's right to free speech. For example, the government has the right to prevent a person from

screaming "fire" in a crowded theater. In 1942, the Supreme Court, in *Chaplinsky v. New Hampshire*,<sup>37</sup> provided a laundry-list of those types of speech which were not entitled to first amendment protection.

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting words"—those by which their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are not an essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>38</sup>

*Chaplinsky* has become the foundation upon which all cases involving unprotected speech have been built. For instance, its "fighting words" doctrine eventually evolved into the Brandenburg-incitement test.<sup>39</sup> Under *Brandenburg*, "speech which is directed to inciting or producing imminent lawless action, and which is likely to incite or produce such action, is outside the scope of the first amendment."<sup>40</sup> Speech which satisfies this two-part test is unprotected, and therefore, may be the basis for both criminal and tortious liability. Hence, in order to remove the first amendment's cloak of protection and thereby impose liability upon a rock musician for the suicide of a listener, the plaintiffs must prove that the rock lyrics were written with the intent of inciting imminent lawless action and that such a result was likely to occur.

## Was Osbourne Negligent for Presenting a "Suicide Solution?"

*If I could stick a knife in my heart  
Suicide right on stage  
Would it be enough for your teenage lust  
Would it help to ease the pain?  
Ease your brain  
...  
I said I know it's only rock 'n roll  
but I like it . . .*<sup>41</sup>

Before addressing the parents' legal arguments in the first suicide case, *McCullum v. CBS, Inc.*,<sup>42</sup> a brief look at the facts of the case is necessary.<sup>43</sup> On October 26, 1984, the decedent (John) repeatedly played side one of Osbourne's "Blizzard of Oz" album and side two of his "Diary of a Madman" album. Later that evening John went to his bedroom, put on a pair of headphones and listened to the final side of Osbourne's double album, "Speak

of the Devil.” The next morning John had a .22-caliber slug embedded in his right temple. When his body was found, his stereo was on and John was still wearing the headphones.<sup>44</sup>

One of the songs John listened to before going to his bedroom was “Suicide Solution.”<sup>45</sup> The plaintiffs alleged that this song preaches that suicide is the only way out; that suicide is not only acceptable, but desirable.<sup>46</sup> They further maintained that the song contains a 28-second instrumental break during which the following “masked lyrics are sung at one and one-half times the normal rate of speech:”

*Ah know people  
You really know where it's at  
You got it  
Why try, why try  
Get the gun and try it  
Shoot, shoot, shoot.*<sup>47</sup>

The plaintiffs brought a four-count complaint against the defendants charging the following: 1) Osbourne's music advised or encouraged their son to commit suicide; 2) his music created “an uncontrollable” impulse in John which caused him to kill himself; 3) the defendant's music incited John to take his own life; and 4) Osbourne intentionally aided, advised, or encouraged John to commit suicide in violation of the California penal code.<sup>48</sup>

When the defendants responded to the complaint by raising the shield of the first amendment, the plaintiffs insisted that Osbourne's music satisfied the *Brandenburg* test, and therefore, was not protected.<sup>49</sup> In order to meet the requirement of the *Brandenburg* test, John's parents alleged that “the defendants knew, or should have known that it was foreseeable that the music, lyrics and hemisync tones of Osbourne's music would influence the behavior of individual listeners, such as John who, because of emotional instability, were peculiarly susceptible to such music[.]”<sup>50</sup>

The court agreed with the plaintiffs that the *Brandenburg*-incitement test was the proper measure of whether Osbourne's music was entitled to First Amendment protection. Under this test, a court may only impose tort liability on a speaker for what he has said, if “the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct.”<sup>51</sup>

First, the court correctly concluded that the plaintiffs could not prove Osbourne released “Suicide Solution” with the intent that listeners commit suicide.<sup>52</sup> In fact, there was nothing in any of Osbourne's songs which could be characterized as a command to any listener to commit suicide. Even if Osbourne was suggesting that suicide is an acceptable alternative to coping with a miserable

existence, such advocacy was not sufficient to satisfy *Brandenburg's* intent requirement.

The history of both literature and music is replete with examples of culturally acceptable works, including Shakespeare's *Hamlet*, which one might argue portray suicide in a positive light.<sup>53</sup> Yet, such a positive portrayal is not the equivalent of proof of *intent* to cause the listener or observer to engage in the same conduct. The lawless action, in this case suicide, must have been the specifically desired result of the dissemination of the song and not an “unreasonable reaction to the music.”<sup>54</sup>

Second, the court held that Osbourne's music failed the second prong of the *Brandenburg* test because it was not likely to produce imminent lawless conduct. It is highly unlikely that Osbourne's song, “Suicide Solution,” or any other song for that matter, could be interpreted as instructing listeners to immediately commit suicide. The court noted that “merely because art may evoke a mood of depression as it figuratively depicts the darker side of human nature does not mean that it constitutes a direct incitement to imminent violence.”<sup>55</sup> Written words, whether read or heard, do not seem to “provide the requisite dynamic interplay between speaker and audience or create the necessary threat of imminent lawless action[.]”<sup>56</sup> so as to satisfy *Brandenburg*. Furthermore, a mass-produced recording would not pose an immediate threat of lawless behavior because it is the listeners, not the speakers, who control when the message is received.

In affirming the trial court's grant of the defendant's motion for summary judgment, the California appellate court followed the lead of earlier decisions and refused to impose liability upon a public medium for the self-destructive or tortious actions of its audience.<sup>57</sup> The court reasoned that “musical composers and performers, as well as record producers and distributors, would become significantly more inhibited in the selection of controversial materials if liability for civil damages were a risk to be endured for publication of protected speech[.]”<sup>58</sup> Hence, the court concluded that allowing tort liability to be imposed on a musical performer for the content of his lyrics could have an undesirable chilling effect on artistic expression.

To allow this case even to go to trial, to say nothing of actually imposing liability, would have had considerable adverse consequences for the music business. Especially hard hit would have been young musicians trying to make a name for themselves. Few record companies will risk a multi-million dollar lawsuit to allow young artists to sing about controversial subjects when enough albums may never be sold to cover production costs.

As a result, fewer and fewer young musicians will explore and push the limits of acceptability. Taken to the extreme, such industry-imposed censorship might break rock's aphrodisiac hold on America's youth and destroy the music which was a major part of such noble causes as "Live Aid" and "U.S.A. for Africa."

Just as Brandenburg, a leader of the Klu Klux Klan, had a constitutional right to speak to the masses, so too does Ozzy Osbourne. Their messages may offend, but that is their right. The right of every member of society is to refuse to listen or, even better, to respond to their messages of hate and self-destruction with counter-messages. The answer to Osbourne's "Suicide Solution" is not censorship or tort liability, it is more speech. To paraphrase Justice Holmes, "the market place of ideas" provides the only constitutionally acceptable response to the "Blizzard of Oz."

### Are Judas Priest's Subliminal Messages Protectable Speech?

*They say the sea turns so dark that you know  
its time you see the sign.*

*They say the point demons guard is an ocean  
grave for the brave.*

*Was it you who said "how long, how long,  
how long to the point of no return."<sup>59</sup>*

The California Court of Appeals did not try to distinguish between the lyrical contents of Osbourne's music and the masked subliminal messages it allegedly contained. In the second suicide case, *Vance v. Judas Priest*, however, the Nevada court did distinguish between the different types of first amendment protection which would be afforded to supraliminal and subliminal messages.<sup>60</sup> This section will focus on this important distinction.

The facts of *Vance* are as follows. On December 23, 1985, Raymond Belknap and James Vance entered into a deadly suicide-pact. After listening to Judas Priest's album, "Stained Class," drinking beer, and smoking marijuana all afternoon, the two boys shot themselves in the head with a 12-gauge shotgun. Belknap died instantly. Vance's aim was not quite as accurate; he survived because the gun had slipped as he pulled the trigger. Vance did, however, manage to blow away his face from the eyes down. Unfortunately, Vance died in a hospital approximately three years later while still trying to recover from his momentary lapse of reason.<sup>61</sup>

As in the *McCullum* case, the victims' parents brought tort claims against the artist and the recording company. One particular song, "Beyond The Realms of Death,"<sup>62</sup> was singled out as the

primary reason for the boys' horrifying actions. The *Vance* court recognized that regardless of its opinion of Judas Priest, the group's music is protected by the First Amendment<sup>63</sup> and thus it refused to impose tort liability on the basis of the lyrical content of the defendant's music. The court, however, considered the possibility that subliminal messages, allegedly contained in numerous songs on the "Stained Class" album,<sup>64</sup> could form the basis of such liability.

Subliminal communication is accomplished by "the projection of messages by light or sound so quickly or faintly that they are received by the listener below the level of conscious awareness."<sup>65</sup> The first publicized use of subliminal messages occurred in the mid-1950s when a New Jersey movie theater flashed the words "Drink Coca-Cola" during a six-week run of the film *Picnic*. Coke sales allegedly increased by fifty-eight percent as a result.<sup>66</sup> Since then, several uses of subliminal messages by the mass media and entertainment groups—both alleged and proven—have been documented.<sup>67</sup>

In turning to the threshold question of whether subliminal messages are protected by the first amendment, the court rejected the defendant's position and concluded that the Brandenburg incitement standard was not the proper standard for determining whether subliminal messages are entitled to first amendment protection.<sup>68</sup> Finding no direct precedent on the issue of whether subliminal messages are entitled to first amendment protection, the *Vance* court posited that subliminal messages were not entitled to any first amendment protection for three reasons: (A) subliminal communication does not advance any of the purposes of free speech; (B) an individual has a first amendment right to be free from unwanted speech; and (C) the listener's right of privacy outweighs the speaker's right of free speech when subliminal speech is used.<sup>69</sup>

In denying first amendment protection to subliminal messages, the court first looked to the primary justifications for protecting free speech, including: first, the promotion of Justice Holmes' market place of ideas;<sup>70</sup> second, the furtherance and preservation of our democratic-form of government; and third, self-fulfillment and self-realization.<sup>71</sup> Subliminal messages are inconsistent with all three of these first amendment rationales which are all premised on the free flow of ideas; both speaker and listener must be conscious of all messages sent and received. There can be no "open and robust debate" if the audience is not consciously aware of the messages it is receiving. Subliminal messages do not foster debate over new ideas, in-

stead they facilitate the blind acceptance of the speaker's message. The message cannot be evaluated, much less rejected, because the listener is unaware he or she is receiving any message at all. Consequently, subliminal messages do not further any free speech ideal, and therefore, should not be protected by the first amendment.<sup>72</sup>

Furthermore, individuals have the right not to receive unwanted messages. Although the Supreme Court has never specifically held that an individual has a first amendment right to be free from unwanted speech, several cases indicate that the Court might be so inclined to hold. First, in *Kovacs v. Cooper*,<sup>73</sup> the Court upheld a municipal ordinance which prohibited sound trucks from broadcasting in the area. The Court accepted the municipality's reasoning that such trucks were a public nuisance, stating that "[t]he right of free speech is guaranteed every citizen that he may reach the minds of *willing listeners*."<sup>74</sup>

Second, in *Lehman v. City of Shaker Heights*, the Court upheld a city transit prohibition on political advertisements on city buses.<sup>75</sup> In upholding the prohibition, the Court stated that due to the captive nature of public transportation, a city bus is not a public forum. Hence, there is no unconditional right to speak on a city bus. Justice Douglas, in his concurring opinion, reasoned that the rights of the passengers were superior to those of a would-be speaker because the passengers were a captive audience incapable of avoiding an unwanted message.<sup>76</sup>

In both cases, the Supreme Court protected "captive audiences" from undesired speech. Subliminal speech may in fact be less desirable than both sound trucks and political advertisements on city buses because such messages are received only by the listener's subconscious. Hence, not only is the listener denied the right to decide whether to receive the speaker's message but is entirely unaware of the message itself.<sup>77</sup> Not only must the audience hear the message, it must listen as well.

Finally, the notion of a "captive audience" brought the court to consider the privacy interests of the audience. As mentioned above, most subliminal messages are forced upon an unknowing audience. There is surely nothing more private than an individual's subconscious mind. Because free speech is protected by the Constitution, however, the listener's right of privacy must be balanced against the speaker's free speech rights. Only where the former outweighs the latter can speech be prohibited.<sup>78</sup>

The *Vance* court, interpreting Supreme Court decisions,<sup>79</sup> concluded that the privacy interests of a listener outweigh the free speech rights of the

speaker when "the listener is subjected to [the] speaker's message under circumstances which make it impossible or impractical for the listener to avoid being exposed to the unwanted message."<sup>80</sup> If the message can be avoided, however, then the speaker's free speech rights must prevail.<sup>81</sup> Because the very nature of subliminal messages makes it impossible for the listener to avoid exposure and because no first amendment value is served by forcing individuals to be captive audiences, the *Vance* court concluded that subliminal messages are not entitled to any first amendment protection.<sup>82</sup>

Having removed the shield of first amendment protection from subliminal messages, the court turned to the issue of causation. While the court was concerned about the ability of the plaintiffs' experts "to isolate and identify the subliminal messages as the legal cause of the shootings,"<sup>83</sup> it refused to grant summary judgment in favor of the defendants and submitted the case to the jury. The jury then found that there was no causal link between the subliminal messages and the boys' suicide pact.<sup>84</sup>

The *Vance* court's focus on the privacy interests of the listener is a logical extension of those cases discussing both the right to privacy and the problem of captive audiences. The court properly concluded that subliminal messages, at least those forced on unknowing audiences, are not protected by the first amendment. Its decision to remove the cloak of first amendment protection from subliminal messages is nonetheless likely to have little impact on the recording industry because of the difficulty which plaintiffs will invariably have in establishing the causal link between the messages and their injuries.

Despite the fact that experts maintain much of today's rock and roll music contains subliminal messages,<sup>85</sup> the extent of their influence has not been conclusively ascertained. In fact, many experts believe the impact of subliminal messages is very limited. For instance, according to Jagdish Sheth, president of the American Psychological Association's Division on Consumer Psychology, subliminal messages do not change people's attitudes. All the messages "can do is trigger a prior attitude or predisposition."<sup>86</sup> Stephan Williamson, one of the sound experts who testified on behalf of the plaintiffs in both the Ozzy Osbourne and Judas Priest cases, has stated that although he confirmed the presence of subliminal messages in Osbourne's "Suicide Solution" and Judas Priest's "Beyond the Realms of Death," he did not believe that rock music would cause someone to act in a particular way without a prior predilection. "[C]ontrary to

what these cases said, there's no way music alone will tip anyone over the edge any more than Mendelssohn's Wedding March tips anyone into getting married."<sup>87</sup>

The attempted imposition of tort liability will not protect society from unwanted subliminal messages because it cannot be established that such a message is the legal cause of the plaintiffs' injuries. Society's privacy interests in being free from these unwanted messages must nonetheless be protected, not through class-action suits against the mass media, but instead through legislative regulation. An example of such action is the regulation enacted in 1988 by the Bureau of Alcohol, Tobacco and Firearms prohibiting the use of any subliminal messages in the advertising of alcohol, tobacco and firearm products.<sup>88</sup> This is a good start but more legislation is needed. For instance, the FCC could prohibit radio and television stations from broadcasting songs known to contain subliminal messages.<sup>89</sup> This would provide artists and recording companies with an economic incentive not to release songs containing such hidden messages. At the very least the public must be protected from all unknowing exposure to subliminal messages. Only the individual who knows of the messages can take steps to avoid receiving them. The right of privacy demands that the public be informed of any potential exposure to subliminal messages.

### The Chilling Effect Of Censorship

*They say there is strangeness, too dangerous  
In our theaters and bookstore shelves  
Those who know what's best for us  
Must rise and save us from ourselves  
Quick to judge  
Quick to anger  
Slow to understand  
Ignorance and prejudice  
And fear  
Walk hand in hand.*<sup>90</sup>

The call for regulation of the undisclosed use of subliminal messages should not be interpreted as a demand for censorship of the recording industry. While one might not agree with the pessimistic views of Ozzy Osbourne or Judas Priest, their right to communicate these messages to the masses must be defended. The music of Motley Crue or 2 Live Crew may offend, but that is the artist's right. The right of the public is to refuse to listen.

The *McCullum* and *Vance* cases have heightened the call for regulation of the music industry.<sup>91</sup> Unfortunately, these isolated instances of rock-related suicide have increased the demand for warning labels, rating systems and outright prohibitions on

the most highly offensive music. Groups like the PMRC want the recording industry to regulate itself and have used the implicit threat of government regulation to encourage industry cooperation. While the Supreme Court would likely strike down any government regulation of the music industry under the strict scrutiny test applied to content-based legislation,<sup>92</sup> the threat of such regulation has induced "voluntary" concessions from the industry.<sup>93</sup> Albums containing sexually explicit, extremely violent or even simply profane lyrics now carry warning labels.<sup>94</sup> In addition, numerous record stores are refusing to sell albums with such warnings to children under the age of eighteen.<sup>95</sup> The PMRC, however, believes these efforts are not sufficient. The group seeks an industry-imposed rating system, similar to that utilized by the movie industry, and the printing of all lyrics on the albums.<sup>96</sup>

Many in the recording business contend these demands of the industry are impractical. According to Stanley Gortikov, president of the Recording Industry Association of America, a rating system for albums would be impossible to implement. He has pointed out that the recording industry releases approximately 25,000 songs each year, in contrast to the 325 films rated by the motion picture industry annually.<sup>97</sup> Furthermore, not all lyrics can be placed on albums because individuals other than the recording artist may own the copyrights.<sup>98</sup>

Despite these practical barriers to further regulation of the industry, the PMRC continues to press industry leaders for more self-imposed restraints. However, because these restraints are based on the threat of government regulation, they may be the equivalent of coercive censorship. This self-censorship may have more profound effects than any government-imposed restriction because the victims cannot challenge the regulations in court. The first amendment only prohibits governmental interference with the freedom of speech. Since there is no state-action involved in self-regulation, censored musicians and deprived listeners cannot challenge the industry's regulatory scheme through the judicial system.

Some in the industry, however, are not concerned by the threat of censorship because they doubt the effectiveness of warning labels or rating systems. Instead of reducing public access, such measures may actually increase sales of "offensive" music.<sup>99</sup> For instance, in 1984 the BBC banned the song "Relax" from its airwaves.<sup>100</sup> Prior to the ban the popularity of the song had fallen, but after the prohibition the song rapidly became one of the top selling British singles of all time.<sup>101</sup> Similarly, MTV's ban on Madonna's video, "Justify My

Love,"<sup>102</sup> seems to have had a considerable impact on the sales of the video.<sup>103</sup> The more the industry attempts to curb access to controversial music, the more the public desires to hear it.

## Conclusion

*We'll be fighting in the streets  
With our children at our feet  
And the morals that they worship will be gone  
And the men who spurred us on  
Sit in judgment of all wrong  
They decide and the shotgun sings the  
song.*<sup>104</sup>

Although both Ozzy Osbourne and Judas Priest successfully defended the tort claims brought against them, those cases have had a negative impact on the recording industry. It was perhaps inevitable that the mere filing of those suits would have a chilling effect on the industry. First, defending lawsuits is expensive. Recording companies are going to be leery of young artists with controversial material. The bottom line of the balance sheet may prohibit new acts like the Lostboys, whose debut album contains a song about suicide, from ever having a chance to sing to the public.<sup>105</sup>

Second, the nation-wide attention these lawsuits have received has increased support for groups like the PMRC. This increased public backing has enabled the group to put even more pressure on industry leaders for record labeling and rating systems. While the PMRC maintains that record labeling and rating are only intended as an educational tool for parents, such measures will result in "the erosion of artistic expression."<sup>106</sup> The industry is currently on the edge of a slippery slope; its leaders should resist the appeal for voluntary self-regulation which might become the unfettered censorship of all music which some segments of the public may deem "offensive."

The recording industry's concessions are disturbing. Record labeling is just the beginning of self-censorship. Any music labeling or rating system will, by its very nature, be highly subjective. Those doing the labeling are given the power to decide for an entire country what music is and is not acceptable. Record labeling, to say nothing of rating systems, undesirably inhibits the artistic freedom which has always been the heart and soul of rock music.<sup>107</sup>

While it may be true that rock lyrics, which were once artfully suggestive, have become blatantly explicit, the music still deserves unabashed first amendment protection. Songs which glorify violent sex, drug use, and satanic worship should be protected to the same degree as songs about love and

peace. As long as the song does not contain hidden subliminal messages, it must be protected. By yielding to the demands of the PMRC, the recording industry has admitted that the music of many of its artists is unacceptable, and in the process it has legitimized the PMRC. By voluntarily labeling records, the industry has encouraged further censorship demands.

The rock and roll industry is not a bad child which needs to be sent to its room until it can behave. Controversy has always been a part of rock and roll; without it the music would die. By its very nature, rock music is often shocking. Rock has always been the source of radical new ideas, some of which society has actually adopted. Despite their outlandish music, most rock musicians are not sex-crazed, drunken lunatics. Many give their talent and money to such worthy causes as Live Aid and "We Are The World."

Although many parents are no longer shocked by the lyrics of today's rock music, they still fear the influence the music may have on their children. But it is the parents' decision to decide what their children hear, and not that of the PMRC or the leaders of the recording industry. The PMRC has given birth to rock censorship, the industry leaders have nurtured it, and now it is time for the public to contemplate its extinction. No form of censorship, even self-imposed, has any place in the market place of ideas.

*The time is gone the song is over,  
thought I'd something more to say.*<sup>108</sup> Ω

1. Richard Fitzer is a third-year law student at DePaul University. He has a B.A. in economics from the University of California, at Irvine. (This article is dedicated to my parents for their love and support. And of course to Kathleen for believing in me. We will do the stars together.)

2. Styx, "The Grand Illusion," *The Grand Illusion* (1977).

3. For the purposes of this article, the author defines "rock and roll" as including heavy metal, pop, soul, rap, and all other forms of mainstream modern music.

4. ROLLING STONE PRESENTS TWENTY YEARS OF ROCK AND ROLL (1987).

5. Wheeler, *Drug Lyrics, The FCC and the First Amendment*, 5 LOY. L.A.L. REV. 329 (1972).

6. Leo, *Rock 'n' Roll's Hatemongering*, U.S. NEWS & WORLD REPORT, Mar. 19, 1990, at 17.

7. Comment, *Modern-Day Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777, 781 (1990).

8. *Id.*

9. Rolling Stones, "Let's Spend the Night Together," *Flowers* (1967).

10. B. WYMAN AND D. COLEMAN, *STONE ALONE* 398 (1990).

11. Harrington, *Rock With a Capital R and a PG-13*, Wash. Post, Sept. 15, 1985, at H1.

12. See The Who, "Acid Queen," *Tommy* (1969); Joel, "Captain Jack," *Piano Man* (1971); Styx, "Light Up," *Equinox* (1975).

13. Pink Floyd, "Comfortably Numb," *The Wall* (1979).



14. For example, Killer Pussy, Johnny Vomit, and N.W.A. (Niggers With Attitudes).

15. Judas Priest, "Eat Me Alive," *Defenders of the Faith*, (1984):

Sounds like an animal panting to the beat  
Groan in the pleasure zone  
gasping from the heat.  
Gut wrenching frenzy that destroys every joint.  
I'm gonna force you at gun point to eat me alive...  
squealing in passion as the rod steel injects.

16. Scorpions, "Rock You Like A Hurricane," *Love At First Sting* (1984).

17. Def Leppard, "Pour Some Sugar On Me," *Hysteria* (1987).

18. Prince, "Darling Nikki," *Purple Rain* (1984).

19. McBee, *Now It's Labels On "Porn Rock" To Protect Kids*, U.S. NEWS & WORLD REPORT, Aug. 26, 1985, at 52.

20. *Id.*

21. In early 1990, Florida Governor Bob Martinez called for an investigation into whether 2 Live Crew's album violated state obscenity and racketeering laws. Two weeks later, Judge Isaac Anderson ordered the album removed from all stores in Lee County because there was "probable cause" that the album was obscene. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990). See also Neely, *Retailers, Label's Give In on Lyrics*, ROLLING STONE, Mar. 5, 1990, at 30.

22. Philips, *Too Much Joy Acquitted In Obscenity Trial*, L.A. Times, Jan. 19, 1991, at F8, col. 1.

23. In dismissing the charges, however, the trial court undoubtedly concluded that no song could satisfy the second-prong of the *Miller* test; i.e., "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Miller v. California*, 413 U.S. 15, 24 (1973). Speech cannot be found obscene simply because it has an objectionable theme. See *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 687-688 (1959); *Jenkins v. Georgia*, 418 U.S. 153, 161. Music may be able to advocate "immoral" sexual behavior, but under *Miller*, it just is not capable of describing sexual conduct in a patently offensive way. See Berry & Wolin, *Regulating Rock Lyrics: A New Wave of Censorship?*, 23 HARV. J. ON LEGIS. 595, 598 (1986).

24. E.g., Europe, "The Final Countdown," *The Final Countdown* (1986).

25. E.g., Osbourne, "Suicide Solution," *Blizzard Of Oz* (1981).

26. E.g., Judas Priest, "Eat Me Alive," *Defenders of the Faith* (1984).

27. E.g., Iron Maiden, "The Number Of The Beast," *Live After Death* (1985).

28. In 1985, Ramirez reigned terror down upon Californians from San Francisco to Mission Viejo. See Stewart, *Stalker Suspect Isn't Talking; Ramirez Described as Passive and Compliant*, L.A. Times, Sept. 2, 1985, 1, at 1, col. 3. According to his college roommate, Ramirez was obsessed with the alleged satanic messages of AC/DC's 1979 album *Highway To Hell*. One song on that album is entitled "Night Prowler:"

Somewhere a clock strikes midnight and there's a  
full moon in the sky  
You hear a dog bark in the distance, you hear  
someone's baby cry  
A rat runs down the alley and a chill runs down  
your spine  
And someone walks across your grave, and you wish  
the sun would shine  
'Cause no one's gonna warn you and no one is gonna  
yell ATTACK  
And you won't feel the steel until it's hanging  
out your back  
I'm your night prowler, I'll sleep in the day.  
Night prowler, get out of my way  
Yeah I'm the night prowler when you turn out the light . . .

See Cipriano, *To Fans and Critics, 'Night Prowler' Is Supposed to Be Fun*, L.A. Times, Sept. 2, 1985, 1, at 3, col. 1.

29. *McCullum v. CBS, Inc.*, 202 Cal. App. 3d 989, 249 Cal. Rptr. 187 (1988).

30. Vance v. Judas Priest, 16 Med. L. Rptr. 2241, 2242 (1989).

31. The Beatles, "With A Little Help From My Friends," *Sgt. Pepper's Lonely Heart's Club Band* (1967).

32. U.S. CONST. amend. I.

33. *Palko v. Connecticut*, 302 U.S. 319, 324 (1937).

34. See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974) (first amendment barred prosecution for affixing a peace symbol to an American flag); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (demonstrating was held to be protected speech); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (labor picketing is protected speech).

35. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) (nude dancing was a type of expression protected by the first amendment).

36. See, e.g., *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 569 (9th Cir. 1984); *Reed v. Village of Shorewood*, 704 F.2d 943, 950 (7th Cir. 1983); *Tacynec v. City of Philadelphia*, 687 F.2d 793, 796 (3rd Cir. 1982).

37. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

38. *Id.* at 571-572.

39. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

40. *McCullum v. CBS, Inc.*, 202 Cal. App. 3d 989, 1000, 249 Cal. Rptr. 187, 193 (1988) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

41. Rolling Stones, "It's Only Rock 'N Roll," *It's Only Rock 'N Roll* (1974).

42. 202 Cal. App. 3d 989, 249 Cal. Rptr. 187 (1988).

43. Because the trial court granted the defendants' (Osbourne and CBS) motion for summary judgment, the following facts, alleged by the plaintiffs, were accepted as true by the California Court of Appeals.

44. *Id.* at 995, 249 Cal. Rptr. at 189.

45. Osbourne, "Suicide Solution," *Blizzard of Oz* (1981):

Wine is fine but whiskey's quicker  
Suicide is slow with liquor  
Take a bottle drown your sorrows  
Then it floods away tomorrows  
Evil thoughts and evil doings  
Cold, alone you hand in ruins  
Thought that you'd escape the reaper  
You can't escape the Master Keeper  
Cause you feel life's unreal and you're living a lie  
Such a shame who's to blame and you're wondering why  
Then you ask from your cask is there life after birth  
What you sow can mean Hell on this earth  
Now you live inside a bottle  
The reaper's traveling at full throttle  
It's catching you but you don't see  
The reaper is you and the reaper is me  
Breaking law, knocking doors  
But there's no one at home  
Made your bed, rest your head  
But you lie there and moan  
Where is to hide, Suicide is the only way out  
Don't you know what it's really about.

46. 202 Cal. App. 3d at 995-996, 249 Cal. Rptr. at 190.

47. This last line was repeated for about ten seconds.

48. 202 Cal. App. 3d at 997-998, 202 Cal. Rptr. at 191.

49. *Id.* at 1000, 202 Cal. Rptr. at 193.

50. *Id.* at 997, 202 Cal. Rptr. at 191.

51. *Id.*

52. *Id.*

53. See, e.g., Shakespeare, *Hamlet*. Act III, Scene I; Miller, *Death of a Salesman* (1949); Altman & Mandel, "Suicide Is Painless (Theme song from M\*A\*S\*H)," *M\*A\*S\*H Soundtrack* (1970). See also *McCullum v. CBS*, 202 Cal. App. 3d at 995 n.4, 249 Cal. Rptr. at 190 n.4.

54. 202 Cal. App. 3d at 1000-1001, 249 Cal. Rptr. at 193-194.

55. *Id.* at 1001, 249 Cal. Rptr. at 194.

56. Comment, *supra* note 7, at 800.

57. *McCullum v. CBS*, 202 Cal. App. 3d at 1007, 249 Cal. Rptr. at 198. See also *Oliva N. v. National Broadcasting Co.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981) (NBC was protected by the first amendment from liability for plaintiff's injuries suffered when she was artificially raped by four minors who were acting out a scene from the television film *Born Innocent.*); *DeFlippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982) (NBC was shielded from liability from a wrongful death action when plaintiffs' child hung himself trying to emulate a stunt shown on "The Tonight Show."). But *c.f.* *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975) (court held radio station libel for the wrongful death of a motorist who was killed by two teenage drivers who were speeding in order to be the first to a particular location which was broadcast on the radio. The court held that the radio station could have reasonably foreseen that someone would be injured as a result of its contest.).

58. *McCullum v. CBS*, 202 Cal. App. 3d at 1003, 249 Cal. Rptr. at 195.

59. Kansas, "The Point Of No Return," *The Point Of No Return* (1977).

60. *Vance v. Judas Priest*, 16 Med. L. Rptr. 2241, 2246 (1989).

61. *Id.* at 2242-2243.

62. Judas Priest, "Beyond The Realms of Death," *Stained Class* (1979):

He's had enough  
 He couldn't take anymore  
 He's found a place,  
 And his mind slammed the door.  
 No matter how they tried,  
 They couldn't understand.  
 They washed and dressed him,  
 Lent him a hand  
*Chorus*  
 That's how he left the world behind.  
 I am safe, here in my mind.  
 I'm free to speak,  
 With my own mind.  
 This is my life! This is my life!  
 I'll decide, thank you!  
 Withdrawn, he sits there,  
 Staring into space.  
 No signs of life,  
 No flicker on his face.  
 Until one day he smiled,  
 It seemed as though he died with pride.  
 The wind kissed him goodbye,  
 And then he died.  
*Repeat Chorus*  
 Keep your world,  
 Of blood and sin.  
 It's not fit for living in.  
 Yes, I'll destroy you.  
 It will take forever, ever, ever and ever,  
 But I will win.

63. *Vance v. Judas Priest*, 16 Med. L. Rptr. at 2244.

64. For example, the song "Better By You, Better Than Me," allegedly contains the subliminal command "Do It," while the title track, "Stained Class," supposedly contains the masked message, "Sing my evil spirit." See *Vance v. Judas Priest*, 16 Med. L. Rptr. at 2244.

65. *Vance v. Judas Priest*, 16 Med. L. Rptr. at 2244. See also Note, *The Subconscious Taken Captive: A Social, Ethical, and Legal Analysis of Subliminal Communication Technology*, 54 S. CAL. L. REV. 1077, 1080 (1981); WESTIN, *PRIVACY AND FREEDOM* 279 (1970).

66. Lander, *In Through The Out Door*, OMNI, Feb. 1981, at 45-46.

67. For example, in 1974, a subliminal death mask was placed over the face of the priest in Warner Brothers' movie *The*

*Exorcist*. Numerous rock artists have also been accused of placing such messages in their music. For example, one of the most popular rock and roll songs of all-time, Led Zeppelin's "Stairway To Heaven," has been rumored to contain backward satanic messages. In addition, Reverend Shane Westhoelter, director of music research at the Missouri's Project Rock, claims Bruce Springsteen's "Dancing in the Dark" contains satanic messages. When played backward, the line "You can't start a fire without a spark" becomes "Lord Satan!" See Goldberg, *At a Loss for Words*, ROLLING STONE, May 31, 1990, at 19-20.

68. *Vance v. Judas Priest*, 16 Med. L. Rptr. at 2247.

69. *Id.*

70. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

71. *Vance v. Judas Priest*, 16 Med. L. Rptr. at 2247.

72. *Id.* at 2248-2249.

73. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

74. *Id.* at 87 (emphasis added).

75. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

76. *Id.* at 307 (Douglas, J. concurring).

77. *Vance v. Judas Priest*, 16 Med. L. Rptr. at 2251.

78. *Id.* at 2251. The court in *Vance* stated, "[A]n individual's right of privacy will prevail over another's right of free speech if the unwilling listener's degree of captivity makes it impractical for him to avoid unwanted speech." *Id.*

79. *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

80. *Vance v. Judas Priest*, 16 Med. L. Rptr. at 2253.

81. *Id.*

82. *Id.* at 2254.

83. *Id.* at 2256.

84. Kot, *Metal respecters* [sic], Chicago Trib., Nov. 28, 1990, at C3. See also Jenkins, *More Priestly Pounding*, Wash. Post., Oct. 24, 1990, at D7.

85. See, e.g., Comment, *supra* note 7, at 786 (Dr. Wilson Bryan Key, a subliminal advertising specialist, maintains that a significant portion of today's rock music contains hidden messages.).

86. Lander, *supra* note 67, at 48. "A subliminal message is a subtle instrument. For it to have any effect, the individual must first be favorably disposed to thinking or behaving in the proposed way." *Id.* at 46.

87. Churcher, *Etadpu nib yenool*, PENTHOUSE, Dec. 1990, at 44, 220, quoting the statements of Stephan Williamson.

88. 27 C.F.R. 5.65(h) (1988).

89. See *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969) (because of the scarcity of the airwaves, the rights of the listeners, and not the broadcasters, are paramount. It is for the audience's benefit that the FCC is empowered to regulate the airwaves.); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978) (Supreme Court upheld FCC's power to regulate the radio broadcast of material which was indecent but not obscene).

90. Rush, "Witch Hunt," *Moving Pictures* (1981).

91. "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.... But when men have realized that time has upset many fighting faiths, they have come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

92. "Above all else, the First Amendment means the government has no power to restrict expression because of its messages, its ideas, its subject matter or its content." *Police Dept. v. Mosely*, 408 U.S. 92, 95 (1972). See also *Carey v. Brown*, 447 U.S. 455 (1980).

93. Too many in the industry have adopted stances similar to that of John Bonk, the head of the National Association of Recording Merchandisers. He says, "We don't want to pull any records[.] But we have to do business in these communities." Goldberg, *supra* note 68, at 20.

94. Neely, *supra* note 22, at 30.

95. Goldberg & Ressler, *Retailers Take On Stickers*, *ROLLING STONE*, Apr. 19, 1990, at 26.

96. *Parents v. Rock*. PEOPLE, Sept. 16, 1985, at 46.

97. He has estimated that such rating of music albums would require the industry to rate 100 songs each day. *Id.*

98. *Id.*

99. Russ Solomon, co-owner of Tower Records, has stated that "Labeling won't do anything but turn kids on to what you don't want them to buy." Cieply, *Records May Soon Carry Warnings That Lyrics Are Morally Hazardous*, *Wall St. Jour.*, Jul. 31, 1985, at 21, col. 4.

100. Frankie Goes To Hollywood, "Relax," *Welcome To The Pleasure Dome* (1984).

101. *Parents v. Rock*, *supra* note 97, at 46. See also Berry & Wolin, *supra* note 25, at 617.

102. Madonna, "Justify My Love," *The Immaculate Collection* (1990).

103. "Madonna's *Justify My Love* video, a carnal carnival of voyeurism and leather-and-lace sex, brims with so much hanky-panky that even cleavage-inclined MTV refuses to air it." Gundersen, *MTV Can't 'Justify' New Madonna Video*, *USA Today*, Nov. 28, 1990, at 1D. "Justify My Love" may be the most erotic of all Madonna videos, but it should not come as a surprise from a woman who has made a career out of pushing the limits of sexual acceptability. Although MTV will not air the video, Madonna stands to make a considerable profit from the sale of the video single which was released in December. Harrington, *Marketing Madonna*, *Wash. Post.*, Dec. 12, 1990, at G7.

104. The Who, "Won't Get Fooled Again," *Who's Next* (1971).

105. Goldberg, *supra* note 68, at 22.

106. *Id.* at 19.

107. Cieply, *supra* note 100, at 21, col. 4.

108. Pink Floyd, "Time," *Darkside Of The Moon* (1973).

**S**uccess as an artist should  
depend on creative energy and talent  
— not on the ability to afford an attorney.

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