Vanderbilt Journal of Entertainment & Technology Law

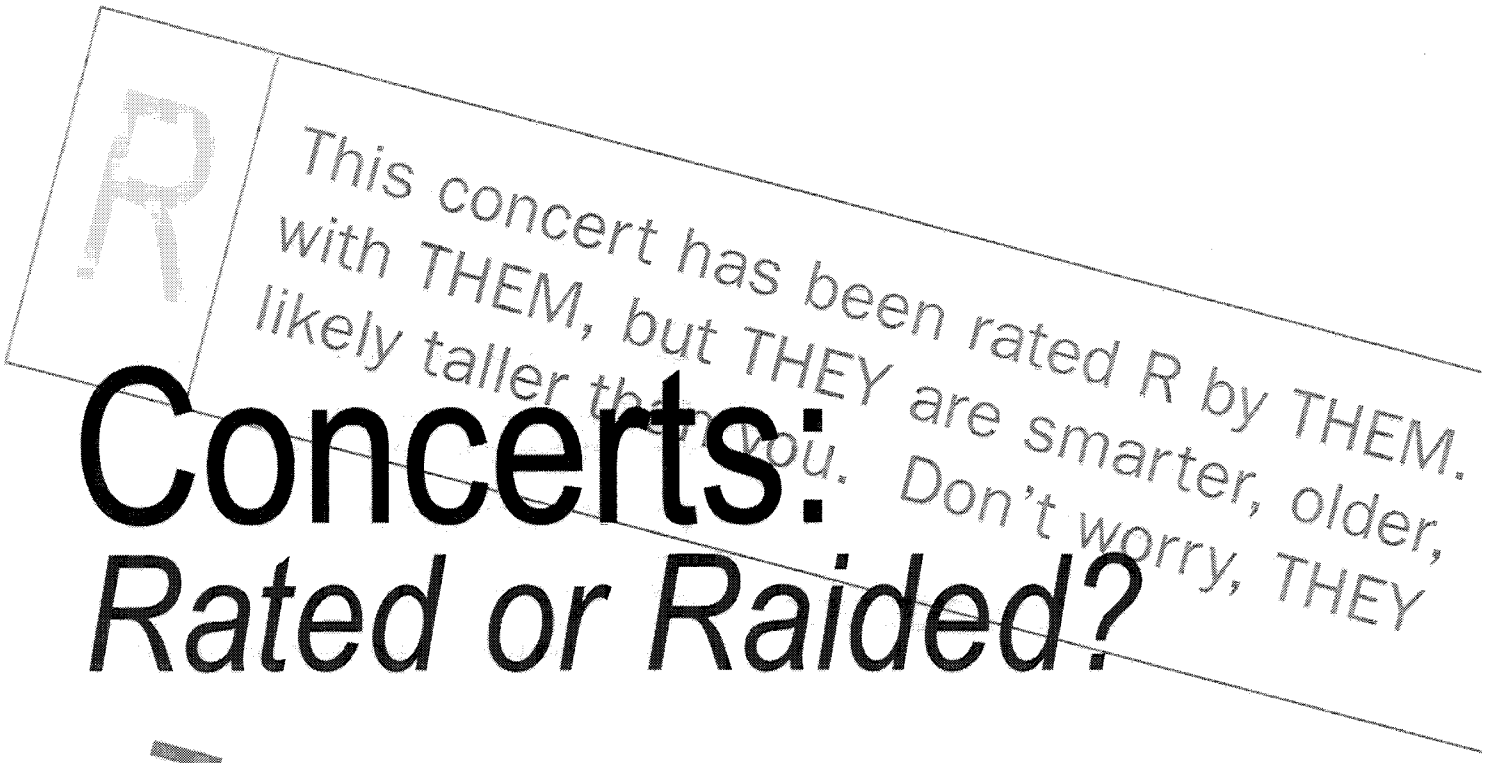
Volume 2
Issue 2 *Spring 2000*

Article 3

2000

Don't Sell Out, Sell Bonds: The Pullman Group's Securitization of the Music Industry

Hewson Chen



Concerts: *Rated or Raided?*

First Amendment Implications of Concert-Rating

By Deborah Cazan

Thirty years ago, during a Doors concert, Jim Morrison "pulled down his pants to reveal the band's fifth member."[1] Twenty years ago, Mick Jagger straddled a giant inflatable penis on stage at a Rolling Stones concert.[2] Lou Reed used to shoot up drugs on stage.[3] These examples illustrate how rock 'n' roll has a long past of pushing the norms of accepted behavior. Despite this history, many states have recently raced to propose concert-rating regulations in their legislatures. To some, "the spark that lighted the fires ... was a year-long tour by the cross-dressing hard-rock group Marilyn Manson that ended in fall 1997."[4]

Upon learning Manson's concerts featured the destruction of Bibles, the use of the American flag as toilet paper, and the screaming of obscenities as part of the group's tour, some state lawmakers felt compelled to take action.[5]

After attending Marilyn Manson's concert, Michigan State Senator Dale Shugars stated he found the performance "obscene, gratuitous and completely lacking in social value."[6] Shugars claimed Manson's "sacrilegious antics, vulgar language, sexual gestures, drug promotion, and portrayal of Adolf Hitler urging the audience on in chants of 'heil' and 'we hate love; we love hate,' offered very little quality."[7] Subsequently, Shugars proposed a Michigan bill that could be "the first volley of a long fight in state legislatures and, ultimately, on Capitol Hill."[8]

Opponents of concert-rating bills, however, stress that the government lacks the power to assume a "guardianship of the public mind" by regulating speech.[9] As the United States Supreme Court has explained, "the forefathers did not trust any government to separate the true from the false for us."[10] Several music industry groups, including the Recording Industry Association of America ("RIAA"), are strongly opposed to the measures, believing they violate the First Amendment.[11] According to Nina Crowley, executive director of the Massachusetts Music Industry Coalition, "a community can't take away free speech when they feel like it ...that's what's at stake here."[12] As a result, Nina Crowley doesn't think "a rating system on a government level would stand a constitutional challenge – it's censorship based on content."[13]

This Note examines the constitutionality as well as practicality of two different concert-rating statutes. San Antonio ordinance 61,850, the first attempt at concert-rating, has never been challenged constitutionally. This Note asserts that if the ordinance were challenged, the Court would find it constitutionally valid on its face, despite the possibility of unconstitutional applications. However, some unconstitutional consequences remain. The second statute examined is one recently proposed by Senator Shugars in the Michigan state legislature. Like the San Antonio ordinance, this Note concludes that Senate Bill 239 would also withstand a constitutional challenge.

This Note examines the history and structure of concert-rating bills. Next, it describes general First Amendment doctrine. Then it relates how the First Amendment affects the bills. Finally, it explores practical problems with and alternatives to regulated concert rating.

Context of Concert Rating

Since the dawn of rock 'n' roll, people have asserted the immorality of certain songs and musical artists.[14] Recent attempts to regulate the music industry began in 1984 when the National Parent Teachers Association of America (NPTA) requested that the Recording Industry Association of America (RIAA) require record ratings.[15] At that time, the RIAA ignored requests for a mandatory labeling system.[16] However, the RIAA began to consider these labeling requests when a powerful citizens' group, the Parents Music Resource Center (PMRC), formed and began to take action.[17]

Headed by Tipper Gore and containing ten other members who were the wives of either senators or other cabinet members, the PMRC disapproved of the way "many of today's artists advocate aggressive and hostile rebellion, the abuse of drugs and alcohol, irresponsible sexuality, sexual perversions, violence and involvement in the occult."[18] In a letter to the RIAA dated May 31, 1985, the PMRC made its own request for mandatory record ratings.[19] The letter implored the RIAA to "exercise voluntary self-restraint perhaps by developing guidelines and/or a rating system, such as that of the movie industry."[20] An additional memorandum asked the RIAA, among other requests, to print lyrics on the album covers, devise a rating system to inform parents of which albums are suitable for children, place the rating marks on the covers of the albums, and rate music concerts.[21]

As a result of the PMRC's requests, the RIAA announced that its member companies such as BMG Music, Geffen Records, Motown, Elektra, and Arista would attach generic warning stickers, suggesting parental guidance, on some of their records.[22] However, the PMRC was

not satisfied with this generic warning system,[23] especially since some record companies initially refused to comply with the rating system.[24] One month after the RIAA imposed the labeling system, the Senate Commerce Committee, five of whom were married to PMRC members, held hearings on the subject of record labeling systems.[25] Due to concerns about violating the First Amendment,[26] however, the hearings did not prompt any federal regulation of the RIAA or its members.[27]

Although the federal government was unwilling to impose regulations on the music industry at that time, state and local governments were not so restrained.[28] A bill introduced in the Pennsylvania state legislature, which was representative of other regulatory efforts, required labels on all records containing lyrics that "explicitly describe, advocate or encourage suicide, incest, bestiality, sadomasochism, rape or involuntary deviate sexual intercourse" or "advocate or encourage murder, ethnic intimidation, the use of illegal drugs or the excessive or illegal use of alcohol."[29] Eleven other states introduced similar legislation.[30] In response to legislative "threats" of governmentally mandated warning labels, the RIAA agreed to a new uniform warning sticker, which would be "easier for casual consumers to identify."[31] After the announcement of the new warning label, most legislatures dropped pending bills, although a few states waited to drop the bills until certain of industry compliance.[32] Although no state legislature has passed a *record* labeling law since, some are now considering *concert* labeling/rating laws.

History and Structure of Concert-Rating Bills

Attempts at concert rating first began at a local level on November 14, 1985, in San Antonio, Texas, when ordinance 61,850 was passed.[33] According to the ordinance, it is illegal for a child who is under the age of 14 and without a parent or legal guardian to attend a concert that is considered obscene as to minors.[34] In addition, if the concert is considered obscene for children, the ordinance requires that all advertising contain a parental advisory and warning that no child under the age of 14 will be admitted without a parent or legal guardian.[35] In order to determine whether a concert is obscene, the ordinance sets forth an obscenity standard, discussed later in the Note, that mirrors the Supreme Court's current standard for obscenity.[36] Although the San Antonio ordinance is still good law, its constitutionality has never been challenged because no one has yet been prosecuted under it.[37]

Attempts at concert rating first began at a local level in San Antonio, Texas, in 1985. A San Antonio ordinance made it illegal for a child who is under the age of 14 and without a parent or legal guardian to attend a concert that is considered obscene as to minors. The ordinance has never been constitutionally challenged because no one has yet been prosecuted under it.

Today, concert-rating bills are again circulating in several state legislatures. Michigan is at the forefront of this trend. The proposed Michigan bill does not proscribe a G, PG, PG-13, R, NC-17 rating system like the one used by the movie industry. Instead, it imposes notification standards on concerts of "adult" nature.

In 1997, Michigan State Senator Dale Shugars proposed Senate Bill 239 to allow Michigan "cities and towns to designate certain music performances as 'harmful to minors.' To attend, concert-goers under eighteen would have to be accompanied by an adult."[38] However, the opposition to this bill from venue operators, the music industry, and the American Civil Liberties Union forced Shugars to revise its original form.[39] The revised bill required, instead, that the warning, "harmful to minors" be printed on all tickets and advertising for concerts of adult nature.[40] This revised bill, however, also failed to pass.[41]

The newest version of the bill is a milder version of the original. It requires that if an artist's record has a parental advisory notice printed on the label, then the advertising and tickets to that artist's concerts must also have the same warning label.[42] Although Senate Bill 239 does not attempt to restrict minors' attendance at concerts, it still raises constitutional concerns because the

state government is attempting to place restrictions on speech. Whereas the warning on the artist's album originates from the record industry's self-regulation, Michigan Senate Bill 239 proposes governmentally imposed regulations on speech. Therefore, the proposed bill is subject to First Amendment scrutiny.

The question now is whether the San Antonio ordinance and the proposed Michigan Senate Bill are constitutional. In other words, can the government, in accordance with the First Amendment, restrict minor's attendance at "obscene" concerts, as per the San Antonio ordinance? And can the government, in accordance with the First Amendment, require warning labels on tickets and advertising of concerts of adult nature, as per both the San Antonio ordinance and Senate Bill 239?

General Purpose of the First Amendment

The First Amendment states that "Congress shall make no law ... abridging the freedom of speech."[43] As the Supreme Court observed, "the very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion."[44] In fact, an important difference between a democratic society and a totalitarian government is that American people have an absolute right to propagate political opinions "the government finds wrong or even hateful."[45]

A principal "function of free speech under our system of government is to invite dispute."[46] Freedom of expression and public discussion lends itself to America's societal goals of "individual dignity," a "capable citizenry," and each individual's right to make his or her own political decisions.[47] Freedom of speech might best serve these societal goals "when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger."[48] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[49] After all, "one man's vulgarity is another man's lyric."[50] "The constitution leaves matters of taste and style ... largely to the individual."[51]

Extent of First Amendment Protection

The Supreme Court has held that protected expression is not limited to the spoken word.[52] For instance, conduct such as nude dancing[53] and flag burning[54] has been held to be expressive. In deciding whether conduct contains sufficient expressive elements to warrant First Amendment protection, a court must conclude that the actor intends to "convey a particular message" and that the "likelihood [is] great that the message [will] be understood by those who [view] it."[55]

The Supreme Court has acknowledged that First Amendment protection extends not only to political speech but also to entertainment in the form of movies, radio and television broadcasts, live entertainment, and musical as well as dramatic works.[56] For instance, in Schad v. Borough of Mount Ephraim, the operators of an adult bookstore installed a coin-operated machine that allowed customers to view a live nude dancer.[57] The owners were subsequently convicted under a zoning ordinance prohibiting live entertainment.[58] Reversing the convictions, the Court held that nude dancing was a form of expression protected by the First Amendment.[59]

Musical lyrics and concerts are entitled to First Amendment protection both because they constitute political speech and because music is a form of entertainment.[60] In Ward, the Supreme Court explicitly stated that "music is one of the oldest forms of human expression."[61] In that case, the Court upheld New York City's sound amplification guideline for live music performances.[62] The Court stated that throughout history, "rulers have known [music's] capacity to appeal to the intellect and to the emotions, and have censored musical compositions; ... [however] the Constitution prohibits any like attempts in our own legal order."[63] Therefore, as an entertaining form of expression and communication, music is covered under the First Amendment's blanket of protection.[64]

First Amendment Implications for Government Regulation

The First Amendment limits the government's power to "restrict expression because of its message, its ideas, its subject matter, or its content."[65] "It is a central tenet of the First Amendment that the government must remain neutral in the "marketplace of ideas."[66] However, the government may still impose "reasonable restrictions on the time, manner, or place of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are

narrowly tailored to serve a significant interest, and that they leave open ample alternative channels for communication of the information.'"[67] Otherwise, government regulation of speech on the basis of its subject matter "slip[s] from the neutrality of time, place, and circumstance into a concern about content."[68] These types of permissible regulations are also known as "content neutral" restrictions.

In Ward v. Rock Against Racism, the Supreme Court upheld a regulation of material, protected by the First Amendment, finding the restriction to be content-neutral.[69] As described above, the Court upheld New York City's sound amplification guideline for live music performances.[70] This regulation was not aimed at the content or the message of the music, but solely at the manner in which it was conveyed.[71] The city sought to control noise levels at bandshell events by ensuring that the volume was loud enough to satisfy the audience without being so loud as to intrude upon the neighboring residents.[72] The court found the city's guideline was "narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground, and the guideline leaves open ample channels of communication."[73] Therefore, the regulation was a valid time, place, or manner regulation under the First Amendment.[74]

Although the general premise of the First Amendment is that the government cannot restrict the ideas or content of speech,[75] this protection is not "absolute at all times and under all circumstances."[76] There are certain categories of speech that can be criminalized or silenced without raising any Constitutional problem. Content-based restrictions can apply to obscenity,[77] fighting words,[78] speech that incites illegal conduct,[79] and defamation.[80]

Depending on the audience, the same speech may merit First Amendment protection in one context but not in another. Specifically, it is well-established that when certain speech is directed at children, it may be afforded less First Amendment protection than when the same speech is directed

These categories of speech find no shelter under the protective wing of the First Amendment because they do not contribute to the "marketplace" of ideas.[81] In fact, any benefit that can be derived from "words of such slight social value . . . is clearly outweighed by the social interest in order and morality."[82]

The "fighting words" doctrine excludes from First Amendment protection speech which by its "very utterance . . . tend[s] to incite an immediate breach of the peace."[83] For instance, in Chaplinsky v. State of New Hampshire, a Jehovah's Witness told the Rochester City Marshall he was "a god damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[84] The Jehovah's Witness was subsequently convicted of violating a New Hampshire statute that prohibited addressing offensive speech to any person who is in a public place or calling that person by an offensive name.[85] The Supreme Court upheld his conviction based on the "fighting words" doctrine.[86] Although Chaplinsky has never been overruled, the Supreme Court has not sustained a conviction based on the "fighting words" doctrine since.

Along with "fighting words," speech that advocates "the use of force or of law violation . . . [and] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," is excluded from First Amendment protection.[87] The Supreme Court first articulated this standard in Bradenburg v. Ohio.[88] There, the Court found that a speaker at a Ku Klux Klan rally was merely advocating an abstract teaching rather than "preparing a group for violent action and steeling it to such action."[89] Therefore, the speech was not "directed to inciting or producing lawless action," nor is it "likely to incite or produce such action."[90] Since the standard articulated by the Court was not met, the speech was not advocacy of illegal conduct and was consequently protected by the First Amendment.

Malicious false statements of fact are also excluded from First Amendment protection.[91] New York Times Co. v. Sullivan dictates that a false statement of fact about a public figure on a public issue is not protected by the First Amendment if the statement was made with "actual malice."[92] A statement is made with

"actual malice" if it was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[93] In that case, the police commissioner of Montgomery, Alabama, sued the NEW YORK TIMES because it reported that he had arrested Dr. Martin Luther King Jr. seven times, when actually he arrested him fewer than seven times.[94] The Court found the speech was protected by the First Amendment because the statement was not made with actual malice.[95]

Regulation of Obscenity

Attempts to regulate music lyrics and concerts are based mainly on the theory that some music lyrics are obscene, and obscenity is not protected by the First Amendment of the Constitution. The Supreme Court has set out a three-step approach in order to determine whether certain speech is obscene.[96] The first issue the trier of fact must determine is whether "the average person [rather than a particularly sensitive or particularly insensitive person], applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest in sex."[97] In determining whether the material is erotic or sexually stimulating,[98] the Court mandated reliance on community standards, believing "people in different states vary in their tastes and attitudes."[99] The Court wanted to make certain that diversity was not "strangled by the absolutism of imposed uniformity."[100]

The second obscenity inquiry is whether the speech "portray[s] sexual conduct [specifically defined by applicable state law] in a patently offensive way."[101] This inquiry is also to be determined under contemporary community standards.[102] A few examples of "patently offensive" sexual conduct include "descriptions of ultimate sexual acts, normal or perverted, actual or simulated ...representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[103]

The final inquiry is whether the speech, "taken as a whole," has "serious literary, artistic, political, or scientific value."[104] Unlike the first two obscenity criteria, this third factor is judged not by individual community standards, but by "whether a reasonable person would find such value in the material, taken as a whole."[105] The danger in using the community standard here is that a jury member could feel obligated to follow prevailing local views on "value" instead of considering whether a "reasonable" person would "value" the work.[106] In other words, the value of a work should not vary from community to community based on the local degree of acceptance.[107] The materials will only be deemed "obscene," and the state will only be permitted to regulate the materials, if all three elements are present.[108]

"Obscenity" Depends on Context

Words vary in meaning based on context.[109] Therefore, First Amendment protection of arguably obscene speech depends heavily on the context in which it is said.[110] Often, the medium and the audience are important considerations when determining whether arguably obscene speech is constitutionally protected.[111] Depending on the audience, the same speech may merit First Amendment protection in one context but not in another.[112] Specifically, it is well-established that when certain speech is directed at children, it may be afforded less First Amendment protection than when the same speech is directed at adults.[113]

One example of that phenomenon is that some speech, which is merely indecent when directed at adults, and thus constitutionally protected, is deemed obscene when directed at minors. Unlike obscenity, indecency does not have to appeal to the prurient interest.[114] With respect to minors, however, indecent speech may qualify as obscene. In order to determine whether indecent material is obscene as to minors, the same three-step test set forth in Miller[115] is applied, with one small change.[116] The first step becomes whether "the average person, applying contemporary community standards would find that the work, taken as a whole,"[117] appeals to the "sexual interests . . . of . . . minors."[118]

In Ginsberg v. State of New York, the Supreme Court held that states have the power to adjust the definition of obscenity by "permitting the appeal of this type of material to be assessed in terms of [what might appeal to] the sexual interests . . . of . . . minors."[119] States have that ability to adjust the definition of obscenity because "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."[120] Thus, identical speech may be afforded First Amendment protection when directed at adults but denied protection when directed at minors.[121]

Regulating Speech Deemed to be Obscene When Directed at Minors

States are afforded greater power

to regulate obscene speech available to minors than if the speech were available only to adults.[122] However, "the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity."[123] Courts have held that a state has a compelling interest in regulating material that is obscene to minors but the means of regulation must be narrowly tailored to accomplish that state purpose without unduly interfering with adult access to protected material.[124]

The state has a compelling interest in regulating obscenity as to minors when it finds that exposure to obscene material might be physically or psychologically harmful.[125] The Court does not require that the state produce scientific proof of the effects of obscenity on minors.[126]

Ginsberg found the state had a compelling interest in regulating material which was obscene as to minors.[127] In that case, the Court upheld a statute that prohibited the sale to minors of material which was deemed obscene with respect to them.[128] Specifically, the Court held that the "state has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'"[129]

After deciding a state has a compelling interest in regulating obscenity as to minors, a court will determine whether the regulation was narrowly tailored to accomplish its purpose without interfering with adult access to protected material. The Court in Ginsberg found the regulation was narrowly tailored to accomplish its purpose of protecting minors' welfare.[130] The regulation was narrowly tailored because the state regulated material that was obscene to minors, but did it in such a way so as not to interfere with adults' access to material that was merely indecent as to them.[131] By protecting children from potentially harmful material without preventing adult access, the state accomplished its goal of narrowly tailoring the regulation.[132]

In Butler v. Michigan, on the other hand, the state criminalized distribution of materials to the general public that were found to have potentially harmful influence on minors.[133] The Court found the law to be "insufficiently tailored since it denied adults their free speech rights by allowing them to read only what was acceptable for children."[134] Justice Frankfurter described the situation at hand using the frequently quoted statement, "[s]urely this is to burn the house to roast the pig."[135] In other words, the Court did not allow "the government to reduce the adult population . . . to . . . only what [was] fit for children."[136] Similarly, in Reno v. American Civil Liberties Union, the Supreme Court decided that two provisions of the Communications Decency Act of 1996 (CDA) violated the First Amendment.[137] The Court based this decision, in part, on the CDA's suppression of material that adults have a constitutional right to send and receive.[138]

Aside from unconstitutional interference with protected adult material, a regulation can also be struck down if it is overbroad. The First Amendment overbreadth doctrine is based on the theory that a person "whose expression is constitutionally protected may well refrain from exercising [his or her] rights for fear of criminal sanctions by a statute susceptible of application to protected expression."[139] However, a court will only invalidate a statute based on overbreadth if it inhibits a "real and substantial" amount of protected material.[140] In other words, even if there are a few situations where a statute might infringe on legitimately protected First Amendment speech and conduct, a court will not invalidate it if the "remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable . . . conduct."[141] Moreover, a statute should not be held facially invalid unless the court is unable to limit its construction.[142]

In Erznoznik, the Supreme Court held that a statute which prohibited drive-in theaters from showing films containing nudity when its screen was visible from a public street or place was unconstitutional.[143] The state passed the first part of the two-part test in that it had an interest in protecting the well-being of its youth, but in this case the regulation was held to be unconstitutional because it was not narrowly tailored to accomplish its goals.[144] The regulation was overbroad because instead of being directed against sexually explicit nudity, it forbade display of "all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness."[145] The implication of the ordinance was such that minors would be prohibited from viewing a baby's buttocks, newsreel scenes from art exhibits, nude bodies of war, and so forth.[146] Not all nudity is obscene with respect to minors, and "speech cannot be suppressed solely to protect the young from ideas or images that a legislative

body thinks is unsuitable."[147]

In New York v. Ferber, the appellee claimed a statute "prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicted such a performance" was overbroad because, in addition to pornography, it would bar distribution of "material with serious literary, scientific, [or] educational value."[148] The Court concluded the statute was not substantially overbroad.[149] Its legitimate reach, which is hard core child pornography, "dwarfs its arguably impermissible applications."[150] So, although a minimal amount of protected expression such as material in medical textbooks or NATIONAL GEOGRAPHIC could arguably fall within the reach of the statute, the Court found this to be a statute that could easily be limited by the lower courts.[151] In other words, any danger of overbreadth could be cured on a case-by-case analysis.[152]

In following the overbreadth doctrine, a state must ensure any limitation on freedom of expression is not too vague or indefinite.[153] A statute that limits freedom of expression must give fair notice of what acts will be punished.[154] In Winters v. People of State of New York, a bookdealer was convicted of possessing and intending to sell magazines whose content violated §1141 of the New York Penal Law. Section 1141 stated that anyone who "intend[s] to sell ... any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; is guilty of a misdemeanor."[155] The Court found this specification of publications "too uncertain and indefinite to justify the conviction of [the] petitioner."[156] For instance, descriptions of war horrors, which are otherwise "unexceptionable," might be found to be "vehicles for inciting violent and depraved crimes."[157] Due to the vagueness of this regulation, a distributor of publications could not reasonably be expected to foresee and guard against violations.[158] As a result, materials that would otherwise be acceptable under §1141 risk censorship by a bookdealer who is unsure where to draw the line between the allowable and the forbidden material.[159]

A state must ensure any limitation on freedom of expression is not too vague or indefinite. A statute that limits freedom of expression must give fair notice of what acts will be punished.

Content-Based Regulation is Permissible as to Minors Even if Speech is Not Deemed Obscene as to Minors

The First Amendment does not prohibit all governmental regulation that depends on the content of the speech.[160] Specifically, "vulgar and offensive" speech that is not obscene even as to minors can be unprotected depending on its context.[161] In this line of cases, the Court states that material relating to sex or dirty words can be regulated based on its content even without a finding of obscenity as to minors. As with material obscene for minors, any interference with adult access is purely accidental and can therefore be justified under a time, place, manner analysis. In other words, content-based regulation imposed on children's access to certain material is actually subject to a content-neutral time, place, manner analysis in the context of adults since any interference with adult access is purely accidental. Under the time, place, manner analysis, the court will balance the extent of the accidental interference with adult access to material with the state's in preventing access by minors. Three cases that demonstrate this analysis are FCC v. Pacifica, Sable Communications of Cal. v. FCC, and Reno v. ACLU.[162]

In Pacifica, the Court found George Carlin's 12-minute comedy monologue entitled "Filthy Words" could be regulated when broadcast on the radio.[163] Although the Court found the broadcast was not obscene, even to minors, regulation was still permissible because the state had an interest in limiting minors' access vulgar and offensive material.[164] The state's interest focused on protecting minors from potentially harmful material, especially considering that "broadcast is a uniquely pervasive presence that confronts people in the privacy of the home," and that "broadcasting is uniquely accessible to children."[165] In addition, the state had an interest in regulating this broadcast because the broadcast spectrum is a "scarce" expressive commodity.[166] The Court

then balanced these state interests with the extent of the accidental interference with adult access to material, which was not great because the regulation did not involve a complete ban on the material, and found that the regulation was constitutional.[167] However, in its conclusion, the Court emphasized the narrowness of its holding in light of the limited context of broadcasting.[168]

In Sable, a company that was engaged in the phone sex business challenged an amendment to the Communications Act that prohibited all indecent and obscene interstate commercial messages.[169] This case was distinguished from Pacifica because the material in Pacifica was not completely banned, unlike the dial-a-porn in this case. Another distinction between Sable and Pacifica is that here, in contrast to the radio broadcast, the "listeners were required to take affirmative steps to receive communication."[170] "Placing a telephone call is not the same as turning on a radio and being taken by surprise."[171] Nonetheless, the Court agreed the state did have a interest in protecting minors from potential harm.[172] With respect to regulation of indecent speech, the government relied on Pacifica to find that the state objective was to limit minors' access to the material, and that any interference with adult access was purely accidental. Because the interference with adult access was accidental, the Court performed a time, place, manner analysis. Since the regulation effected a complete ban, the extent of the interference with adult access outweighed any government interest. The Court concluded that the regulation was unconstitutional.[173]

Most recently, the Court decided Reno v. ACLU.[174] In that case, the Communications Decency Act of 1996 made criminal the knowing transmission of obscene or indecent material via the Internet to anyone under 18.[175] This Court was also willing to use a time, place, manner analysis because although the regulation was content-based, its intent was to protect children, not limit adult access to the material. Although the government has an interest in protecting children from potentially psychologically harmful material, the Court found the regulation to be unconstitutional.[176] The Court did not uphold the regulation because the government's interest was not enough to justify the extent of the accidental interference with adult access to the material.[177] The Court found that there were other, less restrictive means available to protect minors from potentially harmful material on the Internet.[178] In addition, the Internet provides unlimited capacity for low-cost communication, so the state lacks the same interest in regulating a "scarce" expressive commodity like the radio spectrum in Pacifica.[179]

First Amendment and State Legislation

As an entertaining, artistic, and political combination of both conduct and speech, music concerts are protected by the First Amendment.[180] Because music concerts are protected by the Free Speech Clause of the First Amendment, the government is limited in the restrictions it can place on them.[181] The restrictions placed on music concerts by the San Antonio ordinance and the proposed Michigan statute are not content-neutral time, place, or manner restrictions such as those in Ward v. Rock Against Racism.[182] These regulations are based on the actual subject matter or the content of the message. Therefore, in order for the statute and ordinance to be upheld, they must narrowly regulate only a certain type of speech that has been removed from First Amendment protection.

As Both a Political and Entertaining Form of Speech, Music is Protected by the First Amendment

To say that music does not classify as political speech is to ignore folk music from the 1960s, rap music of today, and many other genres in between.[183] Music during the 1960s and early 1970s teemed with politically charged messages about civil rights and war.[184] Another example where political messages are embodied in music lyrics is urban rap music.[185] "Controversial rappers are some of the most ardently political musicians. Many drive home a message of ... social justice and racial equality."[186] Since music is clearly a form of political speech, it enjoys First Amendment protection.[187] In addition, as stated above, music finds constitutional protection as an entertaining form of expression and communication.[188]

Government Attempts to Regulate Music Have Been Based on the Lack of Constitutional Protection Afforded to Obscenity

Attempts to regulate music lyrics and concerts are based primarily on the theory that some music lyrics are

obscene, and obscenity is arguably not protected by the First Amendment of the Constitution. Thus, an obscene song or obscene music concert would not warrant protection under the First Amendment and could be regulated by the government. In practice, though, "no work of music alone has yet been held to be obscene even for minors."[189] Using the Miller three-part obscenity test, federal courts have considered whether a particular recording was obscene, but ultimately found that the state failed to prove the recording was obscene.[190]

Skyywalker Records, Inc. v. Navarro was decided on June 6, 1990, and was the first time a federal court ever considered whether a musical composition was obscene.[191] Focusing solely on the lyrics and not the instrumental music that accompanied the lyrics, the judge determined that "As Nasty As They Wanna Be," a record by 2 Live Crew, was obscene under the Miller test for obscenity.[192] The plaintiffs, 2 Live Crew and their record company, produced several expert witnesses.[193] Dr. Mary Haber, a psychologist testified the recording did not appeal to the average person's prurient interest.[194] Two additional expert witnesses, who were familiar with the origins of rap music, discussed 2 Live Crew's innovations within the rape genre.[195] In addition they noted that a Grammy Award for rap music had recently been introduced, which indicated that the recording industry recognizes rap as a "valid artistic achievement."[196] Therefore, the experts concluded 2 Live Crew's music did possess serious artistic value.[197] Finally, Carlton Long, a Rhodes scholar with a Ph.D. in political science, testified that 2 Live Crew's lyrics contained "political significance [and] exemplified numerous literary conventions, such as alliteration, allusion, metaphor, rhyme, and personification."[198]

Attempts to regulate music lyrics and concerts are based primarily on the theory that some music lyrics are obscene, and obscenity is arguably not protected by the First Amendment of the Constitution. In practice, though, "no work of music alone has yet been held to be obscene even

On the other hand, the defendant produced no expert witnesses as to the prurient interest nor did he produce expert witnesses as to the literary, artistic, or political value of the music.[199] In fact, defendant's only evidence was a tape recording of the music itself. Nonetheless, relying solely on his own expertise, the judge determined that the average person, applying contemporary community standards would find that "As Nasty As They Wanna Be" appealed to the prurient interest and as a whole lacked serious literary, artistic, political, and scientific value.[200]

On appeal, the federal district court's obscenity determination was reversed.[201] The appellate court reversed because it found the record was insufficient to assume the trial court judge had the artistic or literary knowledge or skills to determine whether a work "lacks serious artistic, scientific, literary or political value."[202] In a noteworthy dictum, the appellate court stated, "we tend to agree with the appellants' contention that because music possesses inherent artistic value, no work of music alone may be declared obscene."[203]

Constitutionality of San Antonio Ordinance

The San Antonio ordinance is probably constitutional on its face since its test for obscenity mirrors the obscenity test set forth in Miller with the varying obscenity language set forth in Ginsberg.[204] In Ginsberg, the Court upheld a New York statute prohibiting the sale of obscene material to minors under 17.[205] Similarly, the San Antonio ordinance attempts to regulate minors' exposure to obscene material that could have potentially harmful effects.[206]

A court would probably find that San Antonio has a compelling interest in protecting the physical and psychological well-being of its youth and can therefore regulate obscenity[207] as long as the means of regulation are narrowly drawn to accomplish that state purpose. Thus if the San Antonio concert-rating regulation were challenged, the state would merely have to show that it was rational to conclude that material depicting "sadistic, masochistic or violent sexual relationships,"[208] for instance, might be harmful to the psychological well-being of children. A court will give great deference to this determination without

requiring any scientifically certain evidence linking obscenity and moral development.[209]

In addition, the regulation must be narrowly tailored to serve that interest if it is to withstand a constitutional challenge. With this requirement in mind, a state government must consider the possible consequences on constitutionally protected speech when it adopts regulations and procedures for dealing with obscenity.[210] The court must consider whether the regulation of unprotected "obscene as to minors" speech would have a chilling effect on other protected and valuable speech.[211] State regulation of obscenity must "conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line."[212] In fact, obscenity laws often "run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy."[213]

In the case of the San Antonio concert-rating regulation, where the state government is regulating material that is obscene to minors, it is important that the regulation be narrowly tailored so as not to interfere with adults' access to protected material. For instance, the material in Ginsberg, which was only judged obscene as to minors, was still available to adults.[214] On the other hand, the law in Butler was held unconstitutional because while limiting minors' access to material that was deemed harmful to them, the law also limited adults' access to material that was protected in the context of adults. On its face, the San Antonio ordinance allows material obscene as to minors to be limited from minors while still remaining available to adults.

However, there is speculation that a regulation such as this, if enforced, would have unconstitutional consequences by eventually limiting adults' access to protected material. One source for this speculation is that on December 2, 1998, Pearl Jam announced the band would not play in any state which institutes a concert-rating system.[215] Nina Crowley argues that if concert-ratings happen "on a wide scale, some music will disappear. If Marilyn Manson can't play live, his record company can't make any money."[216] However, none of these regulations suggests that Marilyn Manson cannot play live.

Even if a court finds the San Antonio ordinance to be constitutional on its face, a constitutional application of the three-part Miller test should result in the conclusion that almost no imaginable concert could be deemed obscene, even as to minors. In accordance with the first part of the test, the fact finder must determine whether the material appeals to the "prurient interest" of a minor, "meaning that it [is] intended to cause sexual stimulation."[217] One way to determine whether material is "intended to cause sexual stimulation" is to examine the manner in which the materials are marketed.[218] Just as rock and rap albums are marketed and sold as musical entertainment, rather than "adult" material, so are rock, rap, and other musical concerts.[219] If the concerts were truly "intended" to cause sexually stimulation, it is inconsistent that they be marketed as musical entertainment rather than as "adult" material.

A second reason that applying the Miller obscenity test to concerts would fail to result in a finding of obscenity is that it would be extremely difficult to show that a musical concert does not have serious literary, political, or artistic value.[220] As one commentator has defined the term, "a work has serious value if the 'intent is to convey a literary, artistic, political, or scientific idea, or to advocate a position."[221] It is a relatively safe assumption that musicians who perform in concert do intend to convey an artistic idea.[222] In addition, experts can testify that even vulgar lyrics can contain "political significance [and] exemplified numerous literary conventions, such as alliteration, allusion, metaphor, rhyme, and personification."[223]

Another reason San Antonio would not be able to show that a music concert is obscene, even as to minors, is that it would be almost impossible to determine that a con-

Even if the San Antonio ordinance and the proposed Michigan statute are constitutional, there are practical problems with implementing concert-rating regulations in general. "Rock concerts are fluid and changing; you could give the Stones a PG rating one evening, and something X-rated hap-

cert "*taken as a whole*" appeals to the "prurient interest" of a minor or that the concert "*taken as a whole*" lacks "serious literary, artistic, [or]political . . . value." Even if the fact-finder decides certain lyrics to a song appeal to the "prurient interest" of a minor, a song as a whole might not since its "vocal presentation and melody [also] contribute to its meaning."[224] "Likewise, just as magazines comprised of separate articles are considered whole works, an album made up of distinct songs might also be considered as a whole."[225] It follows that it will be very difficult to determine that a concert with multiple lyrics, multiple melodies, multiple vocal presentations, and multiple actors each performing in their own way, "*taken as a whole*," appeals to the "sexual interests ... of ... minors," and lacks "serious literary, artistic, [or] political . . . value." [226]

Under the Miller test for obscenity, it is very difficult to imagine any concert that could be classified as obscene. This is theory is supported by the fact that since the ordinance was enacted in 1985, no one has ever been prosecuted under it. As discussed above, it is unlikely that a concert would fit the definition of even one of the Miller prongs. It is even more unlikely that a concert would meet the requirements of all three of the Miller prongs, which would be absolutely necessary before a court could say the concert was obscene. Thus, if San Antonio were to ever prosecute a party under this ordinance, and if that party were found to have violated the ordinance, it would most likely mean there was an unconstitutional application of San Antonio ordinance 61,850.

A successful prosecution using a Miller analysis is highly unlikely. If San Antonio wanted to successfully regulate minors' attendance at certain concerts, the city should have written an ordinance that did not require the application of the Miller obscenity test. For instance, San Antonio could have written an ordinance that limited minors' access to concerts that are vulgar and offensive, and that ordinance would then be subject to the same time, place, manner-type analysis that was used in Pacifica. The time, place, manner analysis appropriate because although the regulation would be content based with respect to children's access, it would only be an accidental interference with adult's access to the material. The city would argue that the purpose behind the ordinance is *not* to limit adult access to the concerts, but simply to limit minors' access to concerts that contain potentially harmful material. A party challenging the new ordinance would, of course, argue that Pacifica has a narrow holding limited to the context of broadcasting. However, courts are likely to be sympathetic to a regulation whose purpose is to protect minors. That being the case, the court would use the same time, place, manner analysis as used in Pacifica. The state's interest in its minors would be balanced against the extent of the accidental interference with protected adult material. Assuming adults still had access to the concerts, a court would find that the ordinance is only a slight interference. Finally, the court will determine that the city's interest in protecting the children does justify the slight interference to adult access.

In sum then, as written, the San Antonio ordinance is constitutional on its face because the city would have a compelling interest in regulating obscenity and the ordinance is narrowly tailored so as to not interfere with adults' access to protected material. However, the ordinance really has no practical use if analyzed using the Miller test for obscenity. When Miller is applied in the context of musical performances, there are almost no imaginable concerts that could, under a constitutional analysis, ever be found obscene. The only way San Antonio could constitutionally regulate minors' access to certain concerts is if the city wrote an ordinance that could be analyzed under a time, place, manner analysis similar to that in Pacifica.

The Constitutionality of the Proposed Michigan Senate Bill 239

Senate Bill 239 appears less intrusive than the San Antonio ordinance since it is regulating material that was judged by the music industry itself, rather than by a government official. It almost seems logical to extend the self-imposed warning labels placed on records to the tickets and advertising for concerts performed by those artists. However, a statute's constitutionality must be based on something more substantial.

To reiterate, music concerts are protected by the Free Speech Clause of the First Amendment, and the government is limited in the restrictions that can be placed on them.[227] Since the proposed Michigan statute is not a content-neutral restriction, it must regulate only speech that has been removed from First Amend-ment protection.[228]

At first glance, there appears to be a problem with the proposed statute

because it is content-based regulation, yet it does not restrain material deemed to be obscene even as to minors. Instead, Senate Bill 239 places restrictions on material on which the RIAA has already placed parental warnings. However, material deemed to have "explicit content" by the RIAA is not necessarily the same as the Court's definition of obscenity; therefore the proposed statute is in danger of regulating material that is protected by the First Amendment.

However, as in the Pacifica, Sable, Reno v. ACLU line of cases, content-based regulation of material, otherwise protected by the First Amendment, is possible. In the case of Senate Bill 239, the government would argue that the purpose behind the statute is *not* to limit adult access to the concerts, but simply to limit minors' access to concerts that contain material potentially harmful to minors. Therefore, this statute only accidentally interferes with adult access to material and should be analyzed using a time, place, manner analysis.

A party opposed to the statute would try to distinguish it from Pacifica, which is a case where the content-based regulation of constitutionally protected material was upheld. Unlike the broadcast spectrum, concert halls and arenas are not such a scarce expressive commodity. In addition, the medium of communication is more similar to that in Sable than in Pacifica because concert-goers have to take affirmative steps to attend a concert; this medium of expression is not thrust upon unwilling listeners in the privacy of their home.

Even so, a court using a time, place, manner analysis would probably conclude that this regulation is constitutional by balancing the state's interest in its minors with the extent of the accidental interference with adult's access to protected material. Unlike Sable, this statute does not completely ban the material; the warning labels on the advertisements and tickets are only a slight interference with adult access. Therefore, a Court would probably find the state's interest in protecting the children does justify the slight interference to adult access. In sum, then, under the Pacifica, Sable, Reno v. ACLU line of cases, Senate Bill 239 would probably withstand a constitutional challenge.

Practical Problems Associated With Concert Rating

Even if the San Antonio ordinance and the proposed Michigan statute are constitutional, there are practical problems with implementing concert-rating regulations in general. Gary Bongiovanni, editor of the American music-trade magazine POLLSTAR, doubts there is any way to implement such regulations.[229] He reasons that "rock concerts are fluid and changing; you could give the Stones a PG rating one evening, and something X-rated happens the next."[230] "Bands often change their set lists and onstage routines," and there is concern as to whether a ratings system could respond to such variables.[231] A crucial difference between concerts and movies, which are currently subject to private regulation, is that [concerts] are live, so a band could change its act to get a PG rating and then, when onstage, give the fans an R-rated version."[232] Another difficulty with implementing the San Antonio ordinance, in particular, is that simply verifying the age of concert-goers at an "adult" performance could take up to eight hours.[233] Finally, there is a question to the practicality of putting the warning on the ticket, as proposed in the Senate Bill 239, since it wouldn't be seen until after it was purchased.[234]

Alternatives to Government Regulation

Alternatives to government regulation of concerts do exist. Hilary Rosen, president and CEO of the RIAA, said she would "oppose any attempts to restrict minors from attending rock concerts but would not object to an efficient [self-imposed] parental warning system similar to the one her organization established for albums 12 years ago."[235] Mark Michaelson, aide to Senator Shugars, agreed that "if the industry comes up with something that works and will be observed, that will be a great thing too."[236] Since at least 1997, people in the concert industry have been evaluating concert-rating proposals in an attempt to avoid restrictive legislation.[237] The proposals range from an industry-wide *self-imposed* obscenity warning labels to *self-imposed* imposing ratings that mirror current movie ratings.[238]

November 1, 1968, marked the beginning of the voluntary film rating system of the motion picture industry.[239] Before that date, the Motion Picture Association of America (MPAA) only went so far as approving or disapproving of the content of film.[240] In 1968, however, the MPAA decided to give movies letter ratings based on theme, language, nudity and sex, violence, and how each element was treated in each

individual film.[241] Jack Valenti, president of the MPAA at the time, explained that the ratings "provide advance information to enable parents to make judgments on movies they wanted their children to see or not to see."[242]

There are other industries that have also implemented successful self-imposed rating systems. For instance, the computer industry rates its games.[243] "E" indicates a game that is appropriate for anyone to play.[244] A "T" rating means the game is appropriate for teenagers and older due to bad language and bloodshed in the game.[245] "TA" is the rating placed on computer games recommended for teen-adult audiences due to material with some sexual content.[246] Finally, an "M" rating demonstrates the game is only appropriate for mature audiences, "which means anything goes including hunting nuns and orphans with a flame-thrower."[247] Some book clubs also have symbols indicating potentially offensive or inappropriate material.[248] For instance, one book club uses a star for material with a "sexually explicit theme."[249]

Finally, if government-imposed concert-rating systems do not gain popularity, and even if the concert industry does not impose a rating system on itself, there are other safeguards for minors. One major safeguard is consumer power. If an artist wants to be invited to perform, he or she may have to market to what the audience wants. For instance, "protests ... surrounding Manson performances have been common in cities nationwide. And there is evidence that his reputation is already costing him concert dates."[250] "In South Carolina, for example, Manson was booked last year to play the Carolina Coliseum Arena in Columbia. But that aroused the ire of so many in town that he was asked – and paid well – to go away, according to venue director John Bolan."[251] In fact, numerous scheduled performances by Manson have been canceled because of the band's controversial performances.[252] This is not a "chilling effect" resulting from a specific governmental regulation – yet. It is simply the effect of consumer power.

"There's also the argument that by the time a performer is popular enough to play an arena, there's more than enough information about him or her available (including stickers on CDs, music videos and articles in the press) for parents to make an informed decision about a child attending a show."[253] Many promoters are sensitive to the needs of the parents because they know that ultimately, most parents still buy the tickets.[254] For example, some concert halls and arenas even provide "quiet rooms" for parents who want to accompany their teenage children to concerts.[255] These "quiet rooms" usually provide complimentary coffee, "blessed silence," and an opportunity for parents to be involved in their child's concert experience.[256]

And the Band Played On— For Now

Concert-rating statutes are an up-and-coming phenomena. Logically, they seem like the next step after record warning labels and in light of other ratings being implemented across the entertainment industry. However, unlike warning labels and other rating systems in the entertainment industry that are self-imposed, concert-rating statutes may be products of government regulation, and some teeter on the border of violating the First Amendment.

One of the concert-rating statutes that would withstand a constitutional challenge is San Antonio ordinance 61,850, which attempts to regulate access to concerts that are "obscene" in the context of minors. This ordinance is constitutionally valid on its face because it mirrors the Miller/Ginsburg test for "obscenity." However, as written, the ordinance with its obscenity standard has no practical application to concerts. San Antonio should have considered wording the ordinance so that it could be analyzed using a time, place, manner analysis.

The other concert-rating attempt discussed in this Note is proposed Michigan Bill 239. Like the San Antonio ordinance, this proposed bill would probably also withstand a constitutional challenge. Although the regulation is content based with respect to children's access, it only an accidentally interferes with adult access to the material. The state's interest of protecting children from vulgar and possibly harmful material, balanced against the very slight interference on adult access to the material, would justify the regulation.

Even if a concert-rating statute is constitutional, there are inherent practical problems with its implementation. In light of these practical problems, it is worthwhile for governments and the concert industry to explore the many alternatives to concert-rating statutes. ◆

[1] Elizabeth Renzetti, *Guess Who's Escorting Their Kids to Concerts*, THE GLOBE AND MAIL, Jan. 3, 1998, at A1.

[2] See id.

[3] See id.

[4] Neil Strauss, *Concert-ratings: Salvation or Show-Stopper*, PORTLAND PRESS HERALD, December 14, 1997.

[5] See id.

[6] Ray Waddell, *Senator Steps Up Push for Concert-ratings*, AMUSEMENT BUSINESS, May 3, 1999.

[7] Id.

[8] Dave Ferman, *Should Lewd, Rude Concert Acts be Rated X*, BUFFALO NEWS, October 4, 1998.

[9] Thomas v. Collins, 323 U.S. 516, 545 (1945).

[10] Id.

[11] See id.

[12] Id.

[13] Id.

[14] In 1954 attacks on rock 'n' roll's obscene lyrics began when white teenagers started listening to rhythm and blues records made by African-American performers. Anne L. Clark, *"As Nasty As They Wanna Be": Popular Music on Trial*, 65 N.Y.U.L. REV. N3 (1990) (citing L. Martin & K. Segrave, *Anti-Rock: The Opposition to Rock 'n' Roll* 15 (1988)). Then, in 1965, a NEWSWEEK article asserted that rock 'n' roll had reached a new low. Some of the controversial songs inciting the NEWSWEEK and similar opinions included: the Doors' "The End" containing the lyrics, "Father I want to kill you – Mother I want to fuck you"; the Rolling Stones' "King Bee" containing the lyrics, "Buzzin' round your hive – Together we can make honey – Let me come inside"; and the Rolling Stones' "Midnight Rambler" containing the lyrics, "I'm gonna stick my knife right down your throat." Anne L. Clark, *"As Nasty As They Wanna Be": Popular Music on Trial*, 65 N.Y.U.L. REV. N5 (1990) (citing L. Martin & K. Segrave, *Anti-Rock: The Opposition to Rock 'n' Roll* 15 (1988)); see also Jeffrey B. Kahan, Bach, *Beethoven and the (Home) Boys: Censoring Violent Rap Music in America*, 66 S. CAL. L. REV. 2583, 2587 September, (1983).

[15] See Clark, *supra* note 14, at 1485.

[16] See id.

[17] See id.

[18] See Clark, *supra* note 14, at 1484 (quoting Parents Music Resource Center, Rock Music Report 1 (June 1985)); see also Jim McCormick, *Protecting the Children from Music Lyrics: Sound Recordings and "Harmful to Minors" Statutes*, 23 GOLDEN GATE U.L. REV. 679, 686 (Spring 1993).

[19] See Clark, *supra* note 14, at 1486 (citing Letter from PMRC to Stanley Gortikov, Pres. Of RIAA (May 31, 1985) (on file at New York University Law Review)).

[20] See id. at 1487.

[21] See Clark, *supra* note 14, at 1487 (citing Memorandum from PMRC to Stanley Gortikov, Pres. Of RIAA (undated) (on file at New York University Law Review)).

[22] See Clark, *supra* note 14, at 1487-88.

[23] See id. at 1488.

[24] David Geffen of Geffen Records said, "I have no intention of carrying a warning label on my records. It's censorship. They'd have to pass a law before I'd do it." See Clark, *supra* note 14, at N64 (quoting Cocks, *Rock is a Four Letter Word*, TIME, September 30, 1985, at 71).

[25] See Clark, *supra* note 14, at 1488 (citing Hearings on Record Labeling Before the Subcomm. on Communication of the Senate Comm. On Commerce, Science and Transp. 99[26] Cong., 1st Sess. 11 (1985)); see also McCormick, *supra* note 18, at 686).

[26] See Clark, *supra* note 14, at N67 (quoting Hearings on Record Labeling Before the Subcomm. On Communication of the Senate Comm. On Commerce, Science and Transp. 99th Cong., 1st Sess. 11 (1985) "The PMRC has said clearly it does not want censorship, but I fear that the only acceptable translation of the wishes of the PMRC will somehow constitute a de facto first stage form of censorship").

[27] See Clark, *supra* note 14, at 1488-89 (citing Hearings on Record Labeling Before the Subcomm. On Communication of the Senate Comm. On Commerce, Science and Transp. 99th Cong., 1st Sess. 11 (1985)).

[28] See Clark, *supra* note 14, at 1493-94 (citing Harrington, *The New Wave of Lyrics Laws; Listening to Both Sides of the Record Labeling Debate*, WASH. POST, Jan 28, 1990, at G4).

[29] Clark, *supra* note 14, at 1494 (quoting S. 938, 173d Leg., §3 (1989)).

[30] The other states included Arizona, Delaware, Florida, Illinois, Iowa, Kansas, Maryland, Missouri, New Mexico, Oklahoma, and Virginia. See Clark, *supra* note 14, at 1494 (citing Harrington, *supra* note 28, at G1).

[31] The new warning label reads "Explicit Lyrics – Parental Advisory," and appeared printed in black and white and placed in a uniform position on all records, cassettes, and compact discs. Pareles, *States Drop Recording Labeling Bills*, N.Y. TIMES, Apr. 6, 1990, at C36; see also McCormick, *supra* note 18, at 686.

[32] See Clark, *supra* note 14, at 1494-95 (citing Pareles, *States Drop Recording Labeling Bills*, N.Y. Times, Apr. 6, 1990, at C36).

[33] SAN ANTONIO, TEX. Ordinance 61,850 (Nov. 14, 1985).
Sec. 21-91. DEFINITIONS.
As used in this article the following words and terms shall have the meanings respectively ascribed:

Aid or *assist* shall mean intentionally or knowingly concealing, disguising or misrepresenting the age of a child.

Control over city-owned facilities shall mean any person, or employee of such person, authorized by lease to produce, direct, participate in or perform any musical, dramatic or theatrical performance at a city-owned facility. This term shall not include peace officers in performance of their official duties.

Direct shall mean commanding movement of any actor, performer, stage equipment or stage props.

Explicit reference shall mean the use of words which have a readily recognizable meaning describing or depicting conduct proscribed hereby, but shall not include words which are merely suggestive or have meanings which are equally consistent with actions not proscribed hereby.

Intentionally, knowingly, recklessly shall have those meanings as defined in the Texas Penal Code.

Leased area shall mean that area of a city-owned facility identified by lease providing for performance of a musical, dramatic or theatrical production.

Participate shall mean placing or moving equipment or props used in a musical, dramatic or theatrical production.

Perform shall mean acting or performing a musical, dramatic or theatrical production.

Performance shall mean any musical, dramatic or theatrical production performed by any individual or identifiable group whether or not the production includes more than one individual or identifiable group staged in a city-owned facility.

- Performance *obscene* as to a child shall mean a performance which contains a description of or explicit reference to:

(a) Anal copulation;
(b) Bestial sexual relations;
(c) Sadistic, masochistic or violent sexual relationships;
(d) Sexual relations with a child;
(e) Sexual relations with a corpse;
(f) Exhibition of male or female genitals;
(g) Rape or incest; or
(h) A vulgar or indecent reference to sexual intercourse, excreto ry functions of the body, or male or female genitals; and which, taken as a whole: (1) Appeals to the prurient interest of a child under the age of fourteen (14) years in sex; and (2) violates generally prevailing standards in the adult community as to the suitability of such performances for observation of a child under the age of fourteen (14) years; and (3) lacks any serious, artistic, literary, political or scientific merit as to a child under the age of fourteen (14) years.

Person shall mean any individual, partnership, corporation or other legal entity of any kind.

Produce shall mean contractual responsibility for advertising, staging or setting up a musical, dramatic or theatrical production.

Sec. 21-92.ADMISSION OF CHILDREN.

No person having control over a city-owned facility shall intentionally, knowingly, or recklessly allow or permit a child under the age of fourteen (14) years to enter or to remain within a leased area in a city-owned facility within one hour before or at any time during a performance is scheduled, if such person (1) knows, or (2) has knowledge of sufficient facts and circumstances from which a reasonable person would know that the performance is or will be a performance obscene as to a child, unless such child is admitted with a parent or legal guardian.

Sec. 21-93. PRODUCING, PERFORMING, DIRECTING OR PARTICIPATING IN A PERFORMANCE.

No person shall intentionally, knowingly, or recklessly produce, perform, direct, or participate in a performance within the leased area if such person:

(1) Knows; or
(2) Has knowledge of sufficient facts and circumstances from which a reasonable person would know that:
(a) A child under the age of fourteen (14) years of age is present without a parent or legal guardian; and
(b) The performance is or will be a performance obscene as to a child.

Sec. 21-94. ADVERTISING AND NOTIFICATION.

Any person who shall produce or direct a performance, and who (1) knows, or (2) has knowledge of such facts and circumstances from which a reasonable person would know that the performance is or will be a performance obscene as to a child shall cause and provide by contract or otherwise for inclusion in any advertising for such performance the following notice:

"This performance may contain material not suitable for children without supervision. Parental discretion is advised. No child under the age of fourteen (14) years of age will be admitted without a parent or legal guardian."

No person shall intentionally, knowingly, or recklessly contract for or obtain any advertising for a performance which is obscene as to a child, without providing for the notice required by the foregoing sentence to be included therein.

Sec. 21-95. AIDING OR ASSISTING A CHILD IN ATTENDANCE.

No person shall intentionally or knowingly aid or assist a child under the age of fourteen (14) years not accompanied by a parent or legal guardian in gaining admission to, or in remaining present during a performance which the actor (1) knows, or (2) knows such facts and circumstances from which a reasonable person would know that the performance is or will be a performance obscene as to a child.

Sec. 21-96. DEFENSES.

It shall be an affirmative defense to any prosecution under Section 21-92 above if the person having control over a city-owned facility attempts to ascertain the true age of a child seeking entrance to a performance obscene as to a child by requiring production of a birth certificate, school record, including identification showing the child's age or other school record indicating the child to be enrolled in eighth (8th) grade or higher, and not relying solely on oral allegations or apparent age of the child.

Sec. 21-97. PENALTIES

Each act or failure to act as required herein shall be punishable by a fine of not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00).

Sec. 21-98. SEVERABILITY.

If, for any reason, any one or more sections, sentences, clauses or parts of this article are held legally invalid, such judgment shall not prejudice, affect, impair or invalidate the remaining sections, sen-

tences, clauses or parts of this article.

Sec. 21-99. APPLICABLE EFFECTIVE DATE.

The requirements of this article shall apply only to leases providing for performances of musical, theatrical or dramatic productions in City-owned facilities executed after the effective date of this article [Ordinance Number 61850].

[34] See id.

[35] See id.

[36] A performance obscene to a child is defined as a performance which contains a description of or explicit reference to:

(a) Anal copulation;
(b) Bestial sexual relations;
(c) Sadistic, masochistic or violent sexual relationships;
(d) Sexual relations with a child;
(e) Sexual relations with a corpse;
(f) Exhibition of male or female genitals;
(g) Rape or incest; or
(h) A vulgar or indecent reference to sexual intercourse, excretory functions of the body, or male or female genitals;

and which, taken as a whole: (1) Appeals to the prurient interest of a child under the age of fourteen (14) years in sex; and (2) violates generally prevailing standards in the adult community as to the suitability of such performances for observation of a child under the age of fourteen (14) years; and (3) lacks any serious, artistic, literary, political or scientific merit as to a child under the age of fourteen (14) years.

See SAN ANTONIO, TEX. Ordinance 61,850 (Nov. 14, 1985); for the Supreme Court's obscenity standard, see Miller v. California, 413 U.S. 15 (1973).

[37] See Clark, *supra* note 14, at 1492.

[38] Phillip Taylor, *Michigan State Lawmaker Takes Concert-Rating Proposal on the Road* (last modified March 31, 1999) <http://www.freedomforum.org/speech/1999/3/31miconcert.asp>.

[39] See id.

[40] See id.

[41] See id.

[42] 1999 Bill Text MI S.B. 239. As of May 25, 1999, Senate Bill 239 read as follows:

Sec. 1. (1) If a performers recorded music will be performed at a music venue and if during the 5 years prior to the date of the performance, the performer released recorded music containing a parental advisory label issued by the recording industry as to the explicit content of the recorded music, the owner or operator of the music venue or the promoter of the performance shall comply with at least 1 of the following:

Tickets that are sold for the performance at the music venue shall contain, in boldfaced print not smaller than 9-point type, an advisory stating: "PARENTAL ADVISORY WARNING : EXPLICIT CONTENT".

Print advertisements for the performance at the music venue shall contain, in boldfaced print not smaller than 9-point type, an advisory stating: "PARENTAL ADVISORY WARNING : EXPLICIT CONTENT".

Television, radio, or other electronic advertisements for the performance at the music venue shall contain the following:

If spoken, and advisory that states: "This artists music has received the recording industry's parental advisory due to explicit content".

If written, the advertisement shall contain, in bold faced print not smaller than 9-point type, and advisory stating: "PARENTAL ADVISORY WARNING: EXPLICIT CONTENT".

This section does not apply to a performance at a music venue by a performer whose appearance has not been advertised or promoted.

As used in this section, "music venue" means a commercial venue where live music performances are held.

Sec. 2. A person who violates this act is guilty of a misdemeanor punishable by a fine of not more than $5,000.00.

Enacting section 1. This act takes effect upon the expiration of 60 days after the date of its enactment.

[43] U.S. CONST. amend. I.

[44] Thomas v. Collins, 323 U.S. 516, 545 (1945).

[45] American Booksellers Ass'n v. Hudnut, 475 U.S. 1001 (1986).

[46] Texas v. Johnson, 491 U.S. 397, 408-409 (1989) (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

[47] Cohen v. California, 403 U.S. 15, 24 (1971).

[48] Texas v. Johnson, 491 U.S. at 408-409 (quoting Terminiello, 337 U.S. at 4).

[49] Texas v. Johnson, 491 U.S. at 414.

[50] Cohen, 403 U.S. at 25.

[51] Id.

[52] See Texas v. Johnson, 491 U.S. 397 (1989); Barnes v. Glen Theater Inc., 501 U.S. 560, 565-66 (1991).

[53] See Schad v. Mount Ephriam, 452 U.S. 61 (1981).

[54] See Texas v. Johnson, 491 U.S. 397 (1989).

[55] Id. at 404.

[56] See Schad, 491U.S. at 65-66; see also Joseph Burstyn, Inc. v. Wilson et al. 343 U.S. 495, 501 (1952); Ward et al. v. Rock Against Racism, 491 U.S. 781, 790 (1989); McCollum ET AL. v. CBS Inc., 202 Cal. App. 3d 989, 998 (Cal. 1988).

[57] 452 U.S. at 61-64.

58 See id.

59 See id. at 65.

60 See id.

61 Ward et al. v. Rock Against Racism, 491 U.S. 781, 790 (1989).

62 See id.

63 Id.

64 See id.

65 Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

66 See FCC v. Pacifica Found. et al., 438 U.S. 726, 745-46 (1978).

67 Ward, 491 U.S. at 791 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)); see also Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (quoting Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

68 Consolidated Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 536 (1980) (quoting Mosley, 408 U.S. at 99).

69 See Ward, 491 U.S. at 791.

70 See id.

71 See id. at 792.

72 See id. at 784.

73 Id. at 803.

74 See id.

75 See Mosley, 408 U.S. at 95.

76 Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942); see also McCormick, *supra* note 18, at 680.

77 See Miller, 413 U.S. at 23; see also Roth v. United States, 354 U.S. 476, 485 (1957); New York v. Ferber, 458 U.S. 747, 754 (1982); McCormick, *supra* note 18, at 680.

78 See Chaplinsky, 315 U.S. at 571-72; see also McCormick, *supra* note 18, at 680.

79 See Bradenburg v. Ohio, 395 U.S. 444, 447 (1969); see also McCormick, *supra* note 18, at 680.

80 See New York Times Co. v. Sullivan, 376 U.S. 254, 301-302 (1964).

81 See Chaplinsky, 315 U.S. at 572; see also McCormick, *supra* note 18, at 680.

82 Chaplinsky, 315 U.S. at 572; see also McCormick, *supra* note 18, at 680.

83 Chaplinsky, 315 U.S. at 572.

84 Id. at 569.

85 See id. at 569.

86 See id. at 574.

87 Bradenburg, 395 U.S. at 447.

88 Id.

89 Id. at 448.

90 Id. at 447.

91 See New York Times Co., 376 U.S. at 279-80.

92 Id.

93 Id. at 280.

94 See id. at 258.

95 See id. at 287.

96 See Miller, 413 U.S. at 15.

97 See id.

98 See Cohen, 403 U.S. at 20.

99 Miller, 413 U.S. at 33.

100 Id.

101 Id. at 15.

102 See Pope v. Illinois, 481 U.S. 497, 501 (1987).

103 Miller, 413 U.S. at 25.

104 Id. at 24.

105 Pope, 481 U.S. at 501.

106 See id. at 501 n.3.

107 See id. at 500.

108 See Miller, 413 U.S. at 24.

109 See Schenck v. United States, 249 U.S. 47, 52 (1919).

110 "[T]he constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its 'social value' ... vary with the circumstances." See Pacifica, 438 U.S. at, 747.

111 See id.

[112] See Ginsberg, 390 U.S. at 636.

[113] See e.g. Ginsberg, 390 U.S. at 636; Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975); Ferber, 458 U.S. at 756 (1982).

[114] See Cohen, 403 U.S. at 20.

[115] See Miller, 413 U.S. at 15.

[116] See Ginsberg, 390 U.S. at 638.

[117] Miller, 413 U.S. at 15.

[118] Ginsberg, 390 U.S. at 638.

[119] Id.

[120] Id. at 639 (quoting Prince v.Massachusetts, 321 U.S. 158, 170 (1944)).

[121] See Ginsberg, 390 U.S. at 638.

[122] See, e.g., Erznoznik, 422 U.S. at 212.

[123] Reno v. ACLU, 512 U.S. 844, 875 (1997).

[124] See e.g. Consolidated Edison Company of New York, Inc., 447 U.S. at 534; Schad, 452 U.S. at 68; Sable Communications of California, Inc., 492 U.S. at 126.

[125] See Ginsberg, 390 U.S. at 639; Ferber, 458 U.S. at 756-57.

[126] See Ginsberg, 390 U.S. at 642-43 (1968).

[127] See e.g. Ginsberg, 390 U.S at 639; Ferber, 458 U.S. at 756-57; Sable Communications of California, Inc, 492 U.S. at 126.

[128] See Ginsberg, 390 U.S. at 637.

[129] Id. at 640-41 (quoting Prince, 321 U.S. at 165).

[130] See Ginsberg, 390 U.S. at 643-45.

[131] See id.

[132] See id. at 634-36.

[133] Butler v Michigan, 352 U.S. 380 (1957).

[134] Id.

[135] Id. at 383.

[136] Id.

[137] See Reno v. ACLU, 521 U.S. 844 (1997).

[138] See id.

[139] Ferber, 458 U.S. at 768 (1982) (quoting Village of Schaumburg v. Citizens for a Better Environment, 444 U.S.620, 634 (1980).

[140] See Erznoznik, 422 U.S. at 216; Ferber, 458 U.S. at 770.

[141] Ferber, 458 U.S. at 770 (quoting CSC v. Letter Carriers, 413 U.S. 548, 580-81 (1973)).

[142] See Erznoznik, 422 U.S. 205, 216 (1975).

[143] See id. at 217-218.

[144] See id. at 216-17.

[145] Id. at 213.

[146] See id. at 213.

[147] Id. at 213-14.

[148] 458 U.S. at 766

.

[149] See id. at 773-74

.

[150] Id. at 773.

[151] See id.

[152] See id. at 773-74.

[153] See Winters v. People of State of New York, 333 U.S. 507, 509-510 (1948).

[154] Id.

[155] Id. at 508.

[156] Id. at 519.

[157] Id.

[158] See id.

[159] See id.

[160] See Reno 521 U.S. at 868 (citing Pacifica 438 U.S. at 742-743).

[161] See id. (citing Pacifica 438 U.S. at 744-748).

[162] Reno, 521 U.S. 844 (1997); Sable Communications of California, Inc., 492 U.S. 115 (1989); Pacifica, 438 U.S. 726 (1978).

[163] 438 U.S. 726 (1978).

[164] See id. at 746-47.

[165] Id. at 748-49.

[166] See id. at 748.

[167] See id. at 750.

[168] See id.

[169] 492 U.S. 115 (1989).

170 Id. at 127.

171 Id. at 127-28.

172 See id. at 126.

173 See id. at 131.

174 521 U.S. 844 (1997).

175 See id. at 859.

176 See id. at 885.

177 See id.

178 See id. at 877.

179 See id. at 868.

180 See U.S. CONST. amend. I.; see also Joseph Burstyn, Inc. v. Wilson et al. 343 U.S. 495, 501 (1952); Schad, 451 U.S. 61 (1981); Texas v. Johnson, 491 U.S. 397 (1989); Ward, 491 U.S. at 790; McCollum et al. v. CBS Inc., 202 Cal. App. 3d 989, 998 (1988).

181 Ward, 491 U.S. at 790.

182 491 U.S. 781 (1989).

183 See Kahan, *supra* note 14, at 2583-87.

184 See Kahan, *supra* note 14, at 2586.

185 See generally Kahan, *supra* note 14, at 2583.

186 Kahan, *supra* note 14, at 2589 (citing Sally B. Donnelly, *The Fire Around the Ice*, TIME, June 22, 1992, at 66; Richard Harrington, *KRS-One's Hard-Hitting Attack on Injustice*, WASH. POST, Sept. 21, 1989, at C1; David Mills, *Pop Recordings; Public Enemy as Icon; Setting the Standard for Afro-Centric Rap*, WASH. POST, Sept. 29, 1991, at G1.

187 See generally Kahan, *supra* note 14, at 2583.

188 See Ward, 491 U.S. at 790.

189 Soundgarden v. Eikenberry, 871 P.2d 1050, 1055 (1994).

190 See id.

191 Skywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla., 1990).

192 See id. at 591.

193 See Luke Records, Inc. v. Navarro, 960 F.2d 134, 136-37 (11th Cir. 1992).

194 See id. at 136.

195 See id.

196 Id. at 137.

197 See id. at 136-37.

198 Id. at 137.

199 See id. at 136.

200 See Skyywalker Records, 739 F. Supp. at 591.

201 See Luke Records, Inc., 960 F.2d at 139.

202 Id. at 138.

203 Id. at 135.

204 See Miller v. California, 413 U.S. 15 (1973); Ginsberg v. State of New York, 390 U.S. 629 (1968).

205 See Ginsberg, 390 U.S. 629 (1968).

206 SAN ANTONIO TEX. Ordinance 61,850 (Nov. 14, 1985).

207 Ginsberg, 390 U.S. at 639.

208 SAN ANTONIO TEX. Ordinance 61,850 (Nov. 14, 1985).

209 See Ginsberg, 390 U.S. at 639.

210 Bantam Books, Inc., et al. v. Sullivan et al., 372 U.S. 58, 66 (1963).

211 Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 195 (1983).

212 Bantam Books, Inc. v. Sullivan et al., 372 U.S. 58, 66 (1963).

213 Ferber, 458 U.S. at 756.

214 See Clark, *supra* note 14, at N286.

215 See Mas M.I.C., *Censors ask for Concert Ratings* (last visited April 14, 2000) <http://www.ultranet.com/~crowleyn/conratings.html>.

216 Ferman, *supra* note 8.

217 Clark, *supra* note 14, at 1516-17 (citing Cohen, 403 U.S. at 20).

218 Id.

219 See id.

220 But see Skyywalker Records, 739 F. Supp. at 594-96.

221 Clark, *supra* note 14, at 1519.

222 See id.

223 See Luke Records, Inc., 960 F.2d at 137.

224 Clark, *supra* note 14, at 1516-17.

225 Id. at N286 (citing Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 1367-68 (5th Cir. 1980)).

[226] Ginsberg, 390 U.S. at 638.

[227] See Ward, 491 U.S. at 790.

[228] See 1999 Bill Text MI S.B. 239.

[229] Renzetti, *supra* note 1, at A1

[230] Id.

[231] Tony Morton, *Let Parents Rate Concerts*, OMAHA WORLD-HERALD, August 30, 1998.

[232] Id.

[233] See Sarah Hollander, *Concert-rating Legislation doesn't Play Under the Proposal, Local Governments Could Require Parents to Escort Children Under 18 to Concerts Deemed Indecent*, THE GRAND RAPIDS PRESS, June 9, 1998.

[234] See Linda Deckard, *Mich. Senator's Fight for Concert-rating System Topic At Conference*, AMUSEMENT BUSINESS, October 5, 1998.

[235] Neil Strauss, New York Times News Service, *Concert-ratings: Salvations or Show-stopper*, PORTLAND PRESS HERALD, December 14, 1997, at 1E.

[236] Ed Golder, *Van Adel Bashes Concert Ratings Bill; A Letter Written by the Local Arena's Namesake Urges the Government to Avoid 'Sweeping, Knee-jerk Regulation,"* THE GRAND RAPIDS PRESS, June 18, 1998.

[237] See Strauss, *supra* note 235, at 1E.

[238] See id.

[239] See Swope v. Lubbers, 560 F. Supp. 1328, Appendix 1 (Mich. Dist. Ct. 1983).

[240] See id.

[241] See id.

[242] Id.

[243] Robert Kirby, *Warning: This Column Has Not Been Rated*, THE SALT LAKE TRIBUNE, July 29, 1999, at B1.

[244] See id.

[245] See id.

[246] See id.

[247] Id.

[248] See id.

[249] See id.

[250] Ferman, *supra* note 8.

[251] Id.

[252] See Morton, *supra* note 231.

[253] Ferman, *supra* note 8

[254] See Renzetti, *supra* note 1, at A1.

[255] See id.

[256] See id.