DO IT YOURSELF: THE MUSIC INDUSTRY GUIDE TO REGULATION OF VIOLENT CONTENT

INTRODUCTION

In June of 1999, President Bill Clinton asked the Federal Trade Commission ("FTC") to investigate whether the entertainment industries were promoting violent material to underage children.[1] President Clinton's request came on the heels of the Columbine High School massacre,[2] in which two students stormed into their school and fatally shot twelve classmates and a teacher before killing themselves.[3] The shooting spree focused national attention on the issue of youth violence, and public concern was further aroused when subsequent media reports revealed that at least one of the killers posted music lyrics and movies with violent content on the World Wide Web.[4]

The FTC's findings, released in September 2000, uniformly condemned the music, movie, and video game industries for marketing tactics that inappropriately targeted children.[5] Specifically, the report found that even where industry insiders did identify material that was considered too violent for children, they nonetheless intentionally promoted and marketed that material to the very age groups deemed too young to consume it.[6]

These findings led the chairman of the FTC to testify in his opening statement to the Senate Commerce Committee that:

> Studies indicate that there is some correlation between exposure to violent materials and aggressive attitudes and insensitivity to violence. That correlation—and a desensitization to violence that we all sense—demands that we stop and consider the wisdom if not propriety of the target marketing to children that our report uncovered. It seems to me unacceptable to continue a process in which advertisers and marketers seek new and

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[1] *See Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording, and Electronic Game Industries: Before the S. Comm. on Commerce, Sci., and Transp.*, 106 CONG. (2000) (statement of FTC Chairman Robert Pitofsky), *available at* http://www.ftc.gov/os/2000/09/violencerpttest.htm (last visited Sept. 13, 2000) [hereinafter Pitofsky].

[2] *See id.*

[3] *See* Lonn Weissblum, *Incitement To Violence on the World Wide Web: Can Web Publishers Seek First Amendment Refuge?* 6 MICH. TELECOMM. TECH. L. REV. 35, 36 (2000) (citing Angie Cannon et al., *Why?*, U.S. NEWS & WORLD REP., May 3, 1999, at 16-17).

[4] *See id.*

[5] *See* Pitofsky, *supra* note 1.

[6] *See id.* (stating that "companies in each entertainment segment routinely end run, and thereby undermine, these parental warnings by target marketing their products to young audiences").

> more efficient ways to market materials they or their industry regards [*sic*] as violent to an underage audience.[7]

All of this has the industry poised at a crossroads, with two possible courses of action taking music executives in decidedly different directions. On the one hand, there is the status quo: industry leaders could conceivably decide to do nothing at all in response to the FTC's report, relying instead on the traditional First Amendment defenses to any attempt at industry regulation.[8] On the other hand, an industry-wide attempt at self-regulation, is something that, although encouraged and in fact recommended by the FTC,[9] would essentially resemble a preemptive strike.[10]

This article takes the position that the second course of action should be followed. In other words, the music industry should take steps to internally regulate the marketing and promotion of material with violent content. The reasons for self-regulation are threefold. First, self-regulation would comply with the explicit recommendations of the FTC and would avoid external legislation by Congress. Second, recent developments in case law suggest that courts may be starting to view traditional First Amendment defenses in a light that leaves the music industry very susceptible to litigation. Finally, self-regulation would protect the artistic freedom of expression that is of paramount concern for the industry, and at the same time improve standing in an already volatile and potentially hostile public environment.

I. The Fork in the Road: Status Quo or Self-Regulation?

The implication of the FTC's report is that eventually, in some way or another, the music industry faces the prospect of change. The FTC has acknowledged that it does not presently possess the power to discipline recording labels for refusing to change marketing tactics.[11] Yet the FTC has also suggested that if the industry does not impose its own regulations within a reasonable amount of time, one solution would be Congressional legislation that would

7 Pitofsky, *supra* note 1.

8 *See Marketing Violent Entertainment to Children: A Review of the Applicability of the Federal Trade Commission Act to Proactices Documented in the Commission Report* (letter from FTC Chairman Pitofsky to S. Commerce Comm. Chairman John McCain), *available at* http://www.ftc.gov/os/2000/11/violstudymccain.htm (Nov. 21, 2000) [hereinafter Pitofsky Letter].

9 *See id.*

10 *See* Pitofsky, *supra* note 1.

11 *See* Pitofsky Letter, *supra* note 8 (stating that "the Commission believes that there are a number of significant legal limitations, including substantial and unsettled questions, to effective law enforcement actions under the FTC Act").

specifically grant the FTC with the power necessary to regulate externally.[12] Thus, the music industry has two options. They can either do nothing at all, which in a sense dares Congress to regulate from the outside, or it can regulate on its own.

The traditional legal argument in favor of the status quo, against regulation and in favor of inaction, is that the First Amendment essentially protects all recorded music from generating liability in the first place.[13] Thus, the argument contends, there is no basis for regulation of content or marketing. The First Amendment historically has afforded virtually absolute freedom to artistic expression,[14] and therefore renders such guidelines unnecessary. Moreover, while this principle has always been subject to vigorous moral debate, there has until recently been no real reason to question its legal soundness.

A recent trend in case law, however, suggests that the First Amendment may no longer protect artistic expression from litigation as well as it once did. This factor, combined with the growing Congressional resolve to regulate,[15] suggests that the inaction approach should be rejected. To understand why, we must first examine the progression of the case law.

A. *From Brandenburg to Today*

There is no shortage of cases alleging that members of the various entertainment industries bear responsibility for "inspiring" members of the general public to commit acts of violence.[16] But historically, the attempt to hold an artist liable for a third party's act of violence has been an exercise in futility.[17] Musical lyrics, in particular, are afforded the utmost First Amendment protection,[18] and as a result, artists and music executives have traditionally been safe when a plaintiff alleges that violent lyrics were the inspiration for a real-life act of violence.

12 *See* Pitofsky, *supra* note 1.

13 *See generally* McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 191-92 (Cal. Ct. App. 1988).

14 *See id.*

15 *See* Pitofsky, *supra* note 1.

16 *See* James v. Meow Media, Inc., 90 F. Supp 2d. 798 (W.D.Ky. 2000); Donaldson v. Lundgren, 4 Cal. Rptr. 2d 59 (Cal. Ct. App. 1992); Adams v. City of Fremont, 80 Cal. Rptr. 2d 196 (Cal. Ct. App. 1998); Matarazzo v. Aerosmith Productions, Inc., 1989 U.S. Dist. LEXIS 13609 (S.D.N.Y. Nov. 15, 1989).

17 *See generally* Robert Firester & Kendall T. Jones, *Catchin' the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior*, 20 Loy. L.A. Ent. L. Rev. 1 (2000).

18 *See id.* at 17-18. *But see id.* at 18-19 (suggesting that protection might not be afforded to some forms of "gangsta rap" that contain excessively violent content and possess no political value).

Yet there are limits to this doctrine.[19] An artist's work is not entitled to First Amendment protection if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[20] This standard, set forth in *Brandenburg v. Ohio*[21] and then refined in *Hess v. Indiana*,[22] has generally entitled musicians to near-absolute protection from liability. The two-part test requires that all speech, other than the most extraordinary calls to illegal action, be shielded.[23]

A number of cases have further defined these principles in terms of the entertainment industry; specifically, *McCollum v. CBS, Inc.*[24] In *McCollum*, the plaintiffs alleged that their nineteen-year-old son was incited to commit suicide by Ozzy Osbourne's song, "Suicide Solution."[25] The court determined that the song was not written with the *intent* that its listeners commit an illegal activity, and therefore one listener's unreasonable reaction to the music did not justify imposing liability on the artist.[26] Notably, however, not even the plain advocacy of violence would be sufficient by itself to constitute incitement.[27] As such, substantial protection is provided to an artist's lyrics.

Another pertinent issue of the doctrine's progression is the artist's duty to the plaintiff. In most cases, due to the protected status of musical lyrics, an artist has no duty to ensure that members of the general public will not react violently to any given song.[28] This is not true, however, if the work violates the *Brandenburg* test, and therefore forfeits that initial wall of protection. In

19 *See McCollum*, 249 Cal. Rptr. at 192-93. Notably, the *McCollum* court acknowledged "freedom of speech guaranteed by the First Amendment is not absolute. There are certain limited classes of speech which may be prevented or punished" such as 1) obscene speech; 2) libel and slander; 3) criminal statutory violations; and 4) speech "which is directed to inciting or producing imminent lawless action, and which is likely to incite or produce such action. . . ." *Id.* The present discussion is limited to the fourth category.

20 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (reversing a Ku Klux Klan leader's conviction and declaring an Ohio criminal statute unconstitutional). Here, the court distinguished "mere advocacy" from incitement. *Id.*

21 395 U.S. 444 (1969).

22 414 U.S. 105 (1973).

23 *See McCollum*, 249 Cal. Rptr. at 193 (citing *Hess*, 414 U.S. at 108 (providing that the two-part test consists of (1) the *intended* incitement to imminent lawless activity, and (2) the *likelihood* that such activity will occur)).

24 249 Cal. Rptr. 187 (1988).

25 *See id.* at 188-91.

26 *See id.*; *see also* Carolina A. Fornos, *Inspiring the Audience to Kill: Should the Entertainment Industry be Held Liable for Intentional Acts of Violence Committed by Viewers, Listeners, or Readers?* 46 LOY. L. REV. 441 (2000).

27 *See McCollum*, 249 Cal. Rptr. at 193. *But see generally* Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir. 1997) (providing that book containing instructions on how to be a hit man is not entitled to protection). In *Rice*, the defendant admitted that the book's intent was to provide assistance to killers. *See id.*

28 *See McCollum*, 249 Cal. Rptr. at 192-93.

Weirum v. RKO General, Inc.,[29] for example, the defendant radio station had such a duty, and its violation of that duty left it liable to the plaintiffs.[30] There, the radio station sponsored a contest in which listeners were actually encouraged to get in their cars and drive to a location where a station employee would distribute prizes to the first arrival.[31] While competing in this contest, two listeners negligently caused a car accident, resulting in the death of another driver.[32] The court determined that because the radio station *intended* an immediate, specific course of action that was likely to occur (reckless driving), it therefore had a duty to the plaintiffs and could be held liable for the negligent acts of the participating drivers.[33]

It is here that a recent development may suggest a shift in the way these types of cases will be treated. In 2000, the court in *Byers v. Edmondson*[34] utilized the *Weirum* duty standard and ruled that movie executives might be liable for the acts of two viewers who went on a shooting spree after watching the movie "Natural Born Killers."[35] The plaintiff was critically wounded in the shooting, and alleged that the filmmakers shared liability for the acts of those who did the actual shooting.[36] Conventional *Brandenburg* wisdom suggests that the First Amendment would bar liability for this type of "copycat" crime.[37] Nevertheless, the court in *Byers* determined that since the plaintiff alleged an intentional tort, that is since the plaintiff claimed that the filmmakers *intended* that viewers emulate the film's violence rather than claiming that they were *negligent* in not preventing a violent reaction, the claim could not be immediately dismissed.[38] If the plaintiffs could prove such intent, the court stated, then the filmmakers would have a duty to protect innocent viewers from third-party acts of violence.[39]

B. *Implications of* Byers

Admittedly, proving such intent poses a substantial hurdle ab-

29 539 P.2d 36 (Cal. 1975).

30 *See id.* at 38-40.

31 *See id.*

32 *See id.*

33 *See id.*

34 712 So. 2d 681 (La. Ct. App. 2000)

35 *See id.* at 687.

36 *See id.*

37 *See* McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 192-93 (Cal. Ct. App. 1988); *see also* Fornos, *supra* note 26, at 447-97.

38 *See Byers*, 712 So. 2d at 687.

39 *See id.* at 688.

sent anything short of a complete admission by the defendant.[40] But the fact that such a claim may be allowed to proceed at all should be cause for concern within the music industry. At least one author believes that *Byers* "may be the beginning of a growing trend of allowing these cases to proceed to trial, perhaps resulting in a multi-million dollar verdict against the defendant."[41] In fact, if more cases are allowed to proceed where others were dismissed prior to trial, the effects on the industry could be severe.[42] The pressure on recording companies would increase along with the potential for costly litigation, and artistic freedom, which is so central to the industry's disdain of regulation, would be seriously compromised as a result.

Whether *Byers* actually signals the onset of a new trend remains to be seen. But the mere possibilities inherent in one such successful lawsuit ought to be enough to dissuade music industry leaders from the inactive response to the recommendations of the FTC. Combined with the cries for reform by members of Congress, these realities leave little doubt that the best course of action for the music industry involves internal self-regulation.

II. The Benefits of Self-Regulation

The benefits of music industry self-regulation would be manifold. As previously discussed, internal regulation would short-circuit a Congressional movement toward external regulation by acknowledging the FTC's findings and recommendations. At the same time, it could provide a safeguard against possible litigation that was forewarned by *Byers*. Perhaps most important of all, a third reason for this type of action is that each of these objectives can be met through regulations that would actually *protect*, and not restrict, artistic freedom.

The FTC emphasized that, due to First Amendment concerns, its recommendations were "not designed to regulate or even influence the content of movies, music lyrics or electronic games."[43] In subsequent letters from the FTC to members of Congress, the FTC further noted that, without legislation by Congress, "significant and

40 *See id.* at 687; *see also generally Rice*, 128 F.3d 233.

41 Fornos, *supra* note 26, at 463; *see also Rice*, 128 F. 3d. 233 (discussing *Amedure v. Schmitz*, 572 N.W.2d 9 (Mich. 1997), also known as the Jenny Jones case, in which the family of the plaintiff won a multi-million dollar verdict against the Jenny Jones Show after the plaintiff, who had revealed a secret crush on-air to an acquaintance, was killed by the acquaintance four days later. The court found the talk show was negligent in inspiring the acquaintance to kill).

42 *See id.*

43 Pitofsky, *supra* note 1.

unsettled First Amendment issues exist that may affect the viability of an FTC action or remedy."[44] These comments by the FTC further the notion that creating internal guidelines that protect artistic freedom is a major advantage of self-regulation. Indeed, the FTC's wariness of the free speech issue suggests that legitimate self-regulatory efforts by the music industry would likely be viewed favorably, particularly so with regard to First Amendment matters. In contrast, the FTC has made equally clear its intent that, if no internal action is taken, "legislation . . . should be considered."[45] Would such external legislation, almost retaliatory in nature, be as responsive to artistic freedom as internal measures crafted by industry experts and artist representatives?

Opponents of regulations might argue that the true responsibility for the listening and purchasing decisions of children lies with people wholly outside the music industry. Indeed, a strong argument exists that parents, and to a lesser extent retailers, should be equally as culpable as music industry executives. Thus, the argument contends, restricting the music industry would place an undue burden on an entity that ultimately has very little actual control over children. However, this argument is misguided. While it accurately represents the proper allocation of responsibility, it does *not* provide a legitimate argument *against* self-regulation. On the contrary, such regulations would *help* the music industry shift responsibility from itself to parents and retailers. If a system is instituted that can provide parents and retailers with information about content, such as an informative ratings system, then the music industry can effectively wash its hands of further legal responsibility. This approach also seems appropriate on moral grounds because it properly emphasizes that the final responsibility rests with those individuals most likely to directly affect the material consumed and interpreted by children.

Conclusion

In view of the FTC's findings and recommendations regarding the marketing of violent entertainment material to children, the music industry must choose in the near future from two diverging paths. Rather than maintain the status quo, the industry should act on its own and self-regulate the marketing and promotion of violent material. Adopting this course of action will benefit the industry in three significant ways. First, it will demonstrate a willingness

44 Pitofsky Letter, *supra* note 8.

45 Pitofsky, *supra* note 1.

to adopt the FTC's recommendations and simultaneously avoid Congressional legislation. Second, it will address a possible cause for concern in the recent case law regarding traditional First Amendment defenses. Finally, it will preserve artistic freedom while improving public standing.

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