9-1-2002

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Let it Be: A Comparative Study of the Content Regulation of Recorded Music in the United States and the United Kingdom

Adam L. Fernandez

Abstract:

The focus of this comment is on the current methods of regulating the content of recorded music in the United States and the United Kingdom. This comment details the historical background of content regulation in the United States paying particular attention to the issues of censorship, the First Amendment protection of free speech and expression, recording industry self-regulation and the regulatory authority of the Federal Communications Commission. This comment then addresses the historical background and current method of content regulation of recorded music in the United Kingdom. The comment concludes by comparing the similarities and differences between the two systems and some conclusions are drawn regarding the various methods of content regulation in the United States and the United Kingdom.

I. Prologue

The Beatles can largely be credited with the sudden mass popularity of rock and roll music in both the United States and the United Kingdom in the 1960’s. The Beatles experienced unparalleled success in the early 60’s and came under extremely close public scrutiny as well. As a result of this scrutiny, the Beatles’ song lyrics were interpreted and reinterpreted by critics and fans worldwide. However, the reactions on both

1. See The Beatles, Let it Be, on LET IT BE (EMI Records 1970).
2. J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2003. The author would like to thank Peter Hilton-Kingdon for his unwavering assistance in the production of this comment, Katherine E. Lovette for her steadfast support throughout the drafting experience, and his family for their continued love and support.
4. See id.
5. See id.
sides of the Atlantic Ocean to songs such as "Lucy in the Sky With Diamonds" and "With a Little Help From My Friends" were quite different. Both songs have been interpreted as being almost exclusively about drugs and drug use; yet, critics in the United States reacted particularly negatively to such interpretations while the reaction in the United Kingdom was rather indifferent. How could two countries with such similar historical backgrounds respond so differently to the content of these types of songs?

II. Introduction

Recorded music is everywhere in the modern world. From sources such as radio, television, film, and the Internet, recorded music has pervaded every aspect of modern life. The content of recorded music has often been a hot topic of discussion both within and outside of the United States. Since the first recordings were made, individuals have recorded things that some people did not find appropriate.

The focus of this comment is on the current methods of regulating the content of recorded music in the United States and the United Kingdom. First, this comment will detail the historical background of content regulation in the United States, paying particular attention to the issues of censorship, the First Amendment protection of free speech and expression, recording industry self-regulation and the regulatory authority of the Federal Communications Commission. There will then be a discussion on the historical background and current method of content regulation of recorded music in the United Kingdom. Finally, this comment will examine the similarities and differences between the two systems and draw some conclusions regarding the various methods of content regulation in the United States and the United Kingdom.

III. Content Regulation of Recorded Music in the United States

A. Historical Background

United States citizens with conservative viewpoints and political

6. See id. at 242.
7. See id.
8. I stress "recorded music" here, as the regulation of live and other kinds of music is beyond the scope of this comment. For a recent examination of two local ordinances regulating live music performances, see Deborah Cazan, Concerts: Rated or Raided? First Amendment Implications of Concert-Rating, 2 VAND. J. ENT. L. & PRAC. 170 (2000).
9. For examples, see Bruce Springsteen’s “I'm on Fire;” Prince’s “Darling Nikki” and “Jack U Off;” George Carlin’s monologue “Seven Dirty Words;” etc.
10. The author understands that the word “conservative” carries with it all kinds of
power have always tried to regulate the content of popular music,\textsuperscript{11} despite the fact that the First Amendment of the United States Constitution provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press."\textsuperscript{12} This section of the comment will address the historical background of the regulation of popular music in the United States.

Popular music with its lyrical content, has always sparked intense debate in the United States.\textsuperscript{13} From the initial attack on Elvis Presley in the 1950s, to the current debate over the value of the works of artists such as Eminem\textsuperscript{14} and Marilyn Manson,\textsuperscript{15} the attempt to regulate the content of popular music has been a common theme in the United States for over a half-century.\textsuperscript{16}

In the 1950s, rock and roll music was seen as a threat to conservative American culture and was characterized as "the Devil's language."\textsuperscript{17} The church, especially in the Southern United States, was at the forefront of the attack because it saw rock and roll as a method for African-Americans to corrupt the white youth of their communities.\textsuperscript{18} From church-led boycotts, to record burning, to the banning of concert performances in certain cities, rock and roll music was generally denigrated for its perceived rebellious attitude towards moral society and its apparent sexual content.\textsuperscript{19}

By the 1960s, rock music had become firmly established as part of

\textsuperscript{11.} I admit "popular music" has a broad meaning, but for the purposes of this comment popular music can mean any number of specific musical genres such as rock and roll, pop, hip-hop, gangsta rap, jazz, etc. Obviously, in recent years, the content of rock music, hip-hop, and gangsta rap have been the most eagerly attacked by would-be censors.

\textsuperscript{12.} U.S. CONST. amend. I.


\textsuperscript{14.} See generally, David Germaine, Regulating Rap Music: It Doesn't Melt in Your Mouth, 11 J. ART & ENT. LAW 83 (2001) (discussing rap artist Eminem and the First Amendment issues surrounding the possible curtailment of his music).

\textsuperscript{15.} See Cazan, supra note 8, at 170, 183.

\textsuperscript{16.} See MARTIN & SEGRAVE, supra note 13.


\textsuperscript{18.} See H. LONDON, CLOSING THE CIRCLE: A CULTURAL HISTORY OF THE ROCK REVOLUTION (1984), (according to one commentator, the early opposition to rock music was connected to its perceived role in a supposed African-American conspiracy to distort the minds of the nations white youth).

\textsuperscript{19.} See Goodchild, supra note 17, at 132.
American culture, but the attacks continued due largely to the new political nature of the music's lyrics.\textsuperscript{20} Once again, the music became the victim of pressures from both within and outside the recording industry. Although artists were pressured to change controversial lyrics and rock concerts were discouraged, the music continued to be produced.\textsuperscript{21}

The 1970s saw a continued increase in the amount of illegal drugs coming into the country and some individuals drew a correlation between rock music and the increase in drug use by the nation's youth.\textsuperscript{22} Critics have often blamed the content of rock music for society's ills. For example, in an address given at a dinner in September 1970, Vice-President Agnew advised paying closer attention to the lyrics of rock music and claimed that the lyrics of rock music were nothing more than "blatant drug-culture propaganda."\textsuperscript{23} The Vice-President's comments resulted in an official Public Notice from the Federal Communications Commission ("FCC") to radio station licensees reminding them of their duty not to broadcast drug-centered lyrics.\textsuperscript{24}

\begin{itemize}
\item[20.] Id. at 132-33.
\item[21.] Id.
\item[23.] Id. at 330-31 nn.16-17.
\end{itemize}

\textbf{F.C.C. 71-205}

Licensee Responsibility To Review Records Before Their Broadcast

A number of complaints received by the Commission concerning the lyrics of records played on broadcasting stations relate to a subject of current and pressing concern: the use of language tending to promote or glorify the use of illegal drugs [such] as marijuana, LSD, "speed," etc. This Notice points up the licensee's long-established responsibilities in this area. Whether a particular record depicts the dangers of drug abuse, or, to the contrary, promotes such illegal drug usage is a question for the judgment of the licensee. The thrust of this Notice is simply that the licensee must make that judgment and cannot properly follow a policy of playing such records without someone in a responsible position (i.e., a management level executive at the station) knowing the content of the lyrics. Such a pattern of operation is clearly a violation of the basic principle of the licensee's responsibility for, and duty to exercise adequate control over, the broadcast material presented over his station. It raises serious questions as to whether continued operation of the station is in the public interest, just as in the case of a failure to exercise adequate control over foreign-language programs.

In short, we expect broadcast licensees to ascertain, before broadcast, the words or lyrics of recorded musical or spoken selections played on their stations. Just as in the case of the foreign-language broadcasts, this may also entail reasonable efforts to ascertain the meaning of words or phrases used in the lyrics. While this duty may be delegated by licensees to responsible employees, the licensee remains fully responsible for its fulfillment. Thus, here as in so many other areas, it is a question of responsible, good faith action by the public trustee to whom the frequency has been licensed. No
Efforts to regulate and restrict the content of popular music continued and increased in the 1980s with the advent of Music Television ("MTV") and the proliferation of music videos.\(^{25}\) Various organizations were created to address the lyrics that were being graphically exhibited through television which some perceived as obscene and harmful to the nation's younger population.\(^{26}\) This campaign succeeded to a certain degree but the debate regarding the content of music continued through the 1990's and is still important today.

The recording industry and the artists who produce music today are still facing continued attacks from public interest groups and the United States government. One commentator expressed that these censorship activities "threaten to silence a vibrant medium of political and social expression."\(^{27}\)

**B. First Amendment Issues**

Popular music has been deemed a form of expression that is protected by the First Amendment.\(^{28}\) As such, limitations may not be placed on the content of popular music unless that content falls within certain categories of speech defined by the Supreme Court, such as obscenity.\(^{29}\) To fully understand the methods employed by the United States government to limit the content of popular music it is necessary to examine the basic structure of First Amendment law. Although not always thought of as "speech," the Supreme Court has found rock music's content within the definition of speech that falls inside the protection of the First Amendment.\(^{30}\) The First Amendment protections important to the regulation of music may be broken down into a discussion of the special rules

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25. See Goodchild, supra note 17, at 133.
26. See id. at 133-34. See also infra Section II(c) of this comment.
27. Id. at 134.
29. See Miller v. California, 413 U.S. 15 (1973) (leading case on obscenity and the test used by the United States Supreme Court to identify what is obscene).
30. See Ward, 491 U.S. at 789-90.
regarding obscenity and indecent speech and a discussion concerning the special rules that have been created for the protection of children.

1. Basic First Amendment Protections

The right of freedom of speech is widely considered to be one of the most fundamental rights guaranteed by the Constitution. The United States Supreme Court has stated that the goal of the First Amendment is to ensure that discussion throughout the nation remains "uninhibited, robust, and wide-open." This idea rests heavily on Justice Holmes' famous dissenting opinion in Abrams v. United States, where he expressed his belief that freedom of speech is essential to preserving a "marketplace of ideas" in the United States. As a result, in many instances the Government has been limited in its ability to restrict the free expression of ideas. In addition, the rights of minorities to express their views have historically been protected, and the government may not "restrict expression because of its message, its ideas, its subject matter, or its content." Unpopular, offensive, or controversial speech may not be restricted. In 1949, the Supreme Court expressed the fundamental policy behind the freedom of speech. The Court provided that, "speech may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

Given the importance placed on the right of free speech in our society, speech is completely protected unless it presents a "clear and present danger." Today this test is commonly understood to mean that speech "directed to inciting or producing imminent [danger or] lawless action and [that] is likely to produce such action" is not protected by the First Amendment.

31. See Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (explaining that freedom of speech is in a special position); Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) (describing freedom of speech as a fundamental personal right).
35. See Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (noting that people are guaranteed a "right to express any thought, without government censorship.")
36. See Texas v. Johnson, 491 U.S. 397, 412-13 (1989) (holding that a government may not prohibit expression of idea on grounds that the public finds idea offensive or disagreeable.)
38. Id. at 4.
Amendment. For a famous example, the First Amendment could not be used to protect the individual who shouts "fire" in a crowded movie theatre when there is no fire.

Speech that does not fall under the "clear and present danger" test and that does not fall under any of the enumerated exceptions (to be explained later) may only be subject to narrowly tailored, content-neutral time, place, and manner restrictions. Therefore, the Government could not limit the rights of picketers simply because it did not like or agree with the beliefs of the picketers. The government is also prohibited from restricting speech simply because of its controversial subject or nature.

However, the Supreme Court has removed some speech from First Amendment protection even when "imminent" danger is not "likely" as a result of the expression. In 1942, the Court held that the First Amendment should not be used to protect speech lacking in social value. In the Court's opinion, such speech included "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Since then however, profane and libelous speech has been removed from the unprotected classification, and the Court's holding concerning "fighting words" has been severely weakened. Obscenity is still considered unprotected speech under the First Amendment, and therefore may be regulated by the Government.

40. Id. at 447 (emphasis added) (citations omitted).
44. See Boos, 485 U.S. at 318-19; Mosley, 408 U.S. at 99.
45. See Consolidated Edison, 447 U.S. at 536; Virginia State Bd. of Pharmacy, 425 U.S. at 771.
47. Id. at 571-72 & n.4 (citing CHAFFEE, FREE SPEECH IN THE UNITED STATES 149 (1941)).
48. Regarding libel, see N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("libel can claim no talismanic immunity from constitutional limitations"). On profanity, see Cohen v. California, 403 U.S. 15, 25-26 (1971) ("[T]he state may not, consistently with the First and Fourteenth Amendments, make the simple display...of [an] expeditious a criminal offense.").
49. Compare Chaplinksy, 315 U.S. at 569 (upholding defendant's conviction for calling police officer "damned racketeer" and "damned fascist") with Lewis v. City of New Orleans, 415 U.S. 130, 131 (1973) (reversing defendant's conviction for calling police officer "you god damn m[other] f[ucking] police").
2. Obscenity

The first case in which the Supreme Court addressed the constitutionality of regulating obscene speech was *Roth v. United States*. The Court concluded that obscenity should be determined by inquiring "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." In addition, the majority opinion found obscenity to be without "redeeming social importance." The court removed obscenity from First Amendment protection and thus, made obscene speech subject to governmental regulation. However, the Court did not include all representations or discussions of sex in its definition of obscenity. In addition, the Court had previously held in *Butler v. Michigan*, that adults' access to materials found harmful to children could not be overly burdened by governmental regulation.

In 1973, the Supreme Court handed down an opinion in *Miller v. California*, which reaffirmed its decision in *Roth* that obscenity is unprotected speech, and created a new three-part test for determining what is obscene. All three prongs of the *Miller Test* must be satisfied in order for the material in question to be found obscene. The guidelines elucidated by the Court are:

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

The Court continued by stating that the "utterly without redeeming social value" test would not be adopted as part of the new constitutional stan-
In addition, the Court provided some guidance to lower courts in how they should apply the new *Miller Test*.

First, "prurient" was to be determined by local community standards, as the Court felt that structuring obscenity proceedings around a "national community standard" would not work effectively. Later, the Court would hold that material that provokes "only normal, healthy sexual desires" did not fall under the scope of "prurient." The second prong of the test was limited to materials depicting or describing "hard core" sexually explicit conduct as defined by the laws of the regulating state. The Court continued by listing some examples of materials that would satisfy the second requirement of the test.

Needless to say, there was much criticism of the *Miller Test* at the time it was created, and the disapproval continues today. Nevertheless, the *Miller Test* is still good law in the United States. What this suggests is that the First Amendment must protect any speech or material that is not found to satisfy all three prongs of the obscenity test. Despite the vitality of the *Miller Test* today, however, the Supreme Court has allowed the regulation of indecent or offensive speech in certain contexts.

### 3. Indecent/Offensive Speech

Sexually explicit speech that does not satisfy the *Miller Test* may, nonetheless, be regarded as indecent or offensive. Unlike obscenity, however, in most cases the First Amendment protects indecent or offensive speech. The leading case on this subject is *Cohen v. California*, in which Cohen wore a jacket bearing the words "Fuck the Draft" into the Los Angeles County Courthouse. In determining that the jacket was not obscene, the Court concluded that the phrase was not "erotic"
and that it could not possibly be asserted that anyone would be "stimulated" by Cohen's method of expression. The Court determined that Cohen's message was largely political in nature and therefore should be protected by the First Amendment.

More importantly, the Cohen decision stands for the proposition that the Government should not be in the business of "cleans[ing] public debate to the point where it is grammatically palatable to the most squeamish among us." The Court continues by explaining that, "the Constitution leaves matters of taste and style ... largely to the individual." The Court concluded its opinion by warning against the dangers of the Government banning certain words from public discourse: "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." Thus, in Cohen the Supreme Court established that indecent and offensive speech was protected at least in the context of political speech.

In FCC v. Pacifica Foundation the Court created a limited exception, in the context of broadcasting, to the broad First Amendment protection for indecent or offensive speech that it had apparently created in Cohen. The case involved the mid-afternoon broadcast of a satiric monologue recorded by comedian George Carlin, entitled "Filthy Words," by a radio station owned by the Pacifica Foundation. In its opinion the Court held that the monologue, as broadcast, was indecent and that the FCC had the "authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting."

In addition, the Court made certain to emphasize the narrowness of its holding in Pacifica. Acknowledging that the recording was speech that fell within the meaning of the First Amendment, the Court pointed

69. Id. at 20.
70. See id. at 18.
71. Id. at 25.
72. Id.
75. See id. at 729-30. The monologue deals with the "seven dirty words": shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Id. at 751 (appendix to the opinion of the Court).
76. See id. at 741. "Indecent" is defined in the opinion as the "nonconformance with accepted standards of morality." Id. at 740.
77. Id. at 738.
78. See Pacifica Found., 438 U.S. at 750.
79. See id. at 744.
out that the monologue would be protected within other contexts. What made this particular monologue subject to FCC regulation was the "uniquely pervasive presence" of the broadcast media "in the lives of all Americans." Furthermore, the Court stressed the fact that broadcast airwaves confront citizens "in the privacy of [their] home[s]" and that broadcasting is "uniquely accessible to children." Thus, with *Pacifica* the Court created a limited exception to the broad protection provided to indecent and offensive speech by the holding of *Cohen*.

4. Special Rules Regarding Children

As the *Pacifica* holding indicates, the Court is especially concerned with the accessibility of indecent material to children. Historically, would-be censors have attempted to justify their efforts by adopting a "protect the children" ideology. Clearly, a distinction can be and has been made between the standards used for regulating the access of minors and adults to indecent material. States and municipalities have the authority to adopt stricter standards when it comes to protecting children as long as those same standards do not unduly interfere with an adult's ability to obtain the same indecent materials.

The leading case concerning this subject area is *Ginsberg v. New York*. In *Ginsberg*, the Court upheld the validity of a New York criminal obscenity statute that prohibited the sale of materials, defined as obscene, to minors under the age of seventeen, whether or not the same materials would fall under the definition of obscene for adults. Applying a modified test developed in the *Roth* and *Memoirs* opinions ("Roth/Memoirs Test"), the Court determined that the statute did not violate minors' First Amendment freedoms, taking into account the heightened sensitivity of children to indecent material. Essentially, the

80. See id. at 746.
81. Id. at 748.
82. Id. at 748-49.
85. Id.
86. See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).
88. See id. at 631, 633.
89. See supra text accompanying note 51.
90. See id. at 633, 637-38. The modified test reads: "representations ... [which] ... (i) predominantly appeal[] to the prurient, shameful or morbid interest of minors, and (ii) [are] patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) [are] utterly without redeeming social importance for minors." Id. at 633 (emphasis added).
Court simply lowered the standard for finding materials legally obscene as to minors but, unfortunately, the standard was still criticized for being unclear.91

The Supreme Court elaborated on their Ginsberg holding in Erznoznik v. City of Jacksonville.92 The issue in that case was the constitutionality of a local ordinance that prohibited the showing of films containing nudity at a drive-in movie theater when the theater’s screen was visible from a “public street or place.”93 In striking down the ordinance, the Court explained that, even under Ginsberg, the regulation of certain indecent material requires more than a mere vague showing of a general threat to the welfare of children.94 In addition, the Court concluded that: “all nudity cannot be deemed obscene even as to minors.”95 More importantly, the Court established that speech that is not obscene to children, or subject to some other legitimate regulation, could not be censored simply to shield children from pictures or expressions “that a legislative body thinks unsuitable for them.”96 Although dealing ostensibly with children’s exposure to nudity in motion pictures, the standard created by the Court in Erznoznik can be applied to the regulation of the content of popular music.

Unfortunately the standard for the regulation of obscene or indecent material as to children remains largely unclear.97 The standard was based on the Roth and Miller tests which themselves have been criticized for their over-subjectivity and vagueness.98 Since Ginsberg, though, the Supreme Court has upheld some regulations placed on the delivery of indecent material to minors. For example, in Pacifica, the Court upheld the regulation of a radio station because its broadcast was “uniquely accessible” to children.99 While in Sable Communications100, the Court acknowledged the governmental interest in protecting children from indecent telephone communications.101 Reiterating the standard it established in Butler, the Court stated that the legislation in question was not narrowly tailored to “serve the compelling interest of preventing minors

91. See id. The material at issue in Ginsberg was not obscene as to adults and was therefore still available to them. The Court in Ginsberg simply created a new standard by which statutes drafted to protect minors, from materials deemed indecent or obscene as to minors only, could pass constitutional scrutiny. Id.
93. Id. at 206.
94. See id. at 217-18.
95. Id. at 213.
96. Id. at 213-14.
97. See Clark, supra note 83, at 1513.
98. See supra text accompanying note 64.
99. See supra text accompanying notes 72-80.
100. See, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989).
101. See Sable at 131.
from being exposed to indecent telephone messages.  

Again, the standard created by the Court in its opinion is applicable to the regulation of musical content.

C. Self-regulation

Self-regulation is one of the main methods by which the content of recorded music is regulated within the United States. In theory, industry self-regulation is meant to provide an adequate amount of information about newly released recordings to parents, who are then supposed to use that information to make educated decisions about what records their children should own and enjoy. The success of this method in "regulating" musical content is open for debate. Depending on whom one asks, industry self-regulation has either provided the necessary information to parents so they can make educated decisions about what their children should be listening to, or the industry has not done enough in this regard. The Recording Industry Association of America has been at the forefront of the self-regulation discussion since the mid-1980s.

1. Recording Industry Association of America

The Recording Industry Association of America ("RIAA") is the main representative body of the recording industry within the United States. The RIAA represents the major national recording companies that produce, distribute, and sell almost ninety percent of the recorded music in the United States. As the RIAA's own homepage explains:

Our mission is to foster a business and legal climate that supports and promotes our members' creative and financial vitality. In support of our mission, we work to protect intellectual property rights worldwide and the First Amendment rights of artists; conduct consumer, industry and technical research; and monitor and review - state and federal laws, regulations and policies.

Thus, the RIAA is an important player in the struggle over content regulation among private individuals, public interest groups, some segments of the government, and the individual artists that create the music sold by the record companies nationwide.

102. Id.
104. See id.
105. Id.
a. Parental advisory labels

In 1985, the RIAA reached an agreement with the Parents Music Resource Center ("PMRC") and the National Parent Teacher Association ("NPTA") on a system of labeling records containing explicit lyrics. The agreement came after a number of Congressional hearings, initiated by Tipper Gore and the PMRC, were convened to provide an open forum for the discussion of the content of popular music recordings and possible regulation of such recordings. Threatened by potential Federal regulation, the record companies, through the RIAA, agreed to voluntarily label newly released recordings that contained lyrics describing explicit sex, violence, or substance abuse.

In an effort to fulfill their end of the agreement the RIAA has provided record companies with a standard label that is still being used today to indicate which recordings contain explicit lyrics. The recording companies work along with each of their individual artists to determine which releases require the use of the parental advisory label. In certain instances the record company has asked an artist to re-record certain songs or a portion of a song because the "creative and responsible view of the music demands such a revision."

The RIAA views its parental advisory program as an effective method of assisting parents in staying aware of the type(s) of music their children are purchasing. The labeling system allows parent(s) to take the responsibility for the music that their families are listening to without taking away from the core American values of freedom of speech and expression. A statement by Hilary Rosen, President and CEO of the RIAA, in April 2000, encapsulates the RIAA's position on the parental advisory labeling program:

The recording industry takes seriously our responsibility to help parents identify music with explicit lyrics. We believe that not all music

107. See id.
108. See id.
111. Id.
112. See id.
113. See id.
is right for all ages and our Parental Advisory Label was created for just that reason. Parents can use the label to identify music that may not be appropriate for their children and make the choice about when – and whether their children should be able to have that recording.\footnote{Parental Advisory, supra note 107.}

The RIAA also works closely with the National Association of Recording Merchandisers ("NARM") to coordinate and implement the labeling program.\footnote{See id.} Some retail merchandisers have in-store policies that prohibit the sale of labeled records to anyone under the age of eighteen, while some stores refuse to stock or sell records that have been labeled.\footnote{See id.}

The system is entirely voluntary on the part of the record companies and its biggest critics have focused on the fact that the program provides no definitive guidelines for the labeling of recordings.\footnote{FEDERMAN, supra note 106, at 92.} The RIAA provides no supervision of the program and allows any record company to use the label as long as it is affixed properly.\footnote{See id.} In addition, the program provides no system of penalties for companies that do not label records with explicit content.\footnote{See id.}

To address these concerns the RIAA along with NARM decided to organize a campaign to raise the standards and awareness of the Parental Advisory Program through advertising and merchandising and to formulate better guidelines for the implementation of the program.\footnote{Recording Industry Association of America, Recording Association of America Enhances Parental Advisory Program: Educational Campaign Designed for Parents, Educator and Music Consumers, available at http://www.riaa.com/PR_story.cfm?id=458 (last visited Aug. 31, 2002) [hereinafter Educational Campaign].} The campaign included a new parental advisory label brochure for parents, caregivers and educators; new in-store displays describing the program; and the creation of a public service announcement ("PSA") by producing legend, Quincy Jones.\footnote{See id.}

In addition, the RIAA provided the music industry and NARM with a new set of guidelines to assist them in determining which recordings should contain the parental advisory label.\footnote{The National Association of Recording Merchandisers Homepage, available at http://www.narm.com (last visited Oct. 28, 2001) [hereinafter NARM Homepage].} Rosen also emphasized that the number of recordings containing the label comprised a significantly small number when compared to the total number of records available in any given retail establishment.\footnote{Educational Campaign, supra note 119.}
Again, in analyzing the relative successes and failures of the RIAA's labeling program, it largely depends on whom you ask about the system. The system's critics maintain that the labels do not provide enough information about the content of the recording and that there are still no set guidelines for determining which albums should be labeled. The advocates of the RIAA's efforts assert that the sheer number of recordings made on an annual basis makes a formalized ratings system impracticable to implement and that no one should have the authority to regulate, censor, or limit the expression of the musical artists in the United States. While the advisory labels have provided warnings, they have done little to regulate the content of the albums produced. A method by which the content of recorded music has been successfully (and legally) regulated in the United States has been through the authority of the Federal Communications Commission.

D. Federal Communications Commission and Content Regulation

As stated above, the Federal Communications Commission ("FCC" or "Commission") has the authority to control the content of recorded music in the United States. The Commission is constitutionally permitted to regulate the kinds of music and other broadcast information that is sent out over the nation's airwaves. Thus, the FCC has an indirect process by which they can compel artists and, more importantly, record companies to "self-censor" the musical product they are distributing to the public. In order to understand the Commission's function in this process, one must first have an understanding of the FCC's history, organization and duties.

1. History, Organization and Duties of the FCC

The Federal Communications Commission was created by Congress through the Communications Act of 1934124 ("the Act") for the purpose, in part, of "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service ...."125 The Communications Act of 1934, ch. 652, § 301, 48 Stat. 1081, as amended, 47 U.S.C. § 151 et seq. (1994). See generally, A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 (Max D. Paglin ed., 1989) (provides a thorough examination of the Act's legislative history).

124. 47 U.S.C. § 151 (1994). The word "radio" in its all-inclusive sense also applies to television. Section 151 provides:

§ 151. Purpose of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communica-
tions Act authorizes the FCC to "make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of . . . [the Act]." 126

The FCC was created to serve as an independent federal agency directly responsible to the United States Congress. 127 The Commission is charged with regulating interstate and international communications via wire, radio, television, satellite and cable and its jurisdiction covers all fifty states, the District of Columbia and other United States' possessions. 128 Like most other federal agencies, the FCC adopts rules and regulations that it deems are necessary for the proper execution of its functions. 129 The Act created the FCC and provided the organizational structure under which the Commission still operates today. 130

The law provides that the FCC should be composed of five commissioners, each to be appointed by the President with the advice and con-

126. 47 U.S.C. at § 303(f). Section 303(f) provides:
§ 303. Powers and duties of Commission
Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;


128. See id.

129. 47 U.S.C. § 154(i) (1994). Section 154(i) provides:
(i) Duties and powers
   The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

sent of Congress, and that the President should designate one of the five as the chairman of the Commission. The commissioners are appointed to serve five-year terms, must be United States citizens, and may not have financial contacts or interests in the communications field. In addition, the statute states that only three of the commissioners may be members of the same political party at any given time.

131. 47 U.S.C. § 154(a) (1994). Section 154(a) provides:

§ 154. Federal Communications Commission
(a) Number of commissioners; appointment
The Federal Communications Commission (in this chapter referred to as the “Commission”) shall be composed of five commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman.

132. Id. § 154(c). Section 154(c) provides:
(c) Terms of office; vacancies
Commissioners shall be appointed for terms of five years and until their successors are appointed and have been confirmed and taken the oath of office, except that they shall not continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office; except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he succeeds. No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all the powers of the Commission.

133. Id. § 154(b)(1). Section 154(b)(1) applies to all “members of the Commission” and not just Commissioners, and provides: (b) Qualifications (1) Each member of the Commission shall be a citizen of the United States.

134. Id. § 154(b)(2)(A). Section 154(b)(2)(A) provides:
(b) Qualifications

(2)(A) No member of the Commission or person employed by the Commission shall—
(i) be financially interested in any company or other entity engaged in the manufacture or sale of telecommunications equipment which is subject to regulation by the Commission;
(ii) be financially interested in any company or other entity engaged in the business of communication by wire or radio or in the use of the electromagnetic spectrum;
(iii) be financially interested in any company or other entity which controls any company or other entity specified in clause (i) or clause (ii), or which derives a significant portion of its total income from ownership of stocks, bonds, or other securities of any such company or other entity; or
(iv) be employed by, hold any official relation to, or own any stocks, bonds, or other securities of, any person significantly regulated by the Commission under this chapter;

except that the prohibitions established in this subparagraph shall apply only to financial interests in any company or other entity which has a significant interest in communications, manufacturing, or sales activities which are subject to regulation by the Commission.

135. Id. § 154(b)(5) (1994). See also, FCC Handbook, supra note 126. Section 154(b)(5) provides:
(b) Qualifications

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The FCC, as it operates today, is organized by function and is composed of seven operating Bureaus and ten Staff Offices. The Bureaus are responsible for (amongst other things): (1) the processing of licensing applications and other filings; (2) the handling of complaints; (3) the implementation of investigations; (4) the drafting and execution of regulatory initiatives; and (5) participating in Commission hearings. The Commission’s offices provide administrative support services.

(5) The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission.

136. See FCC Handbook, supra note 126. See also 47 U.S.C. § 155(b) (1994). Section 155(b) provides:

(b) Organization of staff
From time to time as the Commission may find necessary, the Commission shall organize its staff into (1) integrated bureaus, to function on the basis of the Commission’s principal workload operations, and (2) such other divisional organizations as the Commission may deem necessary. Each such integrated bureau shall include such legal, engineering, accounting, administrative, clerical, and other personnel as the Commission may determine to be necessary to perform its functions.

137. See id, supra note 124. See also 47 U.S.C. § 303 (1991). Section 303(a-u) details the various “Powers and duties of the Commission.” Concerning each of the Commission’s seven Operating Bureaus, About the FCC provides:

Cable Services Bureau – serves as the single point-of-contact for consumers, community officials and the industry for cable-related issues.

Common Carrier Bureau – responsible for rules and policies concerning telephone companies that provide interstate, and under certain circumstances intrastate, telecommunications services to the public through the use of wire-based transmission facilities (i.e., corded/cordless telephones).

Consumer Information Bureau – communicates information to the public regarding Commission policies, programs and activities. This Bureau is also charged with overseeing disability mandates.

Enforcement Bureau – enforces the Communications Act, as well as the Commission’s rules, orders and authorizations.

International Bureau – represents the Commission in satellite and international matters.

Mass Media Bureau – regulates AM, FM radio and television broadcast stations, as well as Multipoint Distribution (i.e., cable and satellite) and Instructional Television Fixed Services.

Wireless Telecommunications Bureau – oversees cellular and PCS phones, pagers and two-way radios. This Bureau also regulates the use of radio spectrum to fulfill the communications needs of businesses, local and state governments, public safety service providers, aircraft and ship operators, and individuals.

138. See id. Concerning each of the Commission’s ten Staff Offices, About the FCC, supra note 124, provides:


Office of Communications Business Opportunities – provides advice to the Commission on issues and policies concerning opportunities for ownership and contracting by small, minority and women-owned communications businesses.

Office of Engineering And Technology – allocates spectrum for non-
Commission's Bureaus and Offices commonly work together and combine their resources to address important issues facing the Commission, even though they have unique functions.139

The Commission's Mass Media Bureau is responsible for the daily recommendation, drafting, and implementation of the rules and regulations that control radio and television stations.140 In adopting rules and regulations, the FCC must first notify and seek comment from the public.141 The Commission reports its draft regulations in a document called a "Notice of Proposed Rule Making," which specifically explains the proposed regulation and sets a deadline for the submission of public comments.142 After the Commission provides an opportunity to hear from the public, it may: (1) adopt the proposed rules; (2) adopt a modified version of the proposed rules; (3) ask for public comment on additional issues relating to the proposals; or (4) end the rule-making process without adopting any new rules.143

2. The FCC's Authority to Regulate Musical Content

The FCC has been granted fairly wide authority by Congress to regulate the content of recorded music at least as far as radio broadcasts

Government use and provides expert advice on technical issues before the Commission.
Office of The General Counsel - serves as chief legal advisor to the Commission's various Bureaus and Offices.
Office of Inspector General - conducts and supervises audits and investigations relating to the operations of the commission.
Office of Legislative and Intergovernmental Affairs - is the Commission's main point of contact with Congress and other governmental entities.
Office of The Managing Director - functions as a chief operating official, serving under the direction and supervision of the Chairman.
Office of Media Relations - informs the news media of FCC decisions and serves as the Commission's main point of contact with the media.
Office of Plans and Policy - serves as the Commission's chief economic policy advisor.
Office of Work Place Diversity - advises the Commission on all issues related to workforce diversity, affirmative recruitment and equal employment opportunity.

139. See id., supra note 127.
142. See id.
are concerned. Pursuant to its authority the FCC may fine, imprison, or revoke the station license from "[w]hoever utters any obscene, indecent, or profane language by means of radio communication." Thus, the FCC may regulate these categories of speech in the context of radio broadcasts, even though the First Amendment provides them some protection. Even though the FCC's regulations suppress speech that is ordinarily protected by the First Amendment, the constitutionality of this authority has been upheld on a number of occasions.

The Commission has provided simple guidelines to assist radio licensees to determine what they may broadcast. As noted earlier, obscene speech is not protected by the First Amendment and is prohibited from being broadcast at any time. To be considered obscene, the recording broadcast must satisfy the three-prong test created by the Court in Miller. In addition, as stated above, if the FCC determines that obscene material has been broadcast, they may punish the offending licensee pursuant to Title 18, Section 1464.

However, the Supreme Court has recognized that certain provocative subjects may not be prohibited completely by the FCC. The Court has acknowledged the right of broadcasters to present material that some members of the listening public may find unpopular or even offensive. In addition, music portraying disorder and violence may not be banned for that reason alone.

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   Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.
147. See Tallman v. United States, 465 F.2d 282 (7th Cir. 1972); Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966). See also Pacifica Found., 438 U.S. at 738 (upholding FCC's authority to regulate indecent speech).
149. See id.
150. See Miller v. California, 413 U.S. 15, 24 (1973). See also supra text accompanying notes 56-64.
151. See supra text accompanying note 143.
152. See Goodchild, supra note 17, at 185.
The Commission’s authority to regulate indecent speech can also be traced to Congress and the Supreme Court’s decision in *Pacifica Foundation*. The FCC has defined broadcast indecency as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.” Thus, indecent speech contains descriptions or depictions of offensive sexual or excretory activities that do not satisfy the obscenity standard and may not, therefore, be prohibited entirely by the FCC. However, the Commission may regulate so as to prohibit the broadcasting of indecent materials during the times of day when children may make up more of the listening audience than adults.

Conforming to the standard created by federal statute and federal court decisions, the FCC has adopted a rule whereby radio broadcasts that fit within the indecency definition and that are aired between 6:00 a.m. and 10:00 p.m. are subject to the Commission’s enforcement powers. The FCC has provided information regarding its enforcement procedures and for the filing of complaints on its website.

One commentator has suggested that the FCC’s authority to regulate popular music is a “significant threat” to the status of music as a protected form of expression. However, as noted by that same commentator, there exists several limitations on the Commission’s regulating authority. The anti-censorship provision of the Communications Act, the FCC’s exercise of discretion in allowing licensees to make their own programming decisions, and the general First Amendment limitations on federal regulatory power all serve to limit the Commission’s regulating authority.

Thus, after reviewing the history, organization, duties, and authority

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155. See supra text accompanying notes 141-44.
156. *Obscene Broadcasts*, supra note 145.
157. See id.
158. See id.
159. See id.
160. See id.
162. See id.

§ 326. Censorship

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

165. See id. at 187-88.
of the Federal Communications Commission, it is clear that the federal
government may indirectly regulate the content of recorded music and its
dissemination over the airwaves. Simply put, by regulating when certain
kinds of records may be broadcast, the FCC is controlling one of the
main avenues the recording industry advertises its latest musical releases.
Without the free advertising supplied by radio stations (and to a greater
extent today, music video), certain modern musical artists or groups
would not sell nearly as many records, which would subsequently hurt
the record companies’ revenues. Thus, by regulating broadcasting, the
FCC is indirectly wielding a mighty sword against certain types of musi-
cal content.

IV. Content Regulation of Recorded Music in the United Kingdom

A. Historical Background

As is the case in the United States, the set of fundamental freedoms
espoused through the United Kingdom’s democratic form of government
provides certain protections against the regulation of recorded music. This
section of the comment will discuss the historical background and
current system of media regulation in the United Kingdom.

The regulation of the various forms of media in the United King-
dom has developed over many years and has illustrated the ambiguous
position the British Government takes toward content regulation. This
ambiguity has created a potential for both significant public benefits and
great civic difficulties. In addition, the government’s attitude raises
important issues about the independence of the broadcast media from
governmental limitations and the standards by which the content of
broadcasts is regulated.

166. A complete examination of the forms and processes of the British Government
are beyond the scope of this comment. For general information regarding the British
System of Government, see ANTHONY H. BIRCH, THE BRITISH SYSTEM OF GOVERNMENT
(7th ed. 1986) and RODNEY BRAZIER, CONSTITUTIONAL PRACTICE: THE FOUNDATIONS OF
BRITISH GOVERNMENT (3d ed. 1999). For a discussion of the incorporation of the Euro-
pean Convention on Human Rights into British domestic law, see RICHARD GORDON QC
& RICHARD WILMOT-SMITH QC, HUMAN RIGHTS IN THE UNITED KINGDOM (1996). For an
Eastern Indian discussion of the future of human rights in the United Kingdom, see
RABINDER SINGH, THE FUTURE OF HUMAN RIGHTS IN THE UNITED KINGDOM: ESSAYS ON
LAW AND PRACTICE (1997).

167. See id.

168. See id.

169. Recognizing that “broadcast media” is rather broad, for the purposes of this
comment I am primarily concerned with the regulation of broadcast radio.

170. See id.
Since the British Broadcasting Corporation's ("BBC" or "Corporation") establishment in 1926, its programming has been supervised by a Board of Governors.\textsuperscript{171} The Board of Governors is charged with maintaining the integrity of the Corporation's royal charter and with making certain that its broadcasts comply with its special licensing agreement.\textsuperscript{172} However, since its creation, the Board of Governors has been made up of almost entirely governmental appointees,\textsuperscript{173} which suggests its lack of independence from governmental scrutiny and influence.

With the advent of commercial broadcasting on a wider scale in the 1950's, the British Government altered its attitude towards the regulation of the media.\textsuperscript{174} The decision was made in Parliament to change its regulatory scheme to police through direct statutory regulation as opposed to the use of the criminal law.\textsuperscript{175} The Independent Broadcasting Authority ("IBA") was created by statute in 1954 to supervise and license the growing number of independent broadcasters.\textsuperscript{176} More specifically, the IBA was designed to: (1) ensure that programming would not offend the general public's good taste, decency or public feeling; (2) ensure that programming would not encourage or incite crime or lead to disorder; (3) ensure that the news was presented with precision and objectivity; and (4) ensure that the objectivity of the news was preserved especially in situations concerning political, industrial, or public policy matters.\textsuperscript{177} When the BBC's Board of Governors decided in 1964 to follow the regulations set out by the IBA, all British broadcasting (both public and independent) was subject to the same standards.\textsuperscript{178}

Today, public and independent broadcasters are once again regulated by different bodies and by varying standards. The BBC is still supervised by the Board of Governors. Through BBC's license agreement with the British Government, which promised to promulgate and enforce its own standards, codes of programming and scheduling requirements to ensure the continued protection of good taste and decency on the public airwaves.\textsuperscript{179} The Broadcasting Standards Commission ("BSC"), set up by the Broadcasting Act of 1996,\textsuperscript{180} also monitors the Corporation al-

\textsuperscript{171} INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN 231 (Christopher McCrudden & Gerald Chambers eds., 1994).
\textsuperscript{172} See id.
\textsuperscript{173} See id.
\textsuperscript{174} See CLAYTON & TOMLINSON, supra note 164, at 1042-43. The British define "media" as any television or radio broadcast in addition to printed periodicals and motion pictures. Id.
\textsuperscript{175} See id. at 1043.
\textsuperscript{176} See Broadcasting Act, 1981, § 4 (Eng.).
\textsuperscript{177} See CLAYTON & TOMLINSON, supra note 164, at 1043.
\textsuperscript{178} See id.
\textsuperscript{179} See id.
\textsuperscript{180} See Broadcasting Act, 1996, § 106 (Eng.).
though the BSC’s rulings are not legally binding on the BBC.\textsuperscript{181}

Presently, independent broadcasters fall within the boundaries of the Broadcasting Acts of 1990 and 1996.\textsuperscript{182} Independent radio is now regulated by the Radio Authority, which has been endowed with licensing and regulatory authority by the Broadcasting Acts.\textsuperscript{183} The Radio Authority is responsible for planning frequencies, awarding licenses, regulating programming and advertising, and supervising the radio station ownership system.\textsuperscript{184} In accordance with its statutory authority, the Radio Authority plays an active role in ensuring a system of high standards and quality assurance for the whole of independent radio in the United Kingdom, much like the FCC sets the standards for radio broadcasts in the United States.\textsuperscript{185}

The Broadcasting Standards Commission and the Radio Authority are the main method by which the content of recorded music is controlled within the United Kingdom. These two administrative bodies were created by the British Parliament and endowed with important powers over broadcast radio. Only by examining these two authorities and how they function can one truly understand the current method of content regulation in the United Kingdom and how they relate to the system of indirect regulation and industry self-regulation in the United States.

\textbf{B. Media Controls}

Both the Radio Authority and the Broadcasting Standards Commission fall under the authority of the Department for Culture, Media, and Sport. This Parliamentary department was created out of the Department of National Heritage in July 1997, and is the youngest governmental department.\textsuperscript{186} The Department for Culture, Media, and Sport “has policy responsibility for museums, galleries and libraries, the built heritage, the arts, sport, education, broadcasting and the media and tourism, as well as the creative industries, the Millennium and the National Lottery.”\textsuperscript{187} This broad grant, added to the number of players that may regulate content in the United Kingdom, is similar to the number of players charged with

\begin{footnotes}
  \footnotetext[181]{See \textsc{Clayton} & \textsc{Tomlinson}, \textit{supra} note 164, at 1043.}
  \footnotetext[182]{See Broadcasting Act, 1990, (Eng.) \textit{and} Broadcasting Act, 1996, (Eng.).}
  \footnotetext[183]{See \textsc{Clayton} & \textsc{Tomlinson}, \textit{supra} note 164, at 1043.}
  \footnotetext[185]{See id.}
  \footnotetext[186]{See Department for Culture, Media and Sport, \textit{Homepage, available at} http://www.culture.gov.uk/role/index.html (last visited Aug. 31, 2002) [hereinafter \textit{Media Homepage}].}
  \footnotetext[187]{See id.}
\end{footnotes}
regulating content in the United States.

1. Radio Authority

The Radio Authority is the statutorily created body responsible for the licensing and regulation of independent, commercial radio within the United Kingdom. The Secretary of State for Culture, Media, and Sport appoints the Chair, Deputy Chair, and other Members of the Authority and there are forty-four full and part-time staff members. The Authority is charged with publishing codes of conduct that licensees must follow in order to avoid various types of sanctions. The codes cover topics such as programming, sponsorships, and advertising while the sanctions range from broadcast apologies (and/or corrections), to fines, to the shortening or revocation of a license. The Authority plays "an active role in the discussion and formulation of policies affecting the commercial radio industry and its listeners."

The Radio Authority’s various "codes" are required by statute and are drafted after wide consultation and review. The codes concern advertising and sponsorship, news and current affairs, programming, and local license engineering. The “Programme Code” covers “such matters as taste and decency, the portrayal of violence; accuracy, privacy . . . crime, terrorism and anti-social behavior . . . and the handling of complaints.” Similar to the FCC standard, the Radio Authority’s current “Programme Code” includes special provisions for the protection of children, provisions concerning “gratuitous or offensive language” (including song lyrics), sexual matters, and the portrayal of violence among a variety of other regulated areas. Pursuant to Section 91(2) of the Broadcasting Act of 1990, the Authority must take special care in drawing up their

189. See id.
190. See id.
191. See id.
192. See id.
194. See id.
195. See id.
rules so as to protect children from "harmful programming." The code provides that licensees must be "vigilant" in their programming choices so as to protect the greatest number of children under the age of eighteen (as defined by the code). In addition, the code specifies that adult access to material deemed unsuitable for children should not be inhibited.

Regarding profanity in song lyrics, the code provides that licensees must make "considered judgments" concerning the scheduling of certain songs, taking special care to avoid broadcasting such songs during times when the audience may be made up of more children than adults. The code also suggests the editing or re-mixing of certain songs so as to make them more appropriate for broadcast at certain times of the day. Concerning sexual matters, the Authority states that, much like offensive language, innuendo may be permitted if used sparingly and gratuitous vulgarity is never acceptable.

The Authority also acknowledges the public concern regarding the portrayal of violence and states in the Programme Code: "Violence must never be glorified or applauded." In regulating the use of violence in broadcasting, the code specifically mentions that the context in which the matter is broadcast is important, as is the cumulative effect of the entire broadcast. Again, the Broadcast Act of 1990 is cited as the underlying authorization for the Radio Authority to ensure that broadcast standards are maintained and that the interests of children are protected.

The Authority (along with the Broadcasting Standards Commission) is also charged with addressing any public complaints regarding programming, advertising, and sponsorship problems with respect to all non-BBC radio stations. The Authority has provided the means by which private citizens may petition it to perform an investigation into violations of its various codes. The Authority performs its independent investigations and publishes a quarterly bulletin concerning the complaints procedure that gives a full listing of all complaints filed and adju-

197. See id. at 16.  
198. See id.  
199. See id.  
200. See id. at 17.  
201. See Programme Code, supra note 193, at 17.  
202. See id.  
203. See id. at 18.  
204. See id.  
205. See id.  
207. See id.
2. Broadcasting Standards Commission

The Broadcasting Standards Commission was created by Parliament to handle issues of fairness and promulgate standards for broadcasting in the United Kingdom. Fairness issues are understood as broadcast practices that subject certain members or groups of the public to unfair treatment or intrude on their privacy. The standards drawn up by the BSC relate exclusively to matters of taste and decency in any public broadcast. Today, the BSC is the only organization with Parliamentary authority to regulate all television and radio broadcasting within the United Kingdom. The BSC has been charged with three main tasks: (1) to promulgate codes of conduct concerning broadcasting standards and fairness; (2) to investigate and adjudicate public complaints; and (3) to perform research on the subjects of standards and fairness in broadcasting and to publish their findings.

The codes drafted and implemented by the BSC are designed to provide guidance to all broadcasters on how to self-regulate their programming so as to conform to the public standards of taste and decency. In addition, the BSC performs research to monitor the changing attitudes of the British public concerning what it feels is acceptable for normal broadcast media. A number of research reports regarding the British public’s feelings concerning the depictions of sex and violence and the inclusion of “bad language” in television, radio, and other forms of media broadcasts. The BSC also maintains a system for handling citizen complaints concerning standards or fairness practices in broadcasting. However, unlike the Radio Authority and the FCC, the BSC does not have the same power to sanction broadcasters who have violated its standards or fairness principles. The BSC is accountable to Parliament through the Department of Culture, Media, and Sport and all

208. See id.
209. See Broadcasting Act, 1996, §§ 107, 108 (Eng.).
210. See Broadcasting Standards Commission, Homepage, available at http://www.bsc.org.uk/index1024.htm (last visited Aug. 31, 2002) [hereinafter BSC Homepage]. Although “unfair treatment” and “privacy invasions” are important issues concerning radio broadcasting, both topics are beyond the scope of this comment.
211. See id.
212. See id.
213. See id.
214. See id.
215. See BSC Homepage, supra note 207.
216. See id.
217. See id.
of its findings are included in an annual report to Parliament.\(^\text{218}\)

The BSC’s “Code of Standards” contains specific guidelines for broadcasters to follow, so they will not breach the “implied contract” between themselves and the listener as far as taste and decency are concerned.\(^\text{219}\) The standards contain a detailed description of the “Watershed” “which starts at 9:00 p.m. and lasts until 5:30 a.m., [and] is well established as a scheduling marker to distinguish clearly between programmes [sic] intended mainly for family viewing and those intended for adults.”\(^\text{220}\) The “Watershed” is a means by which the BSC, much like the FCC in the United States, may indirectly regulate what types of programs are broadcast when the audience of the station may be made up of more children or adults depending on the time of day. Although the BSC explains that there is no “Watershed” for radio broadcasts, it maintains: “caution should be exercised at the times children tend to listen, especially during breakfast programmes [sic].”\(^\text{221}\)

The “Code of Standards” continues, through a section devoted to “Taste and Decency,” to explain the boundaries of good taste in broadcasting and suggests how far those boundaries may be stretched without offending a great proportion of the audience.\(^\text{222}\) The Code concedes that matters of taste are not static but move over time and can vary greatly from one age group to another.\(^\text{223}\) In the final analysis, the BSC cautions against programming that would offend the public’s concept of decency and that considerations should be taken to avoid such transgressions.\(^\text{224}\)

There is one last point worth mentioning about the BSC’s “Code of Standards.” The Code contains a specific guideline for the regulation of contemporary song lyrics.\(^\text{225}\) The BSC suggests that “[c]are should be taken over material which glamorises [sic] crime and drug-taking, incites aggression, or debases human relationships.”\(^\text{226}\) Much like the approach taken by the Radio Authority and the FCC, the BSC is especially interested in limiting the amount of violence, sex and drugs included in the music that is broadcast, especially when it is likely to reach the ears of young children.

\(^{218}\) See id.


\(^{220}\) See id. at 15.

\(^{221}\) See id.

\(^{222}\) See id. at 16-20.

\(^{223}\) See id. at 16.

\(^{224}\) See BSC Codes, supra note 216, at 16.

\(^{225}\) See id. at 16.

\(^{226}\) See id.
V. Conclusions and a Comparison of Approaches

After examining the systems of content regulation of recorded music in the United States and the United Kingdom, it is important to discuss some of the similarities and differences between the two methods. Both countries have a long history of preserving the freedom of speech as a method of ensuring the continued vitality of their own system of democracy. As a result, both countries have chosen a system of more or less indirect regulation of musical content. Each country, however, for its own unique reasons, has chosen to allow certain types of governmental regulation in a variety of methods and contexts.

Clearly, both nations put a premium on each citizen's right to free speech and expression. The citizens of each country have come to recognize the free expression of ideas as a fundamental pillar of their democratic systems of government. As a result, both nations generally treat any kind of content regulation with great suspicion because of the fear that governmental agents will use their authority to suppress the free flow of ideas. With that understanding, however, both nations have allowed their respective governments to indirectly regulate the content of recorded music.

The United States has granted the Federal Communications Commission the authority to regulate what can be broadcast over the nation's airwaves, thereby indirectly regulating what artists and recording companies produce. At the same time, the PMRC's connections to high-ranking governmental officials provided the necessary pressure on the RIAA to create a system of self-regulation within the recording industry itself. The FCC's regulation of radio broadcasts and the RIAA's labeling program serve to regulate the content of music by taking away the opportunities for the individual artists and record companies to make a profit from what they produce. Both of these methods have been somewhat successful in indirectly regulating the content of recorded music in the United States.

In the United Kingdom, the Department of Culture, Media, and Sport is responsible for much the same kind of regulation as the FCC is responsible for in the United States. Through the Radio Authority and the Broadcasting Standards Commission, the British Government ultimately controls the content of recorded music, at least as far as it is to be broadcast over the nation's radio system. Both governmental organizations are responsible for creating rules by which the countries' broadcasters make decisions on what they will play and what they will not.

227. For a comprehensive analysis of the right to free speech in the United States and the United Kingdom, see ERIC BARENDT, FREEDOM OF SPEECH (1985).
play. Again, this pressure indirectly limits the music being produced for profit by the artists and recording companies.

One main difference between the approaches taken by the two nations is also worth discussing. Many helpful program standards that are frequently required in the United Kingdom and many other European countries, such as the requirement to broadcast the news and current affairs programs, are not looked upon with great favor in the United States. Opponents to such programming standards in the United States explain that such requirements would go against the near total prohibition in the United States against regulations based exclusively on content. The regulation of the organization of the media industry through the application of domestic anti-trust laws, for example, is looked upon much more favorably in the United States.

In the final analysis, both countries take similar paths to regulate the content of recorded music. Although some differences do exist in their respective methods, those differences can largely be attributed to the different historical and cultural developments in each country over the past one hundred years. Essentially, the content of recorded music is protected in both nations by a large body of law that holds the importance of the "marketplace of ideas" above the wishes of some members of society to sanitize musical expression. Somewhat ironically, although the British have a reputation in the United States for being fairly conservative and boring, the regulations in the United Kingdom appear to be less burdensome than those in the United States. It is currently uncertain whether the freedom allowed musical expression today will be maintained in the future; it seems likely that it will.
