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Marketing Murder or Selling Speech?

by

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This much is *not* in dispute: Elyse Marie Pahler is dead and the three then-teenage boys who brutally choked and stabbed the 15-year-old girl in July 1995 are now serving 26 years to life in prison.[1] Pahler's decomposed body was found eight months after the attack, splayed in a eucalyptus grove in San Luis Obispo County, California, when one of her killers finally came forward to police.[2]

What remains at issue, however, is whether the blame for her death should stretch beyond the acknowledged murderers. That issue has recently manifested itself as a lawsuit filed in California by Pahler's parents that seeks to hold the so-called "death metal"[3] or "speed metal"[4] band Slayer, its members, and the companies in the recording industry that produce, disseminate, and market its music, civilly liable for the tragedy.[5] Why? The three boys who killed Pahler, it seems, listened to the music of Slayer,[6] a band once described by *The Los Angeles Times* as "giants of new American metal" and "the favorite group of every bad kid in suburbia," due in part to its reliance on "violent imagery" and fascination with evil.[7]

Of course, the media blame game is nothing new. Ongoing battles against violence[8] and for control of media content have tried to shape popular teen culture for decades.[9] Rock music, in particular, has been controversial since its inception in the 1950s.[10] In the 1980s, the United States Senate—prompted, in part, by the urging of Tipper Gore and several fellow wives of Washington politicians—held hearings regarding lyrics that allegedly glorified violence and sex.[11] Recently, a spate of lawsuits have sought to hold the artists and producers of various media products—music,[12] movies,[13] books,[14] video games,[15] and even World Wide Web sites[16]—accountable for real-world violence and death. One need only recall the recent finger pointing after the tragedy at Columbine High School to understand this culture of media blame in which the case of Pahler v. Slayer[17] is firmly situated.[18]

But what makes Pahler so interesting—and in some ways, unique—is its framing of the legal issues and the focus of its attack on the entertainment industry. In particular, the plaintiffs have concentrated their legal efforts not only on Slayer's music under the usual wrongful death claim, but also on the *marketing and promotion* of that music. Plaintiff's Second Amended Complaint alleges that the band's albums have been targeted at "severely emotionally disturbed adolescents"[19] who are "ready to explode"[20] and subject to "violent mood swings."[21] The amended pleading[22] further asserts that, especially in light of its troubled audience, Slayer's obscene[23] and harmful[24] music contributes to the delinquency of minors,[25] encourages minors to break the law,[26] aids and abets criminal activity,[27] and solicits the crimes of rape and murder.[28] As a result of these qualities, plaintiffs conclude, Slayer and the recording industry defendants named in the lawsuit have violated the California Business and Professions Code's regulations against unlawful and unfair business practices.[29] What's more, the plaintiffs claim that Slayer engaged in misleading advertising by allegedly holding itself out as believing in the unlawful and violent activities described in the lyrics when, in fact, it does not truly believe in those activities.[30] As the plaintiffs put it, the defendants "espoused these acts to adolescent males so they could increase their product sales when, in fact, these individual defendants did not believe what they professed to believe."[31]

These alternative theories appear to represent an effort to plead around the standard First Amendment[32] barriers that California courts have erected to thwart wrongful death claims against the media based on either negligence[33] or incitement to violence[34] theories.[35] The case thus ostensibly shifts from First Amendment concerns regarding censorship of music to business practice concerns regarding the marketing and promotion of that music. As Allen Hutkin, an attorney for the Pahlers, framed the issue in a recent newspaper interview, "We are not trying to censor this music. We are basically saying we want to limit access to minors."[36]

As will become clear later in this article, this artful posturing and pleading is only one type of framing[37] the plaintiffs have engaged in to divert attention from First Amendment concerns.[38] Nevertheless, by asserting violations of California's unfair competition law,[39] the plaintiffs' seek a number of non-monetary remedies that would impose restrictions on the band's speech, including: 1) injunctive relief imposing "reason-

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able time, place and manner restrictions on the sale and marketing of Slayer music and merchandise to minors;"[40] 2) the imposition of an order mandating that the defendants engage in a so-called "corrective advertising campaign to undo the harm that Slayer's music and merchandise has inflicted on California's youth;"[41] and 3) injunctive relief preventing the defendants from engaging in unfair competition and misleading advertising in the future.[42]

So far, the creative pleading has not been successful for the Pahlers. In January 2001, a Superior Court judge dismissed their Second Amended Complaint.[43] Nonetheless, while the judge agreed that Slayer's music is protected by the First Amendment, he gave attorneys for the Pahlers sixty days to file another amended complaint and to introduce specific evidence to bolster their contention that the marketing of the music caused the death of Elyse Marie Pahler.[44] That's good news for Hutkin, who remains "confident" that the complaint can be modified further "so that the case can go forward."[45] With both sides already vowing to fight it all the way to the United States Supreme Court, he may just be right.[46]

One of the most controversial media figures of the late 1980s and the 1990s wasn't a singer or a music group or, for that matter, even a real person. Instead, it was a cigarette-promoting cartoon character known as Joe Camel, who perhaps gained most of his notoriety after being blamed for causing an increase in underage smoking in the United States.

This Article uses the Pahler legal battle as a case study to examine the current culture wars that have placed the Hollywood recording and entertainment industries in the legal crosshairs of both legislative and judicial efforts to redefine popular teen culture. The first section demonstrates how the theories at issue in Pahler mirror the tactics used in the recent war against tobacco industry advertising that also allegedly targeted minors.[47] Next, the Article situates Pahler within the context of Congressional hearings in the fall of 2000 that focused attention on the alleged Hollywood marketing of products featuring violent content to minors.[48] It then scrutinizes the Second Amended Complaint in Pahler to show the types of framing mechanisms variously used by the plaintiffs to pitch the case within the context of advertising and to place it outside the scope of First Amendment protection.[49] The Article ultimately concludes that the proper solution to the problems and issues raised by cases like Pahler can be found not in the creative application (or misapplication) of unique legal theories to First Amendment issues, but rather in fighting fire with fire—by implementing aggressive media literacy programs in the nation's elementary schools.[50]

JOE CAMEL'S NOSE UNDER SLAYER'S MUSICAL TENT: THE ART OF ALTERNATIVE PLEADING

One of the most controversial media figures of the late 1980s and the 1990s wasn't a singer or a music group or, for that matter, even a real person. Instead, it was a cigarette-promoting cartoon character known as Joe Camel, who perhaps gained most of his notoriety after being blamed for causing an increase in underage smoking in the United States.[51] After the Joe Camel campaign was introduced in the United States in February 1988, the R. J. Reynolds' Camel cigarette brand "jumped from three percent to more than thirteen percent of the market in just three years, and among the youngest groups, the jump was even larger."[52] It was this latter fact—that the cartoon seemed to appeal to children—that made the campaign so contentious.[53]

Given the controversy surrounding the fictional dreaded dromedary, it is not surprising that the Joe Camel figure also became the subject of protracted and expensive litigation in California.[54] In the end, the case of Mangini v. R. J. Reynolds Tobacco Company[55] played a pivotal role in the termination of the Joe Camel campaign.[56] Plaintiff Janet C. Mangini, a San Francisco-based attorney, contended in her lawsuit that the campaign "improperly target[ed] minors, and [sought] to make cigarette smokers of them."[57] This aim, she alleged, constituted an unlawful and unfair trade practice under California's Business and Professions Code.[58]

In a landmark 1994 ruling, the California Supreme Court unanimously allowed Mangini to proceed—against attacks based on federal legislation preemption grounds—with her unfair business practices claim that "the Old Joe Camel advertising campaign target[ed] minors for the purpose of inducing and increasing their

illegal purchase of cigarettes."[59] The high court reasoned:

> [I]t is unlawful in California to sell cigarettes to minors or for minors to buy them. Advertising aimed at such unlawful conduct would assist vendors in violating the law. The predicate duty is not to engage in unfair competition by advertising illegal conduct or encouraging others to violate the law.[60]

Of course, by now all of this should sound very familiar. At the heart of the Mangini case lie the same legal theories now at issue in Pahler. In each case, plaintiff's theory depends on the same critical components—namely, that defendants marketed a product that is unlawful or harmful to minors, and that the marketing was conducted in such a way that the defendants knew would attract the attention of a youthful audience. Just as Janet Mangini focused her attention on the marketing of cigarettes to minors, so too have the plaintiffs in Pahler directed their efforts toward the "intentional marketing strategy"[61] of music that targets adolescent males.[62] And just as cigarettes are unlawful for minors to purchase,[63] so too is obscene speech an unlawful product.

In a nutshell, the Pahler plaintiffs' case boils down to this: Slayer amounts to Joe Camel, and Slayer's songs amount to cigarettes. Ironically, there are indeed many cartoonish aspects to the group's over-the-top morbid shtick.[64] Thus, as Joe Camel became the pariah of anti-tobacco advocates, so stands Slayer—it has been said, for instance, that "[i]f Slayer didn't exist, anti-rock forces could have invented the band."[65]

But Slayer, of course, is not a cartoon character but a group of citizens, and its product is not tobacco or addictive nicotine but speech. Smoking a cigarette causes cancer to the smoker. Listening to a Slayer album, however, does no physical harm to the listener (unless, of course, the sound level is turned up too loud). It also does no harm to the overwhelming majority of individuals who don't listen to Slayer but who meet or encounter Slayer fans. The Second Amended Complaint perhaps implicitly recognizes this fact, failing as it does to name one individual other than Elyse Marie Pahler who was killed by Slayer listeners under the influence of the band's lyrics. Thus, if one wants to compare Slayer's music to a cigarette, it is clear that those who encounter Slayer listeners are *not* like those who encounter smokers. In contrast to the real second-hand smoking effect, there is no second-hand listening effect.

More importantly, there is a fundamental difference between speech products and non-speech products: speech products receive First Amendment protection unless the plaintiff can prove that they somehow fall outside the scope of its safe harbors. While the Pahlers' complaint acknowledges this rule, it seeks to circumvent it by asserting that Slayer's lyrics constitute obscene speech[66] that incites violent and unlawful conduct, [67] thus invoking two categories of expression that fall outside the ambit of First Amendment protection.[68] In addition, the Pahlers allege a laundry list of penal code sections that Slayer's music also supposedly violates[69] in order to extract the music from inside the First Amendment's protective fortress.[70]

The bottom-line comparison between the two cases appears to be roughly this: same theories applied to different facts packaged similarly.[71] In other words, the success of the attack on Joe Camel under California's Business and Professions Code has opened up an avenue of attack which the Pahler lawsuit seeks to follow. The critical difference lies in the fact that while cigarettes do not constitute speech, Slayer's music does—no matter how repulsive the ideas it communicates may seem.[72] But as the following section suggests, the attack on media marketing present in the Pahler case has its roots in more than simply the Mangini litigation. In particular, it also must be contextualized within a rising tide of legislative concern about Hollywood's marketing of violent entertainment.

The Marketing of Violent Content: From the Hollywood Hills to Capitol Hill

David and Lisanne Pahler's attack on the marketing of graphic media content to minors doesn't stand alone. In fact, it falls squarely within a political climate that is increasingly hostile to Hollywood's marketing and promotion practices. Understanding this background proves essential to the full appreciation of why the Pahler case provides a representative example of the new efforts to attack media marketing.

In September 2000, an "unprecedented" meeting occurred in Washington, D.C.[73] Eight Hollywood entertainment executives were called to the nation's capital to face questions from members of the United States Senate Commerce Committee.[74] The senators, led by erstwhile presidential aspirant John McCain (R.-Ariz.), threatened government regulation of the movie indus-

try if it did not stop the alleged practice of marketing violent movies to children.[75] In response, the Hollywood executives pledged to limit such activities but refused to end advertising for violent movies altogether.[76]

Even prior to these hearings, Senator Joseph Lieberman (D.-Conn.), the outspoken critic of Hollywood and vice-president running mate of Al Gore in 2000, had teamed up with McCain to propose a law targeting the marketing of violent content to minors.[77] The not-yet-enacted Media Violence Labeling Act of 2000 would require manufacturers of movies, music, and video games to label violent content and restrict its sale to minors.[78]

Neither the Commerce Committee hearings nor this legislation were isolated or random events that year. In particular, the Senate hearings came in the wake of a Federal Trade Commission (FTC) report issued in early September 2000 that concluded that the entertainment industry systematically and relentlessly target-markets violent content to minors.[79] The massive report entitled "Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries,"[80] provides in relevant part in the Executive Summary:

> Although the motion picture, music recording and electronic game industries have taken steps to identify content that may not be appropriate for children, companies in those industries routinely target children under seventeen as the audience for movies, music and games that their own rating or labeling systems say are inappropriate for children or warrant parental caution due to their violent content. Moreover, children under seventeen frequently are able to buy tickets to R-rated movies without being accompanied by an adult and can easily purchase music recordings and electronic games that have a parental advisory label or are restricted to an older audience. The practice of pervasive and aggressive marketing of violent movies, music and electronic games to children undermines the credibility of the industries' ratings and labels.[81]

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The report already is being considered by some plaintiffs' attorneys as providing the background and ammunition necessary for class-action lawsuits against members of the Hollywood entertainment industry based on their marketing practices.[82] (Imagine Pahler ratcheted up to the class-action level against a wider array of entertainment industry entities.) Unsurprisingly, those attorneys analogize the possibility of early class-action suits to the efforts in Mangini attacking the marketing of cigarettes to minors. As attorney John B. Thompson of Coral Gables, Florida put it, "This is kind of like the embryonic days of tobacco litigation. They started out as individual lawsuits too."[83]

The FTC's scathing report on Hollywood marketing practices was followed by an attack from another administrative agency, the Federal Communications Commission (FCC). In September 2000, William Kennard, then Chairman of the FCC, said the FCC would begin to study whether television stations promote inappropriate content at times when children are likely to be in the audience.[84]

All of this focus on the marketing of speech products ultimately trickled down to the 2000 presidential campaign. Al Gore, for instance, said that he would favor additional regulations of the entertainment industry if it did not come up with its own plan to reform marketing practices.[85] George W. Bush, during the third televised debate with Gore, similarly stated, "I don't support censorship, but I do believe that we ought to talk plainly to the Hollywood moguls and people that produce this stuff and explain the consequences. I think we need to have rating systems that are clear."[86] During the same debate, Gore referenced the FTC report described above, observing that "the Federal Trade Commission pointed out that some of these entertainment companies have warned parents that the material is inappropriate for

children and they've turned around behind the backs of the parents and advertised that same adult material directly to children. That's an outrage."[87]

The most recent assault on the media coming out of Washington, however, came not from a candidate, senator, or the head of a federal administrative agency charged with regulating advertising or broadcasting. It came, instead, from the Surgeon General, in the form of a January 2001 report entitled, "Youth Violence: A Report of the Surgeon General."[88] The report cites the results of one so-called meta-analysis of media violence as indicating "clearly that brief exposure to violent dramatic presentations on television or in films causes short-term increases in the aggressive behavior of youths, including physical aggressive behavior."[89] Although the report's much-publicized[90] link between real-life violence and media content is subject to different interpretations and may even be misleading,[91] some of its conclusions and data nonetheless add fuel to the fire started (or at least fanned) by legislators in Washington and plaintiffs in cases like Pahler.

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What will be ignored by the proponents of restrictions on marketing violent media content to minors are the report's other conclusions that "not all youths seem to be affected equally by media violence"[92] and that "the impact of violent television, film, and video games on aggression is moderated by viewers' aggressive characteristics."[93] So too will future plaintiffs need to convince courts to overlook this information, as it it suggests that individuals, rather than the media, bear responsibility for their own conduct.

Even when the influence of media violence is conceded, its overall effect remains impossible to gauge. As Edward Donnerstein, a social scientist at the University of California-Santa Barbara who studies television violence, has observed, "it is very clear that there are a multitude of factors which contribute to violent behavior, and they all interact with each other. There is no single cause, just as there is no single cause for any type of behavior we want to examine."[94] This fact and the reality that there are multiple variables involved in teen violence, however, routinely get swept aside in a political climate hostile to the media and looking to pin blame on an easy target.[95]

In summary, the Pahler case, with its seemingly novel legal focus on media marketing, actually arises in an atmosphere filled with legislative concerns about the marketing of violent media content to minors. With recent wall-to-wall news coverage of the school violence in Santee, California[96] and Williamsport, Pennsylvania[97] intensifying that atmosphere, both judges and juries could potentially be more easily swayed to ignore First Amendment concerns—or, at least, to relegate those concerns to the shadows—in cases in which media content is blamed for real-life violence.[98]

With this background of the rising tide of concern with media marketing in mind, the next part of this Article returns to the Pahler case to reveal some of the rhetorical strategies used by the plaintiffs to frame their case. The Second Amended Complaint, as well as the comments to the media given by the plaintiffs themselves, reveal the efforts to position the case as one not about the First Amendment (as defendants would wish),[99] but one instead concerned with marketing practices and the protection of children.

Framing the Pahler Case: First Amendment Issue? What First Amendment Issue?

As courtroom advocates for their clients, litigators must paint the facts at issue in as favorable of a light as possible and make arguments that sell those facts and their clients' cases to the triers of fact. This part of the Article discusses some of the tactics and strategies used by the attorneys in Pahler to do just that. They are worth analyzing because they reflect the cultural and political debate today in the United States about the pros and cons of regulating media content.

It's About Instructions, Not Creative Expression

Thirty years ago, the United States Supreme Court observed that it is "often true that one man's vulgarity is another's lyric."[100] Pahler might be said to put a new spin on that old maxim. According to the Pahler plaintiffs, it's not that one man's vulgarity is another's lyric so much as it is that one man's lyric is another's instruction.

Indeed, one of the simplest yet most important tactics used by the plaintiffs' attorneys in the Second Amended Complaint involves framing Slayer's songs as containing something other than lyrics. The lyrics, according this amended pleading, actually constitute "instructions,"[101] "directions,"[102] and "directives."[103] For instance, the plaintiffs argue that the killers of Elyse Marie Pahler "were instructed" to commit "atrocities" by the following words from a Slayer song:

> This fucking country's lost its grip. Sub-conscious hold begins to slip. The scales of justice tend to tip. The legal system has no spine. It's corroding from inside. Slap your hand you'll do no time. Anyone can be set free on a technicality. Explain the law again to me. Murder, mayhem, anarchy now are all done legally. Mastermind your killing spree. Unafraid of punishment with a passive government there's nothing for you to regret, nothing to regret. Violence is my passion. I will never be contained living with aggression and its everlasting reign.[104]

Are these words really "instructions" and "directives" or are they merely descriptions and musings? From the plaintiffs' perspective, lyrics such as those quoted above from a song called "Dittohead"[105] are much more than the descriptions or musings of a group of guys once described as "a band of Southern California surfers turned rockers."[106] To plaintiffs, they constitute, variously and collectively, "*instructions* [that] include *directions* about stalking, mutilation, dismemberment, rape, torture, cannibalism and necrophilia, as well as rituals and altars, and the selection of a virgin female as a victim."[107]

Another pair of examples illustrates this strategy of turning lyrics into instructions. From the plaintiffs' standpoint, the killers acted "consistent with instructions"[108] from a song called "PostMortem" that provides, as quoted in the Second Amended Complaint: "Entering a tomb of a corpse yet conceived tighten the tourniquet around your neck. Sifting away the debris of hated life cold touch of death begins to chill your spine."[109] Plaintiffs also contend that a song called "Tormentor"

The *Real* Slim Shady?

The cultural battle over meaning holds true today with the music of rapper Eminem as much as it does with Slayer. Eminem's lyrics on *The Marshall Mathers LP* describe violence against women and include homophobic rhetoric.[1] The song "Stan," for instance, describes a fan named Stan who ties up his pregnant girlfriend, stuffs her in the trunk of his car, and then drives it over a bridge.[2] While some might argue the song glorifies violence, others could view it as Eminem's warning that what he sings about should not be taken seriously or literally.[3] Yet one can easily envision, especially given the anti-media climate described in this Article, a suit against Eminem should someone who listens to the artist commit an act of violence against gays or women. Eminem, however, has said that his young audience members "are taking my music for what it's worth . . . They're taking it with . . . a grain of salt."[4]

[1] Neva Chonin, The Rap on Eminem, S.F. Chron., Feb. 20, 2001, at A1, available at http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/02/20/MN17035.DTL.

[2] See The Lyrics to Eminem's 'Stan': How Will They Be Sung on TV?, L.A. Times, Feb. 21, 2001, at Calendar F4 (setting forther the complete lyrics to "Stan"), available at http://www.latimes.com/archives/.

[3] The song can be interpreted as "a tale about an obsessed fan that also serves as a response to his [Eminem's] critics (the moral is, don't practice what Eminem preaches)." Neil Strauss, Eminem Grabs Spotlight, but Steely Dan Wins Best Album, N.Y. Times, Feb. 22, 2001, at A22, available at http://search.nytimes.com/search/.

[4] Michael D. Clark, Eminem Steals Shows Spotlight with Controversy, Houston Chron., Feb. 21, 2001, at 1.

"instructed the teenage boys who murdered Elyse Marie Pahler to terrify their victim before killing her"[110] with the following words:

> Running from shadow. Blinded by fear. The horror of nightfall is ever so near. I slowly surround you as terror sets in. Are you afraid of the night? I see the fright in your eyes as you turn and run. But is your mind playing tricks on a body so very young? Feeling as if no one cares the fear runs down your spine. But I know I'll never rest until I know you're mine.[111]

Given the plaintiffs' repeated use of the term "instructions" in the Second Amended Complaint,[112] one might think that the members of Slayers engaged themselves less with the penning of songs than with the meticulous writing of step-by-step directions, less with the creation of albums than with the authorship of cookbooks filled with recipes for death. In turn, the members of Slayer would not be considered musicians but instructors—more specifically, instructors engaged in some bizarre, unholy pedagogy.

For their part, of course, the members of Slayer do not describe their lyrics as instructions but merely as descriptions and stories. In a 1990 article published in *The New York Times*, Tom Araya, Slayer's singer and bassist, commented, "I graphically describe a lot of things—this really happens, this goes on. I'm not telling people to do it; I'm just telling people what I see, what I hear, what I know."[113] Similarly, Jeff Hanneman, a guitarist for Slayer, told a reporter for *The Los Angeles Times* back in 1988:

> We write these songs that we do because that's what we like. But they are just stories—not things we actually do or recommend anyone else go out and do. Take the song 'Piece by Piece,' about chopping up somebody. To us, it's like a horror movie. It's fun because [the songs and movies] shock you. The kids get into it on the same level we do. They know it is just a story and just fun.[114]

Music critics agree with the band, arguing like Hanneman that "the lyrics' bloody scenarios are deliberately scary, like horror movies and amusement park haunted houses."[115] Others state the point even more strongly. For instance, Robert Palmer, former chief rock critic for *The New York Times*, writes that the "darkness in the music holds up a mirror to the darkness in society—the empty pieties and alienating double speak of politicians and self-appointed spiritual guardians. The best dark metal bands may be anathema in some quarters. But there can be no question of their artistic intent."[116]

So why do the plaintiffs contend otherwise and attempt to frame the lyrics as instructions? Two reasons appear important. First, one suspects that this framing is an attempt to circumvent a statement made by a California appellate court that:

> [M]usical 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, nor judged by a standard of prose oratory. Reasonable persons understand musical lyrics and poetic conventions as the figurative expressions that they are.[117]

This language is particularly troublesome for the plaintiffs' in Pahler because it comes from a decision rejecting a wrongful death action against singer Ozzy Osbourne based on the claim that Osbourne's lyrics proximately caused a 19-year-old man to commit suicide. The Pahler plaintiffs could answer by claiming that the children to whom Slayer allegedly targets its music are neither "reasonable" nor trained in understanding "figurative expressions," but rather "severely emotionally disturbed"[118] drug users. The more effective claim, however, lies in denying a different section of the calculus by asserting that what's at issue is not "musical lyrics and poetic conventions," but rather instructions—precisely the kind that clearly embody "calls to action."

A second reason why the Pahler plaintiffs frame the lyrics in terms of instructions may be to make their case seem factually similar to an undisputed "instruction" case, Rice v. Paladin Enterprises, Inc.[119] There, plaintiffs brought a wrongful death suit against a publisher for murders allegedly aided and abetted by a book called *Hit Man: A Technical Manual for Independent Contractors*.[120] The Fourth Circuit Court of Appeals rejected the defendants' motion for summary judgment based on the First Amendment, and the parties eventually settled.[121] That ending came as little surprise after the tone of the Fourth Circuit's opinion:

> Paladin's astonishing stipulations, coupled

> with the extraordinary comprehensiveness, detail, and clarity of *Hit Man*'s instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law. In at least these circumstances, we are confident that the First Amendment does not erect the absolute bar to the imposition of civil liability for which Paladin Press and amici contend.

Of course, as is evident by the court's repeated insistence of the blatant nature of the directive contained in the book, the speech in that case clearly came solely in the form of an instruction manual, not a collection of songs. But to the extent that the Pahler plaintiffs can brush over the detailed list of qualities that signaled the former to the Fourth Circuit, and stretch the "circumstances" cited by the court to reach the latter, they can edge closer, at least in theory, to the Paladin result.

If the recent January 2001 hearing provides an indication of their chances at success, however, the plaintiffs remain some distance from such a result. Superior Court Judge E. Jeffrey Burke did not buy the plaintiffs' "instructions" framing. Instead, he aligned himself with the California appellate court quoted above, commenting on the nature of Slayer's lyrics as "more descriptive than directive."[122] Of course, it remains to be seen whether he will take this position again after the plaintiffs amend their complaint.

It's About Money, Not Speech

A second tactic in framing the case away from protected expression appears to involve pitching it as being about the necessary limits of commerce and capitalism—in particular, the need to limit the right to profit from disturbed children. David Pahler, Elyse's father, made this clear in an interview with a reporter from *The Washington Post*.[123] The music industry, he declared, is "about money. That's the driving force. I can't imagine the adults in the band, in the distribution end, really think this so-called music or the lyrics are good."[124]

The focus on financial motives clearly links directly to the plaintiffs' causes of action for unlawful and unfair business practices, as well as for false advertising.[125] After all, business and advertising center around making money, and no one can deny that musical artists profit from the sales of their cassettes and CDs. Likewise, the plaintiffs allege that Slayer's "product is *solely a commercial endeavor* produced to promote sales to adolescents who are searching for an identity,"[126] and that the group acts "with *solely a profit or commercial purpose*."[127] The plaintiffs also point out that Slayer has "received millions of dollars through the commercial sale" of its albums, lyric books, sheet music, hats, and T-shirts.[128] The focus on marketing thus frames the case as one about sales and money, not about artistic creativity and expression.

It's About Children, Not Speech

The two tactics described above—framing the lyrics as instructions, and framing the case as being about money—form only two-thirds of the plaintiffs' legal strategy in Pahler. The final third, a focus on children, also plays an important role.

When it comes to restricting the display of sexually explicit images, or for that matter, any other offensive or allegedly harmful speech, there is perhaps no more widely judicially or legislatively accepted justification than protecting minors.[129] The courts, in fact, sometimes seem to teeter on the verge of adopting what First Amendment scholar Rodney Smolla calls a "Child's First Amendment"—a rule of law which permits the regulation of speech implicating children in ways that would not be permissible for adults.[130] Yet the Supreme Court has made it clear that even a compelling interest in protecting children "does *not* justify an unnecessarily broad suppression of speech addressed *to adults*."[131]

Unsurprisingly then, the Pahler plaintiffs have used a combination of two tactics to implicate the need to protect children. The first involves a careful characterization of the band's intended audience. Here, the plaintiffs suggest that Slayer preys upon "severely emotionally disturbed *adolescents*"[132] by marketing its music primarily to angry teenage males. Next, the second tactic outlines the potential harm in such a marketing strategy, citing "a continuing threat to the members of the public in that marketing this music to male adolescents will result in physical, mental, and emo-

tional harm to both male and female adolescents and members of their families, schools, and the general public who are victims of the resultant behavior."[133] Having followed the pattern of the "Child's First Amendment" to perfection, the two tactics then intersect in the conflation of the mere statement of the issue with the necessity of the result. Children could be harmed by Slayer's addressing its lyrics to other children: what better reason could there be for limiting free speech than the protection of children?

David Pahler himself summed it all up a bit easier: "This [case] is about the children. It's not about the First Amendment."[134] To the extent his attorneys can convince the courts of that, they can then frame it as one about the permissibility of restricting children's access to harmful music. In other words, while a case involving an attempt to restrict the ability of groups like Slayer to create their music or to sell it to adults *would* be "about the First Amendment," one that merely aims at restricting the targeting of sales to children is just "about the children"—never mind that it restricts speech as well.

It's More than Incitement, It's Obscene

Despite the otherwise absolutist language of the First Amendment,[135] a few specific categories of expression in free speech jurisprudence fall short of being protected by the Constitution. The two most significant categories for cases such as Pahler involve incitement to violence[136] and obscenity.[137] While the effort to frame Slayer's lyrics as instructions seems, in part, geared to fitting the wrongful death cause of action within the incitement exception,[138] the effort to frame the lyrics as obscene is directly linked to the cause of action for unlawful and unfair business practices.

Although some current legal scholars may argue that violent expression should be treated as obscenity and thus outside the ambit of First Amendment protection,[139] such is not the case today. Accordingly, an argument based on obscenity remains difficult for the Pahler plaintiffs to make. To succeed, they must simultaneously claim that the same lyrics that are "instructions" for how to commit murder, rape, and other violent content[140] also meet the criteria for obscenity defined by the Supreme Court in Miller v. California.[141] In that case, the Court created the three-part obscenity test that remains in effect today and is reflected in the California obscenity statute.[142] The test asks whether:

> (a) 'the average person, applying contemporary community standards' would find that

(Not) As Wholesome As We Wanna Be

An irony in the Pahler plaintiffs' attempt to frame Slayer's lyrics as obscene is that this effort comes at a moment when there is an increasing tolerance for, and mainstreaming of, sexually explicit speech in the United States. A brief review of some numbers bears this conclusion out. The adult entertainment industry in the United States takes in $10 billion annually.[1] About one in four regular Internet users—approximately 21 million Americans—visits one of the more than 60,000 sex sites on the web at least once each month, far more than the number that bothers to visit official government-run websites.[2] In 1998, revenues for online pornography reached $1 billion; estimates suggest that figure will grow to $3 billion by 2003.[3] Cyber-pornstar Danni Ashe alone brings in $7 million annually with her "growing empire of adult entertainment."[4]

Anecdotal evidence also suggests that obscenity prosecutions are becoming more difficult. For instance, in October 2000, a jury near St. Louis, Missouri, needed just two-and-a-half hours of deliberations to decide that two adult videos—*Anal Heat* and *Rock Hard*—were not obscene, despite the prosecutor's arguments that the videos were the equivalent of illegal drugs.[5] What might be surprising to some is that the jury, comprised entirely of women, reached this decision after watching the videos' depictions of anal, oral, and vaginal sex among women and between men and women.[6] One juror even commented after the case that the jury easily reached agreement that neither tape was obscene.[7]

[1] Timothy Egan, Porn, Inc., Plain Dealer (Cleveland, Ohio), Oct. 27, 2000, at 1E.
[2] Id.
[3] Neil Irwin, Purveyors of Internet Porn Look to Next Frontier: Wireless, Wash. Post, Nov. 23, 2000, at E05.
[4] John Schwartz, Seamy and Steamy, Wash. Post, May 17, 2000, at G06.
[5] Michael Munz, Jury Finds Explicit Videos From Store are Not Obscene, St. Louis Post-Dispatch, Oct. 27, 2000, at 1.
[6] Id.
[7] Id.

> the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[143]

If all three prongs of the Miller test are met, then any First Amendment protection for the work in question dissolves.

When it comes to music, the third prong usually saves the work from such a fate. Controversy in the early 1990s surrounding rap group 2 Live Crew's *As Nasty as They Wanna Be* album marked the first time that a federal court of appeals was asked "to apply the Miller test to a musical composition, which contains both instrumental music and lyrics."[144] Although a district court judge in that case had previously concluded the recording was obscene,[145] the Eleventh Circuit Court of Appeals reversed on the grounds that the judge, simply by listening to the album and in the face of expert testimony to the contrary, could not conclude that the work had no serious artistic value.[146] Perhaps more importantly, the court wrote in dicta that "we tend to agree with appellants' contention that because music possesses inherent artistic value, no work of music alone may be declared obscene."[147] Even if courts were to disregard this perfectly plausible assessment, at least some experts in the field appear ready to come to the aid of the Pahler defendants—recall the comments of critic Robert Palmer noted earlier, suggesting that Slayer's music does indeed possess artistic value.[148]

None of these appraisals deter the plaintiffs, however, who doggedly contend that "[t]he fact that this obscene and harmful matter is in the form of lyrics does not make it appropriate to market or sell to children."[149] Although the plaintiffs give several samples of lyrics that they claim are harmful to minors in the Second Amended Complaint,[150] the obscenity standard requires that the work be considered as a whole.[151] As a result, plaintiffs face an uphill battle because the content of an entire Slayer album, not a snippet from one song, will need to be considered.

In summary, the Pahler case can be framed in several different ways, each of which attempts either to skirt First Amendment concerns or to place the entire case outside the scope of the First Amendment. California's Business and Professions Code, coupled with the success in the Mangini case, has given the plaintiffs new fodder for such framing, allowing them to focus on marketing and advertising. The degree to which the courts accept that focus might be the deciding factor in the case. Or to put it another way, how the courts actually decide the case depends almost entirely on what they first decide it's actually all about.

CONCLUSION: NO SUCH THING AS A MAGIC BULLET

Pahler epitomizes our ongoing culture wars in the United States. These include not only wars to control the nature of media content that contributes to teen culture, but also wars between the generations, with an older generation attempting to use the legal system to tell a younger generation that its music is too dangerous for its ears.

The case also represents a war over the meaning of words—how they are meant to be interpreted and how they should be interpreted. In particular, is it plausible to suggest that words in song lyrics like Slayer's be taken as commands for action? If the answer in Pahler is yes, what are we to make of other lyrics from other artists? One might wonder, for instance, why pop singer Britney Spears has not been the target of repeated physical assaults, given that she sings the words "hit me, baby, one more time." Could it be that Spears' words are not to be taken literally? Perhaps the word "hit" is not actually meant as a command to strike? Despite the Pahler plaintiffs' repeated insistence that children cannot be expected to divorce literal meaning from subtle artistic expression of the sort found in popular modern music, the lack of violence at Spears' concerts suggests that even the over-exposed star's young fans know not to take some lyrics literally.

Meaning, of course, can never be finally fixed.[152] Communication researchers long ago rejected what has been described as the "magic bullet" theory or "hypodermic needle" theory of direct, powerful, and largely uniform media effects on audience members.[153] In brief, the bullet version of the theory held that "[m]essages only had to be loaded, directed at the target and fired; if they hit the target audience, then the expected response would be forthcoming."[154] Despite this fact, many people still believe that media messages can have direct and powerful effects on an essentially passive audience.[155] But the truth is that people of different experiences, different ages, and different education may interpret or decode the

same musical message in very different ways. It has been said, "[M]eaning is at least as much in the culture as in the message."[156] Indeed, culture itself can be defined as "the site where meaning is generated and experienced."[157] In this light, cases such as Pahler really boil down to efforts to control meaning and culture through legal channels.

That means that for all of its attempts to frame legal issues one way or another, Pahler is ultimately about much more than a family's request for compensation for the tragic death of its daughter or the quest to restrict the marketing practices of music that graphically describes sexual violence. It is about our culture and the efforts to assign both meaning and legal blame within that culture. It is about the power—actual or perceived—of speech to influence that culture and, in turn, to influence actions as well as meaning.

From the perspective of the many thousands of young Slayer fans who enjoy the group's music and yet never commit murder or rape, the case amounts to an even more specific question. Should the right to purchase and listen to such music be limited because of the unfortunate, aberrational actions of three drug-abusing teens? Parsed differently, should the right of the vast majority of individuals to receive speech be sacrificed by one random act of violence? Given the potentially vast implications of the question, more than just Slayer fans might be inclined to respond negatively—that Elyse Marie Pahler's death, although tragic, should not be the grounds for sacrificing the rights of others.

After all, even if Pahler is framed as a case about marketing, it remains a case about the marketing of *speech*, rather than cigarettes or assault rifles or other dangerous instrumentalities. If Slayer's music really is obscene or child pornographic,[158] or if it constitutes an incitement to violence, then its First Amendment protection disappears and regulation is permissible. But if it does not fit within these categories, then free speech concerns will always be present, no matter how artfully pleaded the case.

Nevertheless, this Article has described current Congressional fixation with the target-marketing of speech products to minors. This fixation, in turn, suggests a political culture primed to use Pahler, should it prove successful for the plaintiffs, as an entree for increased media regulation. The slippery slope will not be far away if the plaintiffs are to succeed. Perhaps songs that mention illicit drug use in a positive light will be restricted from sale to young audiences under the premise that drug use is illegal, and that the songs, in turn, cause teens to engage in such illegal conduct. As in Pahler, such a premise assumes very powerful media effects upon a relatively passive audience. Moreover, it assumes that other factors, such as parents, peers, and characteristics of the listener, don't contribute to the decision to use drugs. No wonder they call it a magic bullet.

But just as we must stop subscribing to a magic bullet theory of mass communication, so too must we stop looking for a magic bullet answer to societal problems of youth violence. Restricting access to speech will not change our culture of violence, but will only result in a culture that fears speech. Instead, we would be wise to remember the words of Justice Brandeis in Whitney v. California,[159] words that remain as applicable and relevant today as they were more than seventy years ago when they were first penned: "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women."[160] Groups like Slayer may well be the witches of the 21st century; we should take care that in fearing them we don't burn our First Amendment rights.

Rather, if we are truly concerned about the influence of media messages on children, then we must make media literacy programs a staple of elementary school education. Just as children are taught how to read and write, so too must they be taught how to decipher media messages, how to understand that songs are just songs and not commands for action, and how to understand the difference between reality and the fantasy worlds in television shows or on CDs.

Of course, in the end, we will never be able to prevent a few teenagers like those who murdered Elyse Marie Pahler case from killing, no matter what path we take. Denying access to music like Slayer's or t eaching media literacy in schools will not put an end to juvenile delinquency, and we should not delude ourselves by thinking that some other solution, as of yet undiscovered, will succeed where all others fail. Just as music does not control individuals, society's efforts—in legislatures, courtrooms, and classrooms—to prevent tragedies will not eliminate them. But perhaps more importantly, in taking steps to alleviate what we cannot eliminate, we should seek to avoid those magic bullets that offer only more problems wrapped in the guise of easy answers.

1 See Thomas J. Cole, In to Evil, Albuquerque J., May 1, 2000, at A1 (describing the murder of Pahler and reporting the prison sentences of the three defendants—Royce Casey, Joseph Fiorella, and Jacob Delashmutt—in the case).

2 Glen Martin, Youth Sentenced in Girl's Horrific Slaying, S.F. Chron., Mar. 8, 1997, at A15.

3 See Cole, *supra* note 1, at A1 (using the term "death-metal band" to describe Slayer).

4 "Megadeth, Slayer and Anthrax, all formed in the early 80's, are often lumped together as purveyors of speed metal, thrash metal or death metal." Robert Palmer, Dark Metal: Not Just Smash and Thrash, N.Y. Times, Nov. 4, 1990, at Arts & Leisure 31. Slayer's music also is described as "dark metal, the variety of rock-and-roll guaranteed to upset parents and would-be censors." Id. The term "speed metal" refers to "an unholy hybrid of punk rock thrash and heavy metal that attracts an almost all-male teen-age following." Joe Brown, Slayer's Morbid Schlock, Wash Post, Dec. 6, 1986, at C10.

5 Second Amended Complaint for Damages, Pahler v. Slayer, No. CV 79356 (Super. Ct. Cal. San Luis Obispo Co. filed Apr. 27, 2000).

6 Id. at 1.

7 Jonathan Gold, Record Rack, L.A. Times, Oct. 28, 1990, at Calendar 67.

8 Ironically, the murder rate decreased steadily throughout the 1990s before leveling off somewhat in 2000. Kit Roane, Deadly numbers: Cops fear new surge, U.S. News & World Rep., Feb. 26, 2001, at 29.

9 See James R. Wilson & S. Roy Wilson, Mass Media/Mass Culture 34 (5th ed., 2001) (observing that "[t]he rapid escalation of violence in our society has also brought about criticism that violence in the media is causing the problem").

10 See Richard Campbell, Media and Culture: An Introduction to Mass Communication 72 (2d ed., 2000) (writing that "[t]he cultural storm called rock and roll hit in the 1950s"). See generally Richard Harrington, Rock with a Capital R and a PG-13, Wash Post, Sept. 15, 1985, at H1 (tracing controversies surrounding rock music from Elvis Presley, Jerry Lee Lewis and Chuck Berry through The Rolling Stones, Doors, Sex Pistols, Motley Crüe and Ted Nugent).

11 See Jon Pareles, Debate Spurs Hearings on Rating Rock Lyrics, N.Y. Times, Sept. 18, 1985, at C21 (providing background on the movement spearheaded by the National Congress of Teachers and Parents and the Parents Musical Resource Center that led to the hearings).

12 See Davidson v. Time Warner, Inc., No. V-94-006, 1996 U.S. Dist. LEXIS 21559 (S.D. Tex. Mar. 31, 1997) (granting the defendants' motion for summary judgment in a lawsuit alleging that the music of Tupac Shakur was responsible for causing the death of a law enforcement officer who was shot by a man listening to a pirated cassette tape of Shakur's album *2Pacalypse Now*); McCollum v. CBS, Inc., 202 Cal. App. 3d 989 (1988) (affirming the trial court's dismissal of a civil lawsuit alleging that the music of John "Ozzy" Osbourne — in particular, the albums Blizzard of Oz and Diary of a Madman — proximately caused the suicide of a 19-year-old man).

13 See James v. Meow Media, Inc., 900 F. Supp. 2d 798 (W.D. Ky. 2000) (dismissing a complaint alleging that the movie *The Basketball Diaries* proximately caused a school shooting in McCracken County, Kentucky, in December, 1997); Byers v. Edmondson, 712 So.2d 681 (La. Ct. App. 1998), cert. denied, Time Warner Entertainment Co. v. Byers, 526 U.S. 1005 (1999) (reversing a trial court's decision to dismiss a lawsuit contending that the Oliver Stone movie *Natural Born Killers* inspired and incited the shooting of a convenience store clerk). The Byers case continues today. Oliver Stone gave a deposition in the matter in July, 2000. See Mary Swerczek, Lawyers Question Director in Suit Over Film, Times-Picayune, July 21, 2000, at A15; Stephanie A. Stanley, Filmmaker cleared in shooting trial; 'Natural Born Killers' protected, judge rules, Times-Picayune, March 13, 2001, at National 1.

14 See Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir. 1997), cert. denied, 523 U.S. 1074 (1998) (remanding for trial a wrongful death lawsuit seeking to hold the publishers of a book called *Hit Man: A Technical Manual for Independent Contractors* civilly accountable for the actions in a contract killing that left three people dead).
In Paladin, the Colorado-based publisher of the above-mentioned "hit man" manual reached a multi-million dollar settlement in May, 1999, with relatives of the three people who were murdered by an individual who allegedly followed the book's instructions. Ruben Castaneda & Scott Wilson, 'Hit Man' Publisher Settles Suit, Wash Post, May 22, 1999, at A1. See generally Lise Vansen, Incitement by Any Other Name: Dodging a First Amendment Misfire in Rice v. Paladin Enterprises, Inc., 25 Hastings Const. L.Q. 605 (1998) (analyzing the Paladin case and decision).

15 See James, 90 F. Supp. 2d at 798-801 (plaintiffs contend that the creators and distributors of certain violent video games should be held civilly accountable for the actions of Michael Carneal in shooting three students to death in a school hallway in McCracken County, Kentucky).

16 See id. (plaintiffs contend that the owners of various Internet websites featuring allegedly pornographic and obscene material should be held civilly accountable for the actions of Michael Carneal in shooting three students to death in a school hallway in McCracken County, Kentucky).

17 No. CV 79356 (Super. Ct. Cal. San Luis Obispo Co., Second Amendment Complaint filed Apr. 27, 2000).

18 See generally Clay Calvert, Media Bashing at the Turn of the Century: The Threat to Free Speech After Columbine High and Jenny Jones, 2000 L. REV. M.S.U.-D.C.L. 151 (2000) (describing the knee-jerk reaction against media content — the music of Marilyn Manson, the movie *The Basketball Diaries*, and the video game *Doom* — after Eric Harris and Dylan Klebold fired semi-automatic weapons and hurled explosives at students in a high school near Littleton, Colorado, in April 1999).

19 Second Amended Complaint at 4, Pahler (No. CV 79356).

20 Id. at 5.

21 Id.

22 Id. at 25-28.

23 See Cal. Penal Code § 311(a) (Deering 2001) (setting forth the California statutory definition of obscene matter).

[24] See id.

[25] See Cal. Penal Code § 272(a)(1) (Deering 2001) (creating a misdemeanor offense for contributing to the delinquency of a minor).

[26] See Cal. Penal Code § 31 (Deering 2001) (making it a crime to counsel, advise or encourage a child under fourteen years of age to commit any crime).

[27] Id.

[28] See Cal. Penal Code § 653f(b)-(c) (Deering 2001) (making it a crime to solicit the commission of murder and rape).

[29] See Cal. Bus. & Prof. Code § 17200 (Deering 2001) (providing in relevant part that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and any unfair, deceptive, untrue or misleading advertising"). See also Cal. Bus. & Prof. Code § 17500 (Deering 2001) (making it a crime to engage in the dissemination of false and misleading statements).

[30] Second Amended Complaint at 28-29, Pahler (No. CV 79356).

[31] Id. at 29.

[32] The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. Gitlow v. New York, 268 U.S. 652, 666 (1925).

[33] Actionable negligence under California law involves a breach of a legal duty of care that proximately or legally causes resulting injury. See Juarez v. Boy Scouts of America, Inc., 81 Cal. App. 4th 377, 401 (2000) (describing the basic principles of negligence under California law), rev. denied, 2000 Cal. LEXIS 6328; Victor v. Hedges, 77 Cal. App. 4th 229, 238-39 (1999), rev. denied, 2000 Cal. LEXIS 2103.

[34] The United States Supreme Court, in articulating a principle for determining when speech that incites violence falls outside the scope of First Amendment protection, held "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 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." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[35] See McCollum v. CBS, Inc., 202 Cal. App. 3d 989 (1988) (rejecting on First Amendment grounds and on standard principles of negligence the plaintiffs' then novel attempt to hold a singer and recording industry defendants civilly accountable for the suicide of a young man who listened to the music of Ozzy Osbourne); Olivia N. v. National Broadcasting Co., Inc., 126 Cal. App. 3d 488 (1981) (refusing to impose tort liability against the National Broadcasting Company and the Chronicle Broadcasting Company for physical and emotional injuries suffered by a minor who was sexually assaulted by a group of minors who allegedly imitated acts portrayed in a made for television movie called *Born Innocent*).

[36] Sharon Waxman, Did 'Death Metal' Music Incite Murder?, Wash. Post, Jan. 23, 2001, at E1.

[37] Framing is used here to refer to the rhetorical strategies, including such things as choice of words and what facts to include and exclude, that are used in describing an event that make salient some issues surrounding the event while suppressing others, which, in turn, impacts how we think about, understand and process the event in question. See generally Joseph N. Cappella & Kathleen Hall Jamieson, Spiral of Cynicism: The Press and the Public Good 38-48 (1997) (discussing the concept of framing within the field of journalism).

[38] See *infra* page 133 of this Article (describing the various frames that appear to be used in Pahler).

[39] The plaintiffs' second cause of action is based on Cal. Bus. & Prof. Code § 17200, described by another court as "the core provision" of California's unfair competition law. Schnall v. Hertz, 78 Cal. App. 4th 1144, 1152 (2000), rev. denied, 2000 Cal. LEXIS 4687.

[40] Second Amended Complaint at 35, Pahler (No. CV 79356).

[41] Id.

[42] Id.

[43] Chuck Philips, Company Town; Ruing Favors Band in Suit Over Girl's Murder, L.A. Times, Jan. 25, 2001, at C6, available at LEXIS, News Library, MAJPAP File.

[44] Id.

[45] Judge Rejects Suit Blaming Rock Band for Death of Girl, Associated Press State & Local Wire, Jan. 24, 2001, available at LEXIS, News Library, MAJPAP File.

[46] Philips, *supra* note 43, at C6.

[47] *Infra* notes 51-72 and accompanying text.

[48] *Infra* notes 73-99 and accompanying text.

[49] *Infra* notes 100-151 and accompanying text.

[50] *Infra* notes 152-160 and accompanying text.

[51] See generally Clay Calvert, Excising Media Images to Solve Societal Ills: Communication, Media Effects, Social Science and the Regulation of Tobacco Advertising, 27 Sw. U. L. Rev. 401 (1998) (describing the controversy regarding tobacco advertising, generally, and the Joe Camel campaign, specifically, and questioning assumptions about the effects of media messages).

[52] Phillip J. Hilts, Smokescreen: The Truth Behind the Tobacco Industry Cover-Up 70 (1996).

[53] See Richard Kluger, Ashes to Ashes 702 (1996) (writing that "[t]obacco control advocates pounced on the Joe Camel campaign as evidence of the industry's contempt for public concern about the health issue and a transparent pitch to young people — surely the cartoon character and his likeness adorning low-priced recreational gear were not targeted at adult buyers, they argued").

[54] See Mangini v. R. J. Reynolds Tobacco Co., 7 Cal. 4th 1057

(1994).

[55] 7 Cal. 4th 1057 (1994). The case settled in September, 1997 — six years after it was filed — with R. J. Reynolds pledging to end the Joe Camel campaign and agreeing to pay $10 million to San Francisco and 13 other cities and counties in California. Jim Doyle, Joe Camel is History in California, S.F. Chron., Sept. 9, 1997, at A3, available at LEXIS, News Library, MAJPAP File.

[56] R. J. Reynolds acknowledged this fact in an official statement regarding the settlement that read, in pertinent part, that "the Mangini action, and the way that it was vigorously litigated, was an early, significant and unique driver of the overall legal and social controversy regarding underage smoking that led to the decision to phase out the Joe Camel Campaign." Nina Siegal, The Last Days of Joe Camel, Cal Law., Nov. 1998, at 38, 44.

[57] Mangini, 7 Cal. 4th at 1060.

[58] Id. at 1060-61.

[59] Id. at 1065.

[60] Id. at 1069.

[61] Second Amended Complaint for Damages at 4, Pahler v. Slayer, No. CV 79356 (Super. Ct. Cal. San Luis Obispo Co. filed Apr. 27, 2000).

[62] Id.

[63] Cal. Penal Code § 308 (a)-(b) (Deering 2001).

[64] See Brown, *supra* note 4, at C10 (describing Slayer's "highly hyped demonic shock" as "merely show biz schlock").

[65] Jon Pareles, Review/Rock; For Slayer, the Mania is the Message, N.Y. Times, Sept. 3, 1988, at 14, available at LEXIS, News Library, MAJPAP File.

[66] Second Amended Complaint for Damages at 26, Pahler v. Slayer, No. CV 79356 (Super. Ct. Cal. San Luis Obispo Co. filed Apr. 27, 2000).

[67] See generally Kathleen M. Sullivan & Gerald Gunther, First Amendment Law 13-55 (1999) (providing a summary, including case excerpts, of the development of the incitement jurisprudence under the First Amendment).

[68] See Miller v. California, 413 U.S. 15, 23 (1973) (observing that it "has been categorically settled by the Court that obscene material is unprotected by the First Amendment").

[69] *Supra* notes 23-30 and accompanying texts.

[70] Cf. Lee C. Bolliinger, The Tolerant Society 76-103 (1986) (describing a so-called "fortress" model of First Amendment protection)

[71] The parallels between the Mangini and Pahler pleading are not surprising. In particular, one of the law firms representing the Pahlers is Milberg Weiss Berhad Hynes & Lerach. See Second Amended Complaint for Damages at 1, Pahler v. Slayer, No. CV 79356 (Super. Ct. Cal. San Luis Obispo Co. filed Apr. 27, 2000). That same firm was instrumental in representing Janet Mangini. See Siegal, *supra* note 56, at 40-41. The firm is now financing the Pahlers' lawsuit. See Waxman, *supra* note 36, at E1.

[72] But see Robert H. Bork, Slouching Towards Gomorrah: Modern Liberalism and the American Decline 148 (contending that "[c]elebration in song of the ripping of vaginas or forced oral sex or stories depicting the kidnapping, mutilation, raping, and murder of children do not, to anyone with a degree of common sense, qualify as ideas").

[73] Andy Seiler, Two Studios Offer New Ad Plans, USA Today, Sept. 28, 2000, at 14A.

[74] Howard Rosenberg, In Capitol Hill Show, No One Even Got Hurt, L.A. Times, Sept. 28, at A14.

[75] Lynn Sweet, Senators Shine Their Spotlight on Movie Moguls, Chi. Sun-Times, Sept. 28, 2000, at 3.

[76] Steve Lash, Tinseltown Talk Draws No Applause, Houston Chron., Sept. 28, 2000, at A1.

[77] See Ronald D. Rotunda, Rated V for Violence; Legislation Stamping Warning Labels on Electronic Media May Cause Constitutional Sticker Shock, Legal Times, Aug. 14, 2000, at 68 (critiquing the constitutionality of the McCain-Lieberman legislation).

[78] Id.

[79] David Westphal & Rosalind Bentley, Entertainment Media Rebuked, Star Trib., Sept. 12, 2000, at 1A.

[80] The complete report may be downloaded online from the FTC's Web site. See Report of the Federal Trade Commission, Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries, at http://www.ftc.gov/reports/violence/vioreport.pdf (visited Mar. 8, 2001).

[81] Id. at Executive Summary, i.

[82] Frank J. Murray, FTC Adds Ammo to Lawsuits for Deaths, Wash. Times, Sept. 13, 2000, at A1.

[83] Id.

[84] Jube Shiver, Jr., FCC to Examine Children's Exposure to TV Sex, Violence, L.A. Times, Sept. 13, 2000, at A5.

[85] Christopher Stern, FCC to Examine TV Sex, Violence, Wash Post, Sept. 13, 2000, at E03.

[86] The Campaign 2000: Exchanges Between the Candidates in the Third Presidential Debate, N.Y. Times, Oct. 18, 2000, at A26.

[87] Id.

[88] The report may be accessed online from the Surgeon General's Web site. See Youth Violence: A Report of the Surgeon General, at http://www.surgeongeneral.gov/library/youthviolence/report.html (visited Mar. 8, 2001).

[89] Youth Violence: A Report of the Surgeon General, at http://www.surgeongeneral.gov/library/youthviolence/chapter4/appendix4bsec2.html (visited Mar. 8, 2001).

[90] The report, for instance, made the front page of The Los Angeles Times. Jeff Leeds, Surgeon Gen. Links TV, Real Violence, L.A. Times, Jan. 17, 2001, at A1.

[91] See generally Karen Sternheimer, Commentary; Blaming Television and Movies is Easy and Wrong, L.A. Times, Feb. 4, 2001, at M5 (pointing out what the author calls the "four biggest fallacies about the media-violence connection").

[92] Id.

[93] Id.

[94] Edward Donnerstein, Mass Media Violence: Thoughts on the Debate, 22 Hofstra L. Rev. 827, 828-29 (1994).

[95] Risk factors for teen violence include "birth complications, poverty, anti-social parents, poor parenting, aggression, academic failure, psychological problems and alienation for the home, school and non-delinquent peers." Rosie Mestel, Santee School Shootings; Triggers of Violence Still Elusive, L.A. Times, Mar. 7, 2001, at A1.

[96] See Scott Gold et al., Santee School Shootings; 2 Killed, 13 Hurt in School Shooting, L.A. Times, Mar. 6, 2001, at A1 (describing the shootings by 15-year-old Charles Andrew Williams at a high school near San Diego).

[97] See Dan Lewerenz, Girl, 13, Is Shot at Pa. School, Pitt. Post-Gazette, Mar. 8, 2001, at A-1 (describing the shooting by a 14-year-old girl, Elizabeth Bush, of a classmate in the cafeteria at a Roman Catholic school).

[98] Perhaps it is the macro-political climate in which Pahler exists that has the music industry defendants calling in the legal heavy-hitters to defend their case. In particular, veteran First Amendment attorney Floyd Abrams from New York City's Cahill Gordon & Reindel showed up for the January 2001 demurrer hearing in California. See Chuck Philips, Murder Case Spotlights Marketing of Violent Lyrics, L.A. Times, Jan. 21, 2001, at C1. Abrams is representing CBS Records and Columbia Records in the matter. See Waxman, *supra* note 36, at E1. His very presence at such an early proceeding reveals the seriousness with which the case is being taken in the entertainment industry.

[99] See Defendants Slayer, Death's Head Music, Tom Araya, Kerry King, Paul Bostaph, Dave Lombardo, and Jeff Hanneman's Memorandum of Points and Authorities in Support of Demurrer to Second Amended Complaint, Pahler v. Slayer, No. CV 79356 (Super. Ct. Cal. San Luis Obispo Co. filed Sept. 28, 2000) (arguing that "Plaintiffs' claims against Musicians, no matter how creatively characterized, fail as a matter of law. First, and most importantly, all three of Plaintiffs' claims against Musicians are barred by the free speech guarantees of the First Amendment to the United States Constitution and by the California Constitution").

[100] Cohen v. California, 403 U.S. 15, 25 (1971).

[101] Second Amended Complaint for Damages at 1, Pahler v. Slayer, No. CV 79356 (Super. Ct. Cal. San Luis Obispo Co. filed Apr. 27, 2000).

[102] Id.

[103] Id.

[104] Id. at 4.

[105] Plaintiffs' complaint also cites lyrics from a veritable laundry list of songs with gruesome-sounding names like "Altar of Sacrifice," "Tormentor," "PostMortem," "Serenity in Murder," "Show No Mercy," "Dead Skin Mask," "Born of Fire," "Live Undead," "Kill Again," "Necrophiliac," "Temptation" and "Sex. Murder. Art." See id. at 1-19 (setting forth examples of lyrics from all of these songs).

[106] Brown, *supra* note 4, at C10.

[107] Second Amended Complaint for Damages at 12, Pahler v. Slayer, No. CV 79356 (Super. Ct. Cal. San Luis Obispo Co. filed Apr. 27, 2000) (emphasis added).

[108] Id. at 13.

[109] Id.

[110] Id. at 1.

[111] Id. at 1-2.

[112] The word "instructions" is used three times in one paragraph alone. Id. at 12.

[113] Palmer, *supra* note 4, at § 2, 31.

[114] Robert Hilburn, Speed-Metalists Slayer Still Rocking Against the Grain, L.A. Times, May 21, 1988, at Calendar 13.

[115] Pareles, *supra* note 65.

[116] Palmer, *supra* note 4, at Arts & Leisure 31.

[117] McCollum v. CBS, 202 Cal. App. 3d 989, 1002 (1988).

[118] Second Amended Complaint for Damages at 4, Pahler v. Slayer, No. CV 79356 (Super. Ct. Cal. San Luis Obispo Co. filed Apr. 27, 2000).

[119] 128 F.3d 233 (4th Cir. 1997).

[120] Id. at 239-41.

[121] See *supra* note 14.

[122] Thomas J. Cole, Parents Take Death Music to Court, Albuquerque J., Jan. 29, 2001, at A1.

[123] Waxman, *supra* note 36, at E1.

[124] Id.

[125] See Second Amended Complaint for Damages at 25-29 Pahler v. Slayer, No. CV 79356 (Super. Ct. Cal. San Luis Obispo Co. filed Apr. 27, 2000) (setting forth the second and third causes of action).

[126] Id. at 28 (emphasis added).

[127] Id. at 23 (emphasis added).

[128] Id. at 26.

[129] The United States Supreme Court, in considering the con-

stitutionality of the Communications Decency Act, observed that it has "repeatedly recognized the government interest in protecting children from harmful materials." Reno v. ACLU, 521 U.S. 844, 875 (1997). Lower courts have followed the Supreme Court's lead in this respect. See Action for Children's Television v. FCC, 58 F.3d 654, 656 (D.C. Cir. 1995), cert. denied, 516 U.S. 1043 (1996) (holding that the government has "a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts").

[130] Rodney Smolla, Free Speech in an Open Society 328 (1992).

[131] Reno, 521 U.S. at 875 (emphasis added).

[132] Id. at 4 (emphasis added).

[133] Second Amended Complaint for Damages at 28, Pahler v. Slayer, No. CV 79356 (Super. Ct. Cal. San Luis Obispo Co. filed Apr. 27, 2000).

[134] Thomas J. Cole, Parents Take Death Music to Court, Albuquerque J., Jan. 29, 2001, at A1, available at LEXIS, News Library, The Albuquerque Journal File.

[135] Despite the literal language of the First Amendment that suggests that Congress can never make any law abridging freedom of speech, "the fact is that First Amendment law is far more complex than the Constitution's command." John H. Garvey & Frederick Schauer, The First Amendment: A Reader 169 (2d ed. 1996). "Although the First Amendment is written in absolute language that Congress shall make 'no law,' the Supreme Court never has accepted the view that the First Amendment prohibits all government regulation of expression." Erwin Chemerinsky, Constitutional Law: Principles and Policies 750 (1997).

[136] *Supra* note 35 and accompanying text.

[137] *Supra* note 68 and accompanying text.

[138] This incitement theory should fail in the Pahler case because it is doubtful the plaintiffs can show that the defendants' actually intended to cause the death of Elyse Marie Pahler and because the plaintiffs, as of the filing of the Second Amended Complaint, failed to allege a close proximity in time between the killers listening to the music and the killing Pahler. As attorneys for Slayer argue, "Plaintiffs have not and cannot allege that there was any temporal link or nexus between the Criminal Defendants' listening to Musicians' lyrics and committing the murder." Defendants Slayer, Death's Head Music, Tom Araya, Kerry King, Paul Bostaph, Dave Lombardo, and Jeff Hanneman's Memorandum of Points and Authorities in Support of Demurrer to Second Amended Complaint at 9, at 1, Pahler v. Slayer, No. CV 79356 (Super. Ct. Cal. San Luis Obispo Co. filed Sept. 28, 2000).

[139] Kevin W. Saunders, Violence as Obscenity: Limiting the Media's First Amendment Protection 3 (1996) (arguing that "violence is at least as obscene as sex. If sexual images may go sufficiently beyond community standards for candor and offensiveness, and hence be unprotected, there is no reason why the same should not be true of violence.").

[140] *Supra* notes 106-129 and accompanying text.

[141] 413 U.S. 15, 23 (1973).

[142] Cal. Penal Code § 313(a).

[143] Miller, 413 U.S. at 24 (citation omitted).

[144] Luke Records, Inc. v. Navarro, 960 F.2d 134, 135 (11th Cir. 1992).

[145] Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990).

[146] Luke Records, Inc. v. Navarro, 960 F.2d 134, 138-39 (11th Cir. 1992).

[147] Id. at 135.

[148] *Supra* note 116 and accompanying text.

[149] Second Amended Complaint for Damages at 19, Pahler v. Slayer, No. CV 79356 (Super. Ct. Cal. San Luis Obispo Co. filed Apr. 27, 2000).

[150] Id. at 18-21.

[151] *Supra* note 15 and accompanying text.

[152] Representation: Cultural Representations and Signifying Practices 270 (Stuart Hall ed., 1997).

[153] Werner J. Severin & James W. Tankard, Jr., Communication Theories: Origins, Methods, and Uses in the Media 297-98 (4th ed., 1997).

[154] Jay Black et al., Introduction to Media Communication 38 (5th ed., 1998). It has been suggested that the bullet theory was really never adopted by communication researchers but merely a straw-man theory set up for purposes of comparison. Steven H. Chaffee & John L. Hochheimer, The Beginning of Political Communication Research in the United States: Origins of the 'Limited Effects' Model, in Media Revolution in America and in Western Europe 267 (Everett M. Rogers & Francis Balle eds., 1985).

[155] Id.

[156] John Fisk, Introduction to Communication Studies 7 (2d ed., 1990).

[157] Graeme Turner, British Cultural Studies: An Introduction 15 (1990).

[158] See New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that the distribution of materials defined as child pornography under New York law is "without the protection of the First Amendment"); Osborne v. Ohio, 495 U.S. 103 (1990) (holding that "Ohio may constitutionally proscribe the possession and viewing of child pornography").

[159] 274 U.S. 357 (1927).

[160] Whitney, 274 U.S. at 376 (Brandeis, J., concurring).