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REGULATION OF MUSIC VIDEOS:
SHOULD THE FCC "BEAT IT?"

In recent years, there has been a tremendous increase in the popularity of music videos. Although the concept of music videos has been around since the early 1960's, it has recently exploded into a multi-million dollar business. Recently produced music videos are quite different from the original black and white videos, which were often nothing more than concert footage or a taped studio performance of the musical group. Today's flashy, highly technological music videos use a wide variety of special effects and props.

Early music videos were simply a way of promoting a band or an artist; today's music videos, however, are being embraced as a distinct art form. Music videos are aired twenty-four hours a day on cable television and on special music video programs on broadcast television. Music videos are also recorded on videocassette for home play.

As music videos have become more popular, concern has risen over their increasingly violent and sexual nature. Parents and educators have objected to the graphic violence and sexual imagery depicted in music videos. Record company video executives have also expressed concern over the portrayal of women in music videos as well as the vio-

1. Cf. L.A. Times, April 28, 1985, § VI (Calendar), at 77, col. 4 (regarding a screening of historical video footage, including clips from the 1960's).
2. In 1984, about 1,800 music videos were produced at a cost of $75 million dollars. The Cable Guide, July, 1985, at 10.
3. L.A. Times, April 28, 1985, § VI (Calendar), at 77, col. 3.
4. Music Television (MTV) is a 24-hour music video cable channel. L.A. Times, Aug. 13, 1985, § VI (Calendar), at 10, col. 3. Currently, other cable channels offer more than 25 hours of music videos per week. These cable shows include "Night Flight" on the USA Cable Network, "Video Jukebox" on HBO, and "Album Flash" on Cinemax. Lacayo, The Rock Competition Steps up a Beat, N.Y. Times, Aug. 7, 1983, § B, at 23, col. 1.
5. Music videos can be seen on "Friday Night Videos" on the NBC networks and "N.Y. Hot Tracks" on the ABC networks. Lacayo, supra note 4.
6. In November, 1984, the Speech Communication Association held a conference on the violent and sexually explicit content of music videos. L.A. Times, Nov. 13, 1984, § VI (Calendar), at 8, col. 2. The National Coalition Against Television Violence has monitored music videos and found almost half of them had violent content. See also Gross, What You Can't See on MTV, ROCK VIDEO, June 1984, at 14, 19; Powell, What Entertainers are Doing to Your Kids, U.S. NEWS & WORLD REP., Oct. 28, 1985, at 46.
7. L.A. Times, Nov. 13, 1984, § VI (Calendar), at 8, col. 2; Love, Furor Over Rock Lyrics Intensifies, ROLLING STONE, Sept. 12, 1985, at 13, 83.
Protests have also come from music video artists and producers. Many music videos are rejected by music video shows as unacceptable for air play. Artists and producers of music videos are objecting to this restriction on access imposed by music video show executives.

In short, music videos have become the subject of heated debate. The controversy surrounding music videos is not likely to disappear; if anything, it threatens to increase. Some action must be taken by both the cable and broadcast television executives and by the artists and producers of music videos. The dispute surrounding music videos must be addressed while it is still manageable.

This Note begins with the assumption that all types of music videos are beneficial. If an artist feels the need or desire to produce an explicit or violent video, the artist should be provided some outlet for his creative work, unless the video is legally obscene. Video producers should not be hampered by network fears or guidelines.

Some regulation of videos is needed to avoid self-censorship. Instead of completely rejecting all videos seemed too explicit or violent, a system of regulating the broadcasting of music videos should be developed under which all videos can be seen at some time by those desiring to do so. Regulation of videos will enhance the artists' expression by guaranteeing some outlet for their finished product.

A regulated system of broadcasting music videos will also allow those who do not wish to be exposed to these explicit or violent videos more control over what they see and when they see it. Parents will be better able to prevent their children from watching music videos they find objectionable.

This Note is limited to the discussion of music videos aired on broadcast and cable television. Regulation of music videos on video cassettes purchased for home play is beyond the scope of this Note.

I. THE FUROR OVER MUSIC VIDEOS

Music videos are a unique hybrid of rock music and film imagery combined in a non-traditional form. This combination of visual and au-


9. A music video by the band Motorhead was rejected by MTV because of "excessive and senseless violence." L.A. Times, March 3, 1985, § VI (Calendar), at 69, col. 4 (quoting a spokeswoman from MTV). A music video by Peter Godwin showing two naked women embracing was never shown on MTV. Gross, supra note 6, at 19. See also Gross, The Video Censorship Battle is Growing, ROCK VIDEO, Dec. 1984, at 15; Gross, supra note 6, at 14 (detailing other examples of music videos rejected for air play); L.A. Times, March 3, 1985, § VI (Calendar), at 69, col. 4.

10. Gross, supra note 6, at 19; L.A. Times, March 3, 1985, § VI (Calendar), at 69, col. 4.
R留下 heavy on sophisticated special effects and changing scenery. Messages are communicated by
innuendo and suggestion. Therefore, music videos often do not portray true life situations. Instead, music videos often present a fantasy-oriented or distorted version of reality. The physical structure of music videos is laden with special camera techniques, film imagery, and special effects. The eye is dazzled and the attention of the largely adolescent audience is captured for the length of the video three or four minutes.

Studies show that the predominant themes in music videos played on popular cable and television shows are sex and violence. Critics have counted eighteen acts of violence in each hour of music videos. One survey found that half of all women in videos were provocatively dressed or, as stated in the study, “presented as upper-class sex objects for lower-class males.”

A recent study devoted completely to analyzing the content of music videos reached the same conclusion. Researchers found that over ninety percent of the music videos analyzed presented odd, unusual, and/or unexpected representations of reality. Other frequent themes in videos are, in descending order, sex, dance, and violence and/or crime. The most frequently observed violent acts were acts of physical aggression, not the use of weapons, murder, or sexual violence.

Although themes of celebration and friendship were the next most prevalent themes, the top portion of the list consists primarily of negative themes such as isolation, bizarreness, use of artificial substances, physical restraint, and androgyny. Positive themes, such as health, fitness, and religion were found at the low end of the spectrum.

The images presented in music videos can be extremely violent and explicit. A music video by the band Frankie Goes to Hollywood depicts...
a bondage orgy scene in a gay bar. A video by the band Duran Duran simulates a lesbian encounter. The Twisted Sister video for “We're Not Gonna Take It” shows a son throwing his father down a flight of stairs and through a window. The video also contains a scene in which the members of the Twisted Sister band trample down a door over the father and smash him against a wall. The music video for “Hot for Teacher” by the band Van Halen shows a shapely, pretty school teacher stripping down to a string bikini and strutting among her young students.

Because the field of music videos is still embryonic, it is essentially a medium with no rules. There is no legislation or case law which specifically addresses music videos. Until recently, there has not been a need for such laws.

In the past, the self-restraint exercised by artists, producers, and music video show executives has been an adequate solution to the problem. With the increasing technology and sophistication of music videos, however, self-restraint is inadequate. This conclusion is evidenced by the fact that even when music video artists and producers exercise self-restraint, some music videos are still being rejected by all stations and not being seen by the general public. Artists and producers of music videos which include scenes of nudity, implicit sex, and bondage are unhappy with the limited exposure and play time given their videos.

Parents and women's civil rights groups are also voicing increasing displeasure with the sex and violence found in many music videos. A group called the Parents' Music Resource Center (PMRC) is currently proposing that a warning be shown at the beginning of videos with sex-

23. Gross, supra note 6, at 19; L.A. Times, Feb. 10, 1985, § VI (Calendar), at 75, col. 2.
24. Powell, supra note 6, at 46.
26. Love, supra note 7, at 83.
27. Often various versions of a video are made. A moderate version for general circulation and a more explicit version for home video sales.

One rock group, Frankie Goes to Hollywood, released five videos for one song, “Relax.” When the original video was not frequently aired, the group produced a tamer version which was widely aired on MTV. The group also produced another completely different video for this song. When this version was totally rejected by MTV, producers prepared an edited version which was again rejected by MTV. Finally, the group shot a new, completely different video for the song which the group feels will definitely be suitable for general airplay. L.A. Times, Feb. 10, 1985 § VI (Calendar), at 75, col. 2.
28. See supra note 9 and accompanying text.
29. See supra note 9 and accompanying text.
30. Goldstein, supra note 8, at 1.
ually explicit lyrics or excessive violence.\textsuperscript{31} In November, 1985, the PMRC, the National Parent Teacher Association, and the Recording Industry Association of America reached a voluntary agreement after months of heated debate. Under this agreement, record companies will print an "Explicit Lyrics—Parental Advisory" notice on albums that contain explicit references to drugs, sex, or violence or will print the lyrics to the songs on the album jackets.\textsuperscript{32}

The PMRC, however, was apparently not satisfied. Upset over the "violent, sadistic and sexual videos,"\textsuperscript{33} the PMRC still wants a warning shown at the beginning of explicit music videos or to have such music videos grouped together and shown at a time when young children would not be watching.\textsuperscript{34}

The music video and broadcast industry still exercise some amount of restraint. Top video executives have stated that they have actively discouraged or completely rejected videos with extreme violence or sex.\textsuperscript{35} Music Television (MTV), a twenty-four-hour cable music video channel, has often refused to play videos it found offensive.\textsuperscript{36}

Because of the growing popularity of music videos, they can no longer be adequately regulated under the laws governing broadcasting and cable television in general. Self-restraint exercised by the producers and artists will also not solve this problem. The audio-visual characteristics of music videos present unique problems and a separate regulating scheme must be established.

The furor over music videos presents two antagonistic interests. On the one hand, people have the right to object to videos they find offensive. Parents have a legitimate interest in protecting their children from exposure to sexually explicit or violent videos. Women have a right to object to videos which are derogatory to women. Television executives have a right to refuse to air videos they find objectionable or offensive.

On the other hand, our country is founded upon the principle of freedom of speech or expression. Artists should not be hampered in their creative endeavors. Producers of music videos have a great incentive to produce a video that will fall within acceptable guidelines and be aired on broadcast and cable television. The cost for a music video can range from $35,000 to $150,000.\textsuperscript{37} If the video is refused for broadcast,
the money spent is completely lost. These two competing interests must be balanced in a practical and workable scheme.

II. CURRENT LAW

A. FIRST AMENDMENT PROTECTION AND THE MEDIA

Any discussion or regulation of communication must necessarily begin with the first amendment. Although broad and vaguely worded, the first amendment has been the starting point and defense raised in any action by government to directly or indirectly impede, impair, or censor various forms of speech, communication, and media. Although the amendment states in pertinent part, "Congress shall make no law ... abridging the freedom of speech, or of the press, ..." numerous statutes, regulations, and case decisions have been promulgated which regulate both speech and the press.

A crucial distinction in applying the first amendment lies in the different treatment accorded the print media as opposed to the broadcast industry. Generally, broadcasting has been regulated much more heavily than the print media. It is well settled that the first amendment has a special meaning in the broadcasting context. The Supreme Court in *FCC v. Pacifica Foundation* stated, "We have long recognized that each medium or expression presents special first amendment problems. And of all forms of communications, it is broadcasting that has received the most limited first amendment protection."

Two glaring examples of the different treatment afforded broadcasting and the print media have become known as the Fairness Doctrine and the Personal Attack Rule. The Fairness Doctrine requires commercial broadcasters to keep their public affairs programming reasonably balanced. When broadcasters cover one side of a controversial issue, they must balance that presentation by airing opposing view-

38. U.S. CONST. amend. I.
39. Id.
41. FRANCOIS, MASS MEDIA LAW & REGULATION 435 (2d ed. 1978).
42. Id.
45. Id. at 748 (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952)).
46. Communications Act, supra note 40, at § 315.
points. The Personal Attack rule, a subpart of the Fairness Doctrine, states that individuals who are personally attacked, such as in a broadcast editorial or commentary, must be notified of the attack and given an opportunity to reply over the air.

In Red Lion Broadcasting v. FCC, the Supreme Court upheld both the Fairness Doctrine and the Personal Attack Rule as applied to the broadcast media. The Supreme Court held that broadcasters must present diverse opinions on controversial issues and must also give free air-time to victims of personal attacks. In Miami Herald Publishing Co. v. Tornillo, the Supreme Court reached the exact opposite result with regard to the print media. Newspapers and any other print media are not subject to the Fairness Doctrine or the Personal Attack Rule. Newspapers are free to publish only one side of a controversial issue and to attack individuals without granting them space to reply.

The rationales most frequently cited for limiting the broadcast industry's first amendment right is the scarcity theory. The scarcity theory states that because of the limited amount of radio frequencies, the government may force broadcast licensees to present the views of individuals which the government feels should be expressed through this medium. The Supreme Court has stated that "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."

Another rationale for the differing levels of regulation is that both cable and broadcast television are presented in the home. Because of the significant privacy concerns of an individual inside his home, television and radio are given a much more limited first amendment protection than other communication presented outside the home. The line between the home and the outside world has been a major line of demarcation with regard to privacy rights and first amendment values.

48. Communications Act, supra note 40, § 315.
51. Id. at 386-401.
53. Id. at 256-58.
55. Owen, supra note 54.
57. Pacifica Foundation, 438 U.S. at 748-749.
Traditionally, courts have given greater weight to the privacy interests of persons inside their homes than to the first amendment concerns of broadcasters.\footnote{Id.}

Finally, courts have also expressed concern over the pervasiveness of broadcasting as a justification for its limited scope of protection.\footnote{Pacifica Foundation, 438 U.S. at 748.} Television intrudes into almost every aspect of an individual's daily life. In fact, with the growth of the traditional forms of media and the introduction of new technologies of communication, it is becoming more and more difficult to avoid being exposed to the mass media on a near constant basis.

Although regulation of radio began in 1910,\footnote{Wireless Ship Act, Pub. L. No. 61-262, 36 Stat. 629 (1910).} it was not until Congress passed the Radio Act of 1927\footnote{Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927) [hereinafter cited as Radio Act].} and the Communications Act of 1934,\footnote{Communication Act, supra note 40.} that the broadcast media was subject to direct regulation and policing. Prior to these acts, the broadcast industry was virtually a free-for-all with no restrictions on granting licenses, time periods, or content of broadcasts.\footnote{R. ELLMORE, BROADCASTING LAW & REGULATION 12-15 (1982).}

The 1927 Act\footnote{Radio Act, supra note 62.} and the 1934 Act\footnote{Communications Act, supra note 40.} resulted in, among other things, the creation of the independent seven-member Federal Communications Commission\footnote{Communications Act, supra note 40 at §§ 151, 154-55.} ("FCC" or "Commission") to oversee and regulate broadcasting. The acts placed common carriers under the jurisdiction of the FCC\footnote{Communications Act, supra note 40 at § 201-24.} and established specific statutory guidelines for license renewal,\footnote{Communications Act, supra note 40 at § 307.} which, in effect, indirectly allows the FCC to exert some influence on the content of broadcast programs.

The 1934 Act directed the FCC to regulate broadcasting in the "public convenience, interest, or necessity. . . ."\footnote{Communications Act, supra note 40 at § 303.} The public and its interests were of paramount consideration.\footnote{R. ELLMORE, supra note 64, at 17-18.} Congress merely gave "the Commission this broad mandate and left the Commission to develop its own standards and guidelines to carry out its responsibilities."\footnote{R. ELLMORE, supra note 64, at 17-18.}

The recently enacted Cable Franchise Policy and Communications
Act of 1984\(^7\) ("Cable Act of 1984" or "Cable Act") is legislation which specifically regulates the area of cable communications. The Cable Act addresses issues such as cable ownership restrictions,\(^7\) regulation of rates,\(^7\) and protections for consumers\(^7\) and for subscriber privacy.\(^7\)

The Cable Act was enacted to deal with the various problems of regulating cable that have arisen from the attempt to regulate cable using an antiquated federal statute written for the broadcast medium.\(^7\) Recognizing the significant differences between cable and broadcast television, Congress passed the new act in order to, \textit{inter alia}, create a "national policy concerning cable communications"\(^7\) and to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems."\(^7\) The Cable Act also recognized the important interest in free expression and thus sought to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."\(^7\)

Any rule or regulation promulgated by Congress or by the FCC, whether it relates to radio, television, or cable television, must pass Constitutional muster since the broadcast media enjoy first amendment protection.\(^8\) For example, the Commission is specifically forbidden to censor the content of broadcast programs. Sections 326 of the 1934 Act states:

[N]othing in this act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, 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.\(^9\)

This guarantee of constitutional protection to radio, television, and cable television, as well as to motion pictures has also been affirmed by the courts. The Supreme Court stated in \textit{United States v. Paramount}

\begin{footnotesize}
\begin{itemize}
\item[74.] Cable Act, supra note 73, § 613.
\item[75.] Cable Act, supra note 73, § 623.
\item[76.] Cable Act, supra note 73, § 632.
\item[77.] Cable Act, supra note 73, § 631.
\item[78.] Cable Act, supra note 73, § 601(1).
\item[79.] Cable Act, supra note 73 at § 601(3).
\item[80.] Cable Act, supra note 73 at § 601(4).
\item[81.] See infra notes 83-86 and accompanying text.
\item[82.] See infra notes 83-86 and accompanying text.
\item[83.] Communications Act, supra note 40, § 326.
\end{itemize}
\end{footnotesize}
Pictures, Inc.\(^\text{84}\) that, "[W]e have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the first amendment."\(^\text{85}\) Again, in Joseph Burstyn, Inc. v. Wilson,\(^\text{86}\) the Court reaffirmed that the first amendment applies to any "significant medium for the communication of ideas."\(^\text{87}\) Under these cases, any legislation, administrative regulation, or judicial order restraining or regulating television, radio, motion pictures, music videos or any other communications media or form must meet Constitutional standards.

As of yet there is no legislation which specifically addresses music videos even though music videos are a distinct and unique form of communication. Instead, music videos are dealt with under current regulations and legislation for broadcast and cable television.

**B. THE LAW OF OBSCENITY AND INDECENCY**

Speech and communications which have been labeled "obscene" by a set of elusive standards are not afforded constitutional protection.\(^\text{88}\) Obscenity falls outside the first amendment so the government has the power to regulate and even censor any form of communications which has been found to be obscene.\(^\text{89}\) Thus, the crucial issue is in defining obscenity. If a work is found to be legally obscene, it may be censored and its producers may be prosecuted. If a work is not found to be legally obscene, it may not be censored under the first amendment.

The current standard for obscenity was enunciated in Miller v. California.\(^\text{90}\) Miller involved advertising brochures with very explicit pictures and drawings which were used to advertise the sale of adult books. The Miller three-part test to determine whether material may be banned as legally obscene is:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (citations omitted)\(^\text{91}\)

Further, the Court emphasized that in determining precisely what

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84. 334 U.S. 131 (1948).
85. Id. at 166.
86. 343 U.S. 495 (1951).
87. Id. at 501.
89. Id.
91. Id. at 24.
appeals to the "prurient interest" or is "patently offensive," a national standard may not be used.92 Instead, courts are directed to look to local community standards for guidance.93

The three-part Miller standard remains the definitive test in determining whether material is obscene. If material is found to be legally obscene under the Miller test, it may be legally censored or banned no matter what form it takes. Therefore, obscenity can be banned whether the material is a movie, book, or television program.

In the area of broadcasting, however, regulations of obscenity encounter some difficulty. Two apparently contradictory federal statutes must be reconciled. Section 326 of the Federal Communications Act states:

> 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 station, 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 communications.94

In the federal criminal code, 18 U.S.C. Section 1464 states that,

> 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.95

The Supreme Court in FCC v. Pacifica Foundation96 held that,

> the two statutory provisions have a common origin.97 The Court also stated that the anti-censorship provision,

has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties. . . . In 1948, when the Criminal Code was revised to include provisions that had previously been located in other Titles of the United States Code, the prohibition against obscene, indecent, and profane broadcasts was removed from the Communications Act and re-enacted as § 1464 of Title 18.98

The Cable Act of 198499 specifically addresses the issue of regulation of obscenity in cable communications. Section 639 states that,

> whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined not more than $10,000 or imprisoned not more than two years,

92. Id. at 30-34.
94. Communications Act, supra note 40, § 326.
97. Id. at 735.
98. Id. at 735-738.
99. Cable Act, supra note 73.
or both.\textsuperscript{100}

Thus, the FCC has the power to impose sanctions, including the revocation of a broadcast license, if the licensee transmits obscene or indecent materials over the airwaves.\textsuperscript{101} No station, however, has ever had its license revoked for broadcasting obscenity, although stations have incurred fines for such broadcasts.\textsuperscript{102}

The question of what material is "obscene" has been a source of controversy for years.\textsuperscript{103} Due to the necessary subjectivity of the inquiry, commentators have argued that it is impossible to fashion an objective, non-vague, workable definition of obscenity.\textsuperscript{104} The controversy, however, has been limited to the definition and determination of obscenity. It is well settled that once material falls into the category of obscenity, it may be regulated and completely banned by the government.

In dealing with material that is deemed "indecent" as opposed to "obscene," however, the vagueness and confusion increases. In fact, there has been some dispute whether the words "obscene" and "indecent" have two separate meanings.\textsuperscript{105} A footnote in United States v. 12 200-Ft. Reels of Super 8mm Film,\textsuperscript{106} clearly implies that the words indecent and obscene share a common meaning:

\begin{quote}
If and when such a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" as used to describe regulated material in... 18 U.S.C. § 1462 ..., we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in Miller v. Californ...\end{quote}

\textsuperscript{100} Cable Act, supra note 73.


\textsuperscript{103} For an analysis of obscenity and the Supreme Court's difficulty in defining it, see L. Tribe, American Constitutional Law, §§ 12-16 (1978).


\textsuperscript{106} 413 U.S. 123 (1973).
The FCC developed its own definition of "indecent" at a time when there was no judicial definition. In In re WUHY-FM, (Eastern Educational Radio), the FCC defined indecency as material that is "(a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value." In light of the later Supreme Court decision in Miller, this definition is probably no longer valid.

While the Court has only occasionally allowed governmental regulation of non-obscene but indecent expression in the print and motion picture media, some regulation of indecency has been allowed in the broadcast media. During the 1960's and 1970's, the FCC penalized several radio stations for broadcasting material that probably would not have been declared obscene under the Miller test. Often invoking the public interest standard, the Commission has successfully penalized stations for broadcasting language variously described as in poor taste, off color, coarse and vulgar, of indecent double meaning, or obscene as to children.

The most significant decision dealing with broadcast indecency was FCC v. Pacifica Foundation. This case dealt with a radio broadcast of a monologue by humorist George Carlin, in which he repeatedly used seven four-letter words. In the "seven dirty words" case, the Supreme Court granted the FCC a new, but narrow, charter to regulate both "indecency" and "obscenity" in broadcasting. Upholding the FCC's reliance on a nuisance rationale, the Court held that the FCC has the power to regulate a radio broadcast that is indecent but not obscene.

The Court defined "indecency" as "nonconformance with accepted standards of morality" and found that the context in which the material

107. Id at 130, note 7.
109. Id. at 412.
110. 413 U.S. 15 (1973); see supra notes 90-93 and accompanying text.
111. The requirement that obscene works be utterly without literary, artistic, political, or social value, as required by the Roth test, no longer exists. 354 U.S. 476, 484-85 (1957). The current test in Miller only requires that obscene works lack serious value. 413 U.S. 15, 24 (1973).
115. Id. at 738.
116. Id. at 740.
is broadcast was a crucial factor. The Court also found two other factors important in stating that the first amendment does not give as broad a protection to broadcasting as it does to other forms of speech and expression. The Court reasoned that,

[The broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.]

The Court also stated that, "broadcasting is uniquely accessible to children, even those too young to read. . . . Other forms of offensive expression may be withheld from the young without restricting the expression at its source." The holding in Pacifica has been construed rather narrowly and is usually limited to the specific facts of the case. The Court mentioned variables such as the time of day of broadcast and the differences between radio, television, and closed-circuit transmissions as influencing whether the FCC's action against indecent broadcasting was appropriate.

There have been very few instances in which the FCC has attempted to regulate indecency on broadcast television. The scarcity of cases dealing with television indecency may be due in part to the circumspection by television broadcasters who must appeal to the wide range of tastes of their viewing audience and who must also solicit commercial sponsors. Although the Commission has occasionally expressed concern over indecency on television, it has never formally penalized a television station for the broadcast of indecent material.

Regulation of indecency on cable television has been even less successful. The recent Cable Act attempts to delineate the lines of power between the FCC and state and local authorities. The Cable

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117. Id. at 742.
118. Id. at 748-50.
119. Id. at 748.
120. Id. at 749.
121. Id. at 726.
122. Riggs, supra note 102, at 286.
123. Pacifica Foundation, 438 U.S. at 750.
124. Id. at 288.
125. Riggs, supra note 102, at 289, n. 158.
126. Cable Act, supra note 73.
127. Cable Act, supra note 73, § 636.
Act differentiates between obscene and indecent programming and attempts to resolve the constitutional problems of indecent programming through the use of cable technology.

The Cable Act addresses the prohibition of obscenity in several sections. First, the Act imposes a stiff federal criminal penalty for the transmission of obscene material. Generally, state and local obscenity laws are not preempted. State and local obscenity laws are preempted only insofar as they relate to a cable operator's liability for programming shown on public, educational, governmental, and commercial access channels. Finally, the franchising authority and a cable operator may prohibit the transmission of obscene programming.

The Cable Act does not attempt to directly regulate the transmission of indecent material on cable television. The legislative history notes that the courts have found that an indecency standard applied to cable television is not constitutional. If, however, the Supreme Court were to rule that cable television should be treated like broadcast television for the regulation of indecency, the Cable Act would not preempt local indecency laws.

In order to accommodate the viewers who want to keep obscene material out of their homes and prevent their children from viewing it, the Act requires that a "lock box" be made available by the cable operator to any subscriber at their request. This device, which blocks out specific channels for certain periods of time is meant to "restrict the viewing of programming which is obscene or indecent."

State and local attempts at regulation of indecency on cable television have thus far been unsuccessful. Although the Supreme Court has not addressed the matter, such cases are currently pending. Several federal cases have been decided in favor of cable companies, striking down the regulation of indecent material.

128. Compare Cable Act, supra note 73, § 639 with Cable Act, supra note 73, § 624(d)(2).
129. Cable Act, supra note 73, § 624(d)(2).
130. Cable Act, supra note 73, § 639.
131. Cable Act, supra note 73, § 638. State and local obscenity laws, however, are preempted only insofar as they relate to a cable operator's liability for programming shown on public, educational, governmental, and commercial access channels. Id.
132. Id. § 624(d)(1).
134. Indecent material may be regulated to a limited extent on broadcast television. See supra notes 113-125 and accompanying text.
137. Cable Act, supra note 73, § 624(d)(2)(A).
138. Riggs, supra note 102, at 293.
In *Home Box Office, Inc. v. Wilkinson*, a federal district court struck down a Utah state statute which made it a crime for any person to "knowingly distribute by wire or cable any pornographic or indecent material to its subscribers." Pornographic material was defined in accordance with the *Miller* test for obscenity and this portion of the statute was not challenged. The court, however, found that the prohibition against indecent material, as defined by the statute was overbroad. The court found that the statute amounted to a prohibition on most depictions of nudity and sexual activity and a wide range of non-obscene material which went beyond the *Miller* privilege.

Similarly, in *Community Television of Utah, Inc. v. Roy City* the court struck down a city ordinance attempting to limit indecent material on cable television. The court found that the standards for indecency did not satisfy the *Miller* standards. The court also found *Pacifica* inapplicable because of the significant difference between

140. UTAH CODE ANN. 76-10-1229(1) (SUPP. 1985).
141. Id. §§ 76-10-1201, 1203 (1978).
143. The relevant section of UTAH CODE ANN. § 76-12-1227 (Supp. 1985) reads as follows:

   For purposes of this act:
   
   (1) "Descriptions or depictions of illicit sex or sexual immorality" means:
   (a) Human genitals in a state of sexual stimulation or arousal;
   (b) Acts of human masturbation, sexual intercourse, or sodomy; or
   (c) Fondling or other erotic touching of human genital, pubic region, buttock, or female breast.
   (2) "Nude or partially denuded figures" means:
   (a) Less than completely and opaquely covered:
      (i) Human genitals;
      (ii) Pubic region;
      (iii) Buttock; and
      (iv) Female breast below a point immediately above the top of the areola; and
   (b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

144. *Home Box Office, Inc.*, 531 F. Supp. at 999.
146. The relevant part of the ROY CITY, UTAH, ORDINANCE, title 17, ch. 3, § 6(6), (7) stated:

   (6) "Indecent Material" shall mean material which is a representation or verbal description of:
   (a) An erotic human sexual or excretory organ or function; or
   (b) Erotic nudity; or
   (c) Erotic ultimate sexual acts, normal or perverted, actual or simulated; or
   (d) Erotic masturbation;
   which under contemporary community standards is patently offensive.
   (7) "Erotic" shall mean tending to arouse sexual feelings or desires.
   (The text of the ordinance appears as an appendix to the opinion. 555 F. Supp. at 1173).
broadcasting and cable. The court found that the crucial distinction between broadcasting and cable lay in the differing "levels and degrees of choice" which give the cable viewer more control over what he receives. This in turn significantly reduces the potential of cable television to intrude into the privacy of the home when it is unwanted or unexpected.

Finally, in Cruz v. Ferre, the court reaffirmed the inapplicability of Pacifica to cable television by striking down a city ordinance. The court found Miller to be the controlling precedent and, predictably, Miami's ordinance failed to meet that standard.

C. REGULATION OF MOTION PICTURES

The regulation of obscenity and indecency in the motion picture industry has had a turbulent history. Since 1915, the Supreme Court has addressed the issue of obscenity and indecency in motion pictures, holding at various times that movies were not speech and therefore may legitimately be subject to prior approval and/or censorship, that a movie could not be banned because of a determination that it was "sacrilegious," and that any prior restraint system for the licensing of movies must give extra due process procedures and safeguards. Currently, there is no dispute that motion pictures are a valid form of speech and deserve first amendment protection, albeit somewhat limited in scope.

The movie industry itself has taken various steps to regulate itself. In 1922, motion picture studios and distributing companies formed the Motion Picture Producers and Distributors of America, later to be called the Motion Picture Association of America (MPAA). This association has passed resolutions regarding the production of films. In 1930, the MPAA established the Motion Picture Code which was to set

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148. Id. at 1167, 1169.
149. Id. at 1170.
150. Id. at 1168-69.
152. Id. at 131.
153. Id. at 132.
155. Id.
160. E. DEGRAZIA & R. NEWMAN, BANNED FILMS 30-32 (1965); RANDALL, supra note 159, at 199.
guidelines for the production of movies.161

In 1968, the MPAA, the National Association of Theater Owners (NATO) and the International Film Importers and Distributors of America (IFIDA) joined together and came up with the voluntary film rating system of the motion picture industry.162 Most movies produced and released in the United States are rated by the MPAA. Although this system is purely voluntary, most producers overwhelmingly submit their film for a rating. In addition, approximately eighty-five percent of the motion picture exhibitors subscribe to the rating program.163

From the outset, it has been emphasized that the purpose of the ratings was to provide information and guidance to parents, not to censor movies.164 The MPAA has stated:

[t]he purpose of the rating system was to provide advance information to enable parents to make judgments on movies they wanted their children to see or not to see. Basic to the program was and is the responsibility of the parent to make the decision. The Rating Board does not rate for quality or the lack of it. (emphasis in original)165

The ratings are determined by a majority vote of the Board after viewing and discussing a film. In reaching a decision, each Board member states his or her reasons for the rating in each of the categories considered by the MPAA.166 These categories include: theme, language, nudity, sex, and violence.167

A producer who is unhappy with the rating of his film has two options.168 If the producer requests, the Board must inform him of the reasons behind a particular rating. The producer can then re-edit the film, perhaps deleting or modifying objectionable passages, and submit the film for rating a second time.169

The other option available to an unhappy producer is the process of appeal. A producer dissatisfied with a rating can appeal to the Ratings Appeals Board.170 The Appeals Board is comprised to twenty-two members of MPAA, NATO, and IFIDA.171 An initial film rating by the Ratings Board can be overturned by a two-thirds vote of the Appeals Board
present. A decision by the Appeals Board is final. The Appeals Board, however, may grant a rehearing upon a producer's request. The MPAA presently uses five categories of rating: G, PG, PG-13, R, and X. Most pornographic movie makers do not submit their films to the MPAA but simply self-apply the X rating before its release. The MPAA has a monopoly on all the other ratings. A company must submit its film for review and certification to the MPAA if it desires a G, PG, PG-13, or R rating.

A film with a G rating is one for "General Audiences—All ages admitted." These are films that are suitable for all ages. This does not necessarily mean that it is a children's film; it merely means that there is no offensive language, adult themes, nudity or sex, or there is a minimal amount of violence.

A PG rating means "Parental Guidance Suggested; some material may not be suitable for children." A PG film may contain some profanity and brief nudity. These films, however, do not contain explicit sex or cumulative violence.

A PG-13 rating stands for "Parents are strongly cautioned to give special guidance for attendance of children under 13. Some material may be inappropriate for young children." A PG-13 film contains more nudity and profanity than a PG film but not enough to amount to an R rating.

An R film is "Restricted, under 17 requires accompanying parent or guardian." An R film may contain nudity, rough language, and violence. Explicit sex is not found in R-rated films.

An X rating is the only designation which absolutely prohibits children from attending. A X rating states "No one under 17 admitted." A film with an X rating contains adult material consisting of explicit
sex, brutal or sexually connected language, or excessive and sadistic violence.\textsuperscript{187}

An X rating does not define a film as obscene or pornographic.\textsuperscript{188} Legal obscenity is left for the courts to determine.

As previously stated, a key element in the MPAA rating and regulatory scheme is parental involvement and supervision.\textsuperscript{189} The ratings themselves give parents a vague guideline by which to monitor their children's movie viewing habits. The MPAA does not now, nor does it believe it should, take steps to regulate movies based on their rating.\textsuperscript{190} There may be some regulations of movies based upon their ratings (such as zoning laws for X-rated movies, advertising and poster prohibitions) but this exceeds the MPAA's limits in the self-regulatory process.\textsuperscript{191}

D. THE "PORN ROCK" CONTROVERSY

In April, 1985, a group of parents concerned over the explicit lyrics in rock and roll music which glorify sex, violence, and drugs, formed the Parents' Music Resource Center (PMRC).\textsuperscript{192} The members of PMRC led a public relations campaign to raise public awareness and to pressure the recording industry to implement some changes.\textsuperscript{193}

Initially, the PMRC demanded that a complex rating system be implemented in the recording industry.\textsuperscript{194} Record album jackets and cassettes would be marked V for violent material, X for sexually explicit lyrics, O for lyrics with references to the occult, and D/A for references to drugs or alcohol.\textsuperscript{195} The PMRC also sought to have the lyrics of all songs printed on album jackets and to have all offensive album covers removed from display in record stores.\textsuperscript{196}

After months of heated debate, which included a meeting with the FCC,\textsuperscript{197} hearings before the Senate Commerce Committee,\textsuperscript{198} and a flood of editorials in magazines and newspapers,\textsuperscript{199} the PMRC, the Na-
tional Parent-Teacher Association, and the Recording Industry Association of America reached a compromise agreement. The agreement was joined by record companies which produce approximately eighty percent of the records sold in the United States.

The agreement calls for a label reading "Explicit Lyrics—Parental Advisory" to be placed on albums containing songs with explicit lyrics. In lieu of the warning label, song lyrics may be printed on the album jacket. With tape cassettes, either a warning label or instructions directing the customer to the record album cover for the song lyrics must be affixed. However, musicians with contracts that allow them complete creative control over their product, including album covers, will be free to ignore the agreement.

III. REGULATION OF MUSIC VIDEOS

It is not contended that any music videos in general circulation today are legally obscene. Obscenity is a legal term of art and thus its determination should be left to the courts. In light of the restrictive definition of obscenity currently in use today, only hard core pornography qualifies as obscenity. Given that music videos consist of the blending of music, lyrics, and film imagery, it is highly unlikely that any music videos will lack serious artistic value. As stated above, however, this is a determination to be made by the courts and regulation of obscenity must be done through lawsuits.

A strong argument can be made that many music videos being aired on broadcast and cable television are indecent. Indecency, as defined in Pacifica, is "non-conformance with accepted standards of morality." As discussed earlier, regulation of indecent material has been quite limited. While obscenity may be completely banned in all mediums, the authority for regulation of indecent materials is much less evident. Limited regulation of indecent material has been upheld in the area of broadcast television. Pacifica sets the model and the limitations.


201. Id.
202. Id. § I, at 12, col. 1.
203. Id.
204. Id.
205. AP Wire Service, supra note 198.
206. Miller, 413 U.S. at 24.
207. Id.
208. Pacifica Foundation, 438 U.S. at 740.
209. Id. at 726.
Pacifica emphasizes that the context in which the indecent material is broadcast is determinative.\textsuperscript{210} Pacifica also encouraged broadcasting of indecent material at times when children are not likely to be part of the audience.\textsuperscript{211} While mere channeling of indecent music videos will ease the problem of unwanted exposure to such videos, the broadcast approach alone is not sufficient. While young children's access to indecent music videos might be more difficult if such videos were aired later at night, access would still be only as far away as the flip of a television switch.

The FCC approach to indecent material on cable television incorporates a lock box.\textsuperscript{212} But this alone will not solve the problem of exposure to indecent music videos. A lock box is more restrictive than is necessary. It would completely block out a whole music video channel or show. While many music videos are indecent, violent, and sexually explicit, many are perfectly acceptable and some may even be beneficial and uplifting.\textsuperscript{213}

While neither the cable television approach nor the broadcast television approach alone is adequate, a combination of the two methods may be the best solution. Broadcasters and cable operators need to channel the more explicit music videos (those considered indecent) to times when children are not likely to be in the audience. Forewarning viewers and parents of the times when the more explicit or violent videos will be aired will ease the problem of a viewer haphazardly stumbling upon a music video he considers objectionable. The second phase would involve the use of a lock box to block out those times when it is known that the more mature music videos will be shown. The use of a lock box will allow parents greater control in monitoring the television viewing habits of their children.

These methods necessarily require a judgment by someone as to whether a music video is explicit or non-explicit. The framework of the movie industry may be helpful in this respect. Almost all movie producers submit their movies to the MPAA to receive a rating before distribution.\textsuperscript{214} This practice is entered into voluntarily by the movie industry.\textsuperscript{215} A similar voluntary practice is needed in the music video industry. Under this practice, music videos would be submitted to some

\textsuperscript{210} Id. at 742, 744.
\textsuperscript{211} Id. at 749-50.
\textsuperscript{212} Cable Act, supra note 73, § 624(d)(2).
\textsuperscript{213} The music video for "Second Wind" by Billy Joel discourages teenage suicide. Bruce Springsteen videos often celebrate the American way by depicting scenes of baseball, beer drinking, and Mom's apple pie. L.A. Times, Aug. 13, 1985, § VI (Calendar), at 10, col. 4.
\textsuperscript{214} Valenti, supra note 162, at 7.
\textsuperscript{215} Valenti, supra note 162, at 7.
independent group for a rating. Only two broad categories should be used to avoid the fine, almost arbitrary distinction made by the movie industry between PG and PG-13 or between PG-13 and R. A music video which is deemed to be indecent, sexually explicit, or too violent should receive an M, denoting that this music video is intended for mature audiences. Labels such as X or R as used by the movie industry or X, V, or D/A as suggested by the PMRC have negative connotations. The designation of M for mature has been proposed because it is a more neutral term.

The initial rating should not be final. As in the movie industry, producers should be given a chance to re-edit their work or to appeal.

CONCLUSION

There is no doubt that television, both broadcast and cable, is a pervasive and powerful medium. Approximately ninety-six percent of American households have at least one television set. The average television set is on for more than six hours a day. In addition, the availability cable television has increased significantly. As of August 31, 1984, approximately forty percent of American households with television sets were cable subscribers. Numerous studies have shown that there is at least a tenuous relationship between watching television and behavior.

Music videos are also becoming very pervasive and powerful. This popularity is demonstrated by the tremendous growth of MTV. Reportedly, MTV is adding one million new subscribers a month. The great influence of music videos is also apparent from the effect MTV has had during its four years of existence. Fashion trends, television shows, and literature all display the influence of music videos.

216. Valenti, supra note 162, at 8-11.
219. Id.
220. This percentage represents approximately 32 million viewers. Cable Stats. Cablevision, Jan. 21, 1985, at 44.
221. TV Report, supra note 218.
222. Lacayo, supra note 4, at 23.
223. Lacayo, supra note 4, at 23.
224. The television show "Miami Vice" often blends artistic visual depictions and current popular songs, making it similar to a music video. "Miami Vice" consistently appears at the top of the TV rating charts.
225. A currently popular novel Less Than Zero by Bret Easton Ellis is filled with references to MTV. L.A. Times, Aug. 13, 1985, § VI (Calendar), at 10, col. 4.
The media, music video producers, and artists must realize that they exert a tremendous influence over impressionable adolescents. The recent controversy over explicit rock and roll lyrics and the resulting agreement\footnote{See supra text accompanying notes 192-205.} indicate that both the public and the recording industry are aware of this influence. Given the power and influence of the media, the executives and creators of media entertainment must act responsibly.

Although the above proposal may appear intrusive and seems to smack of censorship, it is meant to be the exact opposite. Once it is agreed that the prevalence of indecent music videos is a problem and threatens to become an even greater problem, the above proposal is the least restrictive and intrusive alternative. Instead of having a system of government regulation, it would be better for the industry to accept its responsibility and regulate itself.

The above proposal provides a reasonable balance between the rights of viewers to view or not to view certain material, and the rights of the broadcasters, cable operators, and music video artists and producers to produce and broadcast such material. Music videos which are currently rejected by broadcasters and cable operators as being too violent or explicit could be aired at certain times under industry-imposed regulation. Under this proposal, artists and producers wishing to make explicit or violent videos and viewers who wish to see such videos would be able to do so.

Channeling indecent music videos, providing forewarning of their airtime, and making lock boxes available would give broadcasters and cable operators greater freedom in their choice of programming. Parents would be less likely to object and less likely to prevail in obtaining restrictive measures if they knew in advance when indecent music videos would be shown and were provided with a mechanism for preventing their children's exposure to it.

The movie rating scheme met with some resistance at its inception, but today it is accepted and has become a part of the movie industry. The idea of rating and regulating music videos may seem unfamiliar and undesirable; however, it is the best compromise between competing interests in a difficult situation.

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