SONG LYRIC ADVISORIES: THE SOUND OF CENSORSHIP

I. INTRODUCTION

Great controversy surrounds allegedly sexually explicit, violent, and profane lyrics in rock-and-roll music,[1] which are offensive or objectionable to certain vocal segments of the American public.[2] The recording industry has been blamed for causing morally or socially unacceptable behavior, thereby placing it in an uncomfortably defensive position. This explicit lyric controversy fails to present an issue of first impression for music has always been criticized.[3] Hence, the furor can be characterized as another attempt to regulate lyric content which may indirectly censor rock music.[4]

In response to mounting pressure from a number of paren-

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[1] The term "rock music" is used throughout this Note as a catchall phrase encompassing all forms of popular contemporary music, including "disco" ("popular dance music characterized by hypnotic rhythm, repetitive lyrics, and electronically produced sounds[,]" WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 360 (1985)), and "new wave" ("rock music characterized by cohesive ensemble playing and usu[ally] lyrics which express anger and social discontent[,]" *id.* at 797).

[2] *See, e.g.*, Koppel, *Porn Rock*, ABC News Nightline Transcript, Sept. 13, 1985.

[3] Horowitz, *Classical Keeping Score*, Billboard, Sept. 28, 1985, at 42, col. 3.

[4] Palmer, *Early Blues Lyrics Were Often Blue*, N.Y. Times, Nov. 7, 1985, at C33, col. 4. As far back as the 1920's, parents and the clergy assailed the "seductive, destructive power" of jazz and blues music. Hentoff, *Pasting Pink Slips on Album Covers*, Newsday, Aug. 28, 1985, at 57, col. 2. "But it was the arrival of rock 'n' roll 30 years ago, raw powerful music for black adults that was adopted by white teenagers, that really focused outraged [sic]." Koppel, *supra* note 2, at 3. During the 1950's, citizens and representatives from the entertainment industry expressed concern regarding the psychological effects of rock music on listeners. I. STAMBLER, ENCYCLOPEDIA OF POP, ROCK AND SOUL 12 (1974). Since its inception, rock music was associated with controversial and disturbing subjects. One of the first major rock compositions, Bill Haley's *Rock Around the Clock* was used as the theme song for a movie about juvenile delinquency. "This association, rock and rebellion, was to stick to the music for quite some time. In addition to being damned for causing delinquency, rock's open sexuality also petrified most parents." I. STAMBLER, *supra*, at 7.

Accordingly, the 1950's were highlighted by attempts at censorship. "Rhythm and Blues" recordings containing sexual references were rarely broadcast. C. BELZ, THE STORY OF ROCK 57-58 (2d ed. 1972) (citing Simon, *Term R & B Hardly Covers Multi-Material So Grouped*, Billboard, Feb. 4, 1956, at 55, col. 3). Attacks were also lodged against "pop" songs for their sexually suggestive lyrics. C. BELZ, *supra*, at 58. Rock music during this period additionally was considered satanic. Hentoff, *supra*, at 57, col. 2. And, in the 1960's and 1970's, rock music was further associated with drug abuse. *See infra* text accompanying notes 88-90. "Song lyrics emphasized the [drug] theme, often in code form to avoid censorship." I. STAMBLER, *supra*, at 12.

Although artists attempted to thwart the effects of censorship, expurgation was forced upon certain songs. In response to racial implications, the song, *Carry Me Back To Old Virginia*, had to be rewritten before its radio broadcast could be sanctioned. C. BELZ, *supra*, at 58. Likewise, the Rolling Stones' hit song, *Let's Spend the Night Together*, was

tal organizations,[5] the Recording Industry Association of America, Inc. ("RIAA") agreed, in November 1985, to either affix warning labels to, or print lyrics on, record albums containing explicit or suggestive lyrics.[6] This agreement, in addition to other regulatory proposals[7] advanced, has been the subject of extensive debate.[8]

Advocates of industry self-regulation have contended that regulation has merit when examined from a child-protection standpoint.[9] Their moral beliefs, coupled with assertions regarding the exaggerated effects of rock music on contemporary youth,[10] have created warranted fear of censorship throughout

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edited prior to its performance over national television. Cieply, *Records May Soon Carry Warnings That Lyrics Are Morally Hazardous*, Wall St. J., July 31, 1985, at 21, col. 3.

For a good discussion of rock 'n' roll history, see generally J. MILLER, THE ROLLING STONE ILLUSTRATED HISTORY OF ROCK & ROLL (1980).

5 The National Parent Teachers Association ("NPTA") and the Parents' Music Resource Center ("PMRC") are the principal parental organizations responsible for initiating and supporting the explicit lyric controversy.

6 Wharton, *RIAA, PMRC Reach Accord On Record Lyrics; Labels Agree to Use Stickers or Print Words*, Variety, Nov. 6, 1985, at 85, col. 5. The printed warning label reading "Explicit Lyrics—Parental Advisory" will be in a ruled box on the back cover of albums deemed offensive. *Id.*; *see also infra* text accompanying notes 54-57. Instead of placing advisories on albums, under the agreement, complying RIAA members have the option either of printing lyrics on the backs of album covers or placing printed lyric sheets under the plastic covers of albums. Wharton, *supra*, at 85, col. 5; *see also* NPTA Press Release, Nov. 1, 1985, at 1 (available from NPTA).

Cassettes and compact discs deemed to be potentially offensive either will carry the warning label or an inscription advising consumers to examine the album when appropriate. Wharton, *supra*, at 85, col. 5; NPTA, Press Release 1 (Nov. 1, 1985); *see also infra* text accompanying note 57.

7 *See infra* text accompanying notes 28-32.

8 In addition to the extensive coverage awarded to the controversy by the conventional press (*e.g.*, Pareles, *Debate Spurs Hearings On Rating Rock Lyrics*, N.Y. Times, Sept. 18, 1985, at C21, col. 1) and various trade publications (*e.g.*, Terry, *RIAA Rejects PMRC's Demand for A Panel on 'Explicit' Lyrics*, Variety, Aug. 21, 1985, at 123, col. 6; Sutherland, *Trade Reacts to Lyric Agreement*, Billboard, Nov. 16, 1985, at 1, col. 1), the controversy received cover story coverage in the popular press (*e.g.*, Wolmuth, *Parents Vs. Rock*, PEOPLE, Sept. 16, 1985 at 46; Love, *Furor Over Rock Lyrics Intensifies*, ROLLING STONE, Sept. 12, 1985, at 13).

9 One commentator has gone so far as to label the issue as "[c]ensorship in the guise of consumer protection." Krauthammer, *X Ratings for Rock?*, Wash. Times, Sept. 20, 1985, at A27, col. 1; *see also* Dolan, *'Porn Rock' Hearing Hot Ticket in D.C.; Zappa Lashes PMRC*, Variety, Sept. 18, 1985, at 73, col. 1.

10 It has been asserted that rock music effects increases in teenage pregnancies and suicides. "Young people feeling inadequate can have an instant sense of power from the music and identification [sic] closely with the lyrics . . . . Adolescents with emotional and/or drug problems . . . become further involved in delinquent behavior, violence, acts of cruelty and Satan worship. The glamorization of violence, sex, and drugs leads to further problems with directing young people's attitudes." *Record Labeling: Hearing Before the Senate Committee on Commerce, Science, and Transportation*, 99th Cong., 2d Sess. 172 (1985) (statement of Dr. Paul King, child psychiatrist) [hereinafter cited as *Senate Hearing Transcript*].

According to the *Noedecker Report*, the United States has the highest teenage pregnancy rate (96 out of 1,000 teenage girls become pregnant) among the developed countries. Furthermore, the latest statistics show that rape is up 7% and suicide rates for the

the industry's artistic and business communities. Although it is alleged that neither censorship of, nor legislation concerning, explicit lyrics is the desired outcome, this Note will argue that the present RIAA agreement will effectively result in censorship. This agreement and any other proposals, if instituted, will unquestionably infringe upon recording artists' creative freedoms, because artists may be forced to temper their lyrical compositions to avoid an undesired warning label.[11] The first amendment prohibits encroachment upon artists' freedom of expression in order to suppress the production and distribution of potentially offensive music.[12] Furthermore, the agreement may produce economic losses for the industry as a whole.[13] These prospective impediments will naturally translate into industry-wide censorship.

After tracing the history of the recent controversy, this Note will analyze the proposals and subsequent agreement. In lieu of the RIAA labeling accord, recommendations for a more effective solution to the controversy will be offered. To discuss industry regulation in the absence of applicable case law, analogies will be

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16 to 24 year-old population has risen by 300% in the last 30 years, while statistics for the adult population have remained constant. *Id.* at 18 (statement of Susan Baker citing the *Noedecker Report*).

However, these isolated statistics do not advance the PMRC's cause. The PMRC has failed to exhibit a correlation between the rise in the reported incidents and youth listening to rock music. Further, the PMRC has not proven that listening to music with explicit lyrics leads to antisocial, aggressive behavior by children or teenagers. This absence of a cause and effect relationship evokes Justice Douglas' dissent in *Roth v. United States:* "[t]he absence of dependable information on the effect of obscene literature on human conduct should make us wary. *It should put us on the side of protecting society's* interest in literature . . . ." Turney, *The Road to Respectability: A Woman of Pleasure and Competing Conceptions of the First Amendment,* 5 U. DAYTON L. REV. 271, 292 (1980), *quoting Roth v. United States,* 354 U.S. 476, 511 (1957) (emphasis added). Various stimuli and sociological factors, not proximately related to the music, could be jointly or severally responsible for the statistics cited by the PMRC. Furthermore, there appears to be no empirically accurate method available by which data can be collected in support of the PMRC's implicit claim as to a cause and effect relationship between the offensive music and the statistical increases. The Senate hearing itself also does not contain any other statistically valid evidence.

Nonetheless, rock musician Ozzy Osbourne is presently being sued for indirectly causing the death of a teenager who shot himself in the head on October 27, 1984 while listening to Osbourne's music. *Osbourne song blamed in teen's suicide,* Newsday, Jan. 14, 1986, at 9, col. 1. Similarly, one witness at the Charles Manson trial in October 1970 speculated that certain Beatles' music caused Manson to commit multiple murders. Waldron, *A Manson Motive Is Heard At Trial,* N.Y. Times, Oct. 18, 1970, § 1, at 61, col. 1.

11 *But see infra* text accompanying notes 169-81.

12 The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. The fourteenth amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." *Id.* amend. XIV, § 1.

13 *See infra* text accompanying notes 77-78.

drawn to the movement to expurgate drug references from rock lyrics, the motion picture rating system, offensive radio broadcasting, and television airing requirements.

Furthermore, since the controversy essentially presents a social benefit versus a social cost debate, extensive industry regulation will arguably result in severe social costs. Therefore, this Note will argue that parents cannot transfer total responsibility to the industry. Concerned parents, and not the industry, must make responsible and concentrated efforts to monitor and regulate their children's musical listening and purchasing habits.[14]

II. THE EXPLICIT LYRIC CONTROVERSY

A. *Background*

1. The Regulatory Proposals

The initial efforts to achieve industry regulation occurred in October 1984, when the National Parent Teachers Association[15] requested that all record companies undertake to voluntarily label recordings to inform consumers of the potentially objectionable lyrics contained therein.[16] In order to facilitate this goal, the NPTA suggested that a panel of consumers and industry representatives be organized by record companies, on an individual or collective basis, to formulate guidelines regarding what language might be deemed offensive.[17] Denying that censorship[18] was desired, the NPTA asserted that record labeling was requested solely for child-protection.[19] Despite its continued requests, the NPTA was unsuccessful in achieving industry compliance.

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[14] Industry assistance may be available to identify those recordings which may be of concern to parents. *See infra* text accompanying notes 65-74.

Although a small and vocal minority claim that regulation of music alone will inculcate more positive values in impressionable children, these so-called benefits have yet to be obversely demonstrated regarding the negative impact of rock music on the same age group. *See supra* note 10.

[15] *See supra* note 5. The NPTA, which was founded in 1897, "is the nation's largest child advocacy association [with] 5.4 million members . . . from every state, the District of Columbia and Department of Defense Schools overseas." Letter from NPTA to Record Companies (Oct. 10, 1984) (available from NPTA).

[16] NPTA, Press Release 1 (Oct. 15, 1984) (available from NPTA).

[17] Letter from NPTA to Record Companies (Oct. 10, 1984). Accompanying the letter was a resolution passed by NPTA's voting delegates at its June 1984 convention entitled "A Rating System for Records, Tapes, and Cassettes." In short, this resolution reminded record companies of their collective responsibility to the public to rate and label recordings containing explicit lyrics. *See* NPTA, Press Release 1 (Oct. 15, 1984).

[18] Censorship has been defined as the "[r]eview of publications, movies, plays, and the like for the purpose of *prohibiting* the publication, distribution, or production of material deemed objectionable as obscene, indecent, or immoral." BLACK'S LAW DICTIONARY 203 (5th ed. 1979) (emphasis added).

[19] *See* Letter from NPTA to Record Companies (Oct. 10, 1985).

Although the NPTA is credited with instigating the present controversy, the Parents' Music Resource Center has essentially replaced the former organization as the movement's sponsor and principal lobbyist.[20] The PMRC was established by, and is comprised of, the wives of prominent congressmen and Reagan administration officials[21] in response to the escalated incorporation of violent and sexually explicit lyrics in rock music.[22] Its membership is averse to the broadcast and sale of such music to which impressionable children might be exposed. Accordingly, the PMRC's "purpose is to promote ethical boundaries in rock music, [to] provide and disseminate information on rock culture and to refer parents to sources of help."[23] Alleging that it was neither advocating censorship nor federal legislation, the PMRC initially requested the industry appointment of a panel charged with the responsibility of establishing uniform guidelines for album rating and labeling. According to the proposal, individual record companies would be expected to label their recordings in adherence to the panel's determination as to what language constitutes blatantly explicit lyrics.[24] In support of this policy, the PMRC argued that the absence of uniform industry standards would create consumer confusion instead of fostering consumer

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[20] *See supra* note 5. Although the NPTA and the PMRC are distinct and separate organizations working toward identical goals, both have cooperated on various matters. For example, in September 1985, both organizations aligned to urge the industry to provide lyrics to all songs and to adopt an "R"-rated warning label for all categories of explicit lyrics. NPTA, Press Release 1 (Sept. 11, 1985) (available from NPTA).

[21] The PMRC, based in Washington, D.C., began pressuring the RIAA in May 1985. PRMC, Press Release (May 13, 1985) (available from PMRC). The executive core of the organization, as of Feb. 5, 1986, is President Pam Howar (wife of Washington real estate developer Raymond Howar), First Vice President Susan Baker (wife of Treasury Secretary James A. Baker), Second Vice President Mary Elizabeth "Tipper" Gore (wife of Senator Albert Gore, Jr.), Treasurer Sally Nevius (wife of Former D.C. Council Chairman John Nevius), and Executive Director Sis Levin (wife of former Beirut hostage, Jerry Levin). Telephone interview with Carey Lansing, PMRC Office Manager (Feb. 5, 1986). Wives of ten senators and six representatives comprise the remainder of the membership. *Recording Group Tells of New Steps on Lyrics*, N.Y. Times, Nov. 2, 1985, at 14, col. 3 [hereinafter cited as *Recording Group*]. Because of the PMRC's political connections, the organization has been referred to in the press as the "Washington Wives." *See, e.g.*, Cieply, *supra* note 4, at 21, col. 3; Gergen, *X-Rated Records*, U.S. NEWS & WORLD REPORT, May 20, 1985, at 98.

[22] Letter from PMRC to Record Company Executives 1 (July 11, 1985) (available from PMRC).

[23] PMRC, Press Release (May 13, 1985) (available from PMRC).

[24] PMRC, Press Release 1 (Aug. 8, 1985) (available from PMRC). This request was communicated in a letter to RIAA President Stanley M. Gortikov. Other letters, outlining the PMRC's concerns, were addressed to various record company executives: "[w]e believe that it is socially irresponsible for an industry to allow these excesses to continue to exist. We cannot believe that the music industry would callously disregard the effect that this material is having on our nation's children and on our society." Letter from PMRC to Record Co. Executives 3 (July 11, 1985) (available from PMRC).

assistance.[25]

Despite the legitimate concerns expressed by both organizations, the creation of such a panel is neither feasible nor the industry's responsibility.[26] Accedence to the proposal may be equivalent to an explicit encouragement of industry censorship.[27]

In addition to the industry panel, the following comprise the PMRC's original proposals:

(1) placing warning labels on albums with explicit lyrics;[28]
(2) establishing a rating system for albums similar to the system instituted by the Motion Picture Association of America;[29]
(3) printing song lyrics on album covers;
(4) providing retail stores with lyric sheets for employee and parental review and information;
(5) furnishing radio stations with lyric sheets to all songs;
(6) storing albums with graphically explicit covers behind the front counters of record stores or enclosing them within opaque wrappers;
(7) banning "backward masking"—the concealing of messages which can only be heard by playing an album in reverse;[30]
(8) reassessing on the part of record companies of " 'contracting artists who engage in violence, substance abuse and/or explicit sexual behavior in concerts where minors are admitted [in addition to rating concerts] according to lyrics and on-stage performance;' "[31]

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25 PMRC, Press Release 1 (Aug. 8, 1985).

26 Letter from RIAA to PMRC 1 (Aug. 13, 1985) (available from RIAA).

> In order to identify 'blatant explicit lyric content,' companies need no such guidelines . . . . 'Explicit' is 'explicit', and no star panel is going to be able to make endless laundry lists of unacceptable words . . . . [T]he music industry refuses to take the first step toward a censorship mode to create a master bank of 'good/bad' words or phrases or thoughts or concepts.

Id.; *see also* Terry, *supra* note 8, at 123, col. 6.

27 *See supra* text accompanying notes 11-13.

28 One possible generic label proposed by the RIAA read "PARENTAL GUIDANCE: Explicit Lyrics." Letter from RIAA to PMRC 9 (Aug. 5, 1985) (available from RIAA).

29 A rating of "X" was requested for "profanity, violence, suicide, or sexually explicit lyrics, including fornication, sado-masochism, incest, homosexuality, bestiality and necrophilia." "D/A" was requested for lyrics concerning drugs and alcohol, "O" for lyrics concerning the occult, and "V" for lyrics concerning violence. *Id.* at 8. The PMRC and the NPTA later amended the rating requests to a single "R" rating which would encompass all categories of explicit lyrics. NPTA, Press Release 1 (Sept. 11, 1985); *see infra* text accompanying notes 125-29.

30 For proposals 3-7, *supra*, see Stuart, *Mothers Rally to Rate Rock*, Newsday, Aug. 28, 1985, at II/ 4, col. 1; *see also* Letter from RIAA to PMRC 5-7 (Aug. 5, 1985).

31 Letter from RIAA to PMRC 6 (Aug. 5, 1985).

(9) rating music videos according to lyrics and performances.[32]

2. The Senate Hearing

In response to increasing pressure from the PMRC, and possibly due to the organization's political connections,[33] the Senate Committee on Commerce, Science, and Transportation, on September 19, 1985, sponsored a hearing on the record labeling controversy. Members of this committee[34] repeatedly stated that the purpose for the hearing was neither to promote legislation,[35] nor to attack the first amendment.[36] Rather, their intent merely was to provide a forum in which the controversy could be discussed.[37] Although legislation was not proposed, the respective testimonies of the participating senators exhibited the committee's alignment with the PMRC and its concerns.

During the hearing, PMRC officials conceded that the organization was neither promoting nor requesting federal legislation,[38] and that its proposals would not require any degree of governmental involvement.[39] Additionally, the PMRC claimed its proposals recommending voluntary labeling would neither result in censorship, nor infringe upon first amendment rights of recording artists.[40] In an attempt to lend support to its position, the PMRC drew a correlation between labeling and the truth in

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32 *Id.* at 7.

33 Some journalists have alleged that the Senate would never have sponsored the hearing, but for the fact that the wives of key Committee members were PMRC executives or members. *See, e.g.*, Zucchino, *Big Brother Meets Twisted Sister*, ROLLING STONE, Nov. 7, 1985, at 9.

34 Among the Members of the Senate Committee on Commerce, Science, and Transportation ("Senate Commerce Committee") are the following key Senators: Chairman John C. Danforth (R-Miss.), Slade Gorton (R-Wash.), Larry Pressler (R-Va.), Ernest F. Hollings (D-S.C.), Russell B. Long (D-La.), Donald W. Riegle, Jr. (D-Mich.), J. James Exon (D-Neb.), Albert Gore, Jr. (D-Tenn.), and John D. Rockefeller IV (D-W. Va.). The wives of five senators who sit on the Committee are PMRC members.

35 *Senate Hearing Transcript, supra* note 10, at 2 (statement of Sen. Danforth). Despite the fact that federal legislation would not be promulgated, explicit lyric opponents were optimistic that the hearing would foster industry self-regulation. Effron, *Battle over rock lyrics touches on some sensitive issues*, Chicago Daily L. Bull., Sept. 25, 1985, at 1, col. 2. However, according to a spokesman for the American Civil Liberties Union, "[t]he message is: change the content or labeling, or face federal action." Effron, *supra*, at 1, col. 2.

36 *Senate Hearing Transcript, supra* note 10, at 8 (statement of Sen. Trible).

37 *Id.* at 2 (statement of Sen. Danforth).

38 "We do not want legislation to remedy this problem. The problem is one that developed in the marketplace. The music industry has allowed . . . excesses . . . and we believe the music industry is the entity to address those excesses. We would like them to do this voluntarily." *Id.* at 43-44 (statement of Tipper Gore).

39 *Id.* at 21 (statement of Tipper Gore).

40 *Id.*

packaging principle, stating that "without labeling, parental guidance is virtually impossible."[41]

RIAA President Stanley M. Gortikov was adamantly opposed to the PMRC's arguments and countered them by discussing the impracticability attendant to each major proposal.[42] Although the RIAA agreed to the record labeling proposal, it refused to accede to the PMRC's recommendations for a rating system.[43] And, while attacking the PMRC's proposals, Gortikov offered explanations regarding the basic inequities inherent in each of the proposals:

(1) although the number of potentially offensive recordings is far outweighed by the total number of releases, the PMRC's complaints communicate the idea that *all* artists are "guilty" of composing music with objectionable lyrics;
(2) most "lyrics reflect either pure entertainment or socially positive attitudes and practices;"[44]
(3) rock music was singled out by the PMRC as the sole form of expression imposing negative effects upon children, while, *inter alia*, movies, prime time television, and magazine advertisements remained unscrutinized;
(4) the activities alluded to in rock music, to which the PMRC objects, actually exist in life and are merely mirrored by art; and
(5) the rights of adults and recording artists to enjoy and produce music should not be relegated to a status secondary to those of parents and their young children.[45]

Also testifying in opposition were recording artists, such as Frank Zappa,[46] who stated that the PMRC's proposals, including the rating system, would lead "to an endless parade of moral quality control programs."[47]

Although legislation was not formally proposed, Senator Ernest Hollings suggested enacting regulations or legislation, if constitutionally permissible, in the absence of effective industry self-regula-

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41 *Id.*
42 *See generally id.* at 136-42 (statement of Stanley Gortikov).
43 *Id.* at 138 (statement of Stanley Gortikov).
44 *Id.* at 140 (statement of Stanley Gortikov).
45 *Id.* at 139-41 (statement of Stanley Gortikov).
46 Dee Snider of the heavy metal rock group Twisted Sister and country music artist John Denver also testified on behalf of the industry. *Id.* at 75, 95.
47 *Id.* at 55. Zappa stated that "[t]he PMRC proposal is an ill-conceived piece of nonsense which fails to deliver any real benefits to children, infringes the civil liberties of people who are not children, and promises to keep the courts busy for years dealing with the interpretational and enforcemental problems inherent in the proposal's design." *Id.* at 52.

tion.[48] Following the hearing, Hollings entertained the possibility of sponsoring a bill requiring the printing of song lyrics on album covers.[49] A spokesperson for Hollings stated that upon the adoption of industry regulations, Hollings " 'would probably lose interest' " in the proposed bill.[50] Hence, whether the RIAA's labeling accord is sufficient to render the proposed bill moot is not yet capable of determination.

B. *The Recording Industry's Response*

The first major advance toward industry self-regulation occurred on November 1, 1985, when the RIAA reached an agreement with the PMRC and the NPTA to provide information regarding lyric content for concerned consumers.[51] This agreement was the product of months of negotiation "between the groups to balance First Amendment protections [of free expression] with parents' desires to make the companies, distributors and customers more aware of objections to certain kinds of lyrics."[52] Participating RIAA companies[53] have the option of complying with the accord by adopting one of two alternatives. After deciding what lyrics reflect " 'explicit sex, explicit violence, or explicit substance abuse,' "[54] individual companies may label albums with a warning which reads "Explicit Lyrics—Parental

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[48] *Id.* at 72; *see also id.* at 51 (statement of Sen. Exon).

[49] Holland, *Senator Hollings Mulls 'Porn Rock' Lyric Bill,* Billboard, Nov. 2, 1985, at 6, col. 1.

[50] *Id.* at 75, col. 2. Hollings' press secretary commented that the possible promulgation of federal legislation was not obviated in light of the RIAA-PMRC labeling agreement. *Recording Group, supra* note 21, at 14, col. 3.

[51] NPTA, Press Release 1 (Nov. 1, 1985); *see also* Wharton, *supra* note 6, at 85, col. 5. The RIAA Policy Statement On Identifying Lyric Content is as follows:

> To facilitate the exercise of parental discretion on behalf of younger children, participating RIAA member recording companies will identify future releases of their recordings with lyric content relating to explicit sex, explicit violence, or explicit substance abuse. Such recordings, where contractually permissible, either will be identified with a packaging inscription that will state: "*Explicit Lyrics—Parental Advisory*" . . . *or* such recordings will display printed lyrics. This constructive policy is intended to respond sensitively to the concerns of parents of younger children and to achieve a fair balance with the essential rights and freedoms of creators, performers, and the adult purchasers of recorded music.

[52] *Recording Group, supra* note 21, at 14, col. 3.

[53] Out of RIAA's 44 member companies, 22 had accepted the accord as of Nov. 1, 1985: A&M, Arista, Atlantic, Capitol/EMI, CBS, Chrysalis, Columbia, Compleat, Crescendo, Elektra/Asylum, Epic, Manhattan, MCA, Mike Curb Prods., Motown, PolyGram, Portrait, RCA, Solar, Scotti Bros., Tabu, and Warner Bros. NPTA, Press Release 4 (Nov. 1, 1985).

RIAA's membership is responsible for more than 80% of all record sales in the country. *See Recording Group, supra* note 21, at 14, col. 3.

[54] NPTA, Press Release 1 (Nov. 1, 1985).

Advisory."[55] Instead of using this inscription, companies may choose to print lyrics on the back covers of album jackets or place lyric sheets under albums' plastic "shrink" wrappers.[56] Due to

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[55] *Id.* The advisory will be in a box on the lower quarter of albums' back covers. Wharton, *supra* note 6, at 85, col. 5. Recording artist Frank Zappa responded to the industry-wide advisory by establishing his own warning label which he places on his albums:

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.

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.

F. ZAPPA, FRANK ZAPPA MEETS THE MOTHERS OF PREVENTION (1985).

Although this is the first time the recording industry has sanctioned the use of warning labels for explicit lyric content, album advisories were used in the past where content misrepresentation would or was likely to cause public deception and confusion. Such deception is a violation of section 43(a) of the Lanham Act which provides in pertinent part:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C. § 1125(a) (1982). In CBS, Inc. v. Gusto Records, Inc., 403 F. Supp. 447, 449 (M.D. Tenn. 1974), the defendant agreed to place printed advisories on certain Charlie Rich albums to clarify the contents therein. The court concluded "that such an accurate statement of the album's contents, if affixed in a prominent location on the album jacket, would alleviate any irreparable harm which might be caused to [Rich] . . . ." 403 F. Supp. at 449. The court in CBS Inc. v. Springboard Int'l Records, 429 F. Supp. 563, 569 (S.D.N.Y. 1976), similarly ordered the defendant to affix labels to certain albums to notify consumers that the albums were not comprised of recent recordings. *See also* Rich v. RCA Corp., 390 F. Supp. 530 (S.D.N.Y. 1975). *But cf.* Benson v. Paul Winley Record Sales Corp., 452 F. Supp. 516, 518 (S.D.N.Y. 1978) ("[a]n explanatory label . . . would be inadequate . . . since both the record jackets and the labels on the records themselves contain extensive false information.").

[56] NPTA, Press Release 1 (Nov. 1, 1985); *see also* Wharton, *supra* note 6, at 85, col. 5. This type of arrangement was considered the best solution to the controversy by the Senate Commerce Committee. The alternative was formulated in response to individual record companies' opposition to the use of the advisory. *Recording Group, supra* note 21, at 14, col. 3. As a result, some opposing labels which had once ruled against the print-

limited space, cassettes and compact discs either will bear the album advisory or an inscription stating "See LP for Lyrics."[57] Consequently, because the RIAA formulated this agreement, the PMRC has not pursued its former requests for increased regulation.[58]

Although the PMRC and the NPTA have commended the RIAA for implementing the above guidelines, both organizations will attempt to pressure record companies that have refused to adopt either alternative into compliance with the accord.[59] However, those artists who have successfully negotiated contracts rewarding them with absolute control over all aspects of their recordings may refuse to comply.[60] In addition to fostering compliance, the PMRC and NPTA "indicated that they will balance their presentations by applauding positive factors within the recording industry and focusing on expanding consumer knowledge of the product identification aids provided by the industry. They will concentrate future criticisms on recordings not in compliance with agreed guidelines."[61] Finally, the three organizations agreed among themselves to further maintain nongovernmental regulation and to apprise the Senate Commerce Committee of the mutually acceptable accord.[62]

Throughout the controversy, the RIAA has essentially acquiesced in the use of warning labels while rejecting the proposed rating system. However, non-affiliated RIAA record companies, opposed to industry regulation,[63] are outside the scope of RIAA control, and the PMRC cannot impose its influence on independent companies through the RIAA. Additionally, the RIAA has repeatedly asserted its inability and lack of authority to control

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ing of controversial lyrics on album covers, Note, *Drug Lyrics, the FCC and the First Amendment,* 5 LOY. L.A.L. REV. 329, 330 n.10 (1972) [hereinafter cited as Note, *Drug Lyrics*], have agreed to comply with the RIAA accord. Wharton, *supra* note 6, at 88, col. 6.

57 NPTA, Press Release 1 (Nov. 1, 1985); *see also* Wharton, *supra* note 6, at 88, col. 6.

58 *See* Wharton, *supra* note 6, at 88, col. 6; *see also supra* text accompanying notes 28-32.

59 Wharton, *supra* note 6, at 88, col. 6.

60 *See Recording Group*, *supra* note 21, at 14, col. 3; *see also* Letter from RIAA to PMRC 4 (Aug. 5, 1985).

61 NPTA, Press Release 2 (Nov. 1, 1985).

62 *Id.*

63 Newly created anti-censorship coalitions such as the "Musical Majority" and "Citizens Against Music Censorship," are joining forces with the opposing record labels. The Musical Majority, which was formed under the auspices of the American Civil Liberties Union in September 1985, is comprised of industry representatives including artists, managers, publishers, and publicists. Schipper & DiMauro, *Agents, Managers And Artists Form Group Versus Lyric Ratings; Industry Cross-Section Involved,* Variety, Sept. 18, 1985, at 73, col. 6.

the practices of broadcasters and record merchandisers.[64]

Nonetheless, the National Association of Broadcasters ("NAB") responded to PMRC pressure by requesting that record companies affix lyric sheets to all recordings sent to broadcasters.[65] Although NAB is prohibited from censoring music that is broadcast by licensees,[66] they thought that enclosing lyrics would help broadcasters program selections tailored to their respective audiences.[67] However, such a request appears to be infeasible because rights to song lyrics are usually owned by music publishers and not by the record companies themselves.[68] Furthermore, unauthorized reproduction of lyrics is proscribed by section 102(a)(2) of the Copyright Act[69] which expressly provides for protection of "musical works, including any accompanying words."[70]

In adherence to traditional industry practices, recording artists generally assign their copyrights to music publishers[71] who receive all rights, titles, and interests connected to the copyrights; the music publishers become "copyright owners" of the assigned works.[72] However, music publishers could agree to sell their copyrights to record companies subject to artists' contractual rights.[73] Thereafter, record companies would be able to fur-

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64 Letter from RIAA to PMRC 4 (Aug. 5, 1985).

65 Wharton, *B'casters Start Blast Against Violent Lyrics*, Variety, June 5, 1985, at 1, col. 1. " 'The sheer volume of new records (and videos) made available to broadcasters . . . makes it extremely difficult for broadcast owners, managers, and program directors to be fully aware of the lyrics of all of the music their stations are being asked to air.' " *Id.* (quoting letter from NAB President Edward Fritts to 45 record company executives).

66 *Id.* at 1, 91.

67 Gortikov, in his letter to the PMRC, stated that the NAB request constituted "a defensive act on its part to place the burden where it does not belong . . . . Further, under FCC regulations, a radio station is obligated to know what it broadcasts. That is its responsibility, not the role of the recording company." Letter from RIAA to PMRC 7 (Aug. 5, 1985).

68 *Id.*

69 17 U.S.C. § 102(a)(2) (1982).

70 *Id.*

71 J. TAUBMAN, IN TUNE WITH THE MUSIC BUSINESS 29 (1980).

72 *Id.* at 32.

73 For example, the *Uniform Popular Songwriters Contract* ("*UPSC*") provides the following:

> *(1) Writer's Consent to Licenses:* The Publisher shall not, without the written consent of the Writer in each case, give or grant any right or license . . . for the exclusive use of the composition in any form or for any purpose . . . . If, however, the Publisher shall give to the Writer written notice, . . . specifying the right or license to be given or granted, the name of the licensee and the terms or conditions thereof, . . . unless the Writer . . . shall, within seventy-two hours . . . object thereto, the Publisher may grant such right or license . . . without first obtaining the consent of the Writer.

2 A. LINDEY, ENTERTAINMENT PUBLISHING AND THE ARTS, Form 7:A-1:01, at 687-88 (1963).

The *UPSC* further provides that "[t]he Publisher agrees that it will not issue any

nish lyric sheets to broadcasters and to record merchants for display in retail outlets.[74] To internalize this expenditure, record companies could choose to increase wholesale album prices. This would naturally translate into higher retail prices. Since the additional information would be made available to heighten consumer awareness, consumers arguably should be expected to absorb the costs incurred in its dissemination. Finally, such a proposal will only prove to be effective if all music publishers agree to cooperate for this limited consumer protection purpose.

C. *The Agreement's Potential Effects*

1. Lack of Commercial Practicability

The RIAA agreement is both prospective and retrospective in application. Companies choosing to subscribe to the agreement with respect to future recordings must also adhere to either alternative with respect to already existing albums upon their rerelease.[75] However, it is questionable whether the agreement will be widely adopted and enforced in the absence of any type of intra-industry sanction for non-compliance.

Since no industry panel will be made responsible for deciding which recordings necessitate labels or lyric sheets, each RIAA-member company will render independent determinations. Due to the fact that lyrics are subject to varying interpretations and responses, subjective evaluations will naturally enter into the decision-making process. Additionally, the placement of the four-word advisory on album jackets, instead of the lyrics, may not sufficiently or adequately guide consumers. Warning labels alone may dissuade potential consumers from purchasing albums they would otherwise buy if prior examination of the lyrics were made possible. Therefore, a more effective solution may be to formalize a method for making lyrics to all recordings available prior to purchase so that concerned consumers can render personal evaluations.[76] Alternatively, record companies complying with the RIAA agreement can choose to print lyrics on album

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license as a result of which it will receive any financial benefit in which the Writer does not participate." *Id.* at 688. Therefore, specified percentages of the consideration received from such sales should be remitted to the artist in the form of royalties. For a more thorough discussion of copyright practices in the recording industry, see generally P. DRANOV, INSIDE THE MUSIC PUBLISHING INDUSTRY (1980).

74 17 U.S.C. §§ 201(d)(1) and 106(5) (1982) grant copyright owners authority to display publicly copyrighted lyrics. Therefore, music publishers could grant to retailers the ability to make all lyrics available to consumers prior to purchase.

75 Wharton, *supra* note 6, at 85, col. 5.

76 *See supra* text accompanying notes 71-74.

covers in lieu of the advisory. This would obviate the fear that erroneous judgments as to the nature of recordings could be formulated by consumers prior to lyric examination.

2. Constitutional Implications

The RIAA labeling accord is also in direct contravention to first amendment principles. By instituting either alternative under the agreement, censorship is likely to be imposed upon the musical community. It is highly probable that artists' freedom of expression will be severely curtailed and that the economic structure of the industry will be undermined. Some foreseeable problems are:

(1) increased administrative costs and burdens resulting from industry self-regulation;
(2) reduced sales of some albums due to reduced broadcasting exposure;
(3) increased bootlegging or piracy by those who desire to capitalize on parents refusal to purchase for, or store owners refusal to sell to, minors those albums which they desire; and
(4) reduced sales due to clauses in shopping-mall leases which may implicitly proscribe the sale of recordings unacceptable to landlords (*i.e.*, the landlord reserves the " 'right to ask the tenant to pull any merchandise that is deemed to be morally objectionable.' ").[77]

These factors could result in millions of dollars of lost sales. In response, artists could lose their outlets for self-expression and be forced into self-censorship.[78]

Furthermore, any form of censorship of radio communication is expressly proscribed by section 326 of the Communications Act of 1934:[79]

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio sta-

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77 McCullaugh & Paige, *Camelot's Bonk Lashes Out Against Rating Stickers*, Billboard, Oct. 12, 1985, at 1, col. 1.

78 Despite the PMRC's attempts at lyric regulation, the organization will be unable to eradicate the market for explicit music. There exists a perpetual need for non-conformist outlets of expression in every democratic society. Although the RIAA agreement may aid in appeasing the PMRC's concerns, it fails to constitute an absolute method for regulating all music containing offensive lyrics. Non-complying RIAA members, and small underground record labels, are thereby free to generate recordings with lyrics that the PMRC would deem objectionable.

79 47 U.S.C. § 326 (1982).

> tion, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.[80]

This statute provides as a matter of law and policy that first amendment principles are applicable to broadcasting.[81]

Whether songs are included within this language has been questioned. Due to the synthesis of lyrics and music, some commentators contend that songs are undeserving of first amendment protection.[82] However, at least one commentator has convincingly argued that "since music serves a considerable social function and at the same time represents an important mode of artistic expression" it should be so protected.[83] It has also been contended that "[s]ince rock songs usually have substantial artistic merit, people respond to them aesthetically, and not semantically. But in order to constitute advocacy of [sexual promiscuity, violence, or the use of illegal drugs], lyrics would have to be understood semantically, rather than aesthetically."[84]

III. History of Comparable Media Regulation

A. *Broadcasting and Drug-Oriented Lyrics*

1. A Similar Controversy

Various attitudes toward sex and drugs have always been expressed through rock music.[85] The instant controversy constitutes an intensification of complaints regarding these attitudes.[86]

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[80] *Id.* A 1948 Senate Committee Report provided an additional safeguard against administrative censorship by interpreting section 326 as "mak[ing] clear that the Commission has *absolutely no power of censorship over radio communications* and that it cannot impose *any* regulation or condition which would interfere with the right of free speech by radio." S. Rep. No. 1567, 80th Cong., 2d Sess. 14 (1948) (emphasis added).

[81] *See* Note, *Broadcasting Obscene Language: The Federal Communications Commission and Section 1464 Violations,* 1974 Ariz. St. L.J. 457, 475 [hereinafter cited as Note, *Broadcasting Obscene Language*].

[82] *See* Comment, *Musical Expression and First Amendment Considerations,* 24 De Paul L. Rev. 143, 159 (1974).

[83] *Id.* at 159. "[M]aterial dealing with sex in a manner that advocates ideas, . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection." Jacobellis v. Ohio, 378 U.S. 184, 191 (1964) (footnote and citation omitted).

[84] Comment, *Drug Songs and the Federal Communications Commission,* 5 U. Mich. J.L. Ref. 334, 343 (1972) [hereinafter cited as Comment, *Drug Songs*]. When a listener comprehends semantically, he actively incorporates the medium's message literally. In contrast, music is perceived at an aesthetic level which is partially metaphorical. Aristotle, *The Poetics,* in The Philosophy of Aristotle 410, 414 (A. Wardman & J. Creed trans., R. Bambrough ed. 1963); *see also* F. Nietzche, *The Birth of Tragedy* in The Birth of Tragedy And The Genealogy of Morals 37-40 (F. Golffing trans. 1956).

[85] Note, *Drug Lyrics, supra* note 56, at 329 n.4.

[86] *See supra* text accompanying notes 3-4.

Accordingly, the controversy is comparable to the movement to expurgate drug references from rock lyrics.[87] In 1970, then Vice President Spiro Agnew attacked the media for promoting narcotics addiction through the use of drug-oriented lyrics.[88] Agnew stated that " 'in too many of the lyrics, the message of the drug-culture is purveyed. We should listen more carefully to popular music, because . . . at its worst it is blatant drug-culture propaganda.' "[89] According to Agnew, the suggestive rock lyrics tended to brainwash youths into drug use.[90] Similarly, some proponents of lyric regulation now contend that rock music has led to increases in teenage pregnancies and suicides.[91]

In response to public complaints regarding rock lyrics "tending to promote or glorify the use of illegal drugs,"[92] the Federal Communications Commission ("FCC") in 1971 issued a Public Notice entitled *In re Licensee Responsibility to Review Records Before Their Broadcast*.[93] The Notice constituted a brief reminder to licensees of their collective responsibility to exercise control over broadcast material. Judgment as to whether recordings depicted the "dangers of drug abuse" or promoted "illegal drug usage"

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87 The drug lyrics from the 1970's should be compared to the explicit lyrics of the 1980's. *Drug Lyrics:* "I'm the gypsy, the Acid Queen/pay before we start/I'm the gypsy, the Acid Queen/I'll tear your soul apart/My work is done now, look at him/his head shakes, his fingers clutch, watch his body writhe/I'm guaranteed to break your little heart." P. TOWNSEND, *Acid Queen*, in TOMMY (1969). *Sexually Explicit Lyrics:* "Met a girl named Nikki. Guess you could say she was a sex fiend. I met her in a hotel lobby masturbating with a magazine." PRINCE, *Darling Nikki*, in PURPLE RAIN (1984). Another example of violent and sexually explicit lyrics is Motley Crue's song, *Bastard*, in SHOUT AT THE DEVIL (1983). "Out go the lights/In goes my knife/Pull out his life/Consider that Bastard dead./Get on your knees/Please beg me, please/You're the King of the Sleaze/Don't you try to rape me." Both songs were quoted in the PMRC Letter to Record Company Executives 1-2 (July 11, 1985).

88 Naughton, *Agnew Assails Songs and Films that Promote a 'Drug Culture,'* N.Y. Times, Sept. 15, 1970, at A18, col. 3.

89 Note, *Drug Lyrics, supra* note 56, at 330-31 n.17.

90 Naughton, *supra* note 88, at A18, col. 3. Agnew commented that " 'far too many producers and editors are still succumbing to the temptation of the sensational and playing right into the hands of the drug culture.' " *Id.* And, in a speech before a group of Nevada schoolchildren he said " '[y]ou need a Congress that will see to it that the wave[s] of permissiveness, . . . pornography and . . . . moral pollution never become the wave of the future in our country.' " *Id.*

Although Mr. Agnew was at the forefront of the movement advocating lyric regulation, his endorsement fails to confer credibility on the morally-based campaign. This is due to Agnew's subsequent resignation as Vice President of the United States on October 10, 1973, under an agreement with the Department of Justice to admit Federal income tax evasion. Naughton, *Judge Orders Fine, 3 Years' Probation*, N.Y. Times, Oct. 11, 1973, at A1, col. 7.

91 *See supra* note 10.

92 *In re* License [sic] Responsibility to Review Records Before Their Broadcast, Public Notice, 28 F.C.C.2d 409 (1971).

93 *Id.*

was reserved for individual licensees,[94] because it was neither within the FCC's jurisdiction nor ability to render such determinations.[95] In order to comply with this reminder, station executives were requested to ascertain the lyric content of songs prior to their broadcast.[96] According to the FCC, failure to become cognizant of drug-oriented lyrics contravened the licensee's basic duty to operate his station so that "public convenience, interest [and] necessity"[97] is served.[98]

A dissent to the Notice considered such promulgation to be "an unsuccessfully-disguised effort . . . to censor song lyrics . . . aimed clearly at controlling the content of speech."[99] The dissent feared that the Notice would force recording artists into self-censorship and create economic impediments for the industry.[100] The Notice, and a subsequent clarifying Order,[101] were attacked by a radio station licensee as being an unconstitutional infringement upon broadcasters' first amendment rights to free speech in *Yale Broadcasting Co. v. FCC*.[102] The court, finding the licensee's contentions invalid, upheld the FCC's Notice and Order.[103] Despite the licensee's allegations, neither an extensive investigation nor a pre-screening of records was mandated.[104] The require-

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94 *Id.*

95 *See In re* Licensee Responsibility to Review Records Before Their Broadcast, Memorandum Opinion and Order, 31 F.C.C.2d 377, 378 (1971).

96 *Id.* A number of possible alternatives which licensees could adopt in order to comply with the Notice were suggested: "(1) pre-screeing [sic] by a responsible station employee, (2) monitoring selections while they were being played, or (3) considering and responding to complaints made by members of the public." Yale Broadcasting Co. v. FCC, 478 F.2d 594, 597 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973) (footnote omitted).

97 *See* 47 U.S.C. § 303 (1982).

98 Failure to comply with the Notice would also be considered "a violation of the basic principle of the licensee's responsibility for, and duty to exercise adequate control over, the broadcast material presented over his station." 28 F.C.C.2d at 409.

In 1967 the FCC issued a policy statement regarding foreign language programs. The FCC similarly held that licensee responsibility mandated both knowledge of foreign broadcasts and whether such complied with licensees' policies and FCC rules. Foreign language programs, Public Notice, 9 RAD. REG.2d (P&F) 1901 (1967). Violation of this Notice would also "raise serious questions as to whether the station's operation serve[d] the public interest, convenience and necessity." 9 RAD. REG.2d (P&F) 1901.

99 28 F.C.C.2d at 412 (Johnson, Comm'r, dissenting). Commissioner Johnson further stated that the "action is legally objectionable because it ignores the Supreme Court's ruling that the First Amendment protects speech which has any socially redeeming importance." *Id.* at 415.

100 *Id.* at 416.

101 31 F.C.C.2d 377 (1971). This Order explained and modified the earlier Notice. Furthermore, it reinforced the FCC position that licensees are responsible for operating their facilities in the public interest. This implied that failure to do so could result in revocation of, or denial to renew, broadcasters' licenses. *See id.* at 379; *see also infra* notes 113-15 and accompanying text.

102 478 F.2d 594, 597 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973).

103 *Id.*

104 *See supra* note 96.

ments set forth within the Notice and Order failed to create new or unreasonable burdens for licensees by requiring knowledge of broadcast material.[105] Furthermore, since lyrics are often subject to various interpretations, licensees could neither be subject to license revocation nor sanctions against renewal for broadcasting songs with objectionable lyrics which they had either misunderstood or misinterpreted.[106] While implicitly acknowledging that lyrics are often intentionally garbled by singers, the court stated that "only what can reasonably be understood is demanded of the broadcaster."[107]

2. An Analogous Proposal

The PMRC and the NPTA have addressed all of their requests for remedial action to the RIAA and individual record companies. However, the RIAA lacks the authority to control or sanction the practices of broadcast licensees.[108] The FCC is the appropriate administrative agency empowered to impose reasonable regulations on licensees.[109] Therefore, the scope of FCC regulation should be limited to the issuance of a Notice, similar to the 1971 Notice and Order, to remind broadcasters of their pre-existing duty to operate in the public interest.[110]

In the proposed Notice, the FCC may undertake to advise stations regarding the escalated use of lyrics which are either sexually explicit, violent, or profane in character. Contemporary lyrics appear to be more blatant than those written more than a decade ago.[111] Hence, broadcasters should be extra cautious to ensure that airing and timing practices are suitable for their perceived listening audiences. As in the 1971 Notice, licensees or responsible station executives should be required to make reasonable attempts to ascertain the lyric content of songs prior to their broadcast. In reaching this goal, the FCC could enlist the cooperation of music publishers by requesting that they forward lyric sheets to record companies which, in turn, could send them

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105 *See* 478 F.2d at 600.

106 *See id.* at 597.

107 *Id.* "A broadcaster must know what he can reasonably be expected to know in light of the nature of the music being broadcast." *Id.* (footnote omitted).

108 RIAA Letter to PMRC 3 (Aug. 13, 1985).

109 The FCC was statutorily created by the Communications Act of 1934 as an independent federal agency empowered to regulate all forms of wire and radio communication. *See* 47 U.S.C. § 151 (1982). For an enumeration of the FCC's general powers, see 47 U.S.C. § 303.

110 *See* 47 U.S.C. § 303.

111 For a comparison of lyrics, see *supra* note 87.

to radio stations in conjunction with new releases.[112]

Furthermore, the FCC should remind broadcasters that in making renewal determinations it will examine "whether a licensee's programming efforts, on an *overall basis*, have been in the public interest."[113] Upon renewal, the FCC examines the number of times the particular station was cited for violating FCC rules and regulations, and provisions of the Communications Act of 1934. The FCC relies upon public reports of potential violations since it cannot actively monitor each station's broadcasts.[114] In addition, because the FCC is empowered to grant licenses, it may also "revoke any station license . . . for willful or repeated violations of, or willful or repeated failure to observe any . . . rule or regulation of the Commission . . . ."[115] However, if broadcasters have made good faith efforts to ascertain lyric content, their licenses will not be revoked solely because a potentially offensive song was broadcast.

B. *The Motion Picture Rating System*

The controversy over whether songs deserve first amendment protection was once similarly debated with respect to motion pictures. For example, in *Joseph Burstyn, Inc. v. Wilson,*[116] the Supreme Court concluded that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."[117] The Court further stated that even though films may "possess a greater capacity for evil, particularly among the youth of a community, than

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112 *See supra* notes 65-74 and accompanying text.

113 31 F.C.C.2d at 378 (emphasis added).

114 *See* Yale Broadcasting Co. v. FCC, 478 F.2d 594, 597 (D.C. Cir. 1973).

115 47 U.S.C. § 312(a)(4) (1982). Before the FCC revokes a license, the licensee must be granted a reasonable opportunity to show why revocation should not occur. *See* 47 U.S.C. § 312(c).

116 343 U.S. 495 (1951).

117 *Id.* at 502. In Federation of Turkish-American Societies, Inc. v. American Broadcasting Cos., 620 F. Supp. 56, 57 (S.D.N.Y. 1985), the plaintiff sought, *inter alia*, to enjoin exhibition of the film *Midnight Express* in the United States due to its alleged negative representations of Turkish officials. Despite the potentially objectionable aspects of the film to Turkish-Americans, the court denied the requested relief. *Id.* at 58-59. The court stated that "[t]he First Amendment protects the offensive utterance fully as much as it protects the bland or uncontroversial. In a free society, it cannot be otherwise." *Id.* at 58.

Since films are often accompanied by musical soundtracks, it would follow from *Federation* that the absolute first amendment protection afforded to films would also extend to the incorporated music. This decision may have a significant impact on potentially offensive music videos. *C.f.* THE COMMITTEE ON COMMUNICATIONS LAW, CONTENT REGULATION OF CABLE TELEVISION: "INDECENT" CABLE PROGRAMMING AND THE FIRST AMENDMENT, 41 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 71 (1986).

other modes of expression [such capacity] may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship . . . ."[118] While awarding first amendment protection to films, the Court paved the way for the institution of the film classification system seventeen years later.[119]

1. The Rating System: Industry Censorship

The Motion Picture Rating System ("MPRS"),[120] the self-regulatory program instituted by the Motion Picture Association of America ("MPAA"), is the closest regulatory system to which the PMRC's record rating proposals can be compared. The classification system was designed for motion pictures in response to complaints by various religious leaders and by parental and civic organizations,[121] regarding the incorporation of sex, violence, nudity, and obscene language in films.[122] The purpose behind the MPRS is twofold: one, to rate films according to their suitability for children, and to furnish parental guidelines for making informed judgments regarding child attendance; and two, to dissuade censorship by both federal and local governments.[123] Although it appears that the PMRC has revoked its request for a similar rating system due to the RIAA accord,[124] it should be noted that the above purposes are essentially identical to the motives behind the proposed album rating system.

Films submitted to the MPAA's Code and Rating Administration ("CARA") are now ascribed to one of the following categories:

G—*General Audiences*. All ages admitted.[125]

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118 343 U.S. at 502; *accord* Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1958); Superior Films, Inc. v. Dept. of Educ. of Ohio, 346 U.S. 587 (1953).

119 *See* 343 U.S. at 502.

120 Three film-industry trade associations operate the MPRS: (1) the Motion Picture Association of America, comprised of nine of the largest motion picture distributors in the country; (2) the International Film Importers and Distributors of America, comprised of about 40 foreign film importers; and (3) the National Association of Theater Owners, representing most theaters in the country. Friedman, *The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry*, 73 COLUM. L. REV. 185, 191-92 (1973).

121 Windeler, *As Nation's Standards Change, So Do Movies,'* N.Y. Times, Oct. 8, 1968, at A49, col. 4.

122 Canby, *Ratings to Bar Some Films to Children*, N.Y. Times, Oct. 8, 1968, at A1, col. 1.

123 Friedman, *supra* note 120, at 186. The absence of a uniform industry-wide rating system would license municipalities to formulate individual criteria regarding whether movies could be shown at their theaters. *Id.* at 186 n.7. Furthermore, the same movie would be subject to different ratings according to the locality.

124 *See supra* text accompanying notes 28-32.

125 Friedman, *supra* note 120, at 192.

> PG—*Parental Guidance Suggested.* Some material may not be suitable for preteenagers.[126]
> PG-13—Parents are strongly cautioned to give special guidance for attendance of children under 13. Some material may be inappropriate for young children.[127]
> R—*Restricted.* Under 17 requires accompanying parent or adult guardian.[128]
> X—No one under 17 admitted (age limit may vary in certain areas).[129]

Although the MPRS has been effective since its inception in 1968, a similar rating system for albums[130] would not be as successful. Whereas the film industry has CARA, no similar agency exists or could realistically be established to rate and categorize songs. This is due to the probable inconvenience and expense of creating a body charged with the sole responsibility of formulating rating criteria applicable to all categories of music. As a result, songs would be rated according to the subjective evaluations of the various record companies.[131]

It also appears to be administratively easier to rate films, for almost 325 out of the 400 films submitted to CARA each year receive ratings.[132] In comparison, an estimated 2,500 albums are released annually, each of which contains approximately ten songs.[133] Because many of the 25,000 songs are released as singles before the entire album is commercially marketed, most would need independent ratings. Additionally, the industry's "release timing schedules . . . . would make impossible the submission of recordings to any central rating entity without totally disrupting release and marketing patterns."[134]

Furthermore, the ambiguous nature of lyrics in music may render some words more difficult to rate, as opposed to striking visual imagery in films which presents unmediated concepts. Whereas

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126 *Id.*

127 Bennetts, *New Cautionary Film Rating Readied for Parents*, N.Y. Times, June 28, 1984, at C13, col. 3. This rating was instituted in 1984 in response to complaints regarding the inadequacy of the former rating system. Instead of being a restrictive rating, the new category merely presents a parental advisory. *Id.*

128 Friedman, *supra* note 120, at 192.

129 *Id.*

130 *See supra* note 29.

131 This possible result is analogous to the concern regarding the various ratings which would be ascribed to movies in the absence of a uniform industry-wide rating system. *See supra* note 123.

132 RIAA Letter to PMRC 8 (Aug. 5, 1985); *see also* Cieply, *supra* note 4, at 21, col. 3.

133 Pareles, *Should Rock Lyrics be Sanitized?*, N.Y. Times, Oct. 13, 1985, § 2, at 1, 5, cols. 1, 1.

134 It is a general industry practice to manufacture album and cassette packaging prior to completion of the recording. RIAA Letter to PMRC 8 (Aug. 5, 1985).

CARA can immediately ascertain what constitutes excessive nudity requiring an "R" or an "X" rating, for example, determining what combination of words constitutes sexually explicit lyrics would arguably be subject to ongoing debate. And, since music is subject to a plethora of varying interpretations, it would be virtually impossible to render absolute determinations of what can be categorized as sexually explicit, violent, or profane lyrics.

Various inequities could result from a rating system created in the image of the MPRS. Any film rated "R" or "X", regardless of its merit or social value, is both indelibly stamped and regarded as being obscene or explicit. A rating system for albums could lead to similar results. An entire album, because of a number of lyrics which could be negatively interpreted or misconstrued, would receive a single and perhaps undeserved rating. Such a rating could detrimentally affect the album's artistic as well as economic success.[135]

The economic ramifications of the film classification system, which prohibits minors from attending certain films without restricting adult access, were discussed in *Interstate Circuit, Inc. v. City of Dallas.*[136] Some commentators argued that reducing ticket sales would translate into the production of fewer films "for adults only."[137] Therefore, excluding children was regarded as a probable deterrent to the production and exhibition of adult films.[138] Even assuming *arguendo* that the commentators are correct in asserting that the movie rating system can successfully deter the production of "R" and "X" rated films, a similar classification system for recordings may not deter children's purchases. Since children can neither presently be denied entry into record stores nor be restricted from purchasing certain albums, many children would be lured into purchasing recordings with the PMRC's proposed ratings.[139] Despite the revocation of the rating proposal, placing advisories on record albums may similarly arouse young curiosities and attract children into purchasing labeled recordings. Once children are advised against purchasing labeled albums, such albums will probably be in greater demand. Additionally, these albums, coupled with the

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135 *See supra* note 26 and text accompanying notes 24-25.

136 366 F.2d 590 (5th Cir. 1966) The court held that a Dallas ordinance classifying films as "not suitable" for minors was valid when such films depicted "certain levels of brutality, criminal violence, depravity, nudity, sexual promiscuity, and extra-marital or abnormal sexual relations." *Id.* at 597.

137 Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 87 (1960).

138 366 F.2d at 596; *see also* Lockart & McClure, *supra* note 137, at 87.

139 The same argument applies to recordings labeled with the warning "Explicit Lyrics—Parental Advisory."

subsequent attention and debate surrounding the controversy, may result in the creation of a new audience comprised of children who had not been interested in listening to, or who were unaware of, much of the music categorized as offensive. Instead of resulting in the release of fewer recordings of a sexually explicit, violent, or profane nature, lyricists and producers would naturally endeavor to generate music of such character. Hence the PMRC, through its campaign, may be indirectly encouraging the production and sale of the type of music against which it is adamantly opposed.

2. Private Censorship

The PMRC can be compared to post-World War I moral coalitions which were created to remove offensive material from the public view.[140] The most effective group, the Catholic Legion of Decency, now called the National Catholic Office for Motion Pictures,[141] was organized in 1934 to persuade the motion picture industry to adopt self-regulatory guidelines.[142] Notwithstanding its persuasive attempts, the organization established an independent film classification system[143] designed to determine the suitability of films for viewers of the Catholic faith.[144] While the Legion judges films based upon their moral content, it neither comments on their social and political statements nor on their artistic qualities.[145] In the past, the Legion enforced its classifica-

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[140] *See* Note, *Entertainment: Public Pressures and the Law*, 71 HARV. L. REV. 326, 360 (1957) [hereinafter cited as Note, *Public Pressures*].

[141] The Legion changed its name in 1965. Ayer, Bates, & Herman, *Self Censorship in the Movie Industry: An Historical Perspective on Law and Social Change*, 1970 WIS. L. REV. 791, 810 n.68.

[142] Note, *Public Pressures*, *supra* note 140, at 359-60. At the time of the Legion's creation, attempts at self-regulation by the movie industry proved to be unsuccessful. *Id.* at 360-61; *see* Ayer, Bates, & Herman, *supra* note 141, at 810.

[143] As of 1970 the film ratings were as follows:

A-I: morally unobjectionable for general patronage;
A-II: morally unobjectionable for adults and adolescents;
A-III: morally unobjectionable for adults;
A-IV: morally unobjectionable for adults, with reservations;
B: morally objectionable in part for all; and
C: condemned.

Ayer, Bates, & Herman, *supra* note 141, at 810 n.68.

[144] *Id.* at 810.

[145] Note, *Public Pressures*, *supra* note 140, at 360. This holds true "unless the picture touches upon a political issue, such as Communism, which is thought to present a moral problem as well." *Id.* The American Legion had similarly expressed concern regarding the influence of Communism in the movie industry. Accordingly, the organization was successful in banning distribution of the film *Limelight* due to the alleged leftist activities of actor Charlie Chaplin. Ayer, Bates, & Herman, *supra* note 141, at 812.

The scheduled October 9, 1985 opening of the movie *Hail, Mary* in New York City was surrounded by protests and complaints regarding the film's alleged blasphemous and sacrilegious nature. Pope John Paul II asserted that the film " 'distorts and insults

tion system in various ways: "encouragement to observe the ratings through pledges and admonitions from the pulpit, pressure on public officials to take action against exhibitors showing condemned films, and direct action against exhibitors in the form of letters, committee calls, boycotts and picketing."[146]

Ratings and reviews for films according to their quality and appropriateness for audiences of various demographic composition are provided by a coalition of twelve national organizations.[147] This compilation, entitled the *Joint Estimates of Current Entertainment Films*, is known throughout the industry as the "green sheet."[148] In addition, the monthly magazine entitled *Films in Review*, published by the National Board of Review, similarly provides reviews and ratings for films of greater significance or controversial impact. Films are categorized according to their entertainment, educational, ethical, and artistic values; recommendations for audience suitability are also offered.[149]

3. Proposals for Private Regulation of Rock Music

Although the PMRC has revoked its request for an industry-wide rating system it, or another similarly concerned organization, can formulate an independent classification system that does not require labeling on the records themselves.[150] After establishing its own guidelines and criteria regarding what songs are and are not suitable for young listeners, the PMRC can undertake to rate and categorize songs in addition to recordings in their entirety. In doing so, the PMRC may choose to use the rating system as originally proposed to the RIAA.[151] And, in order to disseminate this information, the PMRC can publish its own newsletter to which parents and others concerned can subscribe.

Besides merely attaching appropriate ratings to recordings, the PMRC could perhaps seek authorization to reprint segments of lyrics to exemplify the rationales behind the particular ratings. Since the PMRC may be inadequately staffed to monitor all new releases, it could rely on outside notice regarding potentially ob-

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the spiritual significance' of Christian belief" through its biblical allusions. Bennetts, *Godard's 'Hail Mary' to Open Oct. 9*, N.Y. Times, Sept. 26, 1985, at C17, col. 2.

146 Ayer, Bates, & Herman, *supra* note 141, at 810. While the Legion's lists were once subscribed to by and influenced movie producers and officials presiding over areas of heavy Catholic concentration, the Legion today exerts little influence over film content. *Id.* at 811; *see also* Note, *Public Pressures*, *supra* note 140, at 361.

147 Note, *Public Pressures*, *supra* note 140, at 362-63.

148 *Id.* at 362.

149 *Id.* at 363.

150 *See Senate Hearing Transcript*, *supra* note 10, at 138 (statement of Stanley Gortikov).

151 *See supra* note 29.

jectionable lyrics. Solicitation of outside cooperation by such individuals as parents, teachers, or the clergy would be crucial to the effectiveness of the proposed endeavor. With similar cooperation, radio stations throughout the country cited for repeated airings of songs with explicit lyrics could be reported within the newsletter. These activities could be financed through subscriptions to the newsletter and by charitable grants and contributions.

It is also possible that disclosure could be mandated with regard to lyric content as it is with other products.[152] Accordingly, some proposals have focused on the consumer information aspect of the instant controversy. While essentially supporting the PMRC's main concerns and proposals, one Dallas radio station proposed the formation of a National Music Review Council ("NMRC").[153] Under this proposal, four independent councils based in New York, Detroit, Los Angeles, and Nashville would comprise the NMRC.[154] According to the proposal's sponsor,[155] the:

> councils would review the contemporary music produced in their respective markets, and if acceptable, based on the policy developed therein, the record would receive the seal of approval much like a Good Housekeeping Seal, on the album cover before it went to . . . the record retail outlets for consideration of purchase by [prospective] . . . consumer[s].[156]

While the foregoing proposal centers principally on consumer protection, it fails to completely obliterate the censorship and first amendment controversy. However, the NMRC is comparable to various national and statewide private consumer organizations.[157] The Consumers Union of the United States, for example, is the

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152 For example, the Fair Packaging and Labeling Act, 15 U.S.C. § 1451 (1982), is aimed at preventing unfair or deceptive packaging and labeling of certain commodities. The Public Health Cigarette Smoking Act, 15 U.S.C. §§ 1331-1338 (1982), requires disclosure on packaging and advertising regarding the hazards linked to smoking.

153 *Senate Hearing Transcript, supra* note 10, at 188 (statement of William J. Steding).

154 Each council would be represented by recording artists, songwriters, recording companies, record distributors, broadcasters, record retailers, and consumers. More than 90% of all contemporary music is generated within these four localities. *Id.* at 188-89.

155 William J. Steding, Executive Vice President, Central Broadcast Division, Bonneville Internat'l Corp. is the proposed NMRC's principal advocate. *Id.* at B, 185.

156 *Id.* at 189.

157 The national level consumer organizations are as follows: Consumer Federation of America, National Consumers League, American Council on Consumers Interest, Consumers Union of U.S., Inc., and National Student Consumer Protection Council. Private consumer organizations operate in 33 states. D. ROTHSCHILD & D. CARROLL, CONSUMER PROTECTION: TEXT & MATERIALS 775-78 app. (student ed. 1973).

world's largest consumer testing organization which disseminates information regarding "the quality of goods and services, so that an intelligent, rational decision can be made by the consumer in the marketplace."[158] The proposed PMRC newsletter can be modeled after the Union's monthly publication entitled *Consumer Reports*. Just as *Consumer Reports* publishes product reports following extensive and objective testing, and ascribes a "rating for overall quality,"[159] the PMRC could attempt similar results with respect to music.[160] However, the PMRC would need time to gain consumers' trust and respect, similar to that which the Union achieved after fifty years of public service.[161]

C. *The "Captive Audience" Rationale: The Right Not to Hear Offensive Broadcasting*[162]

1. *FCC v. Pacifica Foundation*

Although the "reception of communication should be voluntary,"[163] listeners are sometimes involuntarily subjected to unexpected programming of an indecent, obscene, or offensive nature. Due to the "uniquely pervasive presence"[164] of broadcasting, listeners may be unable to effectively control the material to which they will be exposed and, hence, become captive audiences. For example, in *FCC v. Pacifica Foundation*[165] a New York radio station aired satirist George Carlin's "Filthy Words" monologue "during a program about contemporary society's attitude toward language . . . ."[166] Although an advisory regarding the monologue's content was aired prior to its broadcast,[167] the FCC received one complaint from a man who, while driving with his young son, turned on his car radio after the advisory and heard

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158 *Id.* at 737-38.

159 *Id.* at 738. However, it can be argued that it is inherently impossible to achieve an objective evaluation of lyric content. *See generally supra* text accompanying note 134.

160 *But see* text accompanying note 134.

161 D. ROTHSCHILD & D. CARROLL, *supra* note 157, at 738.

162 *See* Glasser & Jassem, *Indecent Broadcasts and The Listener's Right of Privacy*, 24 J. BROADCASTING 285 (1980). *Contra* Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1973).

163 Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?*, 67 NW. U.L. REV. 153, 175 (1972).

164 FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

165 *Id.*

166 *Id.* at 730.

167 The advisory, aired prior to the 2:00 p.m. broadcast, warned listeners that the monologue contained " 'sensitive language which might be regarded as offensive to some.' " *Id.* at 730. It further "suggested that those who might be offended should change the station and return in 15 minutes." Glasser & Jassem, *supra* note 162, at 287.

the broadcast.[168]

In a declaratory order, the FCC concluded that broadcast speech, as opposed to other methods of communication, deserved less first amendment protection.[169] While adopting the FCC's nuisance rationale,[170] the Court upheld the FCC's determination that the " 'language *as broadcast* was indecent and prohibited by 18 U.S.C. § 1464.' "[171] The Court, while stressing the narrowness of its holding, expressly assumed that the monologue would be protected in other contexts: "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context."[172] Therefore, the monologue probably would not be held indecent as broadcast if it was preceded by the advisory and aired late at night.[173]

Just as the *Pacifica* complainant and his young son heard offensive language, those who listen to rock music stations may hear recordings with potentially objectionable lyrics. Listening to the radio, unlike listening to an album, reading, or attending a movie, lacks the specific element of choice as to what may be heard.[174] Listeners might be considered "captives in their own homes [if] they are peculiarly susceptible to 'intrusive program-

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168 This was the only known complaint made to the FCC regarding the Carlin broadcast. 438 U.S. at 730.

169 *In re* A Citizen's Complaint Against Pacifica Found. Station WBAI (FM), Memorandum Opinion and Order, 56 F.C.C.2d 94 (1975).

> Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference . . . ; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.

438 U.S. at 731 n.2 (quoting 56 F.C.C.2d at 97).

170 *See* 56 F.C.C.2d at 98. The FCC considered the Carlin broadcast a public nuisance, which is "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821(B)(1) (1979) (defining public nuisance). Because such a broadcast would not be a per se unreasonable interference at all hours of the day, *see infra* text accompanying notes 172-73, the law of nuisance permits the broadcast to be aired at an appropriate time rather than proscribing it altogether. *See* 56 F.C.C.2d at 98.

171 438 U.S. at 732 (quoting 56 F.C.C.2d at 99) (emphasis added). 18 U.S.C. § 1464 (1982) provides: "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

172 438 U.S. at 747 (footnote omitted).

173 *Id.* at 732 n.5 (citing 56 F.C.C.2d at 98).

174 56 F.C.C.2d at 97.

ming.' "[175] Furthermore, since listeners sporadically tune in and out of radio frequencies, advisories, such as the one aired in *Pacifica*, cannot adequately shield listeners from potentially objectionable broadcasts. Accordingly, any future advisories aired by radio stations regarding the content of imminent broadcasts will generally prove to be ineffective.

The effects of television[176] have similarly caused commentators to statistically infer that children deserve protection from potentially harmful or offensive programming.[177] Since television viewers also comprise a captive audience,[178] the three national networks[179] and NAB established self-regulatory guidelines[180] "designed to give parents general notice that after the evening news, and for the duration of the designated period, the broadcaster will make every effort to assure that programming presented . . . will be appropriate for the entire family."[181] Following the proscribed hours, parents are responsible for monitoring their children's television viewing. The policy succinctly reads:

> Entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediate preceding hour.[182] In the occasional case when an entertainment program for this period is

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175 Glasser & Jassem, *supra* note 162, at 293.

176 For a discussion on the effects of television violence on viewers, see Note, *The Regulation of Televised Violence*, 26 STAN. L. REV. 1291 (1974). *See also* Cornell, *The effects of sex and violence on TV*, Newsday, Sept. 21, 1985, at II/ 24, col. 1.

177 This belief is an outgrowth of the courts' recognition of the constitutional right not to be subjected to unsolicited communication in the privacy of one's home. *See, e.g.*, Rowan v. Post Office Dep't, 397 U.S. 728 (1970). *But c.f.* Martin v. City of Struthers, 319 U.S. 141 (1943).

178 *See, e.g.*, CBS v. Democratic Nat'l Comm., 412 U.S. 94, 127-28 (1973).

179 National Broadcasting Co., Columbia Broadcasting Sys., and American Broadcasting Co.

180 These guidelines, labeled the "Family Viewing Policy," were adopted by NAB's Television Code Review Board on Apr. 8, 1975. W. FRANCOIS, MASS MEDIA LAW AND REGULATION 458 (2d ed. 1978). The policy was instituted in response to congressional and FCC pressure to reduce sex and violence in televised programs. Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1094-95 (C.D. Cal. 1976). This policy obviated the need for threatened governmental regulation. Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 422 (1975).

181 51 F.C.C.2d at 422.

182 "The first hour of network entertainment programming in prime time" and "this immediately preceding hour," is to be designated as a "Family Viewing" period. In effect, this would include the period between 7 p.m. and 9 p.m. Eastern Time during the first six days of the week. On Sunday . . . the . . . period will begin and end a half-hour earlier.

Id. (quoting *Amendment to the NAB Code Adopted by the NAB Television Code Board*, Feb. 4, 1975 in 51 F.C.C.2d 418, at app. D).

deemed to be inappropriate for such an audience, advisories[183] should be used to alert viewers.[184]

Just as the FCC sought to remind radio licensees of their collective responsibility to exercise control over broadcast material four years earlier,[185] the FCC undertook to notify television broadcasters of their similar responsibility to provide support for, and to allay, parental concerns.[186] Despite these well-intentioned measures, this "Family Viewing Policy" was struck down in *Writers Guild of America, West Inc. v. FCC*.[187] The validity of the policy was successfully challenged as a violation of the first amendment rights of directors, creators, writers, actors, and producers of television programming.[188] In short, that court also held that networks could independently adopt family viewing policies in the best interests of the viewing public.[189] Furthermore, neither the government nor the FCC could "pressure broadcasters to do what they did not wish to do."[190]

2. Resolutions

Notwithstanding the ineffective attempts to solve the captive audience problem through the use of television and radio advisories,[191] one solution to the lyric controversy might be to broadcast recordings with potentially objectionable lyrics at times when the listening audience is primarily comprised of adults.[192] The FCC endorsed this method of "channeling" and considered it to be an appropriate measure for dealing with indecent broadcasting that did not constitute censorship.[193] It has been asserted

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183 "Viewer advisories" will be broadcast in audio and video form "in the occasional case when an entertainment program" broadcast during the "Family Viewing" period contains material which may be unsuitable for viewing by younger family members. In addition, "viewer advisories" will be used in later evening hours for programs which contain material that might be disturbing to significant portions of the viewing audience.

. . . Broadcasters will attempt to notify publishers of television program listings as to programs which will contain "advisories." Responsible use of "advisories" in promotional material is also advised.

Id. (footnotes omitted).

184 W. FRANCOIS, *supra* note 180, at 458 (quoting NATIONAL ASS'N OF BROADCASTERS, THE TELEVISION CODE OF THE NATIONAL ASS'N OF BROADCASTERS 2-3 (18th ed. 1975) (footnotes not in original).

185 *See supra* notes 92-98 and accompanying text.

186 51 F.C.C.2d at 423.

187 423 F. Supp. 1064 (C.D. Cal. 1976).

188 *See id.* at 1064, 1072.

189 *Id.* at 1131-35.

190 *Id.* at 1150.

191 *See generally supra* text accompanying notes 166-85.

192 *See generally* Glasser & Jassem, *supra* note 162, at 285.

193 *See* FCC v. Pacifica Found., 438 U.S. 726, 731-32 (1978) (quoting *In re* Matter of a Citizen's Complaint Against Pacifica Found. Station WBAI (FM), Memorandum Opinion

that such a plan would "have the effect of 'reduc[ing] the adult population . . . to [hearing] only what is fit for children.' "[194]

Arguably, those adults who wish to hear songs with explicit lyrics can purchase them for private listening.[195] However, adults should not be expected or required to spend money in order to hear songs which are objectionable to some. The right to receive radio broadcasts of all types is both constitutionally protected and common to all individuals, regardless of their musical preferences.

Furthermore, those who are particularly sensitive to potentially offensive rock lyrics do not have to actively subject themselves or their children to music containing such material. This is similar to Justice Harlan's majority opinion in *Cohen v. California*.[196] By wearing a jacket bearing the slogan "Fuck the Draft" in a courthouse corridor,[197] Cohen violated California Penal Code section 415 which prohibited " 'maliciously and willfully disturb[ing] the peace or quiet of any . . . person . . . .' "[198] According to the Court, "the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense."[199] While those present in the courthouse could have looked away from the jacket to "avoid further bombardment of their sensibilities,"[200] it can be argued that those who are sensitive to offensive rock music can similarly avoid being subjected to such by changing stations when objectionable songs are aired, or by being cautious consumers.[201] Assuming *arguendo* that both can be accomplished with relative ease, broadcasters would neither have to comply with the channeling proposal nor undertake to suppress speech due to a possible invasion of privacy.[202]

3. The Obscenity Standard

Prior to *Pacifica*, the FCC had requested broadcaster self-cen-

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and Order, 56 F.C.C.2d 94, 98 (1975)). The *Pacifica* dissent argued against channeling in that it would prevent licensees from broadcasting, and prevent the public from receiving, potentially offensive broadcasts. *Id.* at 774-75 (Brennan, J., dissenting).

194 *Id.* at 760 (Powell, J., concurring) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

195 *See id.* at 750 n.28.

196 403 U.S. 15 (1971).

197 *Id.*

198 *Id.* at 16.

199 *Id.* at 21.

200 *Id.*

201 *See generally* FCC v. Pacifica Found., 438 U.S. 726, 765-66 (1978) (Brennan, J., dissenting).

202 438 U.S. at 766 (Brennan, J., dissenting).

sorship of obscene programming in the guise of sexually explicit radio call-in programs.[203] Following investigation of listener complaints regarding a daily radio program called "Femme Forum,"[204] the FCC issued a Notice of Apparent Liability[205] for forfeiture of $2,000 against Sonderling Broadcasting for violation of the obscenity standard.[206] On appeal, the court in *Illinois Citizens Committee For Broadcasting v. FCC*[207] held that "where a radio call-in show during daytime hours broadcasts explicit discussions of ultimate sexual acts in a titillating context, the Commission does not unconstitutionally infringe upon the public's right to listening alternatives when it determines that the broadcast is obscene."[208] Rock music, which is subject to various interpretations, can be distinguished from the radio programs due to the latter's explicit and unambiguous nature.[209] That is, rock music is a synthesis of information in an art form, whereas obscene radio programs serve no other purpose than to stimulate prurient interest in sexual matters.

Judicial proscriptions and definitions regarding obscenity are also arguably inapplicable to rock music. After defining ob-

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203 *See* Note, *Broadcasting Obscene Language, supra* note 79, at 464. These programs have been called "topless radio." Sonderling Broadcasting Corp., 27 RAD. REG.2d (P & F) 285 (1973).

204 27 RAD. REG.2d (P & F) 285. The program was aired from 10:00 a.m. to 3:00 p.m. on weekdays. *Id.* at 28.

205 *Id.* at 293. 47 U.S.C. § 503(b) (1982) provides that "(1) Any person who is determined by the Commission . . . to have . . . violated any provision of section 1304, 1343, or 1464 of title 18; shall be liable to the United States for a forfeiture penalty . . . . (2) the amount of any forfeiture penalty . . . shall not exceed $2,000 for each violation. Each day of a continuing violation shall constitute a separate offense . . . ."

A written notice of apparent liability is required to be forwarded to the licensee who must be granted the opportunity to respond in writing. 47 U.S.C. § 503(b)(4)(A-C).

206 18 U.S.C. § 1464 (1982) provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

207 515 F.2d 397 (D.C. Cir. 1975). Other broadcast indecency cases preceding *Pacifica* were also examined by the FCC. *See, e.g., In re* WUHY-FM, 24 F.C.C.2d 408 (1970) (notice of apparent liability sent to station regarding interview containing an abundance of expletives); *In re* Palmetto Broadcasting Co., 33 F.C.C. 250 (1965) (FCC denied a station's request for license renewal after investigating listener complaints that certain programs contained "vulgar, suggestive material susceptible of double meanings with indecent connotations . . . ." 33 F.C.C. at 250).

208 515 F.2d at 406.

209 An example of the *Sonderling* broadcasts is as follows:

> Announcer: OK, Jennifer. How do you keep your sex life alive? . . .
> Listener: [T]here are different little things you can do.
> Announcer: Like?
> Listener: Well—like oral sex when you're driving is a lot of fun—it takes the monotony out of things.

27 RAD. REG.2d (P & F) at 286. *But compare* the above *with* the sexually explicit lyrics *supra* note 87.

scenity,[210] the Supreme Court in *Roth v. United States*[211] held that "obscene" materials are not entitled to the protection accorded to "speech" by the first and fourteenth amendments.[212] The obscenity definition[213] was expanded by the Court in *John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts*[214] to include the following three elements which must coalesce prior to a determination that any material is obscene:

> (a) the dominant theme of the material taken as a whole appeals to a prurient interest[215] in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[216]

The last prong of the obscenity test was further modified by the Supreme Court in *Miller v. California*.[217] To be considered obscene, a work, taken as a whole, must lack "serious literary, artistic, political, or scientific value."[218] Since it is hard to imagine any art form which would fall within these guidelines, it is extremely likely that rock music is protected under this analysis.

Similar to the subjective judgment associated with rock music's lyrics, application of the above criteria also requires subjective responses.[219] Thus, it can be argued that recordings containing songs with sexually explicit or suggestive lyrics fail to satisfy these three criteria. The reasons for this are: first, the accompanying lyrics are generally considered as being secondary to the music[220]—it is the music itself which characterizes the nature or genre of the record-

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210 "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Roth v. United States, 354 U.S. 476, 489 (1957).

211 *Id.* at 476.

212 *See id.* at 485.

213 *See supra* note 210.

214 383 U.S. 413 (1966).

215 The *Roth* Court defined prurient interest as a "shameful or morbid interest in nudity, sex, or excretion . . . ." 354 U.S. at 487 n.20.

216 383 U.S. at 418 (footnote not in original).

217 413 U.S. 15 (1973).

218 *Id.* at 26.

219 THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 45 (1970) [hereinafter cited as OBSCENITY REPORT].

220 "In a pop song the subject matter may be incidental to the commercial motive and so secondary to the mode of presentation or the manner of marketing. This emphasis on the commerciality of the pop song is . . . to point out that in the pop world commercial considerations loom large." L. GROSSMAN, A SOCIAL HISTORY OF ROCK MUSIC 11 (1976).

ing;[221] second, despite the PMRC's assertions, albums generally are not predominantly sexually arousing, for "[w]hereas some lyrics may be objectionable, [most] lyrics reflect . . . either pure entertainment or socially positive attitudes and practices;"[222] third, most sexual references in music, even if understandable or interpreted correctly, would fail to affront the sensibilities of most contemporary audiences; fourth, young children, comprising the audience which the PMRC is attempting to protect, are arguably too immature to understand or interpret the sexual innuendos incorporated into rock lyrics; and fifth, since the Supreme Court has suggested that "social value[s]" include both artistic and entertainment values,[223] rock music satisfies the criterion of "serious literary, artistic, [and] political . . . value[s]."[224] Furthermore, because "[r]ecorded music reflects rather than introduces society's values and the realities of human conduct, both good and bad,"[225] any contention that rock music lacks serious artistic value[226] would be erroneous.

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221 Arguably, it is the "sound" of the music which determines its insertion into such categories as "rock-and-roll," "heavy metal," "disco," "soul," and "country/western."

222 *Senate Hearing Transcript*, *supra* note 10, at 140 (statement of Stanley Gortikov).

223 OBSCENITY REPORT, *supra* note 219, at 45.

224 Miller v. California, 413 U.S. 15, 26 (1973).

225 *Senate Hearing Transcript*, *supra* note 10, at 141 (statement of Stanley Gortikov).

226 Books have historically been attacked for obscene content. Print censorship can be traced back as far as Plato and his attempts to restrict poetical expression. E. DE GRAZIA, CENSORSHIP LANDMARKS 287 (1969). For a good historical discussion on literary censorship see generally A. HAIGHT, BANNED BOOKS (3d ed. 1970), which includes a chronological appendix of books which have been banned throughout the world, since Homer's *The Odyssey*, and the reasons therefor.

In the United States, a customs collector attempted to restrict the importation of James Joyce's *Ulysses* due to certain allegedly obscene passages. United States v. One Book Entitled Ulysses, 72 F.2d 705, 706 (2d Cir. 1934). Comparing the piece of literature to works of science, Judge Augustus N. Hand, writing for the court in this landmark case, held that where a book is not intended to be sexually arousing in its dominant part, that book is deserving of first amendment protection. 72 F.2d at 707. According to the *Ulysses* court, the work must be considered as a whole, and objectionable passages cannot be isolated and examined out of context. *See* 72 F.2d at 707. The court, therefore, permitted the book's importation, despite its potentially offensive nature to some persons. 72 F.2d at 709.

Applying the three prongs of the obscenity test independently, the Supreme Court in John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 U.S. 413 (1966), held that the book commonly known as *Fanny Hill* was not obscene. Despite the "prurient appeal" and "patently offensive" nature of the work, the Court stressed that a book must "*utterly* be without redeeming social value" to be undeserving of constitutional protection. 383 U.S. at 419 (emphasis in original); *see also* text accompanying notes 216-18.

Attempts at censorship and book banning have not subsided. Since the 1980 election of President Ronald Reagan, there has been a fivefold increase in complaints regarding books in public libraries. Many requests for the removal of works with objectionable content have been lodged by members of the Moral Majority. *Requests for Banning Books Multiply Since Last Month*, L.A. Daily L.J., Dec. 11, 1980, at 6, col. 5. Moreover, American literature is continually under attack. Quade, *Book censorship*, 70 A.B.A. J., Aug. 1984, at 32, col. 1. Among those works that have been criticized are "Mark

D. *Local Regulation*

In order to obviate the need for federal legislation regarding explicit lyrics,[227] individual municipalities may elect to promulgate ordinances in response to the controversy. Local regulations may operate to reinforce the RIAA record labeling accord,[228] or to establish restrictions regarding the sale of labeled recordings to minors.[229] A number of local governments and businesses are presently attempting to screen various forms

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Twain's *Huckleberry Finn* (for its racial slurs), and John Steinbeck's *Of Mice and Men* (for its profanity) . . . ." Quade, *supra*, at 32, col. 1.

As a general proposition, it would seem anomalous to our democratic system to censor books containing offensive content which could affront the moral sensitivities of some readers. The offensive content of literary works arguably fails to present a clear and present danger to society's moral structure.

> No danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion . . . . [T]he remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). It may be erroneous to assert that books, in addition to music, can induce readers and listeners into commiting illegal acts, because no formal proof of the causal relationship has been offered. *See supra* note 10.

However, these cases address the issue of content regulation, and do not pertain to time, place, and manner considerations, unlike the present matter. Insofar as these cases stand for the proposition that censorship of works of art violates the first amendment, incidental regulations adopted at the PMRC's instigation may have the same effect.

227 *See generally supra* text accompanying notes 45-48.

228 *See supra* text accompanying notes 49-56.

229 For example, local governments may attempt to enact legislation making it unlawful to sell to children under specified ages, without adult or guardian accompaniment, albums containing the advisory label or printed lyrics. A bill making it illegal for retailers to sell recordings containing obscene lyrics to persons under the age of 18 was debated by the Maryland State Assembly. Holland, *Maryland Assembly Mulls Bill on Record Obscenity*, Billboard, Feb. 15, 1986, at 1, col. 1. This bill presented an amendment to article 27, section 419 of the Maryland Code which proscribes the sale of obscene printed materials and videocassettes to minors. MD. ANN. CODE art. 27, § 419 (1982); *see also* Holland, *supra*, at 1. According to the bill's sponsor, "the purpose of the measure [was] not to go after dealers." Rather, it was " 'to put pressure on the manufacturers to keep up their agreement (with the PMRC) and to make sure that [obscene] material is clearly labeled.' " Holland, *supra*, at 1, 77, cols. 1, 1. The Maryland Senate Judicial Proceeding Committee defeated the bill in a seven-to-four vote. Committee Chairman, Senator Thomas Miller, stated that the bill "would have a 'chilling effect' on artists." *Maryland, for Now, Will Not Regulate Lyrics*, N.Y. Times, Apr. 6, 1986, at 45, col. 3.

An RIAA lobbyist invited Frank Zappa to testify on behalf of the recording industry against passage of the obscenity bill at a hearing sponsored by a Maryland State Senate committee on March 18, 1986. Holland, *RIAA Rep Picks Zappa to Fight Porno Bill, But It's News to Assn.*, Billboard, March 22, 1986, at 4, col. 1. This invitation surprised the RIAA because Zappa had testified, at the Sept. 19, 1985 Senate Commerce Committee's record labeling hearing, see generally *supra* notes 33-50 and accompanying text, that the industry's involvement in the controversy was motivated by a desire to "draw attention away from the industry's pending home taping bill, which he opposes." Holland, *Md. Senate Holds Hearing on Porno Bill*, Billboard, March 29, 1986, at 3, 81, cols. 3, 2; *see also* Holland, *supra*, March 22, 1986, at 4, col. 1. At the hearing, Zappa essentially reiterated his position on lyric censorship, *see supra* notes 46-47 and accompanying text, by stating

of entertainment targeted at children.[230] Dallas has instituted a three-tier motion picture classification system. For example, films containing "offensive sex or violence" are given a "not suitable" for 16 year-olds rating. Radio stations in Cleveland have been urged, through a resolution passed by its city council, not to air songs with blatantly sexual or offensive lyrics. And, the Houston Federation of Decency pickets stores which rent videocassettes or sell magazines considered offensive by "parental" standards.[231]

In addition, an ordinance barring children under the age of thirteen from attending certain rock concerts in San Antonio was passed by its city council on November 14, 1985.[232] Children within this age category are prohibited from attending potentially obscene performances at city-owned facilities.[233] The ordinance mandates that promoters of such performances include advisories in all promotional material. The Texas Civil Liberties Union has established a twofold challenge to that ordinance, contending violations of the first amendment freedom of association and the vagueness doctrine.[234]

The New Jersey State Senate has similarly approved child-protection legislation that would make it unlawful to rent or sell videocassettes of "R" or "X" rated films to individuals under the age of seventeen.[235]

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that " '[t]o say that rock music is a major cause of anti-social behavior is not supported by science.' " Holland, *supra*, March 29, 1986, at 3, 81, cols. 3, 2; *see also supra* note 10.

An additional anti-censorship organization comprised of record store retailers and employees was created in response to the proposed amendment to Maryland's obscenity law. This group, "Record Retailers Opposing Censorship," intends to engage in lobbying efforts on both national and local levels against legislation that will negatively affect the recording industry. Holland, *supra*, March 22, 1986, at 4, 84, cols. 1, 4.

Despite the proposed bill, formulation of a state-tailored rating system invokes the same administrative difficulties that rendered impractical the creation of the PMRC's proposed industry panel. *See supra* text accompanying notes 130-39. Furthermore, the amended legislation may be violative of the interstate commerce clause. U.S. CONST. art. 1, § 8, cl. 3. However, discussion of such a concern is beyond the purview of this Note.

230 Powell, *What Entertainers Are Doing To Your Kids,* U.S. NEWS & WORLD REPORT, Oct. 28, 1985, at 47.

231 *Id.*

232 *Texas Concert Law to be Challenged*, N.Y. Times, Nov. 21, 1985, at C18, col. 4.

233 *Id.* The ordinance prohibits " 'vulgar, profane or indecent' " references and expressly prohibits the description of, or reference to, certain sexual acts. A penalty ranging from $50 to $200 is imposed upon those who produce, perform, or participate in obscene performances for each unsupervised child under the age of 13. *Id.*

234 *Id.* Because this is a restrictive ordinance similar to the motion picture classification system, it is likely to be upheld as a reasonable regulation. *See supra* text accompanying notes 125-29.

235 Orodenker, *N.J. Law Would Restrict Sales, Rentals to Minors*, Billboard, Oct. 5, 1985, at 23, col. 1.

Much local legislation has also surrounded the print media. Recently, New York State and six Connecticut cities enacted laws requiring retailers to conceal photographs on the front covers of pornographic publications deemed obscene.[236] To comply with the legislation, retailers can either cover the magazines with plain paper or place panels called "blinder racks" over the photographs, leaving the magazine titles open to view.[237] Since a few rock albums bear graphically explicit covers which may cause children to consider purchasing them, individual localities could promulgate ordinances similarly restricting the display of obscene album jackets.[238]

Similar regulations have withstood judicial scrutiny. A Minneapolis ordinance required sexually explicit books, magazines, and other material[239] determined to be harmful to minors to be kept in sealed wrappers if offered for sale in places where minors may be present, and opaque covers to be placed over any material with potentially offensive packaging. This statute was held not to be in violation of the first amendment,[240] because it was a constitutionally valid time, place, and manner restriction.[241] Likewise, the drafters of the aforementioned New York and Connecticut laws have argued that since the laws "restrict display, a form of advertising known as commercial speech, rather than free speech,"[242] these restrictions are not constitutionally invalid.[243] Despite these apparently child-oriented restrictions, opponents of the Minneapolis ordinance have contended that these

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236 N.Y. PENAL LAW § 245.11 (McKinney Supp. 1986); *see also* Brooke, *Showing of Obscene Magazines Curbed,* N.Y. Times, Nov. 2, 1985, at 28, col. 1. The intent of the New York display legislation, which went into effect November 1, 1985, is "to protect minors against viewing pornography unwillingly from a public place by restricting access to such materials." 1985 N.Y. Laws ch. 231, § 1. Similar laws in Connecticut were enacted throughout the six months preceding enactment of the New York law. Those Connecticut cities in which ordinances were passed are Stamford, New Hartford, Stratford, Torrington, Wallingford, and West Haven. Brooke, *supra*, at 28, col. 1.

237 Brooke, *supra* note 236, at 28, col. 1.

238 The same problems inherent in trying to regulate rock lyrics are present in any attempts to regulate album cover content, *i.e.*, the first amendment rights of all parties concerned. *See supra* text accompanying notes 11-13.

239 Minn. Ordinance §§ 385.131(1)-(2) provide that the restrictions apply to "sexually provocative written, photographic, printed, *sound*, or published materials." Upper Midwest Booksellers v. Minneapolis, 11 MED. L. RPTR. (BNA) 1745, 1756 (D. Minn. 1985) (emphasis added).

240 11 MED. L. RPTR. (BNA) 1745. However, the provision exempting churches, schools, libraries, and other groups from the display restrictions was held to be in violation of the equal protection clause of the fourteenth amendment. *Id.* at 1756. In M.S. News v. Casado, 721 F.2d 1281 (10th Cir. 1983), the court similarly upheld an ordinance requiring a sealed wrapper for materials deemed harmful to minors.

241 *See* 11 MED. L. RPTR. (BNA) at 1752.

242 Brooke, *supra* note 236, at 28, col. 1.

243 *See id.*

limitations infringe upon adults' access to explicit works. Citing *Butler v. Michigan*,[244] they argued that the display requirements rendered it difficult to examine pornographic material prior to purchase.[245] In *Butler*, the Supreme Court had invalidated a Michigan statute declaring it an offense " 'to make available for the general reading public . . . a book . . . found to have a potentially deleterious influence upon youth.' "[246] However, the Minneapolis ordinance was held not to restrict adult access to obscene materials in *Upper Midwest Booksellers v. Minneapolis*.[247]

Since some local legislatures have successfully promulgated child-protection ordinances, display restrictions could be amended to include album covers. However, "[l]egislation aimed at shielding children from allegedly harmful expression must be clearly drawn; the standards adopted must be *reasonably* precise to ensure that those governed by the law and those administering it can understand its meaning and application."[248] In *Ginsberg v. New York*,[249] a store owner was convicted of selling pornographic magazines to a minor. The court said in this instance that the " 'power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . .' "[250] Accordingly, the court further stated that the legislature was constitutionally empowered to regulate in order to ensure the "well-being" of children.[251] Yet, *Ginsberg* did not focus on the constitutional right of adults to have access to such materials. Given the lack of consideration of this issue, *Ginsberg* is not controlling on the exact question presented by this Note. Moreover, there are less intrusive ways of regulating the dissemination of potentially objectionable works without infringing upon adults' and artists' first amendment rights. And, as a matter of constitutional law, legislatures must choose to regulate narrowly to solve a perceived problem.[252]

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244 352 U.S. 380 (1957).

245 *See* 11 MED. L. RPTR. (BNA) at 1751.

246 *Id.* (citing *Butler v. Michigan*, 352 U.S. at 382-83).

247 *Id.* at 1752. Although the ordinance does not absolutely restrict adult access, it does infringe to a certain extent upon free accessibility to the material. *Id. But compare infra* text accompanying note 252.

248 American Booksellers Ass'n v. Rendell, 332 Pa. Super. 537, 568, 481 A.2d 919, 934 (1984) (court upheld display legislation); *see also* Capital News Co. v. Nashville, 562 S.W.2d 430 (Tenn. 1978). *Contra* Rushia v. Town of Ashburnham, 582 F. Supp. 900 (D. Mass. 1983); Calderon v. Buffalo, 61 A.D.2d 323, 402 N.Y.S.2d 685 (4th Dept. 1978); American Booksellers Ass'n v. Webb, 590 F. Supp. 677 (N.D. Ga. 1984).

249 390 U.S. 629 (1968).

250 *Id.* at 638 (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).

251 *See id.* at 639.

252 Certain requirements must be satisfied before the Supreme Court will hold a time,

IV. CONCLUSION

Although the nature and business of music renders it more difficult to regulate than other forms of artistic expression,[253] the recording industry has attempted to structure a mutually acceptable agreement which would encroach minimally upon the constitutional guaranty of freedom of expression belonging to artists, the industry, and the public. Since it is overbroad in application, and will stifle creativity, the RIAA's labeling accord will effectively result in industry-wide censorship. Regardless of the potential repercussions, additional freedoms must not be surrendered by the industry in response to possible further pressure.

Moreover, these proposals to regulate lyrics are deficient, because children are equally, if not more, exposed to explicit violence reported by the national media, and are subjected to explicitly suggestive advertising on a daily basis. Whereas the effects of television on viewers has been discussed and documented,[254] the PMRC's assertions regarding the negative effects of rock music on children remain unsubstantiated.[255] However, in response to the politicized debate, the RIAA has essentially addressed the PMRC's concerns while attempting to preserve the industry's business interests and recording artists' creative outlets. Although the PMRC believes that the new industry regulations will curtail children's access to recordings with potentially offensive lyrics, the regulations may result in attracting or encouraging children into purchasing such recordings.[256] Parents, therefore, must assume responsibility for their childrens' activities. The regulations will prove to be effective only if parents actively use available information to make responsible music selections for, and to monitor the music purchases of, their young children. Concerned parents should accompany children to rec-

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place, or manner regulation valid. First, the restriction must be "narrowly tailored" to serve a "significant governmental interest." Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065, 3069 (1984). It must be shown that the interest cannot be equally well served in a manner that is less intrusive of first amendment interests. *See id.* at 3072. Second, the regulation must " 'leave open ample alternative channels for communication of the information.' " Metromedia, Inc. v. San Diego, 453 U.S. 490, 516 (1981) (quoting Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)); *see also* Note, *USIA Censorship of Educational Films for Distribution Abroad*, 3 CARDOZO ARTS & ENT. L.J. 403, 418 (1984) (synthesizing Supreme Court cases on first amendment regulation).

253 *See supra* text accompanying notes 130-34.

254 *See supra* note 176.

255 *See supra* note 10 and accompanying text.

256 *See supra* text accompanying notes 169-81.

ord stores to determine appropriate selections prior to purchase. In the absence of relevant legislation, retailers cannot be expected to withhold potentially offensive albums from unaccompanied minors.

Finally, rock music has been the target of complaints since its inception.[257] Any work having literary, political, or artistic merit has increasingly been afforded constitutional protection in the United States, despite the patently offensive content contained therein.[258] This broad first amendment protection implicitly extends to all music, including those recordings containing potentially objectionable lyrics. Instead of being responsible for undermining the values of society, literature and music have merely reflected and commented upon changes in sexual and social attitudes. Any method of regulation, directly or indirectly resulting in censorship, would restrict the public's access to the marketplace of ideas.[259] Unrestricted access to varying ideas and viewpoints is integral to a democratic state. Accordingly, regulation of lyric content may undermine freedom of choice, and lead to a society where a vocal minority determines what the majority may hear.

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257 *See supra* note 4 and accompanying text.

258 Roth v. United States, 354 U.S. 476 (1957); John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 U.S. 413 (1966); Miller v. California, 413 U.S. 15 (1972) (chronological progression).

259 *See* discussion of Whitney v. California, 274 U.S. 357, 377 (1927), *supra* note 226.