


1-15-1987

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Recommended Citation

Michael A. Coletti *First Amendment Implications Of Rock Lyric Censorship*, 14 Pepp. L. Rev. 2 (1987)
Available at: <http://digitalcommons.pepperdine.edu/plr/vol14/iss2/7>

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First Amendment Implications Of Rock Lyric Censorship

I. INTRODUCTION

This comment identifies the primary and attendant first amendment issues involved in the current movement to rate, regulate or classify contemporary rock music lyrics. It examines the principal means of attaining these ends and evaluates the constitutionality, as well as the feasibility, of each of these means.

There are three principal theories under which it can be argued that certain rock lyrics are subject to regulation: (1) certain lyrics are constitutionally unprotected speech because they are obscene, and may be regulated accordingly; (2) certain lyrics are constitutionally unprotected speech because they constitute legal incitement, and are subject to broad regulations; (3) lyrics are protected speech, but may be regulated in limited ways under the states' police power, including time, place, and manner restrictions.

This article is essentially a survey of the constitutional and other legal issues involved. It addresses a number of defenses, and complications, to the three theories outlined above. With regard to obscenity, the initial problem is in determining whether the lyrics are *legally* obscene. In addition, there are vagueness and overbreadth difficulties inherent in any attempt to define obscene lyrics statutorily. The principal concern with the incitement theory is its basic, factual applicability. In other words, are those who listen to rock lyrics being incited in a manner in which the first amendment incitement theory was designed to address?

Finally, the possibility of regulating music pursuant to the state police powers must be weighed against the listener's constitutional right to receive information. The comment concludes by describing a partial agreement that exists among some members of the opposing sides, and shows it as an example of why legislation is not desirable, and why non-legislative regulation is not practical.

II. FACTUAL BACKGROUND

The current movement to classify, censor, or ban certain rock

lyrics¹ is the most recent manifestation of a thirty-year conflict² between the rock music industry³ and various parental groups.⁴ The Parents Music Resource Center (PMRC) — the most vocal and con-

1. Included in the list of offensive lyrics are sexual and obscene references to genitals, orgasm, masturbation, vibrators and assorted sexual devices, incest, oral and anal sex, as well as bondage, sodomy, bestiality, sadomasochism, torture, and rape. Violent lyrics include references to knives, chains, whips, blades, nails, and buzzsaws. A separate genre addresses the occult, Satan, demons, witchcraft, exorcism, hell, and evil. In an article on rock censorship, *Rolling Stone* magazine published a few specific examples of such lyrics:

[F]rom the Mentors' "Golden Showers" on their *You Axed for it* LP: "Listen little slut/Do as you are told . . . Come with Daddy for me to pour the gold . . . All through my excrements you shall roam . . ."

. . .

. . . [T]he Rolling Stones' hit album *Undercover* included the song "Tie You Up" with the line "Feel the hot cum dripping on your thigh." And Kiss, in "Fits Like a Glove" from the 1983 gold album *Lick It Up*, sings, "when I go through her its just like a hot knife through butter." And Judas Priest in "Eat Me Alive" from the gold album *Defenders of the Faith*, sings, "I'm gonna force you at gunpoint to eat me alive."

Zucchini, *Big Brother Meets Twisted Sister: Then Tipper Gore and Zappa Go For Drinks*, ROLLING STONE, Nov. 7, 1985, at 9, 15 (extensive news report concerning the movement to rate records, the responses of the record industry, and the hearing held by the Senate Committee on Science, Transportation and Commerce on September 19, 1985).

2. Rock music grew out of blues and jazz as early as the 1940's when white hillbillies merged so-called "race music" into Rock and Roll. *Id.* at 15.

Rock music was censored and subjected to investigation as early as the mid-1950's, around the time of its inception. In 1956, Elvis Presley was televised only above the waist when he appeared on *The Ed Sullivan Show*. In the early 1960's the Federal Bureau of Investigation (FBI) along with the Federal Communications Commission (FCC) conducted investigations of various hit songs, among which was "Louie Louie" by the Kingsmen. The FBI and the FCC played the Kingsmen song at various speeds to detect pornographic or obscene messages. Their final conclusion was that "no matter how the song was played, it was utterly incomprehensible." *Nightline: Porn Rock* (transcript of ABC television broadcast, Sept. 13, 1985)[hereinafter *Nightline*].

In the early 1970's, Spiro Agnew conducted a short-lived campaign to ban rock music, which he felt promoted drug use and the "drug-culture" from radio broadcasts. Zucchini, *supra* note 1, at 15. *See also* Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C. Cir. 1973) (FCC validly gave notice to broadcasters to remind them of their duty to consider content before airing "drug-oriented" music). In 1972, a federal district court heard a case in which a municipal ordinance cancelled all rock concerts for the remainder of 1970 due to fear of premeditated riots. *Contemporary Music Group, Inc. v. Chicago Park Dist.*, 343 F. Supp. 505 (N.D. Ill. 1972).

3. Among those fighting regulation of lyrics are the Recording Industry Association of America, music artists, such as John Denver, Donny Osmond, Dee Snider, and Frank Zappa, the National Association of Broadcasters, various record retailers, lyric and song publishers, and the Music Television Station (MTV). *See* Zucchini, *supra* note 1; *see also* Powell, *What Entertainers Are Doing to Your Kids*, U.S. NEWS & WORLD REP., Oct. 28, 1985, at 46 (news report concerning the lyric rating controversy from a conservative viewpoint).

4. Among those seeking to regulate rock music are such groups as the Parents Music Resource Center (PMRC), the Songwriter's Guild, the National Education Association (NEA), the National Parent Teachers Association (NPTA), the National Coalition on Television Violence (NCTV), and the National Music Review Council (NMRC) which is "a nascent organization started by William J. Steding, executive vice-president of two radio stations in Dallas and Kansas City, [that] wants to initiate a seal of approval for acceptable, positive records." Love, *Furor Over Rock Lyrics Intensifies*,

spicuous of the pro-control groups⁵—purports only to require that the record industry institute a voluntary classification plan similar to that currently used by the Motion Picture Association of America (MPAA).⁶ The primary purpose of this system would be to provide parents with information essential to supervising their children's viewing and listening habits.

In fact, advocates of a labeling system maintain that the issue has less to do with censorship than it does with consumer protection.⁷

ROLLING STONE, Sept. 12, 1985, at 13, 83 (emphasis added); see also Zucchini, *supra* note 1, at 15; Powell, *supra*, at 47.

In 1982, California Representative Robert K. Dornan initiated a move which would require warning labels on albums containing backward masking and other hidden messages. A similar bill was introduced by Republican Assemblyman Phil Wyman of the California Legislature. See Wash. Post, July 6, 1982, at B3, col. 5; *I [heart] Satan?*, Wash. Post, July 10, 1982, at A23, col. 1 (final ed.). Even prior to the current conflict, some record companies were already placing warning labels on especially offensive albums. Zucchini, *supra* note 1, at 15.

5. In addition to enjoying the broadest media exposure, the PMRC is also the best politically-connected of the groups. It includes ten Senators' wives, six Congressmen, and a Cabinet Secretary. Pareles, *Critics View: Should Rock Lyrics Be Sanitized?*, N.Y. Times, Oct. 13, 1985, § 2, at 1, col. 1 (late ed.). Among the members of PMRC is the wife of Senator John Danforth, chairman of the Senate Committee on Commerce, Science, and Transportation; this committee conducted hearings on the issue of pornographic lyrics. The PMRC ranks also include the wife of Senator Ernest Hollings, the wife of Committee member Albert Gore, Jr., Mary Elizabeth "Tipper" Gore, and Susan Baker, wife of Treasury Secretary James A. Baker. Zucchini, *supra* note 1, at 9.

The National Congress of Parents and Teachers has also allied with the PMRC. This organization has five million members. Pareles, *supra*, at 1, col. 1.

6. Briefly, this system involves five classifications. Categories are not based on quality, or lack thereof, but are designed to provide parents with information regarding the films their children may wish to see. There is no real control of audiences, except in the "X" category. The classes are: "G"—general audiences, all ages permitted; "PG"—parental guidance suggested; "PG-13"—under thirteen to be accompanied by parent or guardian; "R"—restricted, under seventeen to be accompanied by parent or guardian; "X"—no one under seventeen admitted. The rating system is not required by federal or state law, but is entirely voluntary. Mayer, *The Motion Picture Classification System: An Opinion*, N.Y.L.J., June 10, 1983, at 5, col. 1. In fact, "no one is required to present a film for classification, [although] the great bulk of motion pictures which are broadly distributed are so presented." *Id.*

7. "This is a consumer information issue—not a First Amendment issue. These steps would allow consumers, parents of young children in particular, to make informed decisions through labeling or access to song lyrics. I believe this is an issue of consumerism, corporate responsibility, and truth-in-packaging." Letter from Senator Albert Gore, Jr. to Michael Coletti (April 18, 1986).

The PMRC reiterated Senator Gore's sentiment in its statement to the Senate Commerce Committee: "A voluntary labeling is *not* censorship. Censorship implies restricting access or suppressing content. This proposal does neither . . . Labeling is little more than truth in packaging, by now a time-honored principle in our free enterprise system." S. Baker & T. Gore, Statement Before the Senate Commerce Committee, part II, at 2 (Sept. 19, 1985) (emphasis in original).

Obviously, a record label would put the buyer on notice with respect to potential danger to his mental, emotional, or spiritual health, in much the same way as a label on a cigarette package warns against possible dangers to one's physical well-being.

A spokesperson for the PMRC intimates that the organization seeks only to codify an existent, but informal, ratings system:

What's happening is that in the music industry right now there is labelling, but it's inconsistent. It is not uniform, it is not standard. I think what the Parents Music Resource Center would like to see is some sort of uniform codes so that what is offensive for Warner Brothers records is offensive for Atlantic and offensive for Columbia.⁸

The PMRC largely achieved its original goal. Record companies have complied with requests to place warning labels on albums which contain explicit lyrics.⁹ By August 5, 1985, Stanley Gortikov, the President of the Recording Industry Association of America (RIAA), had convinced nineteen record companies¹⁰ to comply with the proposed labeling system. Mr. Gortikov agreed to continue his efforts to encourage the remaining RIAA members, as well as nonmember companies, to cooperate.¹¹

However, the PMRC later adopted a plan for a more specific identification system. Under this system, records would be rated by reference to the objectionable matter they contained.¹² This effort was eventually abandoned in lieu of using the MPAA standards.

To implement the MPAA system the PMRC suggests appointing a

8. *Nightline*, *supra* note 4, at 8 (Mrs. Stroud). However, this approach is not universally accepted without argument. Comparing music to the type of products that are commonly labeled for consumer protection is overly simplistic. In the same sense that music can be a conduit for sexual, violent, even insidious messages, it is also a vehicle for scientific, artistic, and political thought. Obviously, the system which restricts distribution of information, and thus ideas, must have more far-reaching implications than that which restricts the sale of a possibly dangerous lawnmower.

In addition, the plan for imposing an MPAA-type system of classification is not as simple as it first appears. There are pragmatic and legal complexities which belie the seeming simplicity of transposing a system from one medium of entertainment to another. Furthermore, it is not clear whether the PMRC, and similar groups, have limited their goals to this one plan. This is evidenced by the failure of several preliminary proposals by both sides.

9. The inscription reads: "PARENTAL GUIDANCE: EXPLICIT LYRICS." Zucchini, *supra* note 1, at 69.

10. Love, *supra* note 3, at 14. By November 1, an additional firm had agreed to comply. The list of recording companies included: A&M, Arista, Atlantic, Capital/EMI, Chrysalis, Columbia, Compleat, Crescendo, Elektra/Asylum, Epic, Manhattan, MCA, Mike Curb Productions, Motown, PolyGram, RCA, Solar, Scott Bros., Tabu, and Warner Bros. By the time of the Senate Hearings (September 19, 1985), twenty-four companies had agreed to the original labeling system. PMRC, PTA & RIAA, Joint News Release (November 1, 1985) [hereinafter PMRC & RIAA].

11. PMRC & RIAA, *supra* note 10.

12. Love, *supra* note 3, at 13. The PMRC's rating system: "D/A" for drugs and alcohol; "V" for violence; "O" for occult; "X" for vulgar or explicit lyrics. *Id.* The PMRC also proposed sample ratings for a select fifteen songs, dubbed "The Filthy Fifteen" by Rolling Stone Magazine:

panel composed of individuals from the music industry and consumers, which would design guidelines and definitions for explicit lyrics.¹³ Some albums now are rated with the symbol "PG"; the PMRC desires to upgrade this to "R."¹⁴

The PMRC also seeks to have questionable lyrics printed on albums and cassettes, to control rock concerts to some degree (or at least rate them for content), and to have albums with offensive covers either placed in plain brown wrappers or displayed in an area away from other records.¹⁵ The demands touch upon virtually every area of the entertainment industry, including television, radio, and business. Additionally, the PMRC would like questionable videos bracketed by MTV for late night viewing.¹⁶

PMRC member, Mary Elizabeth "Tipper" Gore has stated that if the music industry is unwilling to compromise further, the PMRC is

ARTIST	SONG	RATING
JUDAS PRIEST	"Eat Me Alive"	X
MOTLEY CRUE	"Bastard"	V
PRINCE	"Darling Nikki"	X
SHEENA EASTON	"Sugar Walls"	X
W.A.S.P.	"(Animal) F— Like a Beast"	X
MERCYFUL FATE	"Into the Coven"	O
VANITY	"Strap on Robby Baby"	X
DEF LEPPARD	"High 'n' Dry"	D/A
TWISTED SISTER	"We're Not Gonna Take It"	V
MADONNA	"Dress You Up"	X
CYNDI LAUPER	"She Bop"	X
AC/DC	"Let Me Put My Love Into You"	X
BLACK SABBATH	"Trashed"	D/A
MARY JANE GIRLS	"My House"	X
VENOM	"Possessed"	O

Id.

13. Zucchini, *supra* note 1, at 9. Such a panel would include a group of consumers to represent the community at large. Other panel members would include artists, broadcasters, distributors, executives, producers, retailers, and songwriters. *Id.*

14. "[O]n the theory that PG has been watered down by too many PG movies." *Id.*

15. *Id.*

16. One of the few commercially successful competitors of MTV, Boston's Channel V66, does just this. Said David Beadle, program director of V66, "We do not edit any videos . . . We either decide to play them or not. Then we decide *when* to play them. In the case of videos that are more adult in nature, we play them after ten o'clock at night." Love, "Washington Wives" set their sights on Video: Clips Should Carry Warnings, group says, ROLLING STONE, Oct. 18, 1985, at 18 (emphasis in original) [hereinafter *Washington Wives*].

The PMRC has also requested that MTV include a symbol on the TV screen at all times during the airing of certain videos. Such a symbol would presumably reflect the rating of any given video. "More radical reform is sought by the National Coalition on Television Violence (NCTV), a small but strident group that favors government legislation to force broadcasters and cable networks to set aside a percentage of viewing time for 'nonviolent, nondegrading material.'" *Id.*

prepared to initiate a plan that would be implemented in every state. This plan would attempt to form a coalition with the National Parents and Teachers Association, the National Education Association, and organized labor. The result would be the formation of a national organization.¹⁷

The RIAA maintains that a rating system like the one the PMRC has in mind is not feasible, and would not be logistically comparable to the motion picture system:

According to RIAA statistics, roughly 2,500 LPs each with about ten songs, are released every year, some within days of recording. If a rating system were imposed all 25,000 songs would have to be rated, because of the possibility of release as a single. 'We would clearly be looking at a very large staff of people to rate that many records,' says Robin Ahrold, a vice-president of communications for RCA records. 'Tunes on the same album can be very different, and you really can't give a single rating to an LP.'¹⁸

The president of the RIAA testified at the Senate Hearing concerning the other issues raised by the PMRC, principally by pointing to the practical limitations of the record industry.¹⁹

On September 19, 1985, the Senate Committee on Commerce, Science and Transportation held a hearing to address the record rating controversy. Members of the music industry, various artists, the PMRC and other concerned groups attended the hearing and testified.²⁰ No legislation was proposed, nor was any expected.²¹

17. Love, *Battle Over Rock Lyrics Heads For Round Two*, ROLLING STONE, Sept. 26, 1985, at 22.

18. Love, *supra* note 4, at 15, 83.

19. In addition to the logistic difficulties of song-by-song ratings, there are a number of problems beyond the scope of the RIAA's influence. Because the rights to lyrics are owned by music publishers—not record companies—they cannot be printed on albums or cassettes. Zucchini, *supra* note 1, at 10.

For the same reason, the RIAA cannot provide each radio station with words to every song. Further, it cannot control what radio stations choose to broadcast. Even the FCC has difficulty doing this. See generally *FCC v. Pacifica Found.*, 438 U.S. 726 (the FCC sought to stop broadcasts of a twelve-minute comedy routine which used extensive profanity), *reh'g denied*, 439 U.S. 883 (1978).

"It cannot control the actions, lewd or otherwise, of rock performers at concerts nor rate concerts for content, because 'the best control . . . is parental supervision of the concert attendance of their children.'" Zucchini, *supra* note 1, at 10 (quoting Stanley Gortikov's testimony at the Senate Hearing).

The RIAA also has no authority to require that retailers package records or display them in ways designed to protect younger patrons. *Id.*

20. John Denver, Dee Snider (lead singer for TWISTED SISTER), and Frank Zappa testified. *Id.* Zappa has been particularly vocal. His television appearances include *Nightline* and the *Phil Donahue* show. He has written editorials and has recently released a new album which partially responds to the Hearing, and to the lyric-rating movement, called *Frank Zappa Meets the Mothers of Prevention*. It bears Zappa's own "warning" label, which reads:

WARNING/GUARANTEE: This album contains material which a truly free society would neither fear nor suppress.

In some socially retarded areas, religious fanatics and ultra-conservative political organizations violate your First Amendment Rights by attempting to censor rock & roll albums. We feel that this is un-Constitutional and un-American.

III. THE OBSCENITY APPROACH: IF ROCK LYRICS ARE OBSCENE, THEY ARE CONSTITUTIONALLY UNPROTECTED AND CAN BE REGULATED ACCORDINGLY

The most effective and certainly the most obvious standpoint from

As an alternative to these government-supported programs (designed to keep you docile and ignorant), Barking Pumpkin is pleased to provide stimulating digital audio entertainment for those of you who have outgrown *the ordinary*. The language and concepts contained herein are GUARANTEED NOT TO CAUSE ETERNAL TORMENT IN THE PLACE WHERE THE GUY WITH THE HORNS AND POINTED STICK CONDUCTS HIS BUSINESS. This guarantee is as real as the threats of the video fundamentalists who use attacks on rock music in their attempt to transform America into a nation of check-mailing nincompoops (in the name of Jesus Christ). If there is a hell, its fires wait for them, not us.

Frank Zappa Meets the Mothers of Prevention, by Frank Zappa, (Barking Pumpkin Records, 1985) (jacket cover) (emphasis in original).

Zappa also includes a quote of the first amendment, a quote from Senator Hollings, the address to write to in order to receive a copy of the Senate Committee Hearing report, a second address to receive information on the issue in general, and a plea to register to vote. *Id.* The song "Porn Wars" is a direct response to the controversy. In "Porn Wars,"

Zappa has woven statements made by [the Senate] officials at the Sept. 19 Senate Commerce Committee hearing . . . into a provocative 12-minute track The avant-garde "Porn Wars" is an ambitious collage that blends electronic music and statements actually made to the committee and to Zappa The new track . . . begins with preliminary comments from Senators and then seems to break away dramatically into a series of voices swirling, growling, chattering, chanting, and wailing.

Rense, *Zappa Takes On the U.S. Senate in "Porn Wars"*, L.A. Times, Oct. 24, 1985, § VI, at 1, col. 1. Apparently, a number of other selections were also named with the PMRC specifically in mind. These include the tongue-in-cheek "Alien Orifice" and "Aerobics in Bondage," both of which are entirely instrumental. The cassette also bears a political cartoon which depicts a woman's hands feeding the Bill of Rights into one end of a grinding machine. Party favors, horns, and notes fly out the other end. An American flag and a view of the Senate office building are in the background.

Zappa is hardly the only one who feels strongly about the issue. U.S. News & World Report, a normally sober, political news journal, began its coverage of the topic with: "Day and night, America's youth are enticed by electronic visions of a world so violent, sensual and narcotic that childhood itself appears to be under siege." Powell, *supra* note 3, at 46.

Senator Hollings, a member of the Commerce Committee, has stated that "[i]t's outrageous filth, and we've got to do something about it If I could find some way constitutionally to do away with it, I would.' He said he had asked the 'best constitutional minds' around to see if the stuff could be legally outlawed." Zucchini, *supra* note 1, at 65.

President Reagan has also commented: "I don't believe that our Founding Fathers ever intended to create a nation where the rights of pornographers would take precedence over the rights of parents, and the violent and malevolent would be given free reign to prey upon our children." Powell, *supra* note 3, at 46.

Rolling Stone magazine has written an editorial on this issue:

Rating records for lyric content provides no benefit to the children it is meant to protect and seriously threatens artists' freedom of expression and every-

which to address the rock lyric problem is to treat the material as obscene.²² If the lyrics are obscene, then they are not protected speech within the ambit of the first amendment.²³ Thus, such lyrics would be more susceptible to regulation.²⁴ However, this approach raises two important questions: first, whether the lyrics are obscene from a constitutional standpoint; and second, even if the lyrics are obscene, whether they can be constitutionally regulated.

The Supreme Court has grappled with defining obscenity in a vari-

one's freedom of choice. The Parents' Music Resource Center's proposal is unworkable and unnecessary and comes perilously close to censorship. . . . [It] is shortsighted, illogical, and dangerous. . . . As a vital and often raw form of expression, rock tends to dance on the outer edge of what society finds acceptable. It always has. We must make sure that it always does.

Rock Ratings: an unnecessary evil, ROLLING STONE, Nov. 7, 1985, at 10 (editorial).

21. Zucchini, *supra* note 1, at 9. See generally *Record Labelling: Hearing Before the Senate Comm. on Commerce, Science, and Transp.*, 99th Cong., 1st Sess. (1985) (Available by writing Superintendent of Documents, Congressional Sales Office, Washington, D.C. 20402; GPO Stock No. 052-070-06101-4.) [hereinafter *Record Labelling*].

22. The recording industry denies that an entire album — or even a song — can be considered obscene merely because it contains words which are patently offensive. The basic argument is that isolated groups of words do not completely obviate the artistic value of an album as a whole. See *infra* notes 34-67 and accompanying text.

The PMRC denies that it is seeking legislation based on the obscenity of the material involved. It has reiterated consistently (even during an informal telephone request for information) that it seeks *only* to establish a voluntary means of regulation similar to that used by the MPAA. For example, one spokesperson for the PMRC stated ten times in a thirty-minute program that legislation was not being sought. See *Nightline*, *supra* note 4. Arnold Fege of the National PTA has stated, "This is not a censorship issue. . . . It's a consumer protection issue. It is absolutely not a censorship issue." L.A. Daily J., Jan. 19, 1986, at 1, col. 1. The Chairman of the Senate Committee opened the hearing by stating: "The reason for this hearing is not to promote any legislation, indeed I don't know of any suggestion that any legislation be passed . . ." John Danforth, Statement Before the Senate Commerce Committee (Sept. 19, 1985).

However, not all agree with this position of non-censorship: "Senator Hollings began the proceeding by noting 'It's outrageous filth . . . and we've got to do something about it' He said that he had asked 'the best constitutional minds' around to see if the stuff could be outlawed." Zucchini, *supra* note 1, at 65. "Senator James Exon (D-Nebraska) . . . said 'This is the largest media event I've ever seen If we're not talking about federal regulation or legislation, Mr. Chairman, what's the reason for this hearing?'" *Id.* Further legislation is sought by other groups. "The NCTV's Dr Radecki notes accurately that the key to the PMRC's success so far has been 'the threat of legislation.'" *Washington Wives*, *supra* note 16, at 18.

23. "We hold that obscenity is not within the area of constitutionally protected speech or press." *Roth v. United States*, 354 U.S. 476, 485, *reh'g denied*, 355 U.S. 852 (1957). In *Roth*, the defendant was convicted of violating the Federal Obscenity Statute by mailing obscene advertisements and an obscene book. In upholding Roth's conviction, the Court reaffirmed the validity of the statute as "a proper exercise of the postal power delegated to Congress . . ." *Id.* at 493.

24. However, because the interests that are protected are so important, the government must be careful in discerning which speech is actually obscene. Freedom of speech enjoys a predominant status: "First Amendment rights are entitled to special constitutional solicitude. Our cases have required the *most exacting scrutiny* in cases in which a state undertakes to regulate speech." *Swope v. Lubbers*, 560 F. Supp. 1328, 1331 (W.D. Mich. 1983) (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)) (emphasis in *Swope*).

ety of contexts for a number of years. The core definition is found in *Miller v. California*.²⁵ The permissible scope of state regulation of obscenity is "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."²⁶ The test for determining whether the appeal is to a strictly prurient interest is whether it appears as such to "the average person, applying contemporary community standards . . ."²⁷ Of singular significance, this appeal must be *the dominant theme* of "the material taken as a whole . . ."²⁸

Albums, more so than books and films, are readily divisible into easily identifiable components.²⁹ Each album consists of several songs, and each song normally has several lyrics. Rarely will an entire album be permeated with the type of lyrics of which the PMRC is concerned.³⁰ In fact, most albums have only one or two lines which are ostensibly obscene.

Therefore, the vast majority of commercial phonographs are unlikely to be considered obscene, because they fail to pass this "dominant theme" test. A single profane, or even blatantly pornographic lyric will not be enough to establish the predominance of theme³¹ which the *Miller* test requires.³² However, assuming this test is satisfied, there are still difficulties which make the obscenity theory an

25. 413 U.S. 15 (1973).

26. *Id.* at 24.

27. *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 489 (1973)). The Court is careful to limit the definition to "prurient" depictions. Sex is not a per se aspect of obscenity. Discussions and analysis of sex in various media—art, literature, textbooks—is to be constitutionally protected. "Sex . . . is one of the vital problems of human interest and public concern." *Roth*, 354 U.S. at 487.

28. *Miller*, 413 U.S. at 24.

29. Censorship statutes are almost always designed as a response to films. Case law addresses obscene magazines, books, photographs, films, and advertisements, but only rarely centers on recordings. One exception to this is the recent controversy over telephone pornography. See generally Cleary, *Telephone Pornography: First Amendment Constraints on Shielding Children from Dial-A-Porn*, 22 HARV. J. ON LEGIS. 503 (1985).

30. See *Cohen v. California*, 403 U.S. 15 (the message "Fuck the Draft" which appeared on the back of a jacket was ruled protected speech), *reh'g denied*, 404 U.S. 876 (1971).

31. See *supra* note 27 and accompanying text.

32. Perhaps the following describes a song with a predominant theme which appeals to a prurient interest. "[Donna Summers 1970's hit] 'Love to Love You Baby,' was a seventeen-minute vinyl aphrodisiac. It consisted of her repetitious moaning of the title phrase over and over to the accompaniment of rapturous groans and murmurs in a marathon of twenty-two orgasms." B. LARSON, *ROCK: PRACTICAL HELP FOR THOSE WHO LISTEN TO THE WORDS AND DON'T LIKE WHAT THEY HEAR* 17 (1980).

unlikely foundation upon which to base a possible plan for legislative regulation.³³

A. Constitutional Vagueness

In *Freedman v. Maryland*,³⁴ the Supreme Court established a set of requirements for censorship statutes.³⁵ These guides are based upon the cornerstone prior restraint rule.³⁶ Essentially, this rule states that any system which imposes a prior restraint on expression "comes to [the] Court bearing a heavy presumption against its constitutional validity."³⁷ In light of this presumption, *Freedman* held that any censorship process which requires the prior submission of a film to a censor board must enact certain procedural safeguards if it is to avoid "constitutional infirmity."³⁸

The most significant of these requirements prohibits banning films absent a judicial proceeding which affirms the censor board's initial decision. The board must also bear the burden of initiating the proceedings, and maintaining the action once the hearing is granted. Furthermore, these steps must be taken within a short, statutorily fixed period. The board must act within this time, either by filing an

33. See *supra* note 1 and accompanying text.

34. 380 U.S. 51 (1965).

35. The case of *Marcus v. Search Warrant*, 367 U.S. 717 (1961), had already established the rule that a state may not adopt procedures for dealing with obscenity without considering the impact upon constitutionally protected speech. *Id.* at 731.

36. Prior restraint is the imposition of a burden upon a person before he speaks. Normal censorship proceedings are initiated by the state. The state must also bear the burden of proof in these proceedings. A system which requires submission of a film prior to exhibition shifts these burdens to the artist. See *Freedman*, 380 U.S. at 58-60; see also *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

Other dangers arise from the prior submission system. The censorship board is not a judicial body. Because its primary function is censorship, not constitutional interpretation, it is less likely to be sensitive to first amendment freedoms. Also, if the censorship process is unduly burdensome and causes unreasonable delay, the board's determination can, in practice, be a final judgment, despite the fact that "[o]nly a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression . . ." *Freedman*, 380 U.S. at 58.

37. *Freedman*, 380 U.S. at 70. Note that systems which impose prior restraints are not invalid *per se*. See *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961).

38. *Freedman*, 380 U.S. at 58. In *Freedman*, no time limit was established in the Maryland statute for board deliberations and deadlines for actions. Neither would the board be required to initiate proceedings or maintain the burden of persuasion. The exhibitor was merely notified that his film could not be shown. At his appeal, the board would reexamine the film. Thereafter, appeals to the court system would be "subject generally to the time and manner provided for taking appeal to the Court of Appeals." *Id.* at 55 (quoting MD. ANN. CODE art. 66a, § 19 (1957)).

In the only reported case of a complete appeal via the Maryland procedure, the first judicial determination took four months; appellate review lasted an additional six months. *Id.* at 56. See *United Artists Corp. v. State Bd. of Censors*, 210 Md. 586, 124 A.2d 292 (1956) (this was the single case, mentioned above, which went through the procedure).

action or by issuing a license to show the film.³⁹

Freedman requires that the regulatory system provide for a prompt, final judicial decision in order to "minimize the deterrent effect of an interim, and possibly erroneous, denial of a license."⁴⁰ The Court states specifically that "[a]ny restraint imposed in advance of a final judicial determination of the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution."⁴¹

State regulations also require government boards to explain license denials,⁴² so that the reviewing court has a record of the criteria and procedures employed by the board. Otherwise, the censor board is answerable only to itself, and unless an appeal is requested, its decisions are never scrutinized by an outside body. In other words, "[v]ague standards, unless narrowed by interpretation, encourage erratic administration whether the censor be administrative or judicial"⁴³

Legislation in this area can take one of two forms: license/permit⁴⁴

39. *Freedman*, 380 U.S. at 58-59.

40. *Id.* at 59.

41. *Id.* The apparent rationale for this is that, "[t]he Supreme Court has recently found that the evils inherent in public exhibition of obscene films are sufficiently great to justify prior administrative censorship of motion pictures." *Universal Film Exchanges, Inc. v. City of Chicago*, 288 F. Supp. 286, 290 (N.D. Ill. 1968) (citing *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961)).

42. See *Interstate Circuit v. Dallas*, 390 U.S. 676 (1967); *ACLU v. City of Chicago*, 13 Ill. App. 2d 278, 141 N.E.2d 56 (1957).

43. *Interstate*, 390 U.S. at 685. *Interstate* involved a film censorship statute which classified films as either suitable or not suitable for persons under sixteen years of age. The ordinance required a screening of any film if the censor board was "dissatisfied" with its proposed classification. "Not suitable for young persons" was defined as:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, *in the judgment of the Board*, likely to incite . . . young persons; or

(2) Describing or portraying nudity . . . or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, *in the judgment of the Board* likely to incite or encourage delinquency or sexual promiscuity on the part of young persons

A film shall be considered 'likely to incite or encourage' crime . . . or sexual promiscuity . . . if, *in the judgment of the Board*, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted.

Id. at 681 (emphasis added).

44. A "license" is "[t]he permission by competent authority to do an act which, without such permission, would be illegal, a trespass, or a tort." BLACK'S LAW DICTIONARY 829 (5th ed. 1979). It is also "[a] permit, granted by an appropriate governmental body, generally for a consideration, to a person, firm, or corporation to pursue

or penal.⁴⁵ While penal codes normally operate by punishing persons for actions which have already occurred,⁴⁶ licensing regulations seek to prevent the wrongdoing before it takes place. Although an obscenity approach may have a deterrent effect by imposing a fine on the defendant after exhibition or distribution of material deemed pornographic,⁴⁷ groups like the PMRC and the PTA, which aim, directly or indirectly, to prevent music pornography from reaching children, especially favor prevention measures.⁴⁸

The licensing system is based on compliance. If an exhibitor or artist personally adheres to required procedures, and if his product is in compliance, then a license will be issued authorizing the desired activity. The permit system requires prior submission of the work to a board which determines whether or not the work is in compliance. Noncompliance can result in a ban on distribution.

Licensing presents inherent risks of prior restraint because it necessarily compels pre-distribution submission. Thus, the most effective legislative option available is also the most constitutionally tenuous, the least likely to withstand constitutional challenge in court, and the most likely to infringe upon first amendment rights. The great weakness of the licensing system is its propensity for constitutional vagueness.⁴⁹ Designing a censorship statute which avoids vagueness has proven difficult, even in traditional areas.

Historically, movies, magazines, and books have been subject to legislation.⁵⁰ Music, however, presents difficulties unique to its medium. Because sound is far more abstract than the written word, innuendo and ambiguity are far more prevalent. Clarity, or lack thereof, also assumes greater importance; how does one address a lyric which is explicit when written, but incomprehensible when performed?⁵¹ This is especially common among heavy metal genres —

some occupation or to carry on some business subject to regulation under the police power." *Id.*

45. "Penal" means, "punishable; inflicting a punishment; containing a penalty, or relating to a penalty." *Id.* at 1019.

46. *Id.*

47. *See supra* notes 23-33 and accompanying text.

48. *See supra* notes 1-22 and accompanying text.

49. A significant second weakness is the unpopularity of the censorship issue. Politicians may not support censorship because it is commonly associated with totalitarianism rather than maintenance of community standards.

A third weakness is the unlikelihood that a federal statute will be passed. Action is far more probable at the state or local level.

50. *See, e.g.,* *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Herndon v. Lowry*, 301 U.S. 242 (1937).

51. A further extension of this problem, and a concern of the PMRC, involves backward masking. Albums with backward masking contain recorded information which can be heard only when the album is rotated backwards. Many of these messages contain references to Satan and the occult. Others are less objectionable. Legislation has been proposed at both the state and federal levels. *See generally Little*

fields particularly targeted by the PMRC, the PTA and other groups.

Legislative difficulties are exemplified in *Freedman*. The statute in *Freedman* was obviously vague, partially because the censor board had extremely broad power over film distribution, and partially because the board had no obligation to divulge the bases of its judgments.⁵² In *Paramount Film Distributing Corp. v. City of Chicago*,⁵³ the court stated that any censorship statute "must be approached with a caution dictated by the fact that it is a patent invasion of the right to freedom of speech guaranteed by the First Amendment."⁵⁴

The statute in *Paramount* granted licenses freely, even to legally obscene movies, so long as the audience was restricted to persons over twenty-one years of age. In effect, the legislature defined "obscene" in terms of age. The court described this anomaly as "an evident contradiction in sense A picture is either 'obscene' . . . or it is not [A] picture either does or does not 'portray lack of virtue of a class of citizens of any race, color, creed or religion.' None of these criteria can change with the age of the beholder"⁵⁵

At the Supreme Court level, only one censorship statute has survived a challenge for vagueness.⁵⁶ In that case, the plaintiffs contended "that the standard 'obscene when viewed by children' [was] so vague that the censors [were] vested with unfettered discretion to deny permits."⁵⁷ Unexpectedly, the court upheld the statute. In doing so, it cited *Ginsberg v. New York*,⁵⁸ which held that the phrase "harmful to minors" was not unconstitutionally vague, essentially because the magazines in question were harmful to minors, "although not obscene for adult readers."⁵⁹

The *Universal* holding, however, had one qualification. Its facts were clearly distinguishable from those in *Ginsberg*, and the court noted this. The definition of "obscene when viewed by children," did not encompass "near obscene" films. It dealt strictly with those films that were clearly pornographic. Consequently, the holding in *Univer-*

Feet, Wash. Post, Feb. 11, 1982, at D1, col. 4; Bliss, *Subliminal Projection History and Analysis*, 5 COMMENT 419 (1983).

52. *Freedman v. Maryland*, 380 U.S. 51 (1965); see *supra* notes 34-38 and accompanying text.

53. 172 F. Supp. 69 (N.D. Ill. 1959).

54. *Id.* at 70.

55. *Id.* at 71.

56. *Universal Film Exch., Inc. v. City of Chicago*, 288 F. Supp. 286 (N.D. Ill. 1968).

57. *Id.* at 293.

58. 390 U.S. 629 (1968).

59. *Universal*, 288 F. Supp. at 294.

sal can be applied only to those situations in which there is no serious doubt as to content. The decision failed to address what would happen when a "near obscene" film was subject to censorship. The *Universal* statute, as a model, is vague only when applied to material which is not clearly pornographic.⁶⁰

The foregoing discussion highlights a primary concern in designing a statute to address the record label issue. Vagueness is the primary hurdle which must be cleared. However, *Universal* demonstrates that even criteria based on age can be construed as constitutionally acceptable. Still, such a statute must be sufficiently detailed to avoid the potential problems posed in *Universal*.

B. The MPAA Alternative

Translation of the MPAA standards⁶¹ from film to music is not a workable alternative, if only because those standards have not yet been approved as adequate film classifications. The rating system used by the MPAA for films produced by its member companies is a strictly voluntary, non-legislative, and unofficial procedure. Court decisions indicate that the system is not acceptable in codified form.

Attempts to codify the MPAA classification system began as early as 1970, almost immediately after the standards were created. In *MPAA, Inc. v. Specter*,⁶² a criminal statute copied the MPAA system, but was summarily ruled unconstitutional for vagueness:

The evidence clearly established that the code and rating administration of the Association has itself no defined standards or criteria against which to measure its ratings. Twelve persons, four in New York and eight on the Pa-

60. Any statute designed to establish a permit system would surely need to meet the minimal standards of the statute in *Universal*, which required a permit "for the exhibition of any motion picture in a public place in the city, to an audience which includes any person under 18 years of age." *Id.* at 288. It provided for examination by the superintendent of police or the Film Review Section (a six member board, also created by the ordinance) within *two days* of receipt of the permit application. *Id.* The permit had to be either issued or denied "forthwith" upon inspection of the film. If the permit was rejected by the Film Review Section, then it would be reviewed within *seven days* by the Motion Picture Appeal Board.

The Appeal Board was required to "review the film in its entirety, and . . . consider whatever evidence the exhibitor or distributor . . . wish[ed] to present in support of the exhibition of the film." *Id.* at 289. A ruling had to be announced within *three days* of the viewing. If the permit was still denied, the government would file an action within *three days* in the Circuit Court of Cook County. A further provision of the law was that whenever the City of Chicago failed to meet the demands of the statute, the motion picture could be exhibited without permit or fees, and without violating the statute. *Id.*

61. For a basic description of the standards see *supra* note 7 and accompanying text. See also Swope v. Lubbers, 560 F. Supp. 1328, 1335 (W.D. Mich. 1983) (detailed history of how the MPAA voluntary rating system originated, including a summary of the purpose of rating, how ratings are determined, and what they mean objectively). See also M. MAYER, *THE FILM INDUSTRIES* (1978) (analysis of the politics behind the rating system and alternatives to it).

62. 315 F. Supp. 824 (E.D. Pa. 1970).

cific coast, do the rating, a voluntary Association undertaking. Films viewed are simply graded accordingly to the individual reactions of the viewing members.⁶³

In light of this informal rating system, the court found the act "so patently vague and lacking in any ascertainable standards and so infringing upon the plaintiffs' rights to freedom of expression . . . as to render it unconstitutional."⁶⁴

A similar statute, in *National Ass'n of Theater Owners of Wisconsin v. Motion Picture Commission of the City of Milwaukee*,⁶⁵ granted authority to a local rating commission.⁶⁶ This had the effect of legally mandating what would otherwise be a voluntary determination. Furthermore, the Commission could initiate actions to enforce its decisions. Another provision required that classifications "be carried in all newspaper advertising in type of bold face and at least 25% of the size of the film title . . . [and] be announced in all radio and television advertising."⁶⁷ The court found the statute unconstitutionally vague "because the ordinance on its face effectively chills the exercise of First Amendment rights."⁶⁸

63. *Id.* at 825. See also *Interstate Circuit v. Dallas*, 390 U.S. 676, 682 (1968), in which the Supreme Court warns against overbroad laws which permit unbridled censorship. The Court ruled the term in the statute "sexual promiscuity" to not be a sufficiently definite standard. *Id.* at 687-88.

64. *Specter*, 315 F. Supp. at 826. A further difficulty with the adaptation is that such a statute subjects only those whose films are rated by the Association to possible criminal sanctions. Exhibitors who simply do not show rated films, effectively avoid the law. Technically, they cannot violate the law. *Id.*

65. 328 F. Supp. 6 (E.D. Wis. 1971).

66. The Commission was:

originally formed pursuant to Common Council Resolution, File No. 12428 (Feb. 26, 1917), for the purpose of providing advice with respect to motion picture films exhibited in Milwaukee. Prior to October 12, 1970, there was no resolution, ordinance, regulation, rule, or other written law defining or describing any standards or classification or process for classification of motion picture films . . . Nevertheless . . . the Commission, pursuant to its understanding of the original funding resolution, has . . . classified motion picture films to be exhibited in Milwaukee.

On October 19, 1970, the Commission was empowered . . . to classify and censor motion picture films . . .

Id. at 9-10.

67. *Id.* at 8.

68. *Id.* at 11. The court also based its holding on procedural failings of the statute. Specifically, the statute failed to provide for a prompt, final judicial review. *Id.* at 12. In a third case, *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970), the Commission sought to partially incorporate MPAA standards. Here, the Commission attempted to use the term "adult motion picture" as defined by the MPAA. The court held that the ordinance constituted a prior restraint on the exercise of first amendment freedoms. It further stipulated that a "classification system" could work a prior

C. Constitutional Overbreadth

Although the Supreme Court has not always clearly distinguished “vagueness” from “overbreadth,”⁶⁹ it has offered various definitions for both terms. The commonly accepted definition of “overbreadth” is stated in rule form: “[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”⁷⁰ In other words, a law enacted to achieve a constitutionally legitimate end must not exceed its defined scope. Such prohibited excess occurs whenever the regulations impinge upon another right, or another class of persons.

In this context, the issue is whether a regulation designed principally to protect children,⁷¹ is overly broad because it affects adults. In 1956, the Supreme Court held unconstitutional a statute which prohibited persons from distributing books to the public which a trial judge “found to have a potentially deleterious influence upon youth.”⁷² The Supreme Court found that “[t]he incidence of this enactment is to reduce the adult population . . . to reading only what is fit for children.”⁷³

If the overbreadth hurdle is cleared, courts will likely be more receptive to regulations proposed especially for children’s protection.⁷⁴ Technically, this should not be so. Obscenity with respect to minors “is defined by adopting the three parts of the adult obscenity definition—prurient effect, patent offensiveness, and no value—to a hypothetical audience of minors.”⁷⁵ Yet, the Court has often supported arguments which advocate a uniformly lowered threshold for defining the patently obscene.⁷⁶

restraint just as could a “censorship system.” “A prior restraint on First Amendment rights does not have to be total to be impermissible.” *Id.* at 1135.

69. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (statute held unconstitutionally vague and overbroad).

70. *Zwicker v. Koota*, 389 U.S. 241, 250 (1967) (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)).

71. See *supra* notes 1-21 and accompanying text.

72. *Butler v. Michigan*, 352 U.S. 380, 383 (1956) (appellant sold an obscene book to a police officer, not a youth; book was determined to have potential effect on youths).

73. *Id.* In this case, Justice Frankfurter described the statute in question as analogous to burning down a house in order to roast a pig. A revised version of the apothegm states that “the PMRC’s demands are the equivalent of treating dandruff by decapitation.” *Record Labelling*, *supra* note 20 (statement of Frank Zappa).

74. The age line . . . must to some extent be arbitrary. Although an upper limit of . . . 17 would appear justified in terms of precedents such as drivers’ licenses, compulsory education and selective service, the lower the age, the less the restriction on free speech and the stronger the argument for the constitutionality of a classification system.

Comment, “*For Adults Only*”: *The Constitutionality of Governmental Film Censorship by Age Classification*, 69 *YALE L.J.* 141, 144 n.23 (1959).

75. Cleary, *supra* note 29, at 523 (footnotes omitted).

76. *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography industry); *FCC v.*

In *Federal Communications v. Pacifica Foundation*,⁷⁷ a New York radio station played a twelve-minute comedy monologue by George Carlin, popularly known as "The Seven Filthy Words."⁷⁸ The broadcast occurred at about two o'clock in the afternoon on a weekday, thus reaching a very large—and very broadly based—audience. The FCC's argument was based principally upon the nature of the material broadcast. It argued, *inter alia*, that broadcasting requires special treatment because "children have access to radios and in many cases are unsupervised by parents . . ." ⁷⁹ (Interestingly, this wording is practically identical to that used by the PMRC.)

The Court prefaced its opinion by acknowledging that offensive speech is not obscene, and cannot normally be regulated as such. The Court then described a lesser standard, designed specifically to address broadcast information. Justice Powell, in a concurring opinion, upheld the ruling of the FCC. He stated that "the speech from which society may attempt to shield its children is not limited to that which appeals to the youthful prurient interest. The language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts."⁸⁰ Justice Powell stated that, in effect, this sort of distribution "[could] be limited, though not prohibited," thus requiring sellers to close their doors only to children.⁸¹

Under the *Pacifica* ruling, material which is merely profane, not obscene, can be regulated in contexts where children might have access to it.⁸² This new standard grants to the states a broad regulatory power wherever circumstances directly involve children. "[T]he Court has maintained a disparity between materials that can be regulated as to children and materials that can be regulated as to

Pacifica Found., 438 U.S. 726 (1978) (radio broadcast industry); Comment, *supra* note 73, at 141 (telephone broadcast industry).

77. 438 U.S. 726 (1978).

78. *Id.* A copy of the monologue is appended to the opinion in *Pacifica*.

79. *Id.* at 731 n.2. The *Pacifica* Foundation responded by explaining that the monologue was played as part of a program about society's attitude toward language and that "listeners had been advised that it included 'sensitive language which might be regarded as offensive to some . . .'" *Id.* at 730.

80. *Id.* at 758 (Powell, J., concurring).

81. *Id.*

82. The rule has been aptly stated by Mr. Cleary: "[I]ndecent' materials such as those at issue in *Pacifica* are subject to state regulations. The concept of 'indecent' applied in *Pacifica* measures only the offensiveness of materials without requiring a prurient effect . . . for Justice Stevens, indecent words 'offend for the same reasons that obscenity offends.'" Cleary, *supra* note 29, at 524.

adults.”⁸³

At first glance, the lower standard seems directly applicable to the record labeling situation because child access and exposure are evident. This standard would benefit the PMRC because the profanity level of review circumvents, to a great degree, the difficulties entailed in defining and qualifying given lyrics as constitutionally obscene.⁸⁴ The “profanity” level of review has also been applied to telephone pornography.⁸⁵ Telephone messages are as difficult to monitor as radio broadcasts. For this reason, it is virtually impossible to separate audiences into adult and child. The level of review, therefore, becomes essential to regulating an otherwise unreachable area.⁸⁶

The key distinction between phonograph and radio disseminations is that phonographs are not necessarily broadcast over public radio waves. The PMRC has evidenced an interest in broadcast material, but its primary focus remains on the retail sale of the records themselves. Children are currently barred from adult bookstores and theaters. Presumably, their access to certain record stores or to specific areas within such stores can also be restricted.

IV. THE INCITEMENT APPROACH: IF ROCK LYRICS CONSTITUTE INCITEMENT, THEY ARE CONSTITUTIONALLY UNPROTECTED AND CAN BE REGULATED ACCORDINGLY

Civil liability actions have sought to restrict indirectly certain dangerous types of expression by imposing liability through the constitutional doctrine of incitement. Basically, these cases allege that the media in question caused, or “incited,” the injurious activity. Similarly, a statute imposing civil liability for lyrics which cause incite-

83. *Id.* at 524.

84. *See supra* notes 20-33 and accompanying text.

85. *See generally* Cleary, *supra* note 29. The Federal Communications Authorizations Act of 1983, Pub. L. No. 98-214, § 8(a), 1983 U.S. Code Cong. & Ad. News 1 (97 Stat.) 1467, 1469-70 (to be codified at 47 U.S.C. § 2237) makes transmission of sexually oriented messages to minors a federal crime. Cleary, *supra* note 29, at 504. Telephone pornography is a recorded information service persons can call to hear various sexual messages and simulations. The business is lucrative:

The dial-a-porn service in New York City received 800,000 calls daily in May 1983 and 180,000,000 calls in the year ending February 1984. At the tariff rate of two cents per call, these calls generated revenues for the dial-a-porn sponsor of \$16,000.00 per day and \$3,600,000 per year.

Id. at 505-06 (notes omitted).

86. Child pornography statutes are also reviewed under an “indecent” standard for regulation. This is because the *Miller* definition does not adequately represent the state’s especially compelling interest in “prosecuting those who promote the sexual exploitation of children. Thus, the question . . . of whether a work . . . appeals to the prurient interest of the average person bears [no] connection to the issue” *New York v. Ferber*, 458 U.S. 747, 761 (1982).

ment could be drafted.⁸⁷

The incitement theory is attractive because, like obscenity, such speech is not constitutionally protected.⁸⁸ Thus, it is more vulnerable to civil and criminal attack. The Supreme Court has defined incitement as speech which "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁸⁹

There are two difficulties with this approach. First, antisocial behavior has not been conclusively traced to the media.⁹⁰ A general anti-pornography statute based on incitement has been advocated by groups which assert that pornography promotes a variety of illegal acts against women.⁹¹ These include "physical, psychological, and

87. Actually, some censorship statutes, indirectly founded upon the incitement theory, use incitement to define obscenity. See *Interstate Circuit v. Dallas*, 390 U.S. 676, 681 (1968) (statute defined violent and sexual themes as not suitable for young persons if they are "likely to incite . . . delinquency or sexual promiscuity . . .") (emphasis added).

88. For a general development of this doctrine since the 1940's, when it was used primarily as a means for prosecuting communists, see *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957); and *Dennis v. United States*, 341 U.S. 494 (1951).

For the early development of incitement, when it was used against socialists and anarchists who advocated the violent overthrow of government, see *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919).

89. *Brandenburg*, 395 U.S. at 447.

90. See Elias, *Sex Publications and Moral Corruption: The Supreme Court Dilemma*, 9 WM. & MARY L. REV. 302 (1967): "Speech must be related to conduct or action before it may be constitutionally penalized or suppressed. There is no evidence that obscene publications have any effect on conduct beyond perhaps arousing impure thoughts." *Id.* at 314 (footnotes omitted). See generally HEALY & BRONNER, *NEW LIGHT ON DELINQUENCY AND ITS TREATMENT* 72 (1936); MITCHELL, *CHILDREN AND THE MOVIES* 142 (1934). *But cf.* Comment, *supra* note 73, at 147 (evidence appears more convincing that motion pictures may cause objectionable behavior in children than in adults).

The Federal Trade Commission has conducted an investigation into the effects television advertising may have on children. The investigation ended without promulgating any legislation. Heinke, *Is The Media Liable for Television Violence?*, L.A. Daily J., Dec. 16, 1981, at 4, col. 4.

The National Institute for Juvenile Justice and Delinquency Prevention is authorized to investigate potential links between media violence and actual violence, sexual abuse, and exploitation. 42 U.S.C. § 5653 (Supp. II 1984).

91. One such group is Women Against Violence in Pornography and Media (WAVPM). See generally Hommel, *Images of Women in Pornography and Media*, 8 N.Y.U. REV. L. & SOC. CHANGE 207 (1979). This article is basically a reprinting of a slide show and lecture on how women are popularly presented as victims, objects, and as inferior to men. For example:

This is the cover of a record album called *Wild Angel*, by Nelson Slater. The woman's face is like a mannequin — smooth and almost plastic looking. The posture with head back, throat exposed, is a common motif. It says, 'I'm vul-

economic coercion of women into performing pornographic acts in front of cameras, attacks on women by strangers, and physical coercion by husbands or lovers who want to reenact scenes from pornographic films or magazines.”⁹² These assertions, however, have not been proven.

Second, incitement, as a constitutional theory, is not readily applicable to obscenity. The incitement doctrine originated as a response to the criminal syndicalism acts of the 1930’s and the 1950’s. These laws sought to restrict political speech advocating criminal conduct, overthrow of the government, or the use of violent means for any political end. Broad application of these acts began to threaten free speech when individuals were persecuted for mere membership in organizations, or even for believing in certain political theories.⁹³

The Supreme Court responded to these extremes by allowing state authority to address only that speech which advocated illegal activity, and which was also likely to cause such activity to occur. “[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action.”⁹⁴ Political debate and belief fall well outside the state’s authority in this area.

In *DeFilippo v. NBC*,⁹⁵ a young boy hung himself while attempting to reenact a stunt shown on *The Johnny Carson Show*. The plaintiffs claimed that their son regularly watched the show, and that defendants were negligent in permitting it to be aired. “[A]n amended complaint . . . rais[ed] four causes of action: negligence; failure to warn; and two novel theories — products liability and intentional tort trespass.”⁹⁶ The Court never addressed these theories of liability, holding only that the first amendment barred recovery. With regard to incitement, the court stated that “[t]he main problem in permitting relief to the DeFilippos is that incitement cannot be measured precisely. Nicky was . . . the only person who is alleged to have emulated the action portrayed”⁹⁷

nerable, I’m an easy target.’ You will never see John Wayne or President Carter in a position like that. The chain through the woman’s mouth resembles a bit used to break horses, suggesting that women are wild beasts that need to be broken. Every detail of the graphic design is evocative. The blood red background denotes violence, passion, intense pain. The white streaks of light in the background resemble knife blades.

Id. at 209. The presentation addresses many such images, many more graphic than this.

92. Comment, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 463-64 (1984) (footnote omitted).

93. See *supra* notes 86-87.

94. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

95. 8 Med. L. Rptr. 1872 (R.I. 1982).

96. *Id.* at 1873.

97. *Id.* at 1876. The court issued the caveat that the incitement standard is to be

*Walt Disney Productions, Inc. v. Shannon*⁹⁸ involved a plaintiff who copied a stunt performed on *The Mickey Mouse Club Show*. The stunt required placing a BB pellet inside a balloon, blowing up the balloon, and then rotating the pellet. The apparent objective of this endeavor was to accurately simulate the sound of a tire tearing away from an automobile. The plaintiff substituted a large piece of lead for the BB pellet; this caused the balloon to pop, thereby impelling the lead into the plaintiff's eye. The plaintiff's theory of liability was no less imaginative than that in *DeFilippo*, alleging that the program constituted an invitation, to do something which posed a foreseeable risk of injury to a child; the plaintiff accepted the invitation.⁹⁹ The court rejected this argument because one of the two elements necessary to maintain the action was lacking.¹⁰⁰ However, the court held that incitement was the appropriate theory of liability, but stated that the facts did not comply with the *Schenk*¹⁰¹ formulation because the statements failed to "give rise to a clear and present danger of personal injury to the plaintiff."¹⁰²

The only two federal cases addressing this issue ruled that the in-

applied cautiously "since the criteria underlying its application are vague. [F]urther, [sic] allowing recovery under such an exception would inevitably lead to self-censorship on the part of broadcasters . . ." *Id.*

98. 247 Ga. 402, 276 S.E.2d 580 (1981).

99. *Id.* at 403, 276 S.E.2d at 581.

100. The only precedent the court found for such a cause of action was in the "pied piper" line of cases:

As we read the pied piper cases, they contain two basic elements: (1) there must be an express or implied invitation extended to the child to do something posing a foreseeable risk of injury; and (2) the defendant must be chargeable with maintaining or providing the child with the instrumentality causing the injury. In this case, the first element is arguably present, but the second element is undisputedly absent.

Id. at 405, 276 S.E.2d at 582-83.

101. The court paraphrased the *Schenk* formulation as follows:

An utterance can be suppressed or penalized on the ground that it tends to incite an immediate breach of peace, if "the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Id. at 404, 276 S.E.2d at 582 (quoting *Schenk v. United States*, 249 U.S. 47, 52 (1919)).

102. *Id.* A California case, *Olivia N. v. NBC*, 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977), involved a rape by instrumentality. It was alleged that three juveniles raped plaintiff in a manner factually similar to a scene in the television drama *Born Innocent*, and that they "were acting upon the stimulus of observing a scene of brutality which had been broadcast . . ." *Id.* at 386, 141 Cal. Rptr. at 512. The substance of the appeal was dismissed, since the appellant had been wrongfully denied a jury trial. However, the court discussed the incitement issue and determined that it would be a question of fact for the jury.

citement theory was inappropriate.¹⁰³ In *Zamora v. Columbia Broadcasting System*,¹⁰⁴ the court projected the possible consequences of an affirmative ruling. It found that recognition of incitement as a cause of action in this situation would provide no clear standard for the television industry to follow. The networks would be required to anticipate every remotely possible act of violence—regardless of the criminal intent of the actor.¹⁰⁵

Similarly, regarding the phonograph medium, a suit was recently brought against singer Ozzie Osbourne, alleging that Mr. Osbourne's music contributed to a teenager's suicide. The decedent allegedly "shot himself with a .22 caliber pistol after brooding for several hours He had been listening to the Osbourne composition [Suicide Solution] on a pair of earphones that were still on his head after his body was discovered."¹⁰⁶

Three problems arise in applying the incitement approach to regulation of rock lyrics; (1) rarely is the speaker/singer expressly advocating that lyrics be interpreted as reality; (2) such lyrics do not pose "imminent" danger in the *Brandenburg* sense; and (3) causation is rarely, if ever, evident.

The record labeling context is too far removed from that in which the incitement doctrine evolved. Language which allegedly incites children to become sexually active, or to perform obscene or even vi-

103. *Herceg v. Hustler Magazine*, 565 F. Supp. 802 (S.D. Tex. 1983); *Zamora v. CBS*, 480 F. Supp. 199 (S.D. Fla. 1979). In *Zamora*, plaintiff had killed an 83-year-old woman and sued CBS, ABC, and NBC on the grounds that he had become "involuntarily addicted to and 'completely subliminally intoxicated' by extensive viewing of television violence." *Id.* at 200.

In *Herceg*, plaintiff's brother and son hung themselves attempting to recreate the so-called "Orgasm of Death" detailed in an article by that name in *Hustler Magazine*. Plaintiff sued on grounds of negligent publication as well as a strict liability theory. Incitement was the prong in the negligent publication theory upon which the duty of the publisher was alleged. The court rejected the incitement argument, stating, "'Negligent' publication is a cause of action which arose in defamation cases. No court has held that the written word is either an attractive nuisance . . . or a dangerous instrumentality" *Herceg*, 565 F. Supp. at 803.

Cases which hold that published ideas are not products properly subject to a products liability suit include: *Walter v. Bauer*, 109 Misc. 2d 189, 438 N.Y.S.2d 821 (N.Y. Sup. Ct. 1981) (experiment in textbook); *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977) (recipe in a cookbook).

In *Carter v. Rand McNally*, No. 76-1864-F (D. Mass. 1976) (unreported case cited in Swartz, "You Can't Judge a Book By Its Cover," TRIAL, Nov. 1981, at 110), plaintiff brought a successful suit of negligence. A student was injured by methylalcohol vapors which exploded. Use of alcohol was recommended and suggested by the publication without warnings. The case was settled for \$1.1 million.

104. 480 F. Supp. 199 (S.D. Fla. 1979).

105. *Id.* at 206.

106. McDougal, *Osbourne Denounces Suit in Teenager's Suicide*, L.A. Times, Jan. 22, 1986, § 6, at 5, col. 1. See also Goldstein, *Pop Eye: Is Heavy Metal a Loaded Gun Aimed at Its Fans?*, L.A. Times, Jan. 26, 1986 (Calendar) at 68, col. 3.

olent acts, does not present the same dangers, or mandate the same level of state interest as incitement to political overthrow.

V. REGULATIONS UNDER STATE POLICE POWER: IS THE STATE INTEREST IN SUPERVISING AND PROTECTING ITS CHILDREN PARAMOUNT TO THE RIGHT TO RECEIVE INFORMATION?

The PMRC has intimated that it may seek to implement a state level plan. Such a plan could be soundly based on the states' recognized interest in the supervision and protection of its children. Parents, too, have a constitutionally recognized right to supervise the education of their children.

These interests were recognized as early as 1923. In *Meyer v. Nebraska*,¹⁰⁷ a parochial school instructor was tried and convicted for violating a Nebraska state law which forbade teaching any subject in a modern language other than English. Foreign languages could be taught as separate subjects only to students having passed the eighth grade. The purpose of the law was to cause children of immigrants to adopt English as their native tongue. The instructor had taught reading in German to a child who had not yet passed the eighth grade.¹⁰⁸

The Court held the statute unconstitutional, acknowledging the parent's right of control "to give his children education suitable to their station in life"¹⁰⁹ However, the Court did recognize and stress that the state police power entailed authority to supervise the education of its minor citizens.¹¹⁰ Essentially, a state has the power to:

regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.¹¹¹

This power extends beyond the classroom. The state is within its authority when it regulates, for example, child employment. To some extent, even parental control is secondary to the authority of

107. 262 U.S. 390 (1923).

108. *Id.* at 396-97. The statute, enacted in 1919, did not target the German language.

109. *Id.* at 400.

110. "That the State may do much, go very far, indeed, in order to improve the quality of its citizens . . . is clear; but the individual has certain fundamental rights which must be respected." *Id.* at 401.

111. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

the state¹¹² because the state can act to guard the general well-being of its youth. “[T]he state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways.”¹¹³

The PMRC, the RIAA, and other concerned parties are particularly interested in the state’s supervisory power to regulate pornography, in addition to education, employment, and physical protection. In *Ginsberg v. New York*,¹¹⁴ the state prohibited sales of pornographic and near pornographic¹¹⁵ materials to minors. The Court found the law to be a proper exercise of the state’s interest in the well-being of its youth.

In light of these decisions, three conclusions can be drawn regarding a state’s power to supervise children: (1) protection and education of children are state, not federal, concerns; (2) a state can guard children against physical, psychological, and emotional injury; and (3) while parental interests are paramount,¹¹⁶ the state’s power to regulate reaches even to the nuclear family. However, this power is not all-encompassing, nor is it applicable to every aspect of a child’s life. On the contrary, every point at which the supervisory powers are refined is met by a parallel—even counter—argument for the right of a child to receive information, to “access” knowledge, and to learn.

In *Meyer*, the state’s power “to improve the quality of its citizens . . .”¹¹⁷ is subordinated to the “opportunities of pupils to acquire knowledge. . . .”¹¹⁸ The holding in *Pierce*, that states *can* regulate the education of children, is limited by the fact that the state cannot standardize its children “by forcing them to accept instruction from public teachers only.”¹¹⁹

Two sub-issues arise out of this antithesis: First, whether listening to music qualifies as a constitutional access of knowledge; and second, whether music is a field which the state can legitimately supervise.

112. “[T]he family itself is not beyond regulation in the public interest . . .” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (plaintiff was barred from selling/distributing religious pamphlets on basis of state regulation, in spite of freedom of religion claim).

113. *Id.* at 166 (footnotes omitted).

114. 390 U.S. 629 (1968).

115. The materials sold in *Ginsberg* would not have been obscene by adult standards. *Id.* at 634.

116. “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Prince*, 321 U.S. at 166.

117. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

118. *Id.*

119. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

A. *Whether Music is "Information"*

The right to access information has been applied to a wide range of situations,¹²⁰ such as information broadcast over radio and television waves.¹²¹ There is equally a right to receive foreign political information without federal intervention.¹²² Prisoners have the right to receive uncensored mail.¹²³ The politician's right to canvass is derived from his constituents' right to be informed,¹²⁴ just as a newspaper reporter's right to access trials is founded upon his reader's right to receive information.¹²⁵ Commercial enterprises may advertise their views on political and social issues partly because their customers, and the public in general, have a right to such information.¹²⁶

120. The right to access knowledge is not based on the value of that knowledge. *See, e.g., Stanley v. Georgia*, 394 U.S. 557 (1969) (right extends to acquisition of obscene material). In *Stanley*, appellant was arrested for possession of obscene matter. The state court held that the charge of possession alone was sufficient; the defendant need not have planned to sell, expose, or circulate the material. Appellant asserted the right to read what he chose, or as the Court put it, "[h]e is asserting the right to be free from state inquiry into the contents of his library . . ." *Id.* at 565. The Court held that the right to receive information is fundamental to a free society, and that it is irrelevant "that obscene materials in general, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw . . ." *Id.* at 566. However, such an uninhibited right of access is granted only to adults, not children.

121. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (stating that "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment").

122. *See Lamont v. Postmaster General*, 381 U.S. 301 (1965) (where a federal provision requiring the Post Office to hold foreign mail consisting of communist political propaganda until the addressee requested delivery was an unlawful inhibition on the free flow of ideas). *But see Kleindienst v. Mandel*, 408 U.S. 753 (1972) (Belgium journalist denied visa to the United States to lecture on communism because on a prior visit he had acted outside of the permitted purpose of the visit).

123. *See Bell v. Wolfish*, 441 U.S. 520 (1979).

124. *Hynes v. Borough of Oradell*, 425 U.S. 610 (1976).

125. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). *But see Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (where newsmen were unable to compel state to permit access to prison inmates and jail facility for purpose of photographing and interviewing); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (although there is a right to receive information, first amendment does not allow a newsman to keep sources confidential when questioned by a grand jury).

126. *See, e.g., Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530 (1980) (utility company permitted to include information on political and social issues in billing inserts because of customers' right to receive information); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (corporations permitted to advertise views on political subjects which materially affect their business or property, as long as the speaker is identified); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1975) (pharmacies allowed to advertise prescription drug prices because of the right of consumers to be informed as to the value of the product).

The right to access information “is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”¹²⁷ Given this reasoning and the applications above, it seems evident that music must also be constitutionally accessible. Music, like any news report, any scholastic text, or any political treatise, is merely one medium among many in which information is transmitted. At a higher level, music is art; it embodies and delivers ideas, philosophies, and emotions. Thus, it is not logical to limit access to music without imposing similar limits on the various other modes of communication.

B. Music and the State Power of Supervision

In most situations, the right to receive information takes precedence over state authority to supervise education.¹²⁸ Even in formal public education, states have limited power to regulate. The state can design public school curricula, but it cannot prohibit instructors from teaching Darwin’s theory of evolution.¹²⁹ School boards may control library content, but may not remove texts indiscriminately.¹³⁰ While public universities can deny funds for student newspapers, they cannot arbitrarily censor those which are funded.¹³¹ Finally, although local boards of education fund subscriptions to periodicals they choose, they cannot cancel those subscriptions when magazines are found to contain advertisements for contraceptives and pro-communist newspapers.¹³² Thus, not only is the state’s supervisory power limited to the education field, it is also carefully monitored even in that area.

The most significant case in this area is *Board of Education v. Pico*.¹³³ In this case, the plaintiffs sued to enjoin a local school board from removing selected books from the school library. The plurality decision concluded that the removal was unconstitutional because it was motivated by the personal, political, and social beliefs of the school board. However, the Court warned that “[t]his would be a very different case if the record demonstrated that petitioners had

127. *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (emphasis in original).

128. There are a few exceptions. See, e.g., *Procunier v. Martinez*, 416 U.S. 396 (1974) (prisoners’ right to receive information not greater than the safety interest in opening packages prior to delivery); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (interest in excluding undesirable aliens is more compelling than the right of students to hear a foreign lecturer); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (prohibition of publication of government classified information).

129. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

130. *Board of Educ. v. Pico*, 457 U.S. 853 (1982); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

131. *ACLU of Virginia v. Radford College*, 315 F. Supp. 893 (W.D. Va. 1970).

132. *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D. N.H. 1979).

133. 457 U.S. 853 (1982) (plurality opinion).

employed established, regular, and facially unbiased procedures for the review of controversial materials."¹³⁴

It is significant that this case involved library books rather than textbooks. Because students are *required* to read texts which are part of a curriculum, a school board generally retains stricter control over selection of texts, than over selection of library content. Furthermore, the Court addressed only *removal* of books from libraries, thus avoiding the question of initial selection and reordering.

Despite its dicta,¹³⁵ the Court's approach to this area of the law is still uncertain and unpredictable. Among the many varied opinions of the Court is a plurality opinion full of caveats and qualifications, two concurrences, and four dissents. The plurality opinion was written by Justice Brennan, and joined by Justices Marshall, Stevens, and Blackmun.¹³⁶ It was met by a vigorous dissent written by Chief Justice Burger, joined by Justices Powell, Rehnquist and O'Connor. The Chief Justice essentially argued that the states' supervisory powers are *exclusive*: "I categorically reject this notion that the Constitution dictates that judges, rather than parents, teachers, and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom."¹³⁷ He further argued that, should the plurality decision become law, the federal court system would be forced to act as a super censor.¹³⁸ Finally, he pointed out that the state was not required to promote affirmatively the right to receive information, but was required only to "protect" this right.¹³⁹

Regulation, classification, or censorship of popular music cannot be based upon the state interest in supervising and promoting the morals and welfare of its minor citizens. This interest is principally fulfilled through formal, public education. It is a limited, but important, arena of state influence. Even in the public school context, the supervisory power of the state is not unfettered by the child's first-amendment right to receive information.

134. *Id.* at 874.

135. "[T]he States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the first amendment." *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982).

136. Blackmun joined the opinion only in part.

137. *Pico*, 457 U.S. at 893 (Burger, C.J., dissenting).

138. *Id.* at 890 (Burger, C.J., dissenting).

139. *Id.* at 888 (Burger, C.J., dissenting).

C. *Time, Place, or Manner Regulation*

The state may control speech which takes place in a public forum by regulating the time, place, or manner in which the activity is conducted. For such limited restrictions to be valid, they must be reasonable and implemented without regard to the content of the speech. These limits on the power of the state exist to prevent restrictions of content being disguised as regulations on the manner in which the speech is made.¹⁴⁰ The United States Supreme Court has held that

a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹⁴¹

This rule has been developed into a three-step analysis under which time, place, or manner restrictions will be upheld so long as they are 1) content neutral; 2) narrowly defined to address a significant governmental interest; and 3) leave open ample alternative means of communication.¹⁴²

In applying this to test the validity of a state regulation, there are two analytical steps. Initially, it must be determined if the regulation of the manner of speech is actually an attempt to control or suppress the content of the message. Such a regulation will not be upheld unless the reviewing court determines that content falls within a category of speech which is unprotected by the first amendment.¹⁴³

Assuming that the regulation is not designed to restrict content, it must then be determined if the regulation is the least restrictive means of promoting a significant governmental interest. This is a balancing test which weighs the stringency of the time, place, or manner regulation against the significance of the state interest involved. However, leaving open an alternative means for communication of the speech weighs heavily in deciding the permissibility of the regulation.¹⁴⁴

Two methods can be suggested in which recorded music can be regulated through time, place, or manner restrictions. First, the place recorded music is delivered can be controlled, if indeed the delivery takes place in a public forum. Second, the state can regulate certain

140. See *Madison School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 (1976); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 92-94 (1977).

141. *United States v. O'Brien*, 391 U.S. 367, 377, *reh'g denied*, 393 U.S. 900 (1968).

142. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

143. See *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984). See also *supra* notes 22-33 and 87-89 and accompanying text.

144. *Regan*, 468 U.S. at 648.

music in order to protect classes of individuals who claim a right to avoid hearing the message.

1. Regulation based upon the type of forum

The Supreme Court has recognized that there are at least three types of public forums. Each type can be subject to varying degrees of state control because of the nature of the forum.

The government is most restricted in the regulations it can impose in places which have traditionally been used for purposes of assembly and communication of public issues. Parks and streets are prime examples of this. Enforcement of content-based regulations must be pursuant to a compelling state interest and, furthermore, must be narrowly drawn to meet that purpose.¹⁴⁵ Enforcement of content-neutral regulations in the traditional public forum must be narrowly tailored to fit significant governmental interests, and must additionally leave open ample alternative channels of communication.¹⁴⁶

The second type of public forum is an area which the state has opened to the public as a place of expressive activity. In *Widmar v. Vincent*,¹⁴⁷ a state university was prohibited from disallowing access to certain facilities by religious groups. Having made these facilities available to campus organizations in general, the university could not arbitrarily deny access to other groups.¹⁴⁸ The Court ruled that the state could reasonably regulate the use of the facility, but that no valid reasons had been offered to justify the exclusion of the religious group.¹⁴⁹

The third category of public forum is public property which is neither a traditional place for public communication nor was it opened by the state for expressive purposes.¹⁵⁰ The Supreme Court recognized this distinction in the following statement: "We have recognized that the 'First Amendment does not guarantee access to property simply because it is owned or controlled by the govern-

145. *Perry*, 460 U.S. at 46.

146. *Id.*

147. 454 U.S. 263 (1981).

148. *Id.* at 273.

149. *Id.* at 276-77. The university argued that its compelling reason for denying the religious group use of the facility was to prevent a violation of the establishment clause. The Court ruled that permitting a religious group to use a facility open to all groups would not have the primary effect of promoting religion. *Id.* at 275.

150. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

ment.’ ”¹⁵¹ The standard for the validity of regulations in this type of forum is as follows: “[i]n addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”¹⁵²

Applying these tests to regulation of music is problematic. Although the first category of public forum is fairly well defined, the others are not. No clear test has been offered to distinguish between a forum created for expressive activity and general public property.¹⁵³ Most rock music is played in places other than traditional public forums, although occasionally a concert will take place in a public park. Nonetheless, time, place, or manner restrictions are well suited for live concerts and radio and television broadcasts.

Recorded music, on the other hand, is not played in a public forum at all, but is bought and sold privately. Unless the stream of commerce is considered a public forum, these transactions do not fall into any of the established categories of regulation.

2. Protecting unwilling recipients

Another class of time, place, or manner regulations are those which protect individuals who claim a right to avoid hearing a message they consider offensive. In *Public Utilities Commission v. Pollak*,¹⁵⁴ a city-regulated bus company was engaged in the practice of broadcasting radio programming, including music, news, and commercials, on buses and street cars in return for compensation. The respondent argued that the passengers should not be required to listen to the broadcasts merely because they were disposed to ride public transportation. A majority of the Court found no constitutional infirmity with the practice.¹⁵⁵ Nonetheless, it was ruled that the state was free to regulate in this area and could protect those passengers who did not wish to listen to commercial broadcasts, if the state so desired.¹⁵⁶

151. *Id.* (quoting *United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981)).

152. *Id.*

153. The *Perry* opinion noted that the parties agreed that the school mail system in question was not a traditional public forum. However, the Court ruled that the internal mail system was not even a limited public forum, since there was no evidence that the state had intended the system to be open to even a limited public use. *Id.* at 46-47. It is possible, therefore, that the finding of a public forum will depend primarily upon the intent of the state when it assigned a use to the public property.

154. 343 U.S. 451 (1952).

155. *Id.* at 465.

156. *Id.*

In *Rowan v. Post Office Department*,¹⁵⁷ the Court was faced with a case in which the government did choose to protect the unwilling recipient. A statute provided that any addressee may demand that he not receive any future mailings from a particular sender. This regulation was upheld as the Court ruled that there is no constitutional right to mail unwanted materials into a private home.¹⁵⁸

Application of this basis for regulation to the music context is not an easy step. The normal purchase of recorded music is done voluntarily, so there is no threat to those who claim a right to not hear the message. This does, however, provide a basis for regulating mail-order clubs, radio and television broadcasts, and perhaps street musicians.

VI. CONCLUSION

CBS Records has recently agreed to adopt an option plan. It will either rate albums, or print the lyrics on the back of the album covers. At first glance, this solution may seem ideal. The problems of practical impossibility mentioned by RIAA President Gortikov have, as expected, disappeared. However, the problem is not resolved when those bands which write about human excrement and bestiality, for the most part, do not sign with CBS Records. At best, this agreement may cause self-censorship of artists who include sexual ambiguity and innuendo in their work; such devices are not obscene under constitutional standards.

A self-regulatory system by major companies is neither uniform nor effective. Without substantial compliance by the many neighborhood-level producers, with whom garage bands like The Mentors traditionally work, regulation is meaningless. The obvious means of avoiding feasibility problems is to pass legislation. Yet, while legislation is a solution, the complexities and difficulties discussed in this comment suggest that this would impose a heavy burden on the regulators. Perhaps the best solution is the one currently being pursued: exhaust feasible, non-legislative alternatives, then consider the legislative possibilities. Finally, as Zappa suggested, reevaluate the potential of effective parental supervision.

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157. 397 U.S. 728 (1970).

158. *Id.* at 738.

