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Justice Isn't Deaf—A Behind the Scenes Look at how Bijoux Records' Executives Discuss the Potential Liability for Violence

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“JUSTICE ISN’T DEAD”

A Behind the Scenes Look at how Bijoux Records' Executives Discuss the Potential Liability for Violence “Inspired” by Song Lyrics and How They Will Fare in the Face of the First Amendment

- By Renée Michelle Moore⁵

Cast of Characters

1. Martin Winchester: Senior Vice President, Business & Legal Affairs, Bijoux Records.
2. Gregory Goddard: Senior Director, Business & Legal Affairs, Bijoux Records.
3. Brooke Hagen: Director, Business & Legal Affairs, Bijoux Records.
4. Hank Riley: Business & Legal Affairs, Bijoux Records.
5. Jake Evans: Business & Legal Affairs, Bijoux Records.
6. Anna Cataldi: Vice President A&R, Bijoux Records.
7. Kathy Cole: Legal Secretary, Bijoux Records.

The music industry is an interesting phenomenon. It is a world that exists on image—and everyone has a say. For that very reason, the music industry is no stranger to critics. At its heart, they are what the industry is all about. Critics are the driving force in the business—their written and verbal exchange of ideas predicts the rise and fall of stars. Critics come in all shapes and sizes—they are the everyday consumer, the media at large, the

hopeful artist, the record company executive, the legal scholar, and even our nation's government.

This article will take you on a journey and show you what happens behind the scenes in the music industry. You will become a “fly on the wall” at a fictitious record company meeting where insiders are discussing the potential signing of a controversial artist, Sam Satyr. In this scenario, you will witness how the critics previously mentioned interact, and how their social and legal concerns are approached.

SCENE I

Wednesday, March 17, 2004

11:00 a.m.

**In the Office of the Senior Vice
President of Business & Legal Affairs at
Bijoux Records**

Kathy Cole, Legal Secretary: We have received a lot of phone calls and letters concerning Sam Satyr. I thought you might like to see a particular letter that I found interesting that was signed by a concerned mother. It is addressed as follows: “To whom remains concerned for the welfare of our nation's children” and the letter states, “I think you are making a mistake if your record company signs Sam Satyr. You have no idea what an impact he has already had on young children—singers like him are talking at kids. They are preaching in a form of lyrical

brainwashing.” She then goes on to compare rap artists to cult leaders since they both preach to young impressionable teens. She illustrates how some artists reach “idol” status just like the cult leader is an “idol.” She writes, “Kids go to bed with headphones on, listening to these rap artists ‘talk’ about using guns and drugs. Sam Satyr not only talks about it, he promotes it. In one song he sings over and over, ‘put a cap in the enemy—you have no friends—they are all the enemy. Get your gun—do it now. F—k them, they don’t understand you, they don’t listen. Nobody listens but they’ll hear the shots ring out.’” She also writes about how these songs are not healthy, calling the songs “lyrical brainwashing aimed at teens who will identify with the ‘nobody understands me, nobody listens’ message and who will believe that the only way people will listen is through violence.” This is just one of hundreds of letters and phone calls we have been receiving about Sam Satyr. What do you think?

Martin Winchester, Senior Vice President: Well, my first thought is that this is just one letter. However, you say there are hundreds of them coming in. I think we should call a meeting with the legal staff. We really haven’t had this kind of heat before. The media and the public are fascinated with Sam Satyr because his lyrics tend to be pretty brutal. So, here’s what I need you to do, Kathy: Send a memo around to the in-house counsel and Sam Satyr’s A&R² person. I want the attorneys to do some research on other recording artists who have run into legal problems. I need to know what—if anything—resulted from lawsuits. I want Sam Satyr’s A&R person at the meeting so that she can tell us what we are dealing with as far as Sam’s effect on the crowd when he performs and alert us to any controversial songs so we know how to handle him. Can you write something up to that effect and distribute it for me?

Kathy Cole, Legal Secretary: Sure. I will also include some of these letters so they have a better idea of what kind of complaints we have received.

SHE writes, “Kids go to bed with headphones on, listening to these rap artists ‘talk’ about using guns and drugs.”

BIJOUX RECORDS

Memorandum

To: Business & Legal Affairs and A&R Department

From: Martin Winchester

Date: March 17, 2004

Re: Staff meeting regarding the signing of Sam Satyr

We are having a meeting on Friday, March 26th at 10:00 a.m. to discuss the feasibility of signing Sam Satyr. I am aware that we have not had this type of meeting before. However, in light of both the violent tragedy of September 11th and recent terror alerts in general, Bijoux Records is undergoing changes to recognize sensitivity to potential violence. The President of Bijoux Records, Carson Wedekind, has asked the Business and Legal Affairs Department to advise him on signing Sam Satyr. As you know, an issue such as this would usually be sent to outside counsel. However, Carson is going on the assumption that Sam Satyr is going to be a mega-star, and he doesn’t want Satyr to get grabbed by another label.

I want each of you to be prepared to discuss any lawsuits against artists or record companies. Specifically, I am interested in what liability, if any, we could be subject to if someone commits a violent act after listening to songs written or performed by Sam Satyr. Although Bijoux Records has not received any indication that violence would occur from listening to his songs, we have received angry letters from parental groups regarding him. I am aware that there have been various cases in the past on this issue with rock groups and rap artists. I want all legal angles covered including any legislation I should be aware of concerning this issue. Thank you.

SCENE 2

Friday, March 26, 2004

10:00 a.m.

**Bijoux Records Business & Legal Affairs
Conference Room**

Martin Winchester, Senior Vice President: Good morning. How is everyone doing? Are you guys ready to dive into this? Okay, who can give me some background?

Hank Riley, Counsel: Well, I thought we could start off with some legislative background. After the Columbine High School massacre back in 1999, President Clinton asked the Federal Trade Commission to investigate whether entertainment industries were promoting violent material to underage children.³ I am sure you all remember this case, but to refresh your memories: two students stormed into their school and fatally shot twelve classmates and a teacher.⁴ This horrific act brought attention to the music industry when media reports revealed that at least one of the killers posted music lyrics and movie lines with violent content on his website.⁵ Eric Harris, one of the shooters, posted lyrics to a German band, KMFDM, on his website and was a fan of rocker Marilyn Manson.⁶

Martin Winchester, Senior Vice President: What did the lyrics say?

Hank Riley, Counsel: The lyrics that Eric Harris allegedly posted were from KMFDM’s song “Waste.” The lyrics were, “What I don’t say I don’t do. What I don’t do I don’t like. What I don’t like I waste.”⁷ So, in reaction to the publicity surrounding the incident, the FTC conducted studies which indicated that there is some correlation between exposure to violent materials and aggressive attitudes and insensitivity to violence.⁸ The FTC then uniformly

condemned the music industry and other industries for intentionally marketing to children material that was considered too violent.⁹

Martin Winchester, Senior Vice President: What did the FTC do as a result of this report?

Hank Riley, Counsel: The FTC’s report suggested an industry-wide attempt at self-regulation, however, the point that I wanted to get across is that the FTC has acknowledged that it does not presently possess the power to discipline record labels for refusing to change marketing tactics.¹⁰ Basically, there would have to be Congressional legislation enacted that would specifically grant the FTC the power necessary to regulate externally.¹¹

AFTER the Columbine High School massacre back in 1999, President Clinton asked the Federal Trade Commission to investigate whether entertainment industries were promoting violent material to children.

Martin Winchester, Senior Vice President: Any legislation in this area is bound to raise substantial First Amendment issues.¹² Though I could be wrong, I don’t believe that laws like that are going to be passed any time soon. Regardless, for now, I would like to focus on what is presently impacting us. Are there any cases out there that we should be particularly worried about?

Brooke Hagen, Director: Well Marty, there have been various lawsuits against record companies and their artists for violent acts committed by individuals after listening to rock and metal groups, like Ozzy Osbourne and Judas Priest, and rappers, like Ice T and Tupac Shakur. Of course, we can go over these cases and discuss their merits individually, but before we do, I would like to address your question, “Are there any cases that we should be particularly worried about?” In my view, it is alarming that cases like these are making their way into court at all. I

mean, it seems like there is a recent trend in case law which suggests that the First Amendment may no longer protect artistic expression from litigation as well as it once did.¹³ This trend, coupled with the growing Congressional external regulation concerns Hank pointed out, seems to me to be a very troubling situation.

Gregory Goddard, Senior Director: Hold on, hold on. Now before we go down that road I think it is important to note that musical lyrics, in particular, are afforded the utmost First Amendment protection out there.¹⁴ Now, as some of you know, I have been studying First Amendment law actively as long as I can remember. I think I can put some of Brooke's fears to rest.

Jake Evans, Counsel: Oh great! If you are about to go on some First Amendment tirade for hours, please let me know so I can go grab a pillow off the reception area couch and give my wife a quick call and tell her I will be home in a week. (Everyone laughs.)

Martin Winchester, Senior Vice President: Hey—easy over there! Seriously, I think we all could use a little First Amendment refresher if Gregory is willing to give us one.

Gregory Goddard, Senior Director: Of course I can, and I will try to be brief because this is review for all of us. I guess I will start with the fact that the United States Supreme Court has specifically stated that First Amendment protection extends to entertainment, so there is no question there.¹⁵ However, this protection has its limitations, and some speech is outside the scope of the First Amendment shield.¹⁶ Since we are discussing potential liability from violent acts committed by an individual after listening to lyrics by Sam Satyr, we should look to the First Amendment standard set out in the famous *Brandenburg v. Ohio* decision, which governs any attempt to impose legal responsibility for injuries

THE United States Supreme Court has specifically stated that First Amendment protection extends to entertainment. However, this protection has its limitations, and some speech is outside the scope of the First Amendment shield.

caused by an incitement to violence.¹⁷ This standard applies whether the attempt is through criminal prosecution or through a civil suit.¹⁸

Jake Evans, Counsel: But if I remember correctly, didn't that case have something to do with a Ku Klux Klan meeting or some sort of rally? And if so, how would this apply to our potential artist?

Gregory Goddard, Senior Director: Yes, *Brandenburg* arose out of a Ku Klux Klan rally that was conducted on a farm outside Cincinnati.¹⁹ No one was present at the rally except the Klan members themselves, a television reporter, and his cameraman.²⁰ However, vile incendiary racist footage from the meeting was broadcast on a Cincinnati station and a national network.²¹ The state of Ohio prosecuted *Brandenburg*, the leader of the Klan group, for violating the Criminal Syndicalism law.²² Ultimately, the Supreme Court held the law unconstitutional and stated that nothing in the record indicated that the racist messages of the Klansmen at the rally posed any immediate physical threat to anyone.²³ If you bear with me for a moment, I will read an excerpt from the case and demonstrate how it could apply to Sam Satyr. Okay, basically in *Brandenburg* the court says, "The constitutional guarantees of free speech and free press... do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."²⁴ So, when you look at the standard, in order for a plaintiff to recover damages against someone like Sam Satyr, they would have to show a few things. First, the individual must show

that the particular conduct at issue was a lawless act.²⁵ Second, he or she must show that Sam Satyr directly advocated the unlawful act. Third, he or she must show that his lyrics or “media speech” went beyond mere advocacy and instead amounted to incitement which was directed to result in imminent action.²⁶

Brooke Hagen, Director: The language you read says “directed” to inciting unlawful conduct. Does that mean that there is some sort of intent requirement?

Gregory Goddard, Senior Director: *Brandenburg* does require some showing of intent, whether explicit or implicit, in conjunction with the other requirements of the test in order to justify revocation of First Amendment protection.²⁷ However, intent alone is not enough. Like I said before, there are other elements that have to be satisfied. For example, in a particular Sam Satyr song, the unlawful act sanctioned by his lyrics must be a likely and foreseeable result of the lyrics.²⁸ Also, the lyrics must be directed to incite and likely to result in imminent illegal conduct.²⁹ Therefore you must have some form

of intent, mixed with foreseeability and imminence, to satisfy this *Brandenburg* formula. commits a violent act, especially when you look at the intent element. I think just about every artist out there would say that they are “expressing” themselves artistically and not trying to incite people to commit violent acts. For example, my friend is a rapper and he says that in his songs he is just relaying what he sees every day in his neighborhood. I truly believe that just because artists have an unfortunate upbringing and have anger in their songs they shouldn’t become targets for lawsuits, even if they are rapping that they want to take out a whole police station or whatever. I don’t see how a media outlet, an artist, or record company can ever be held liable for violent acts committed by others from what they say, especially after hearing the *Brandenburg* standard in detail. It seems impossible to apply the *Brandenburg* standard of incitement to a recording, given the fact that these recordings could occur years before ever hitting the shelves.

Brooke Hagen, Director: That is one way to look at it, but there are two sides to the live speech/taped speech debate. Some argue that taped speech is perhaps more dangerous than live speech for two reasons: (1) it can reach far more people, and (2) it

SOME argue that taped speech is perhaps more dangerous than live speech for two reasons: (1) it can reach far more people, and (2) it is designed for repeated exposure, which, arguably, can work a listener into a frenzy and spur them into action just as successfully as a live performance.

is designed for repeated exposure, which, arguably, can work a listener into a frenzy and spur them into action just as successfully as a live performance.³⁰ On the other hand, opponents to that argument point out that since a listener of recorded music has to take so many affirmative steps, (like buying the album and playing it repeatedly), the speaker is, in effect, taken right

of intent, mixed with foreseeability and imminence, to satisfy this *Brandenburg* formula.

Jake Evans, Counsel: With a standard that strict, where you look at the content of speech and the circumstances under which it was transmitted, I would think that a record company or artist would never be liable to someone who was listening to one of their songs and subsequently goes out and

out of the equation.³¹ Also, let’s be realistic here. Not everyone out there thinks like we do, as lawyers, trying to fit things neatly into standardized black-letter law tests. It is important for us to take into account that some pretty powerful people out there have joined forces on the issue of violent music lyrics, if not on liability, then at the very least on accountability. For instance, in 1985, the Parent’s Music Resource Center (PMRC), alarmed by the new

wave of violent lyrics, and prompted by a 1983 letter from a Cincinnati parent, Rick Alley, who objected to a track from Prince's "1999" LP called "Let's Pretend We're Married," began a crusade against popular music.³² The PMRC was a potent force, largely due to its politically connected founders and board of directors.³³ The PMRC leadership included then-vice-president's wife, Tipper Gore, plus the wives of ten senators, six representatives, and one

assist parents who wish to monitor what their children listen to.³⁸

Jake Evans, Counsel: But most of the record labeling legislative bills that were either dropped because of weak legislative support, low priority scheduling, or local lobbying efforts *really* penalized retailers and distributors, not labels or individual artists.³⁹ I see what you are saying, Brooke, and I do

agree that we should take action groups and legislation into account in our decision. However, I would like to stress again that, with the *Brandenburg* standard⁴⁰ in place, I believe that it would be really tough for Sam Satyr or Bijoux Records to be held liable for actions that are claimed to result from or be in response to Satyr's lyrics. There are just too

THE effort of the PMRC drew broad support from the national Parent Teachers Association, conservative religious interests, and many parents who were becoming increasingly concerned by the violence and "kinkiness" of certain rock videos and lyrics.

sitting Cabinet member.³⁴ Not only did they have the names to back their position, they also had the money. The PMRC used high-powered connections with Occidental Petroleum, Merrill Lynch, and political contributors to generate pressure on the music industry.³⁵ The effort of the PMRC drew broad support from the national Parent Teachers Association, conservative religious interests, and many parents who were becoming increasingly concerned by the violence and "kinkiness" of certain rock videos and lyrics.³⁶ Because of incidents such as this, I believe that we should be seriously considering the possible reactions of these types of action groups and legislative efforts as well as existing case law in making our decision about Satyr.

many loose variables involved in a musical recording to meet the strict test that *Brandenburg* sets out. For instance, an artist typically strives for ambiguity in their music in order to reach a greater number of people, and that is why they seldom use specific names or places in their songs.

Gregory Goddard, Senior Director: You make a valid point, and to illustrate, let's get back to your example of someone rapping about "one day taking out a whole police station." This would fail the *Brandenburg* intent prong as later interpreted by the Supreme Court through *Hess v. Indiana* because it lacks a high level of specificity in the speech.⁴¹ The statement is too ambiguous, pointing only to some remote or possible indirect harm.

Hank Riley, Counsel: The PMRC did in fact stir up a lot of concern about the effect that explicit lyrics could have on children. However, the PMRC only threatened a mandated system and instead backed a voluntary agreement with the Recording Industry Association of America (RIAA) to put into effect a system that would alert parents and consumers to "graphic messages" in the music. Graphic messages of concern would include suicide, rape, and drug abuse promoted in that particular music.³⁷ The main goal of the labeling system was to

Hank Riley, Counsel: Right, right. *Hess* was the case where a Vietnam War protestor was arrested for yelling "We'll take the f—king street later," while the police were attempting to clear the street.⁴²

Gregory Goddard, Senior Director: Exactly, and the court held that because the statement was not directed toward any specific individual or group, nor directed to any specific time or method of "taking the street," the ambiguity of the statement sheltered

it from any challenge to First Amendment protection.⁴³

Martin Winchester, Senior Vice President: It seems that the entertainment industry would enjoy the same protections through music.

Brooke Hagen, Director: So far, this has been the norm. However, there have been cases where a court has held media defendants liable. When I did research to find out whether or not a court allowed a plaintiff to recover damages from those in the music or communications industries, I came across *Weirum v. RKO General*,⁴⁴ a case in which the plaintiffs succeeded on a modified claim of incitement.⁴⁵ In that case, a rock radio station with a large teenage following conducted a live contest that urged its listeners to engage in a street race in order to locate a disc jockey to receive a cash prize.⁴⁶ The disc jockey was driving around town in an identifiable vehicle and giving updates to listeners as to his location.⁴⁷ The radio announcer said, “OK, kids, DJ Bob is on the Pacific Coast Highway, and the first one to find him gets a hundred bucks.”⁴⁸ In an effort to win the prize, a minor, while chasing the disc jockey, forced another vehicle off the road, causing the death of the driver of that vehicle.⁴⁹ The radio station was held liable in that case.⁵⁰

Jake Evans, Counsel: Wait a minute—wouldn’t that accident have more to do with the reckless driving of the teenager than the radio broadcast of a cash giveaway contest?

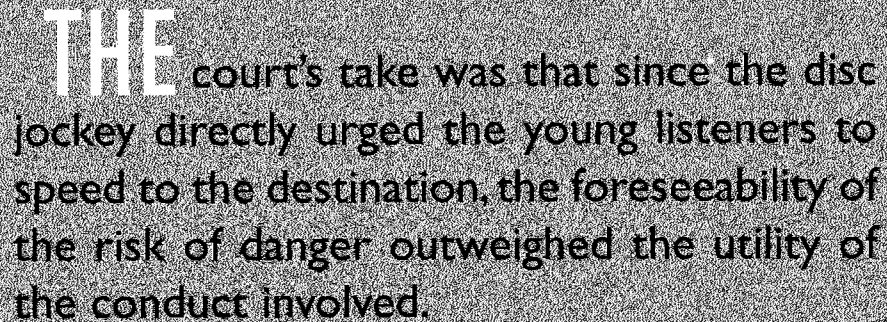
Brooke Hagen, Director: A couple of things happened on appeal. As I understand it, the primary issue the court addressed was whether the defendant owed a duty to the decedent arising out of its broadcast of the cash giveaway contest.⁵¹ The court held that the general rule that a defendant has no duty to control the actions of third parties absent a special relationship has no application if the plaintiff’s complaint is grounded upon an affirmative act of the defendant which created an undue risk of harm.⁵² Basically, the court held that

the sense of urgency conveyed by the broadcaster created an unreasonable risk of harm to the young listeners, and the broadcasters should have known it.⁵³ Beyond that, the court reasoned that because the broadcast was live, the unlawful conduct did occur imminently within the definition of any interpretation of the *Brandenburg* test.⁵⁴

Jake Evans, Counsel: I am not sure how I feel about that. I admit, when you are talking about free money and prizes, people are sure to move—and fast. But holding a radio station liable because a person driving a car ran another vehicle off the road?

Brooke Hagen, Director: The court’s take was that since the disc jockey directly urged the young listeners to speed to the destination, the foreseeability of the risk of danger outweighed the utility of the conduct involved.⁵⁵

Hank Riley, Counsel: I think what I am hearing is that because the audience that listened to the rock radio station was young, the court felt that they were more impressionable and that it was foreseeable that an accident would occur under the circumstances. Isn’t that a dangerous line to draw? For instance, say that Sam Satyr targets teenagers in his songs whom he knows are prone to violent behavior and



THE court’s take was that since the disc jockey directly urged the young listeners to speed to the destination, the foreseeability of the risk of danger outweighed the utility of the conduct involved.

also vulnerable to outside influences that might exacerbate such violent proclivity—does that mean that it is foreseeable that his speech will likely incite unlawful conduct?⁵⁶ What does that mean for us in our current situation when we are dealing with song lyrics?

Brooke Hagen, Director: The court in *Weirum* noted that foreseeability would be measured by the

facts and circumstances of each case.⁵⁷ The court felt not only that it was foreseeable, but that it was very likely—not that someone would do some crazy, wacky thing, but that someone would do exactly what the radio announcer was telling people to do—that someone would get in their car and try to find this disc jockey.⁵⁸

So it appears that the lawless activity cannot be an irrational act, rather it has to be a natural reaction flowing logically from what you are actually asking people to do.⁵⁹ Luckily, it seems as far as the entertainment industry goes, the *Weirum* case is in the minority because of the specific facts involved. There are many cases on our side where plaintiffs have sued because they claim lyrics incited violent behavior and directly caused personal injury to themselves or to loved ones, and where the plaintiffs have ultimately been unsuccessful.⁶⁰

Hank Riley, Counsel: Actually, when I was at CBS, we had a huge concern when dealing with Ozzy Osbourne. At the time I was an intern in the promotions department, so I wasn't privy to any special information. However, I did follow the cases against him in the news and have read up on it this week.

Jake Evans, Counsel: What concerns are you talking about? Are you thinking of the time when he bit the head off of a live dove in front of a group of reporters at a press conference?⁶¹ Or do you mean when he bit the head off of a bat at one of his concerts and had blood streaming down his face?⁶²

Hank Riley, Counsel: Ha, ha funny. Now, I am an Ozzy Osbourne fan, but I do agree that his actions have been questionable. Okay, he can be outright disgusting at times. However, at least as far as the bat goes—he thought it was fake.⁶³ At his concerts, people usually threw stuffed animals, and sometimes live ones, on the stage to see what Ozzy would do with them.⁶⁴ At this particular concert, someone threw a bat on the stage, Ozzy picked it up, held it out to the crowd, and then bit its head off.⁶⁵ He got

a real surprise—and had to be rushed off stage to get a rabies shot!⁶⁶ As far as the dove goes: at a press conference he was supposed to pull it out from

the inside of his jacket and hold it out as an offer of peace to the public because he had the “Prince of Darkness” image.⁶⁷ However, apparently the vibe in the room caused Ozzy to bite the

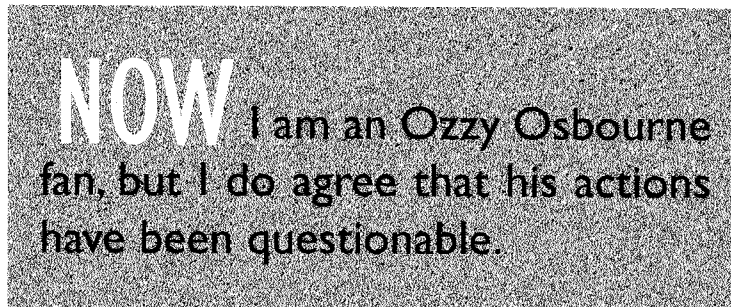
dove's head off—and that really freaked out the people from the press!⁶⁸

Martin Winchester, Senior Vice President: Even though biting the heads off of animals certainly was disgusting, it was probably the turning point of his career. His following grew substantially after those acts. Although it wasn't intentional, it was probably one of the most ingenious publicity ploys in rock history.⁶⁹

Hank Riley, Counsel: It sure did give him a huge following, but as you will see, it was almost to his detriment. The image that he created through these acts was dark and mysterious—and his songs contained a lot of the same messages. As far as actual legal problems, there were a couple of teenagers who committed suicide after listening to his lyrics. The families tried to recover damages from Ozzy Osbourne and the record company.⁷⁰

Martin Winchester, Senior Vice President: Were the suicides in conjunction with or related in some way to each other, or were they totally separate acts?

Hank Riley, Counsel: They were unrelated incidents, actually separated by a number of years. The two cases were *McCullum v. CBS, Inc.*, and *Waller v. Osbourne*.⁷¹ The first case, *McCullum v. CBS, Inc.*, occurred in 1988. A troubled 19-year-old who had alcohol and emotional problems shot and killed himself while lying on his bed and listening repeatedly to a record album by Ozzy Osbourne.⁷² On the night of the suicide, the teen listened repeatedly to one side of “Blizzard of Oz” and side two of the record “Diary of a Madman” on the family stereo in the



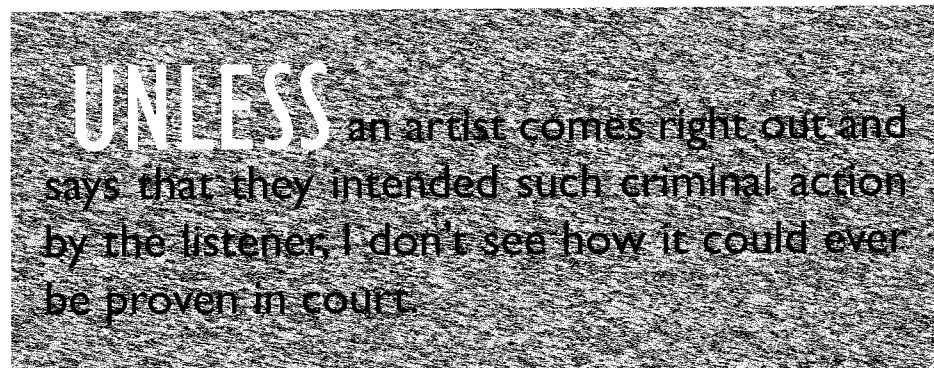
living room.⁷³ Later that evening, he went to his bedroom and put on his headphones, listened to side two of Osbourne’s album “Speak of the Devil,” placed a .22-caliber handgun to his temple, and took his own life.⁷⁴ When he was found the next morning, he was still wearing his headphones, and the stereo was still running with the arm and needle riding in the center of the revolving record.⁷⁵

Brooke Hagen, Director: Oh my, what a horrible scene for the parents to wake up to!

Hank Riley, Counsel: Yes, the parents were very distraught to say the least. However, they didn’t see that this act of suicide was from John’s own will. Rather, they alleged that Osbourne’s music was a proximate cause of John’s death.⁷⁶ The plaintiffs focused in particular on the lyrics to the song, “Suicide

intent that its listeners commit an illegal activity, (in this case, suicide), and therefore “one listener’s unreasonable reaction to the music did not justify imposing liability on the artist.”⁷⁹ In addition, the court noted that “some active and intentional participation in the events leading to the suicide are required in order to establish a violation of the penal code.”⁸⁰ To beat a First Amendment defense, the plaintiffs would have had to show that Osbourne and CBS intended to cause the suicide of John, or some other listener, and that they made the recorded music available for that purpose.⁸¹

Jake Evans, Counsel: Okay, so what did the court have to say about Ozzy Osbourne’s music? What if Ozzy did intend for his listeners to commit suicide? Would that mean that he and the record company would have been liable?



Hank Riley, Counsel: We could explore that hypothetical, although, unless an artist comes right out and says that they intended such criminal action by the listener, I don’t see how it could ever be proven in court.⁸² But to answer your question, the

Solution,’ which they claim incited John to commit suicide because it preaches that suicide is the only way out for a person who is involved in excessive drinking, as John was.⁷⁷

Jake Evans, Counsel: But wasn’t their argument more to do with something about subliminal messages in Ozzy Osbourne’s songs?

Hank Riley, Counsel: Yes, there is a twenty-eight second instrumental interval in the song where the following masked lyrics were sung: “Ah know people. You really know where it’s at. You got it. Why try, why try. Get the gun and try it. Shoot, shoot, shoot.”⁷⁸

Martin Winchester, Senior Vice President: How did the court address that issue?

Hank Riley, Counsel: They steered away from the subliminal messages element and basically determined that the song was not written with the

McCollum court concluded that “nothing in Osbourne’s music could be characterized as a command to an immediate suicidal act.”⁸³

Jake Evans, Counsel: That makes sense. It seems ridiculous to punish speech that advocates illegal action at some indefinite future time.⁸⁴ Sam Satyr may sing or rap about one day “taking out your enemies”—but he could just be blowing off steam. That doesn’t mean he or Bijoux Records should be held liable just because some person takes that as a call to action.

Hank Riley, Counsel: Exactly, and the *McCollum* court seemed to agree with you when they concluded that “reasonable persons understand musical lyrics and poetic conventions as the figurative expression which they are”⁸⁵ and that “no rational person would or could believe otherwise nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action.”⁸⁶

Kathy Cole, Legal Counsel: I am sure there are a lot of parents out there who would disagree, especially when you are talking about teenagers and even younger listeners. Parents certainly don't buy the argument that young people have the ability to think of songs on a philosophical level. Some of the letters we receive strongly suggest that they wouldn't agree with the *McCullum* court's comment that "musical lyrics and poetry cannot be construed to contain the requisite 'call to action' for the elementary reason that they simply are not intended to be *and* should not be read literally on their face."⁸⁷ Instead, these parents believe that teenagers are young and impressionable and are not mature enough to realize that lyrics of a song can be viewed as a poetic device, or even as a play on words, conveying meanings entirely contrary to what they believe the message is.⁸⁸ The parents who have written to us believe that the artist and record label have some duty to the public not to convey messages that will be confusing to teens.

Gregory Goddard, Senior Counsel: Well, if those parents were here today I would tell them that I don't agree with them, and neither should the law. See, in most cases, due to the protected status of musical lyrics, an artist and record label have no duty to ensure that members of the general public will not react violently to any given song.⁸⁹ However, I do concede that this is not true if the work violates the *Brandenburg* test, which would mean that it would forfeit that initial wall of First Amendment protection.⁹⁰

Jake Evans, Counsel: I think the whole argument of an artist and record label having a duty to ensure listeners will not react violently to lyrics is bogus.⁹¹ I mean, why don't we throw William Shakespeare up on a stake while we are at it for writing Hamlet's soliloquy, "To be or not to be - that is the question" where he is pondering life or death?⁹² Not to mention the discussion of Ophelia drowning herself

when she couldn't handle the allegations that Hamlet had something to do with her father's death!"⁹³

Kathy Cole, Legal Counsel: Well, as a parent, I am going to play devil's advocate. I think one major difference is that the works you mentioned are typically discussed in an intellectually controlled environment. Also, these are characters in a book and it isn't like Shakespeare is whispering into one's ear—Do it! Do it! Throw yourself into a brook and drown!⁹⁴ (*Everyone laughs.*) However, I agree 100% that violent themes have been recurrent in artistic expression and we shouldn't expect that rock or rap artists should all of a sudden have to watch what they say because of the possibility that one kid out of a million could have an abnormal reaction to it. Can you imagine trying to write a song if you had to

I think that the whole argument of an artist and record label having a duty to ensure listeners will not react violently to lyrics is bogus. I mean, why don't we throw William Shakespeare up on a stake while we are at it for writing Hamlet's soliloquy, "To be or not to be - that is the question" where he is pondering life or death?

factor in how you might be liable if a person interprets your lyrics the wrong way?

Hank Riley, Counsel: Actually, the *McCullum* court shared the same view when they reasoned that, "the deterrent effect of subjecting the music and recording industry to liability because of their programming choices would lead to self-censorship which would dampen the vigor and limit the variety of artistic expression."⁹⁵ If musical composers and performers, as well as record producers and distributors, were inhibited in the selection of protected, yet controversial, materials in fear of liability for civil damages, that would have the effect

of a prior restraint, which is violative of the First Amendment.⁹⁶

Martin Winchester, Senior Vice President: Hank, at the beginning of your discussion you mentioned that there were two Ozzy Osbourne cases. What happened in the other one?

Hank Riley, Counsel: The other case was *Waller v. Osbourne*, and the court in that case basically used the same reasoning as the *McCullum* court. As far as the song goes, the court noted that it was not specifically directed at any person or group of persons, and that no person could rationally infer that the song incited suicide.⁹⁷

Martin Winchester, Senior Vice President: Okay, that makes sense. Now Brooke, you said there was a case involving the group Judas Priest—what was that all about?

Brooke Hagen, Director: Well, *Vance v. Judas Priest* certainly had more of a subliminal message focus as compared to the cases previously mentioned. The incident occurred in 1985, when two Reno, Nevada, residents, Raymond Belknap and James Vance, both fans of the British heavy-metal band Judas Priest, shot themselves with a 12-gauge shotgun.⁹⁸ Mr. Belknap died, and Mr. Vance, who shot himself in the face, was left horribly disfigured.⁹⁹ Their parents filed a products liability case against the group for the album ‘Stained Class,’ which they maintained had subliminal messages in the song, “Better by You, Better than Me”.¹⁰⁰ They claimed that repeated listening to the group’s lyrics induced the two boys to take their own lives.¹⁰¹ The court rejected the plaintiffs’ claim and ruled that “inadvertent” subliminal messages were not protected by the First Amendment, that, in fact, a listener has a First Amendment right to be free from such messages,¹⁰² and that intervening factors, such as alcoholism, physical abuse, and divorce caused both shootings.¹⁰³

Jake Evans, Counsel: Wait a second, are you saying that the court did factor subliminal messages into their decision?

Brooke Hagen, Counsel: Well, sort of. Basically the Nevada District Judge ruled that the “do it” suggestion was accidental, a coincidence caused by a guitar part and an exhalation, and that there isn’t

enough scientific evidence to conclude that subliminal messages can cause suicidal behavior.¹⁰⁴ Plus, Judas Priest and CBS Records denied using subliminal messages and the whole products liability issue of subliminal messages was sort of left up in the air.¹⁰⁵ Overall, the claims that subliminal messages primarily caused incitement to suicide in the Ozzy Osbourne and Judas Priest incidents severely weakened the plaintiffs’ cases.¹⁰⁶ The courts have made it clear that music is generally protected under the First Amendment, and absent direct language encouraging the suicides or other aggravating factors, no finding of incitement is justified.¹⁰⁷

Martin Winchester, Senior Vice President: Should we be exploring subliminal messages or what?

Anna Cataldi, Vice President of A&R: Well, as far as Sam Satyr’s lyrics go—no. I have spoken to his manager, too. He basically said, “Anything that Sam Satyr has to say, he wants it to be heard loud and clear.”

Martin Winchester, Senior Vice President: Okay, so let’s focus on normal audible lyrics. What other cases are out there?

Gregory Goddard, Senior Director: The band “Slayer” had a suit brought against them by the family of fifteen year-old Elyse Pahler for her brutal murder.¹⁰⁸ The family claimed that her murder was inspired by Slayer’s songs that focus on misogyny, torture, and satanic sacrifices.¹⁰⁹ Unlike the Ozzy Osbourne and Judas Priest cases, or similar cases of alleged rock’n’roll-inspired mayhem that have been tossed out of court on First Amendment grounds, the Slayer case took a novel legal approach. The plaintiff focused on the controversial practices of entertainment marketing.¹¹⁰ The girl’s parents sued Slayer and its American Recordings label for violating the California Business and Professions Code, accusing them of unlawfully marketing and distributing “harmful” and “obscene” products to minors.¹¹¹ Eventually, though, like the other suits we have talked about, this suit was unsuccessful on First Amendment grounds.¹¹² The judge dismissed the case in October 2001 because the parents failed to prove that Slayer’s music incited their daughter’s murder.¹¹³ The parents have filed an appeal for the second time.¹¹⁴

Anna Cataldi, Vice President of A&R: I would like to point out that the Judas Priest, Slayer, and Ozzy Osbourne cases are rock-focused. Sam Satyr does have a hard rock edge as far as his choice of instrumentality and incorporation of dark and sometimes self-loathing lyrics. However, I wouldn't put him strictly in the rock genre. Some of his songs are rap-influenced, and this combination gives him an edge. It seems to make him connect with the crowd a bit more, almost like he is talking to them when he raps.

Hank Riley, Counsel: That is what concerns me. I don't know if it is too much of an edge when we are talking about rap music. It seems different to me than traditional rock music.

THERE are some people out here that don't agree that rap music is just expression reflecting the everyday violence the artist has experienced but rather that rap music brings about the violence by glorifying it in songs.

Brooke Hagen, Director: How so?

Hank Riley, Counsel: Purely from my own experience, I find that rap music has a totally different effect than other types of music—both in its delivery and in its content. Some of the rap songs that I have heard paint a picture of social struggle and anger directed at government officials. However, I know that I have had a limited exposure to rap music, and I don't mean to generalize.

Gregory Goddard, Senior Director: Well Hank, it sounds like you are describing rap like a form of "political speech."¹¹⁵ Since political speech is not limited to literal campaign or governmental rhetoric, it encompasses any kind of speech that addresses societal values and especially includes speech that challenges the status quo—or rather, advocacy of the notion that current societal, governmental, and political practices are misguided or inaccurate.¹¹⁶ Actually, if courts agreed with your vision of rap music, it would be very favorable to artists.¹¹⁷ See, the First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.¹¹⁸

Hank Riley, Counsel: But you have to admit that is a one-sided view about rap music. There are some people out there that don't agree that rap music is just expression reflecting the everyday violence the artist has experienced but rather that rap music brings about the violence by glorifying it in songs.¹¹⁹ If that were the case, then rap wouldn't fit the political speech classification. However, let's pick one of Sam Satyr's rap songs and pretend that it does amount

to something like political speech. Does this mean that it has an absolute First Amendment shield from any liability for violence inspired by the speech?

Brooke Hagen, Director: Well, I personally think that calling rap music political speech is a stretch. Also, the *McCullum* court stated that music, in general, cannot be construed as advocacy because it contains figurative expressions and is not meant to be taken literally.¹²⁰ But to answer your question regarding rap music and violence, you would still have to factor in the *Brandenburg* test.

Martin Winchester, Senior Vice President: We have seen examples of rap music and violence all over the news. I remember there was an incident involving a song by Ice-T¹²¹ and also a highly publicized case involving lyrics by Tupac Shakur.¹²²

Brooke Hagen, Director: That's right—in 1992, the album "Body Count" by Ice-T received such a negative public outcry¹²³ that the album's song "Cop Killer"¹²⁴ was pulled from the market by Ice-T and his record company, Time Warner.¹²⁵ That wasn't the last of Time Warner's troubles—about six weeks after that, they were facing another legal battle involving Tupac Shakur.¹²⁶ In April 1992, Ronald Howard got pulled over in a stolen vehicle by state

trooper Bill Davidson, for a possible traffic violation unrelated to the theft of the vehicle.¹²⁷ Howard fatally shot Officer Davidson with a nine millimeter Glock handgun.¹²⁸ At the time of the shooting, Howard was listening to the cassette tape “2Pacalypse Now,”¹²⁹ a recording by rap artist Tupac Shakur, which contained the song “Soulja’s Story.”¹³⁰ Howard claimed that listening to this recording caused him to shoot Officer Davidson.¹³¹ As a result, Davidson’s survivors then brought a civil action based on negligence and products liability against Shakur and his record companies.¹³² The district court ruled that the media defendants were not liable under both claims, and held that the content of the recording was not a “product”.¹³³

Martin Winchester, Senior Vice President: If I remember correctly, the court didn’t really address the *Brandenburg* test, did it?

Brooke Hagen, Director: They did address it, but only in dicta.¹³⁴ Actually, the plaintiffs alleged that Shakur’s “2Pacalypse Now” fit recognized categories of unprotected speech, such as obscenity, defamatory invasion of privacy, fighting words, and incitement.¹³⁵ Addressing the obscenity issue, the court found that the recording lacked the “patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of genitals.”¹³⁶ Plus, the civil action was based on the violent, rather than the sexual nature of the recording.¹³⁷ The defamation argument failed because Tupac referred to police officers in general, not Officer Davidson specifically.¹³⁸ The “fighting words” argument failed because the recording did not direct its invective and epithets at any specific person, causing them to react violently, and thus were not “fighting words.”¹³⁹ Lastly, as far as *Brandenburg* goes,

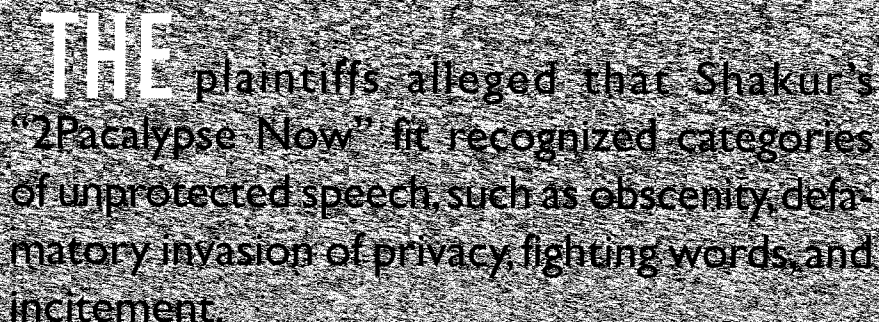
the court commented that the imminence prong was not satisfied.¹⁴⁰

Hank Riley, Counsel: Even though the media defendants were not held liable in this case, the problems encountered by Time Warner should raise a concern for us. It isn’t just coincidence that Time Warner pulled the album from the shelves. They received a lot of heat from Bob Dole back in 1995.¹⁴¹ Dole represented a growing public distaste for corporate giants who seemed to be lacking in self-restraint. We have to be aware that a corporate responsibility movement exists out there, and I think we should be prepared to handle those arguments if we need to.

Martin Winchester, Senior Vice President: Why don’t you give us a little more about the corporate responsibility argument?

Hank Riley, Counsel: In general, some people think that Hollywood, particularly the music industry, is a fairly depraved place.¹⁴² They believe that during the 1990s, the music industry, most notably Dole’s target du jour, Time-Warner, had made a mint by marketing the most offensive, misogynistic products directly to the most vulnerable kids.¹⁴³ Dole was addressing the young, disenfranchised, latchkey child—often a teen-age boy left to wander before dinner—who could isolate himself under a pair of headphones with some incredibly violent rap or hard-metal releases.¹⁴⁴

Jake Evans, Counsel: That seems more like it is a problem for the individual family. If parents leave their children unsupervised, then the kids are almost bound to get into something. It seems a far stretch to be blaming the music industry for their own family’s failures.



THE plaintiffs alleged that Shakur’s “2Pacalypse Now” fit recognized categories of unprotected speech, such as obscenity, defamatory invasion of privacy, fighting words, and incitement.

Hank Riley, Counsel: From the point of view of Dole, and others with similar views, record executives know that these sad, unsupervised children are out there in every town and city, and will spare no expense in swooping down and grabbing them.¹⁴⁵ They

believe that children are so inured as to what is normal, what's genuinely rebellious, and what's downright sick, that there likely will never be any going back unless corporate executives step up to the plate.¹⁴⁶ They claim that there are no ethical standards for so many people in music and that there is no such thing as being a good corporate citizen for

massive conglomerates such as Time-Warner.¹⁴⁷ So, rather than letting corporate giants go unchallenged, politicians like Bob Dole have put pressure on the industry as a whole to do something about it.¹⁴⁸

Jake Evans, Counsel: It's not like legislative groups and parent organizations are the only people out there who have questioned marketing practices of the entertainment industry. Insiders such as the *Billboard* magazine editors encouraged the industry to self-censor the more degrading, offensive works.¹⁴⁹ The editors warned, "either we resolve individually as the record-selling and record-buying public to turn away from the propagation of the hatefully self-destructive material currently threatening to overshadow the more meaningful segments of the marketplace, or we will reap the consequences of what we've sown."¹⁵⁰ Luckily for us, case law is on our side in situations where there might be questions about incitement because they are measured against the *Brandenburg* standard.

Brooke Hagen, Director: "That may be true, but some scholars are now questioning whether or not the imminence requirement of *Brandenburg* is a good thing since it appears to give greater First Amendment protection to potential tortfeasors than is appropriate.¹⁵¹ It has been argued that the state has an important interest in safeguarding persons from physical harm.¹⁵² To deny recovery in these cases lessens the speakers' incentives to remove material from the marketplace that is dangerous and leads users to injure themselves or others.¹⁵³ Thus, although some courts are afraid of the chilling effect that such sanctions would have on speech, many scholars are calling for state action in the form of

ALTHOUGH some courts are afraid of the chilling effect that such sanctions would have on speech, many scholars are calling for state action in the form of tort liability to effect the responsible exercise of First Amendment freedoms.

tort liability to effect the responsible exercise of First Amendment freedoms.¹⁵⁴

Gregory Goddard, Senior Director: And how would something like that work?

Brooke Hagen, Director: Well, it would involve contextually evaluating various forms of expression which are alleged to cause harm or injury and essentially weeding out protected from unprotected speech.¹⁵⁵ Now I am not saying that I agree with this, but it has been argued that when a speaker intends to emote an audience, and when that audience is likely to be emoted by the speech as well as by the particular medium used—such as music—liability for actual harm resulting from the speech should be placed on the speaker in addition to the actual perpetrator of the violent act.¹⁵⁶ It is sort of a totality of the circumstances approach that takes into account the potential impact on permissible and desirable First Amendment discourse.¹⁵⁷

Jake Evans, Counsel: Wow, that concept is completely foreign to me, and the cases we have discussed here don't seem to be moving in that direction at all. Let's take it into account but instead assume that Sam Satyr's lyrics are protected under the First Amendment. There are still additional steps we could take to safeguard Bijoux Records against liability. I have seen companies take out additional insurance¹⁵⁸ and negotiate morality clauses¹⁵⁹ into the artist's recording agreement. For instance, we could put a morality clause into Sam Satyr's contract that would read something like this:

“BREACH AND MORALS: In addition to and not in limitation of any of the rights or remedies available to Bijoux Records hereunder, if Sam Satyr shall be charged with the commission of any act which is an offense involving moral turpitude under federal, state or local laws, or should Sam Satyr commit any act which would reasonably and objectively bring Bijoux Records into disrepute, contempt, scandal or ridicule, at any time, or if Sam Satyr shall fail to perform his duties and liabilities required of him hereunder, then Bijoux Records shall be entitled to terminate this agreement.”¹⁶⁰

Just by incorporating this type of clause into the contract, a lot of headaches could be avoided. Aside from that, it seems from our discussion that his recorded lyrics are not likely to violate the First Amendment anyway, but it may be possible that, in the course of a performance before a live audience,

WHERE an artist’s reputation in the entertainment industry is built on wild behavioral antics, a ‘morals clause’ may pose particular problems, especially when you are talking about terminating an agreement due to arrest or indictment for a felony!

Satyr could cross the line. However, as far as live performances and touring, record companies themselves are seldom involved in that segment of the artist’s career.¹⁶¹

Hank Riley, Counsel: I have heard of record companies taking out additional insurance just like manufacturers of other products do to protect themselves from civil liability.¹⁶² However, I find it highly unlikely that someone like Sam Satyr would agree to a morality clause like the one you proposed. Where an artist’s reputation in the entertainment

industry is built on wild behavioral antics, a ‘morals clause’ may pose particular problems, especially when you are talking about terminating an agreement due to arrest or indictment for a felony!¹⁶³

Gregory Goddard, Senior Director: Certainly, though, taking out additional insurance and negotiating a morality clause are options we could look into, especially if Sam Satyr ever heads down the road of a “gangsta rap” artist.

Jake Evans, Counsel: I am not really sure how much of a problem that would be anymore. Haven’t rap songs changed substantially? As far as I know, most of the songs out there are about having “hoes in different area codes”¹⁶⁴ and how life is perceived as being all about the “bling bling.”¹⁶⁵ (*Everyone laughs.*)

Hank Riley, Counsel: I don’t know, but I *would* like to hear you rap again! Just kidding. Anyway, I think that, regardless of the genre of music we are addressing, we know that musical lyrics presumptively do not constitute unlawful incitement because courts have clearly afforded music general First Amendment protection.¹⁶⁶ Therefore, as we have seen in cases involving recording artists, plaintiffs are faced with a substantial burden when attempting to prove incitement to violent behavior.¹⁶⁷

Jake Evans, Counsel: And that is exactly as it should be! In reality, I don’t think there is anything to worry about. I may be naïve, but I

would like to think that people have the brains not to carry out actions that Sam Satyr is singing about.

Hank Riley, Counsel: Ha! Well, as the entertainment world has seen, sometimes we are not dealing with the most intelligent or mature people in the world. Yet, somehow we end up being the ones to blame. Remember all the negative publicity toward the entertainment industry after that teenager got severely burned when he and his friends attempted to imitate a stunt from a an MTV

program in which a person sat on a barbeque grill while having lighter fluid sprayed on his body?¹⁶⁸

Jake Evans, Counsel: Yeah, but the plaintiff was barred from recovery.¹⁶⁹

Gregory Goddard, Senior Director: True. However, putting aside how strongly I feel about First Amendment rights, I want to touch on an issue we should consider when signing Sam Satyr. In light of avoiding bad publicity such as the type MTV has undergone, rather than looking at Sam Satyr from just a legal standpoint, we should also examine his

Martin Winchester, Senior Vice President: It goes without saying that Bijoux Records takes our responsibility to help parents identify music with explicit lyrics seriously. “Not all music is right for all ages,” and that is why the Recording Industry Association of America (RIAA) created the idea of a Parental Advisory Label.¹⁷² As you know, we have people at Bijoux Records whose job it is to read through lyrics and listen to music, looking for anything questionable, such as the sound of a gun shot in the background, to help decide which releases should carry the Parental Advisory Label.

Jake Evans, Counsel: Right, so identifying explicit lyrics and giving notice to consumers preserves the core value of expression that tolerates unpopular speech and frowns upon censorship.¹⁷³ Also, as far as record sales go, if the song has a good hook and is marketable, we

strong lyrical content more from the perspective of deciding, creatively, is this is the kind of music we want to release?

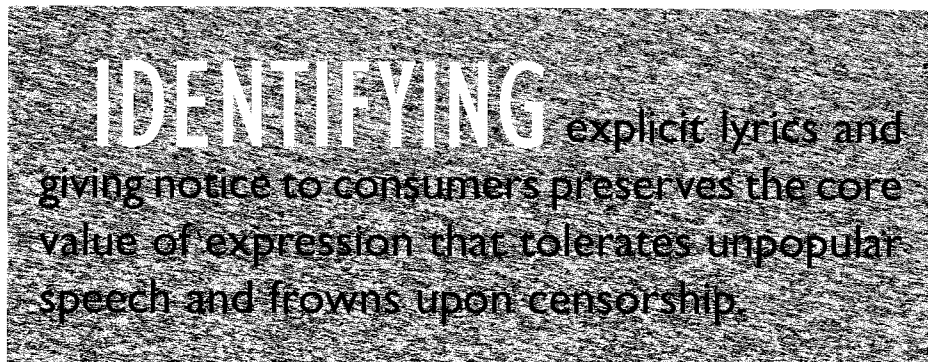
Jake Evans, Counsel: I don’t necessarily think that should factor in as much as you are suggesting, Gregory—at least not outwardly. If we appear to be using that type of restraint, we would enter a dangerous realm of something along the line of “content based” signings in which it would be hard for us to attract an artist if they thought our label would censor their expression.¹⁷⁰ Do you see? Anyway, I understand what you are saying, but as far as reviewing lyrics of our artists’ releases, we should do so only for purposes of determining whether a Parental Advisory Label¹⁷¹ is appropriate on the record packaging.

Kathy Cole, Legal Secretary: But is that all we should do? Slap a sticker on an album and never give it another thought? As we have heard, there are people out there who are saying that it is not enough, and, as a corporation, we have a moral obligation to consumers to think about what we are putting out in the market.

can always have Sam Satyr sing a “clean” version of the song, thus re-recording it without explicit lyrics.

Brooke Hagen, Director: In addition to Jake’s point, there have been many times where we agreed with the artist that there is musical and artistic credibility in the whole of the work, even when the lyrics may be too explicit for mainstream distribution.¹⁷⁴ In those instances we just placed the RIAA’s Parental Advisory Label on the outside of the permanent packaging.¹⁷⁵ The artists have appreciated that it is a voluntary program, which, instead of seeking to censor their words, provides them the opportunity to help parents and families make informed decisions for their children.¹⁷⁶

Gregory Goddard, Senior Director: I would say that the real motivation to follow such practices flows from the fact that artists are aware that an album can lose up to ten percent of its sales if it is not carried by a major chain store.¹⁷⁷ Aside from that, one thing that I am not too clear on is what exactly happens to compact discs when they hit the stores? Are retailers subject to liability for selling the marked packages to children under 18 years old?



Martin Winchester, Senior Vice President: Many retailers have in-store policies forbidding the sale of records containing the Parental Advisory Label to those younger than 18, implementing “Eighteen to Buy” policies.¹⁷⁸ Some large retail outlets such as Wal-Mart will not even carry a stickered product at all.¹⁷⁹ Distribution companies that will not carry a stickered CD but will accept a clean version require the record company to modify the song and submit the record, along with a transcript, to them.¹⁸⁰ Often an album goes back and forth for several weeks before a clean copy is agreed upon.¹⁸¹ Either way—the decision is made by the retailer.¹⁸² For now, there is no external enforcement on these stickers. Rather, it is up to the parents to be on the lookout and use this label to identify music that may not be appropriate for their children.

Jake Evans, Counsel: Actually, retailers complained that they received mixed messages from their customers when they implemented the “Eighteen to Buy” policies in combination with the Parental Advisory stickering.¹⁸³ They received about as much “feedback from parents who were angry that they had to accompany a teenager to buy a particular recording as they previously received from parents who were angry about a piece of music a teenager had bought unchaperoned before the policy was implemented!”¹⁸⁴ It just goes to show that it is hard to please both sides on this issue.

Brooke Hagen, Director: I think that the current practice of keeping consumers informed about lyrics is the best we can really do. I mean, “for the same reason that there is no rating system for books, the works of musical artists are not rated by age” or specific content, “as it is virtually

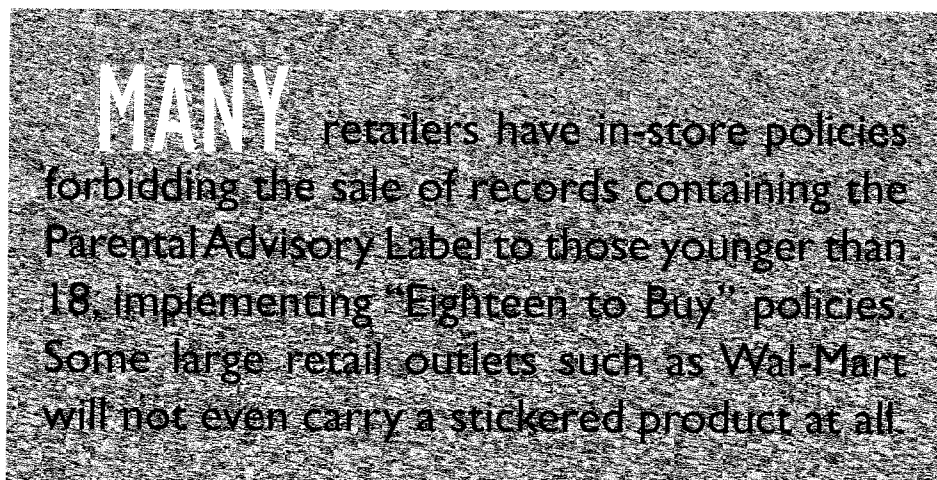
impossible to categorize words.”¹⁸⁵ Also, as we have seen, if a record is just too explicitly violent and sexually explicit, distributors can refuse and have refused to release it. Remember the Geto Boys album? Geffen Records would not endorse the album and said, in part, “[w]hile it is not imperative

that lyrical expressions of even our own Geffen artists reflect the personal values of Geffen Records, the extent to which ‘The Geto Boys’ album glamorizes and possibly endorses violence, racism, and misogyny, compels us to encourage DefAmerican to select a distributor with a greater affinity for this musical expression.”¹⁸⁶

Hank Riley, Counsel: That’s right! They did! Wow, that was pretty bold considering it was on the eve of the album release.¹⁸⁷

Brooke Hagen, Director: Actually, they took a stance similar to what Gregory mentioned a few minutes ago. In that instance, the issue was whether or not Geffen wanted to be associated with those kinds of lyrics.¹⁸⁸ As a private company, they had a right to decide what kind of materials they wanted to be associated with and that Geto Boys’ album happened not to be one of them.¹⁸⁹

Jake Evans, Counsel: So when people are talking about outright censorship of music, they obviously don’t understand what is happening behind the scenes. Don’t get me started on liability. You know, I don’t understand that line of thinking. If they honestly believe that some culpability should lie with music industry executives, then what about parents and retailers? We can only do so much! Stickering



MANY retailers have in-store policies forbidding the sale of records containing the Parental Advisory Label to those younger than 18, implementing “Eighteen to Buy” policies. Some large retail outlets such as Wal-Mart will not even carry a stickered product at all

that warns of lyrics with violent content has been used since 1985—this is not some new concept.¹⁹⁰ I think that should be enough! It is not our fault that children still get their hands on those records. Obviously, retailers are not following their own

guidelines, and parents don't even know what is in their children's CD cases!

Hank Riley, Counsel: Whoa! Someone is getting a little fired up!

Martin Winchester, Senior Vice President:

That's okay—it is nice to see some passion for the First Amendment around here! On a separate note, this has certainly been a very informative meeting. From what you all have said here today, I think we are in agreement that it seems like artists and music executives have been safe when a plaintiff has alleged that violent lyrics were the inspiration for their real-life act of violence.¹⁹¹ The case law we discussed showed that the vast majority of courts confronted with lawsuits seeking recovery from media defendants have “properly viewed the First Amendment as a shield against such suits.”¹⁹² However, there is no Supreme Court precedent regarding entertainment claimed to incite violence, and it seems like each state has its own take on this issue.¹⁹³ If you try any lawsuit in a controversial area these days, with people getting maimed or killed, you are going to find a couple of courts somewhere around the country that will hear it.¹⁹⁴ So, the one thing for us that I want to feel absolutely sure about is whether or not it is safe to go forward in our potential signing. I am going to mull over everything that has been said here today, and I will distribute a memo to the executives that summarizes our concerns and plans regarding Sam Satyr. Okay? So is there anything else?

Everyone: No.

Martin Winchester, Senior Vice President: All right, thanks everyone. Let's wrap up the meeting, and, in the meantime, if there is anything else you think of, let me know. Otherwise, get out of here!

BIJOUX RECORDS

Memorandum

To: Business & Legal Affairs and A&R Department

From: Martin Winchester

Date: April 5, 2004

Re: Staff meeting regarding the signing of Sam Satyr

I had Kathy draft a summary of our meeting last week about the potential signing of Sam Satyr and send a memo to all the executives. I met with Carson Wedekind this afternoon to discuss the points raised in the memo. He appreciates all the hard work we put in as a team to provide him with the tools necessary to make an informed decision.

As you know, absent an incitement which meets the standards of *Brandenburg v. Ohio*, the courts have been universally reluctant to impose tort liability upon any public media for self-destructive or tortious acts alleged to have resulted from a publication or broadcast.¹⁹⁵ With the safeguards we have discussed regarding First Amendment case law, current stickering practices, our limited involvement in touring, taking out additional insurance, and negotiating a morality clause, the executives see no reason why we shouldn't go full throttle and sign Sam Satyr. Bijoux Records is acting under the belief that his lyrics, although raw, are brilliant forms of self-expression. We are excited to invite Sam Satyr to join the Bijoux Records Artist Roster.

Thank you,
Martin Winchester

ENDNOTES

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¹ Disclaimer: In part, this is a work of creative writing. Bijoux Records is a fictitious record company. Any and all

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characters are likewise fictitious and any similarities to real life events are purely coincidental.

² A&R stands for “Artist and Repertoire.” The A&R staff are the people at the record company responsible for finding new talent, either by seeing the artist perform at a concert or an arranged showcase or, from hearing an earlier demo recorded at the artist’s expense. *The Demo Recording Agreement*, 8 ENTERTAINMENT INDUSTRY CONTRACTS 159 (Donald C. Farber ed., 2002).

³ 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 Senate 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 Feb. 29, 2004) [hereinafter Pitofsky].

⁴ 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).

⁵ Carolina 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, 448 (2000).

⁶ *Id.*

⁷ *Id.* at 448 n.34; see also KMFDM, *Waste*, on SYMBOLS (TVT 1997).

⁸ Pitofsky, *supra* note 3; see also James W. Rose, *Do It Yourself: The Music Industry Guide to Regulation of Violent Content*, 19 CARDOZO ARTS & ENT. L.J. 235, 235-36 (2001).

⁹ Rose, *supra* note 8, at 236.

¹⁰ *Id.*

¹¹ Tony Pugh, *Music Industry Broke Its Vow to Curb Sex, Violence, Feds Say; Lieberman to Push Punitive Measure*, SAN DIEGO UNION-TRIB., Apr. 25, 2001, at A8.

¹² *Id.*

¹³ *Id.*; see, e.g., Waller v. Osbourne, 763 F.Supp. 1144, 1145 (M.D.Ga. 1991); Vance v. Judas Priest, No. 86-3939, 1990 WL 130920 (Nev. 2d Dist. Aug. 24, 1990); Davidson v. Time Warner, No. V-94-006, 1997 U.S. Dist. LEXIS 21559, at *6 (S.D. Tex. Mar. 31, 1997).

¹⁴ 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).

¹⁵ See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (“motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee”).

¹⁶ See *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 192–93 (Cal. Ct. App. 1988) (“freedom of speech guaranteed by the First Amendment is not absolute. There are certain limited classes of speech which may be prevented or punished” for example 1) obscene speech; 2) libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, and conspiracy; 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. . .”). This paper is focusing on the fourth category of speech that is not protected by the First Amendment.

¹⁷ 395 U.S. 444 (1969); see Rodney Smolla, *The First Amendment and New Forms of Civil Liability*, 88 VA. L. REV. 219, 220 (2002).

¹⁸ See Smolla, *supra* note 17, at 220.

¹⁹ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also Smolla, *supra* note 17, at 220 n.6.

²⁰ *Brandenburg*, 395 U.S. at 445.

²¹ *Id.*

²² *Id.* at 444. The Ohio Criminal Syndicalism law made it illegal to advocate “the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform,” or to assemble “with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” *Id.* at 444-45. The Supreme Court held this law unconstitutional. *Id.*

²³ *Id.*

²⁴ *Id.* at 447.

²⁵ See Mike Quinlan & Jim Persels, *It’s Not My Fault, the Devil Made Me Do it: Attempting to Impose Tort Liability on Publishers, Producers, and Artists for Injuries Allegedly “Inspired” by Media Speech*, 18 S. ILL. U. L.J. 417, 435 (1994) (stating that the third prong of this test was provided by the Court in *Hess v. Indiana*, 414 U.S. 105 (1973) in which the words “we’ll take the f—king street” shouted to an unruly crowd of anti-war protestors did not constitute advocacy of illegal action and could not be punished as “incitement” because such words merely had a “tendency to lead to violence.”).

²⁶ Quinlan & Persels, *supra* note 25, at 435; see also *Brandenburg*, 395 U.S. at 447.

²⁷ Firester & Jones, *supra* note 14, at 8; see also *Brandenburg*, 395 U.S. at 448.

²⁸ Firester & Jones, *supra* note 14, at 7; see also *Hess*, 444 U.S. 105, 109 (1973).

²⁹ *Hess*, 444 U.S. at 109.

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- ³⁰ See generally Peter D. Csathy, *Takin' The Rap: Should Artists Be Held Accountable for Their Violent Recorded Speech?*, COMM. LAW., Spring 1992, at 7, 8.
- ³¹ *Id.* at 9.
- ³² See Shoshana D. Samole, *Rock & Roll Control: Censoring Music Lyrics in the '90s*, 13 U. MIAMI ENT. & SPORTS L. REV. 175, 187 (1995).
- ³³ *Id.*
- ³⁴ *Id.* at 188.
- ³⁵ *Id.*
- ³⁶ Chris Black, *Tipper Gore: No 'Wacko,' but Maternal Instinct; Campaign '92*, BOSTON GLOBE, July 10, 1992, at 18.
- ³⁷ Richard Harrington, *Record Bills Dropped*, WASH. POST, Apr. 6, 1990, at C2.
- ³⁸ *Id.*
- ³⁹ *Id.*
- ⁴⁰ See *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (stating that "the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").
- ⁴¹ See *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973).
- ⁴² *Id.* at 107.
- ⁴³ *Id.* at 108-09; see also *Firester & Jones*, *supra* note 14, at 8.
- ⁴⁴ 539 P.2d 36 (Cal. 1975).
- ⁴⁵ *Firester & Jones*, *supra* note 14, at 17 (discussing *Weirum*).
- ⁴⁶ *Weirum*, 539 P.2d at 43.
- ⁴⁷ *Id.*
- ⁴⁸ F. Jay Dougherty et al., *A Panel Discussion: Potential Liability Arising From the Dissemination of Violent Music*, 22 LOY. L.A. ENT. L.J. 237, 248 (2002).
- ⁴⁹ *Weirum*, 539 P.2d, at 37.
- ⁵⁰ *Id.* at 41.
- ⁵¹ *Id.* at 39.
- ⁵² *Id.* at 41; see also *Fornos*, *supra* note 5, at 452.
- ⁵³ *Weirum*, 539 P.2d at 40; *Firester & Jones*, *supra* note 14, at 9.
- ⁵⁴ *Weirum*, 539 P.2d at 47. Although *Weirum* does not mention the *Brandenburg* test, the case has traditionally been discussed in other incitement cases. See, e.g., *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 195 (Cal. App. 1988).
- ⁵⁵ *Weirum*, 539 P.2d at 40; see also *Fornos*, *supra* note 5, at 452.
- ⁵⁶ *Fornos*, *supra* note 5, at 452 (discussing the *Weirum* case to highlight the distinction between nonfeasance and misfeasance). In *Weirum*, the disc jockey urged his audience to speed, and it should have been foreseeable that they might drive unsafely. *Weirum*, 539 P.2d at 40.
- ⁵⁷ *Firester & Jones*, *supra* note 14, at 9 (discussing *Weirum*, 539 P.2d at 46-47).
- ⁵⁸ *Dougherty et al.*, *supra* note 48, at 249 (discussing *Weirum*, 539 P.2d at 48).
- ⁵⁹ *Id.*
- ⁶⁰ See generally *Pahler v. Slayer*, No. CV79356, 2001 WL 1736476 (Cal. Sup. Ct. Oct. 29, 2001); *Davidson v. Time Warner*, No. V-94-006, 1997 U.S. Dist. LEXIS 21559, at *6 (S.D. Tex. Mar. 31, 1997); *Waller v. Osbourne*, 763 F.Supp. 1144 (M.D. Ga. 1991); *Vance v. Judas Priest*, No. 86-3939, 1990 WL 130920 (Nev. 2d Dist. Aug. 24, 1990); *McCollum*, 249 Cal. Rptr. at 187.
- ⁶¹ *20/20* (ABC News television broadcast, Nov. 6, 2002) (Barbara Walters interview with Sharon Osbourne).
- ⁶² *Id.*
- ⁶³ *Id.*
- ⁶⁴ *Id.*
- ⁶⁵ *Id.*
- ⁶⁶ *Id.*
- ⁶⁷ *Id.*
- ⁶⁸ *Id.*
- ⁶⁹ *Id.*
- ⁷⁰ See *McCollum v. CBS, Inc.* 249 Cal. Rptr. 187 (Cal. App. 1988); *Waller v. Osbourne*, 763 F.Supp. 1144 (M.D. Ga. 1991).
- ⁷¹ *Firester & Jones*, *supra* note 14, at 14.
- ⁷² *McCollum*, 249 Cal. Rptr. at 188-89.
- ⁷³ *Id.*
- ⁷⁴ *Id.*
- ⁷⁵ *Id.*
- ⁷⁶ *Id.*

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⁷⁷ *Id.* at 191 n. 5. The lyrics to *Suicide Solution* suggest that “the only way out” for an alcoholic is through suicide:

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

Id.

⁷⁸ *Id.* at 191.

⁷⁹ *Id.* at 188–91.

⁸⁰ *Id.* at 198.

⁸¹ *Id.* at 197.

⁸² Professor Rodney Smolla, class lecture discussing *Rice v. Paladin Enterprises*, 128 F.3d 233 (1997). The following summary of *Rice* was taken from Arielle D. Kane, *Sticks and Stones: How Words Can Hurt*, 43 B.C.L. REV. 159, 175-76 (2001):

In *Rice*, the survivors of three murder victims sued the publisher of a pamphlet that provided detailed instructions on how to solicit, plan, execute and cover-up murders for hire. For purposes of summary judgment, the defendant-publisher stipulated that it knew and intended the pamphlet to be used by people to become or hire contract killers. The Fourth Circuit rejected the notion that the First Amendment shielded defendant from liability in a wrongful death action where their publication aided and abetted the actual killer. The court stated that the type of publication at issue in the case, although not sufficient to satisfy the stringent requirements of *Brandenburg*, was nonetheless offensive to the preservation of an ordered society. Therefore, according to the court, because the publication was integral in effectuating activity that could lawfully be suppressed,

the publisher could be equally liable for its part in the conspiracy.

Id.

⁸³ *McCollum*, 249 Cal. Rptr. at 193. (concluding that Osbourne’s lyrics “could not be construed as commanding anyone to any concrete action at any specific time, much less immediately.”)

⁸⁴ *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (explaining that speech which advocates illegal action at some indefinite future time is not sufficient to allow the state to punish the speech).

⁸⁵ *McCollum*, 249 Cal. Rptr. at 194.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See generally *id.* at 193.

⁸⁹ See *Rose*, *supra* note 8, at 238.

⁹⁰ *Id.*

⁹¹ *Fornos*, *supra* note 5, at 450. (“in strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damages thereby suffered by the person to whom the duty was owing. Thus, plaintiffs must prove that the relevant industry had a duty to its audience, that the industry breached that duty, and, as a result, the breach caused the plaintiffs’ injuries.”).

⁹² WILLIAM SHAKESPEARE, *HAMLET PRINCE OF DENMARK*, act 3, sc. 1 (“To be, or not to be: that is the question: Whether ’tis nobler in the mind to suffer/ The slings and arrows of outrageous fortune/ Or to take arms against a sea of troubles, and by opposing end them: To die: to sleep: No more; and, by a sleep to say we end: The heart-ache and the thousand natural shocks/ That flesh is heir to, ’tis a consummation?/ Devoutly to be wish’d. To die, to sleep;/ To sleep: perchance to dream: ay, there’s the rub;/ For in that sleep of death what dreams may come”).

⁹³ *Id.* act 4, sc. 7 (describing Ophelia’s drowning and madness after her father’s death).

⁹⁴ *Id.*

⁹⁵ *McCollum v. CBS, Inc.* 249 Cal. Rptr. 187, 195 (Cal. App. 1988).

⁹⁶ *Id.* at 195.

⁹⁷ *Firester & Jones*, *supra* note 14, at 14 n.84 (discussing *Waller v. Osborne*, 763 F.Supp. 1144, 1151 (M.D.Ga. 1991)).

⁹⁸ Janet Maslin, *Teen-Age Suicide, Rock and Parental Deception*, N.Y. TIMES, Aug. 6, 1992, at C15; see also *Vance v. Judas Priest*, No. 86-3939, 1990 WL 130920, at *17 (Nev. 2d Dist. Aug. 24, 1990).

⁹⁹ *Id.*

¹⁰⁰ Vance, 1990 WL 130920, at *1, *8-9; see also Richard Harrington, *The Trials of Rob Halford, Soft-Spoken Lead Screamer of Judas Priest*, WASH. POST Jan. 6, 1991, at G1.

¹⁰¹ Vance, 1990 WL 130920, at *4, *10-12; see also Maslin, *supra* note 98.

¹⁰² Vance, 1990 WL 130920, at *28 (stating that “the First Amendment right of an individual to be free from intrusive speech are paramount under circumstances involving subliminal messages where the individual has no knowledge that he is being bombarded by these messages, and therefore, has no means of making a conscious decision to either hear them or avoid them.”)

¹⁰³ Vance, 1990 WL 130920, at *18 (for general idea of intervening factors causing suicides); see also Firester & Jones, *supra* note 14, at 14 (suggesting possible specific intervening factors).

¹⁰⁴ John Leland, *Rock and Roll Under Siege*, NEWSDAY, Aug. 27, 1990, at 7.

¹⁰⁵ Chuck Philips, *The Music Didn't Make Them Do it; Verdict: The Rock Band Judas Priest is Absolved of Planting Subliminal Messages on a Record That Families Charged Led to the Deaths of Two Youths*, L.A. TIMES, Aug. 25, 1990, at F1.

¹⁰⁶ Firester & Jones, *supra* note 14, at 15.

¹⁰⁷ *Id.*

¹⁰⁸ See *Pahler v. Slayer*, No. CV 79356, 2001 WL 1736476 (Cal. Sup. Ct. Oct. 29, 2001).

¹⁰⁹ Chuck Philips, *Murder Case Spotlights Marketing of Violent Lyrics Music*, L.A. TIMES, Jan. 21, 2002, at C1; see also Vance, 1990 WL 130920, at *22; Waller v. Osbourne, 763 F.Supp. 1144, 1150-51 (M.D. Ga. 1991).

¹¹⁰ Philips, *supra* note 109.

¹¹¹ *Id.* A verse of a Slayer song called ‘213’ from the band’s *Divine Intervention* album are as follows: “Erotic sensations tingle my spine/A dead body lying next to mine/Smooth blue black lips/I start salivating as we kiss/Mine forever this sweet death/I cannot forget your soft breaths/Panting excitedly with my hands around/Your neck/How I love/How I love to kill you.” *Id.*

¹¹² Chuck Philips, *Southland Suit Over Metal Band’s Lyrics Is Dismissed*, L.A. TIMES, Oct. 31, 2001, at C2.

¹¹³ *Id.*

¹¹⁴ *Id.* See also Chuck Philips, *Company Town Ruling Favors Band in Suit Over Girl’s Murder Music*, L.A. TIMES, Jan. 25, 2001, at C6. Originally, Superior Court Judge Jeffrey Burke did not dismiss the lawsuit by the Pahlers, but gave them sixty days to file an amended complaint citing new evidence to support their argument that Slayer unlawfully marketed and distributed

harmful and obscene products to minors in violation of the California Business and Professions Code. The case was last dismissed on October 29, 2001 and is currently being appealed. *Id.*

¹¹⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

¹¹⁶ Firester & Jones, *supra* note 14, at 4.

¹¹⁷ *Id.* at 4 n.12.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 24.

¹²⁰ *McCollum v. CBS, Inc.* 249 Cal. Rptr. 187, 194 (Cal. App. 1988).

¹²¹ John Charles Kunich, *Natural Born Killers and the Law of Shock Torts*, 78 WASH. U.L.Q. 1157, 1161-62 (2000).

¹²² *Id.* at 1161-62 (referring to *Davidson v. Time Warner, Inc.*, 1997 WL 405907, at *1 (S.D. Tex. Mar. 31, 1997)).

¹²³ This outcry stemmed from the brutal ambush of two Las Vegas police officers, shot by four juveniles in 1992. Even after their arrest, the juveniles continued to chant the lyrics to the song “Cop Killer.” See Kunich, *supra* note 121, at 1161 (discussing the details of the incident).

¹²⁴ “Cop Killer,” contained the following lyrics in the chorus: “Die, die, die, pig, die!/ F—K the police!/ Die, die, die, pig, die!/ F—K the police!/ F—K the police!/ F—K the police, for Rodney King./ F—K the police, for my dead homies./ F—K the police, for your freedom./ F—K the police, don’t be a pussy./ F—K the police!/ I’m a mothaf—kin’ cop killer!/ Cop Killer! Cop Killer!” Kunich, *supra* note 121, at 1162.

¹²⁵ See Chuck Philips, *Texas Death Renews Debate Over Violent Rap Lyrics Trial: Suspect says that album influenced him to shoot trooper*, L.A. TIMES, Sept. 17, 1992, at 1.

¹²⁶ Philips, *supra* note 125; see also Kunich, *supra* note 121, at 1161-62.

¹²⁷ *Davidson*, 1997 WL 405907, at *1; see also Kunich, *supra* note 121, at 1161.

¹²⁸ *Davidson*, 1997 WL 405907, at *1; see also Kunich, *supra* note 121, at 1161.

¹²⁹ *Davidson*, 1997 WL 405907, at *1.

¹³⁰ *Id.* “Soulja’s Story” contains the following lyrics: “Cops on my tail, so I bail till I dodge ‘em/ They finally pull me over and I laugh, / Remember Rodney King and I blast on his punk ass. / Now I got a murder case.../What the f—k would you do? Drop them or let them drop you? / I choose droppin’ the cop.” *Id.* However, although these lyrics were pointed out by

the court, the plaintiffs did not specifically allege which song Howard was listening to at the time of the shooting. *Id.*; see also Quinlan & Persels, *supra* note 25, at 418.

¹³¹ *Davidson*, 1997 WL 405907, at * 1; see also Kunich, *supra* note 121, at 1161.

¹³² *Davidson*, 1997 WL 405907, at * 1; see also Kunich, *supra* note 121, at 1206.

¹³³ *Davidson*, 1997 WL 405907, at *1 (holding first that the court lacked personal jurisdiction over Shakur himself, then that the other media defendants were not liable under the applicable Texas negligence law, finding both a low probability of harm resulting from the recording and a very high burden of preventing harm on the defendants and society at large); see also Kunich, *supra* note 121, at 1206.

¹³⁴ *Davidson*, 1997 WL 405907, at * 16; see also Kunich, *supra* note 121, at 1206.

¹³⁵ *Davidson*, 1997 WL 405907, at * 16; see also Kunich, *supra* note 121, at 1206.

¹³⁶ *Davidson*, 1997 WL 405907, at * 17; see also Kunich, *supra* note 121, at 1207.

¹³⁷ *Davidson*, 1997 WL 405907, at * 17; see also Kunich, *supra* note 121, at 1207.

¹³⁸ *Davidson*, 1997 WL 405907, at * 17; see also Kunich, *supra* note 121, at 1207.

¹³⁹ *Davidson*, 1997 WL 405907, at * 18; see also Kunich, *supra* note 121, at 1207.

¹⁴⁰ *Davidson*, 1997 WL 405907, at * 20; see also Kunich, *supra* note 121, at 1208.

¹⁴¹ Deborah Wilker, *There is Nothing so Terrible About Asking Corporate Giants Like Time-Warner to Exercise a Little Self-Restraint*, SUN-SENTINEL (Ft. Lauderdale), June 7, 1995, at 1 E.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Firester & Jones, *supra* note 14, at 26 n.175.

¹⁵⁰ *Id.*

¹⁵¹ Arielle D. Kane, Note, *Sticks and Stones: How Words Can Hurt*, 43 B.C.L. REV. 159, 181 (2001).

¹⁵² *Id.* (quoting Terri R. Day, *Publications that Incite, Solicit, or Instruct: Publisher Responsibility or Caveat Emptor?*, 30 SANTA CLARA L. REV. 73, 76 (1995)).

¹⁵³ *Id.*

¹⁵⁴ *Id.* (arguing that the First Amendment does not immunize publishers for negligence in other areas of law, including: defamatory and libelous speech; obscene speech; fighting words; speech that directly incites illegal conduct; and other such “utterances that have no appreciable value as speech and that have a direct propensity to cause serious harm.”).

¹⁵⁵ *Id.* at 182.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 183.

¹⁵⁸ Kunich, *supra* note 121, at 1255. (stating that insurance should be affordable given the profitability of the industry and the rarity of any resultant harm.)

¹⁵⁹ *The Demo Recording Agreement*, 8 ENTERTAINMENT INDUSTRY CONTRACTS 159 (Donald C. Farber ed., 2002).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* The artist’s advisors - such as their attorney, business manager and personal manager- will review each contract the artist is required to sign and examine all phases of potential liability, including personal injury, property damage, and workers’ compensation. Contracts that relate to the tour are usually sound and light production, transportation, lodging, and catering.

¹⁶² Kunich, *supra* note 121, at 1255.

¹⁶³ *The Demo Recording Agreement*, 8 ENTERTAINMENT INDUSTRY CONTRACTS 159 (Donald C. Farber ed., 2002).

¹⁶⁴ LUDACRIS, *Area Codes*, on RUSH HOUR II SOUNDTRACK. (Def Jam Records 2001).

¹⁶⁵ JENNIFER LOPEZ, *Love Don’t Cost a Thing*, on J.Lo. (Sony Records 2001).

¹⁶⁶ Firester & Jones, *supra* note 14, at 13.

¹⁶⁷ *Id.*

¹⁶⁸ See Alfred C. Yen, *Perspectives on Intellectual Property: A Personal Injury Law Perspective on Copyright in an Internet Age*, 52 HASTINGS L.J. 929, 936 (2001).

¹⁶⁹ *Id.*

¹⁷⁰ Kunich, *supra* note 121, at 1216 (“Content-based restrictions are presumptively violative of the First Amendment because of the repressive dangers inherent in penalizing individuals for allowing certain ideas or information to enter the marketplace of ideas, discussion, and awareness.”).

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¹⁷¹ See, e.g., Recording Industry Association of America, Information for Parents, at <http://www.riaa.com/issues/parents/default.asp> (last visited Mar. 2, 2004).

¹⁷² The Recording Industry Association of America, Parental Advisory, at <http://www.riaa.org/Parents-Intro.cfm> (April 2000 statement of Hillary Rosen, RIAA President and CEO) (last visited Mar. 2, 2004). The stickers have been used voluntarily since a 1985 agreement between RIAA and the Parents Music Resource Center. *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Samole, *supra* note 32, at 177.

¹⁷⁸ *Id.*

¹⁷⁹ Neil Strauss, *Record Labels Bypassing Store Policies on Lyrics*, N.Y. TIMES, Feb. 6, 1997, at C15. (writing that although large retail stores have these policies in place, record companies will modify the lyrics and provide an edited version with the label removed).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² The Recording Industry Association of America, Parental Advisory, at <http://www.riaa.org/Parents-Intro.cfm> (April 2000 statement of Hillary Rosen, RIAA President and CEO) (last visited Mar. 2, 2004).

¹⁸³ Samole, *supra* note 32, at 189.

¹⁸⁴ *Id.*

¹⁸⁵ Megan Garvey & Jeff Leeds, *Company Town; Music Industry Vigorously Defends It's Rating Policies; Entertainment Officials Are Bracing for a Scolding in a Federal Report Today on the Marketing of Songs with Violent Lyrics*, L.A. TIMES, Apr. 24, 2001, at C1.

¹⁸⁶ Jon Pareles, *Distributor Withdraws Rap Album Over Lyrics*, N.Y. TIMES, Aug. 28, 1990, at C11.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Richard Harrington, *On the Beat: Lyrics, the Stormy Issue for Labels*, WASH. POST, Feb. 28, 1990, at C7.

¹⁹¹ See Rose, *supra* note 8, at 237.

¹⁹² See Quinlan & Persels, *supra* note 25, at 434 n.108.

¹⁹³ Terry Pristin & David Fox, *Pop Culture Violence. Copycats. Blame?*, L.A. TIMES, Oct. 23, 1993, at F1.

¹⁹⁴ *Id.*

¹⁹⁵ *McCollum*, 249 Cal. Rptr. at 198.