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Anatomy of a Suicide: Media Liability for Audience Acts of Violence

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ANATOMY OF A SUICIDE: MEDIA LIABILITY
FOR AUDIENCE ACTS OF VIOLENCE

The first amendment provides that "Congress shall make no law... abridging the freedom of speech." 1 This constitutional guarantee of free speech and expression is not absolute, 2 for in the last forty years the United States Supreme Court has carved out certain limited classes of speech which may be prevented or punished by the state. 3 Modern first amendment interpretation requires the court to balance free speech values against the government's competing justifications for suppression. 4 When applied to the media, 5 the nature and implications of this balancing test present unique problems because of the media's pervasive role in the United States and the threat of a chilling effect on free speech. These problems are particularly evident in cases where liability is imposed on the media for audience acts of violence.

A recent California case, McCollum v. CBS, Inc. 6 confronts this conflict between freedom of speech and audience violence. In McCollum, the plaintiffs make an emotional argument in favor of media liability. In this case, teenager John Daniel McCollum ("John") committed suicide while he listened to the recorded rock music of John "Ozzy" Osbourne ("Osbourne"). John's parents brought a wrongful death action against Osbourne, CBS, Inc. and others involved in the production and distribution of Osbourne's recorded music alleging that the music and lyrics were the proximate cause of John's suicide. 7 The trial court sustained demurrers to all causes of action, and the court of appeal affirmed. 8 This case demonstrates how far courts will extend first amendment guarantees to protect artists, whose work is disseminated through the public media, from liability for audience acts of violence.

1. U.S. CONST. AMEND. I.
2. TRIBE, AMERICAN CONSTITUTIONAL LAW 792 (1988).
4. TRIBE, supra note 2.
5. The term "media" is used in a general sense and refers to companies which produce and promote books, motion pictures, newspapers, magazines, recorded music, radio and television.
7. Id. at 997, 249 Cal. Rptr. at 191.
8. Id. at 993-94, 249 Cal. Rptr. at 188-89.

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FACTS AND PROCEDURAL BACKGROUND

On Friday night, October 26, 1984, John listened repeatedly to side one of an album called *Blizzard of Ozz*, which contained the song "Suicide Solution." He also listened repeatedly to side two of an album called *Diary of a Madman*. "Ozzy" Osbourne, well known as the "mad man" of rock and roll, performed and recorded these albums. Osbourne is viewed as a cult figure by his many listeners, and his songs often focus on the chaos and confusion of life. John, who was 19 years old at the time, was struggling with alcohol abuse as well as serious emotional problems. He stacked Osbourne's albums on the turntable of the family stereo in the living room; he liked to listen to music there because the sound was more intense. He went into his bedroom to listen to the final side of Osbourne's two record set, *Speak of the Devil*, on a set of headphones. He then placed his father's .22 caliber handgun to his right temple and pulled the trigger, tragically taking his own life. When his body was discovered the next morning he was lying on his bed, still wearing the headphones. The stereo turntable was still running with the arm and needle riding in the center of the revolving record.

The action was originally filed in Los Angeles Superior Court on October 25, 1985 by John's parents, Jack McCollum and Geraldine Lugenbuehl ("plaintiffs"), with Jack McCollum acting as administrator of his son's estate. Plaintiffs named CBS Records and CBS, Incorporated (collectively "CBS"), "Ozzy" Osbourne, Jet Records, Bob Daisley, Randy Rhoads, Essex Music International, Ltd., and Essex Music International Incorporated as defendants and argued that these entities composed, performed, produced, and distributed the recorded music and

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16. Id. at 993, 249 Cal. Rptr. at 188.
17. These additional defendants did not appear and it is not clear whether or not they were ever served. Id. at 993-94, 249 Cal. Rptr. at 188 n.1.
lyrics which were the proximate cause of John's suicide. Plaintiffs' claims were based on theories of negligence, product liability and intentional misconduct.

On August 7, 1986, the trial court sustained general demurrers to all causes of action without leave to amend, finding that the first amendment was an absolute bar to plaintiffs' claims. However, the court granted plaintiffs permission to file a proposed second amended complaint to determine if the absolute bar could be overcome. In this amended complaint, plaintiffs alleged four specific violations.

In count I, plaintiffs argued that the defendants were negligent in the dissemination of Osbourne's recorded music and thereby aided, advised or encouraged John to commit suicide. Plaintiffs asserted that Osbourne's albums seemed to demonstrate a preoccupation with unusual, anti-social and even bizarre attitudes and beliefs. The words and music of Osbourne's songs often emphasized such things as satanic worship, the mocking of religious beliefs and death. The message Osbourne's music has often conveyed is that life is filled with nothing but despair and hopelessness and that suicide is an acceptable alternative to a life that had become unbearable. Plaintiffs further claimed that all of the defendants sought to profit, through their efforts to promote Osbourne's records, by cultivating his image as a "lunatic" rocker with the media and his fans.

In count II, plaintiffs alleged that the negligent dissemination of Osbourne's music created an "uncontrollable impulse" to commit suicide in the emotionally unstable teenager. They argued that Osbourne's musical message sought to appeal to an audience which included troubled adolescents and young adults who were having a difficult time coping with this transition period in their lives. Plaintiffs alleged that this specific target group was extremely susceptible to the external influence and directions from a cult figure, such as Osbourne, who had become a role model and leader for many of them. Plaintiffs declared that Osbourne and CBS knew that many of these teenagers were trying to cope with issues involving self-identity, alienation, spiritual confusion and even substance abuse. Thus, the defendants knew, or should have known, that it was foreseeable that the combination of the music, lyrics and hemisync

19. Id. at 994-95, 249 Cal. Rptr. at 189.
20. Id. at 997, 249 Cal. Rptr. at 191.
21. Id. at 995, 249 Cal. Rptr. at 189.
22. Id.
Plaintiffs argued in count III of their complaint that defendants' conduct "incited"\textsuperscript{26} John to commit suicide.\textsuperscript{27} Plaintiffs alleged that a "special relationship" of kinship existed between Osbourne and his avid fans.\textsuperscript{28} This relationship was underscored and characterized by the personal manner in which the lyrics were disseminated to the listeners. Osbourne often sings in the first person about himself and common adolescent problems, directly addressing the listener as "you." Thus, a listener could feel that Osbourne was talking directly to him as he listened to the music. Plaintiffs argued that this "relationship" and the lyrics' "message" that suicide was an acceptable alternative to an unbearable life led to John's suicide.

Count IV alleged that defendants violated Penal Code section 401\textsuperscript{29} which prohibits aiding, advising, or encouraging suicide,\textsuperscript{30} by the dissemination of Osbourne's recorded music and lyrics. In addition, plaintiffs alleged in all four counts that the defendants acted maliciously and oppressively and thus were liable for punitive damages.\textsuperscript{31} In short, plaintiffs proposed "that ideas which some judges and juries might find 'unsafe' or inappropriate for the most vulnerable among us . . . may be suppressed or their creators and publishers held civilly liable in damages."\textsuperscript{32}

In response, defendants claimed that the first amendment's guarantee of free speech barred plaintiffs' entire action irrespective of the theory of recovery.\textsuperscript{33} Defendants argued that the public dissemination of Osbourne's recorded music and lyrics did not, as a matter of law, negligently or intentionally invade any of plaintiffs' rights or constitute a

\textsuperscript{24} Hemisync tones are described as a process of sound waves which impact the listener's mental state. They are designed to stimulate certain brain waves, thus causing a listener to process the accompanying information at an increased rate by promoting a desired thought pattern. These tones are considered a type of subliminal persuasion. See Appellant's Opening Brief, \textit{supra} note 12, at 16-17.

\textsuperscript{25} \textit{McCollum}, 202 Cal. App. 3d at 997, 249 Cal. Rptr. at 191.

\textsuperscript{26} Incitement is defined as an arousing to action, sometimes to violence, mob action or riot, even to revolution. \textit{Ballein\textsuperscript{t}tine's Law Dictionary} 600 (3d ed. 1969).

\textsuperscript{27} \textit{McCollum}, 202 Cal. App. 3d at 997-98, 249 Cal. Rptr. at 191.

\textsuperscript{28} Id. at 996, 249 Cal. Rptr. at 190.

\textsuperscript{29} The code provides: "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony." \textit{Cal. Penal Code} § 401 (West 1988).

\textsuperscript{30} \textit{McCollum}, 202 Cal. App. 3d at 998, 249 Cal. Rptr. at 191.

\textsuperscript{31} Id. at 998, 249 Cal. Rptr. at 191.

\textsuperscript{32} See Respondent's Appellate Brief, \textit{supra} note 14, at 3.

\textsuperscript{33} \textit{McCollum}, 202 Cal. App. 3d at 998, 249 Cal. Rptr. at 191.
violation of Penal Code section 401. In addition, defendants argued that they could not be liable for negligence as they owed no duty to the plaintiffs and plaintiffs made no allegations that Osbourne or CBS specifically intended to cause John's suicide. The trial court sustained general demurrers to all causes of action. The court of appeal affirmed, holding that (1) musical compositions which allegedly expressed the view that suicide was acceptable were entitled to first amendment protection; (2) John's suicide was not a reasonably foreseeable consequence of the distribution of recorded music and lyrics so as to render the defendants liable in negligence; and (3) Penal Code section 401, which prohibits aiding, advising, or encouraging suicide, did not apply to defendants in the absence of evidence of the requisite intent and participation.

**Summary of the Court's Reasoning**

Associate Justice Croskey, who wrote the appellate court's opinion, began the first phase of his analysis by providing a general overview of the depth and breadth of first amendment protections as interpreted by the United States Supreme Court and the courts of the State of California. The court began by recognizing the "overriding constitutional principle that material communicated by the public media . . . [including artistic expressions such as the music and lyrics here involved], is generally to be accorded protection under the First Amendment to the Constitution of the United States." The court explained that "above all else, the first amendment guarantees preclude government from restricting expression because of its message, its ideas, its subject matter, or its content."

The court's analysis specified the types of speech and expression that are covered by the first amendment guarantees. The court stressed the importance of protecting free speech and stated that the first amendment "reaches beyond protection of citizen participation in, and ultimate control over, governmental affairs and protects in addition the interest in

34. *Id.*

35. *Id.* at 1003-04, 249 Cal. Rptr. at 195.

36. *Id.* at 1006, 249 Cal. Rptr. at 197.

37. *Id.* at 994, 249 Cal. Rptr. at 189.


free interchange of ideas and expressions for their own sake."\textsuperscript{41}

Despite reciting a long list of first amendment protections, the court noted that the first amendment guarantees are not absolute. The court recognized that certain types of speech and expression remain unprotected which "may be prevented or punished by the state consistent with the principles of the First Amendment."\textsuperscript{42} These narrowly defined types include: (1) obscene speech;\textsuperscript{43} (2) libel, slander, misrepresentation, perjury, false advertising, solicitation of a crime, complicity by encouragement, [and] conspiracy;\textsuperscript{44} (3) speech or writing used as an integral part of conduct in violation of a valid criminal statute;\textsuperscript{45} and (4) speech which is directed to inciting or producing imminent lawless action, and which is likely to incite or produce such action.\textsuperscript{46}

Plaintiffs argued that the last of these exceptions, relating to culpable incitement, removed Osbourne's music from the protection of the first amendment. Under the test introduced in \textit{Brandenburg v. Ohio},\textsuperscript{47} speech "incites lawless action" if it satisfies the Supreme Court's two-part test. To escape first amendment protection and become punishable, the speech must be: (1) directed and intended toward the goal of producing imminent lawless conduct, and (2) likely to produce such imminent conduct.\textsuperscript{48} Speech directed to action at some indefinite time in the future remains protected.\textsuperscript{49}

The court held that Osbourne's record did not meet the \textit{Brandenburg} test.\textsuperscript{50} In the court's opinion, the view that suicide is an acceptable alternative to a life that has become unendurable was not an example of direct incitement and was protected under the first amendment.\textsuperscript{51} The court concluded that the music and lyrics, even when construed literally, did not contain the requisite "call to action" required under the first step
of the Brandenburg analysis.\textsuperscript{52} The court supported this conclusion by noting that in previous cases, arguments that fictional depictions in the media have incited unlawful conduct have all been rejected.\textsuperscript{53} The court noted that Osbourne's depictions of the darker side of human nature, while unorthodox, express a philosophical view that has a long intellectual tradition in literature and music.

The first amendment argument aside, the court then examined the civil tort claims presented in counts I and II. The court concluded that the plaintiffs' complaint alleged no basis for recovery because a threshold issue in negligence claims is whether the defendants owed any duty to the plaintiffs, and the court found that the defendants owed no duty.\textsuperscript{54} In its duty analysis, the court examined the factors originated in the landmark California case, \textit{Rowland v. Christian}.\textsuperscript{55} The factors include: "the foreseeability of harm to the plaintiff, the degree of certainty that plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved."\textsuperscript{56} The \textit{McCollum} court briefly analyzed each of these factors and concluded that they all favored the defendants.\textsuperscript{57}

The \textit{McCollum} court focused its analysis on the foreseeability of harm, an essential factor in determining whether a duty is owed in a particular case.\textsuperscript{58} If a harm is foreseeable, then a duty to prevent the harm exists. Here, the court determined that "a very high degree of foreseeability would be required because of the great burden on society of preventing the kind of 'harm' of which plaintiffs complain by restraining or punishing artistic expression."\textsuperscript{59} Plaintiffs relied on \textit{Weirum v. RKO General Inc.}\textsuperscript{60} for the proposition that harm to John from listening to Osbourne's music was foreseeable.

In \textit{Weirum}, Los Angeles radio station KHJ conducted a promo-
tional contest in which whoever met the disc jockey, radio personality "the real Don Steele," at a specified location would receive prize money. Steele travelled by car and distributed KHJ bumperstickers at each stop. While the station announced hints about Steele's current location on live radio, two teenagers maneuvered for position close to the prize car at speeds of up to eighty miles an hour, in an attempt to be the first at the next announced stop. The teenagers forced a third person's car onto the center divider, killing the driver. A jury found RKO General and one of the teenagers liable for wrongful death, and RKO's liability was affirmed on appeal.61 The McCollum court distinguished Weirum on the basis that there the defendant's live message repeatedly encouraged listeners to speed to announced locations, and thus it was clearly foreseeable that the listeners would act in an inherently dangerous manner. In McCollum, an album played on a stereo three years after its creation did not provide "dynamic interaction" or "real time" urging of listeners to act in a particular manner. The court concluded that "John's tragic self-destruction, while listening to Osbourne's music, was not a reasonably foreseeable risk or consequence of defendants' remote artistic activities."62

Furthermore, the court held that the plaintiffs' third and fourth counts, claiming violations of the incitement doctrine and California Penal Code section 401, made no allegations that Osbourne or CBS intended to cause John's suicide.63 Simply alleging that the defendants intentionally did a particular act is not sufficient, for plaintiffs must also show that such act was done with the intent to cause injury.64 Here, plaintiffs should have alleged that CBS and Osbourne intended to cause John's (or another listener's) suicide and distributed the record albums for that purpose. The court decided that the plaintiffs' complaint merely made "general conclusionary allegations" which failed to suggest any intentional conduct by the defendants "beyond their intentional composition, performance, production and distribution of certain recorded music."65 In the absence of evidence of the requisite intent and participation, the court concluded that Penal Code section 401 cannot be applied to "composers, performers, producers and distributors of recorded works of artistic expression disseminated to the general public which allegedly have an adverse emotional impact on some listeners or viewers who therefore take their own lives."66

61. Id. at 51, 123 Cal. Rptr. at 474.
63. Id. at 1006-07, 249 Cal. Rptr. at 197-98.
65. McCollum, 202 Cal. App. 3d at 1006, 249 Cal. Rptr. at 197 n.12.
66. Id. at 1007, 249 Cal. Rptr. at 198.
The *McCollum* court's analysis of past cases suggests that absent the requisite "incitement" under the *Brandenburg* test, these courts were reluctant to impose tort liability on the public media for self-destructive or tortious acts which allegedly result from a publication or broadcast.\(^67\) The *McCollum* court followed the established policy of these courts and concluded that Osbourne and CBS, as a matter of law, were not liable for John's suicide.

**COMMENTS ON COURT'S REASONING**

In *McCollum*, the plaintiffs make an emotional argument to hold Osbourne and CBS liable for the suicidal death of their son. Suicidal death is traumatic and stigmatizing and often creates feelings of guilt in other family members.\(^68\) To alleviate these feelings, these relatives may choose to bring legal action against a person or entity who is thought to have caused the suicide. Unfortunately, a wrongful death action for causing suicide often serves only to maintain or renew the family's emotional stress,\(^69\) because the majority of suicides cannot be attributed to anyone other than the decedent himself. As a result, lawyers may render a disservice to these clients if they fail to review and discuss the facts forming the basis of the action in an effort to disclose the very low probability of recovery.\(^70\)

**Constitutional Law Analysis**

The application of the first amendment to recorded music and lyrics is essential to the protection of a valuable vehicle for the exchange of ideas. Imposing liability on media entities for audience acts of violence

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67. *Id.* See Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1982) ("Olivia II"); Bill v. Superior Court, 137 Cal. App. 3d 1002, 187 Cal. Rptr. 625 (1982) (plaintiff was shot outside a theater showing a violent movie made by defendants which allegedly attracted violence prone individuals who were likely to injure members of the general public at or near the theater); DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982) (plaintiffs' son died while attempting to imitate a "hanging stunt" which he saw on television); Walt Disney Prod. v. Shannon, 247 Ga. 402, 276 S.E.2d 580 (1981) (plaintiff was partially blinded when he attempted to reproduce some sound effects demonstrated on television by rotating a lead pellet around in an inflated balloon); Zamora v. Columbia Broadcasting System, 480 F. Supp. 199 (S.D. Fla. 1979) (where plaintiff, a minor, had become so addicted to and desensitized by television violence that he developed a sociopathic personality and as a result shot and killed an 83 year-old neighbor).


69. *Id.* at 998 (quoting Shneidman, *Postvention and the Survivor-Victim*, *DEATH: CURRENT PERSPECTIVES* 347, 348 (1976)).

70. Knuth, *supra* note 68, at 998.
restrains free speech. A chilling effect results when recording artists and distributors fear legal liability and become reluctant to disseminate controversial or questionable matter. This restriction of artistic expression subverts the policies underlying the freedom of speech. Thus, when a proposed tort results in the inhibition of free speech, the court must examine the tort under a constitutional analysis.

The Brandenburg test is a threshold test for determining whether, as a matter of law, free speech and tort liability issues should reach the trier of fact. The United States Supreme Court created this two-part test in 1969, and a review of its development demonstrates its use and significance. In Brandenburg, the Court reversed the conviction of a Ku Klux Klan leader under Ohio’s criminal syndicalism statute because the statute was not properly limited to advocacy (1) “directed to inciting or producing imminent lawless action” and (2) “likely to incite or produce such action.” The Court held that statutes affecting the freedom of speech, like those touching on the right of assembly, must observe established distinctions between mere advocacy and incitement to imminent lawless action. With this holding, the Court overruled a prior decision, Whitney v. California, in which California’s similar criminal syndicalism statute was upheld. The Court stated that its Whitney holding had been discredited by subsequent decisions, and that states could no longer constitutionally punish the mere advocacy of violent means to effect change.

The McCollum court appropriately used the Brandenburg test in examining the plaintiffs’ claims. Courts have applied the Brandenburg test “where a state regulation prohibits or punishes speech because of a likely stimulus to action that the state wishes to prevent.” The test permits regulations of free speech only if the speech has a “very substantial capacity to propel action.” In McCollum, plaintiffs argued that the lyrics and music of Osbourne’s albums “propelled” John to commit suicide.

71. McCollum, 202 Cal. App. 3d at 1007-08, 249 Cal. Rptr. at 198.
72. Id. at 1003, 249 Cal. Rptr. at 195.
74. Tribe, supra note 2, at 848 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).
75. Brandenburg, 395 U.S. at 448-49.
76. 274 U.S. 357 (1927).
79. Hilker, supra note 73, at 550.
80. Id. at 550-51 (quoting United States v. Dellinger, 472 F.2d 340, 359 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973)).
Thus, in *McCollum*, the issue becomes whether tort claims, like state regulations, fall within the scope of the *Brandenburg* test.

To determine media liability for television violence, the Supreme Court in *New York Times Co. v. Sullivan*81 "recognized that tort liability constitutes a form of state action on the ground that application of a state's common law is just as clear an instance of state action as the application of a state statute."82 Subsequent cases follow this doctrine and apply the *Brandenburg* "incitement" standard to claims that media publications caused susceptible individuals to harm themselves or others.83 In *McCollum* the plaintiffs argued for media liability, claiming that Osbourne knew his music would cause susceptible teenagers like John to commit suicide.

The *Brandenburg* test applies to claims which directly implicate federal and state constitutional guarantees of free speech and expression and where threats of damage awards chill the free flow of ideas.84 Under *Brandenburg*, regulation of free speech is justified only if the speech creates an unreasonable risk of imminent violence.85 When properly applied, the *Brandenburg* test acts to protect free speech, while retaining the power to restrain speech that would cause imminent lawless conduct.86 Thus, the *McCollum* court properly applied the *Brandenburg* test, because the potential regulation of free speech was at issue and plaintiffs directly claimed that Osbourne and CBS were liable for "inciting" John's death.

Few cases exist which discuss media liability for audience acts of violence. The leading California case that has applied the *Brandenburg* test is *Olivia N. v. National Broadcasting Co.*87 ("*Olivia II*"). In *Olivia II*, a young girl was assaulted and raped with a bottle following the broadcast of a television movie, *Born Innocent*, which portrayed a similar incident.88 The movie depicted a troubled runaway teenager who was mistreated at home and eventually was committed to a state home for juvenile delinquents. Her teenage assailants, other inmates, restrained her on the floor of a shower while their leader inserted the handle of a

82. Hilker, supra note 73, at 551 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964)).
83. See generally supra note 67.
84. Hilker, supra note 73, at 547-48.
86. Id.
88. Id. at 490-91, 178 Cal. Rptr. at 890-91.
plumber’s helper between her legs with repeated thrusts.\textsuperscript{89} A few days after \textit{Born Innocent} was aired, several juveniles allegedly assaulted nine-year-old Olivia on a public beach, artificially raping her with a bottle.\textsuperscript{90} Olivia’s mother sued the National Broadcasting Company (NBC) and KRON, its owned-and-operated station, alleging that the movie’s rape scene had caused the juveniles to assault her daughter.\textsuperscript{91} The court held for the defendants and stated that while the first amendment is not absolute, the television movie did not fall within the scope of unprotected speech since the broadcast did not fulfill the incitement requirements.\textsuperscript{92}

Like \textit{Olivia II}, \textit{McCollum} involved parents suing an entertainment company in an attempt to hold the company liable for injury to their child. Both cases stem from violent actions, assault and rape in \textit{Olivia II} and suicide in \textit{McCollum}, after the participants were subjected to media messages. In both cases, the courts applied the \textit{Brandenburg} test and concluded that the media was not liable because the test’s two components were not satisfied. While the medium of message transmission differed—in \textit{Olivia II} the message was broadcast by television\textsuperscript{93} and in \textit{McCollum} the message was recorded on an album and played by the listener on a stereo—this difference alone did not distinguish the cases. While the actual injuries differed, both cases concluded that material communicated by the public media was protected under the first amendment.\textsuperscript{94}

In \textit{McCollum}, the plaintiffs argued that \textit{Olivia II} was decided incorrectly and that tort liability should be imposed under the controlling authority of \textit{Weirum v. RKO General, Inc.}\textsuperscript{95} While \textit{Olivia II} and \textit{McCollum} are very similar, \textit{Weirum} is inapposite. \textit{Weirum} can be distinguished because there the radio promotion was aired live and provided dynamic listener interaction, while in \textit{Olivia II} and \textit{McCollum} the messages were recorded and played later. Such passive artistic expressions lack the live call to action necessary to sustain a claim of incitement.

In addition, in \textit{McCollum}, there was no message on the record di-

\textsuperscript{89} \textit{Id}. at 491, 178 Cal. Rptr. at 891.
\textsuperscript{90} \textit{Id}.
\textsuperscript{91} \textit{Id}. at 490, 178 Cal. Rptr. at 890.
\textsuperscript{92} \textit{Olivia II}, 126 Cal. App. 3d at 495, 178 Cal. Rptr. at 893.
\textsuperscript{93} For a discussion of television’s powerful influence, \textit{but cf. Sex and Violence on TV: Hearings Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 2 (1976)}.
\textsuperscript{94} \textit{See Olivia II}, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1982); \textit{McCollum}, 202 Cal. App. 3d at 1006, 249 Cal. Rptr. at 197.
\textsuperscript{95} 15 Cal. 3d 40, 123 Cal. Rptr. 468 (1975).
recting the listener to do a specific act. Plaintiffs argued that Osbourne's songs, like "Crazy Train" and "Suicide Solution,"96 bred hopelessness and advocated suicide. They claimed that these songs led John, a susceptible teenager, to commit suicide. CBS and Osbourne contended that "Suicide Solution" condemns alcohol abuse by equating it with suicide. However, neither interpretation of the lyrics constitutes a call to "imminent lawless action" under the Brandenburg test. Music lyrics, like words used in poetry, have multiple meanings. CBS's lawyer, William Vaughn, stated, "if people wrote books, radio or TV shows so as not to upset all the psychologically unbalanced people in the world . . . Arthur Miller would have been liable for Death of a Salesman or Sylvia Plath for The Bell Jar."97

96. Plaintiffs recognize that John was actually listening to the album Speak of the Devil when he took his life. However, their complaint focuses on the other two albums which John listened to earlier in the evening, Blizzard of Ozz and Diary of a Madman, and argues that the music has a cumulative effect on the susceptible listener. The lyrics to the song "Suicide Solution," from Blizzard of Ozz, are as follows:

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

McCollum, 202 Cal. App. 3d at 996-97, 249 Cal. Rptr. at 190 n.5 (1988). In addition to the lyrics printed on the album cover, the song included a 28-second instrumental break which contained the following "masked" lyrics (which were not included on the album cover):

"Ah know people
You really know where its at
You got it
Why try, why try
Get the gun and try it
Shoot, shoot, shoot (this line was repeated for about 10 seconds)."


When the content of an artistic message is the subject of legal controversy, the recording industry must receive first amendment protection in order to prevent censorship of artistic expression. The threat of criminal or civil liability on artists, producers and distributors stifles creativity and expression. In *McCollum*, the court made the following strong statement about the potential chilling effects legal liability has on artistic expression and the threat of prior restraint:

[I]t is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy. No case has ever gone so far. We find no basis in law or public policy for doing so here. 98

The non-exclusive list of protected expressions under first amendment law includes “books, films, radio, music and concerts” as well as “political and ideological speech, motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works.” 99 *McCollum* follows these other protected forms and extends specific constitutional protection to recorded music and lyrics. 100 This conclusion reflects sound policy, for the democratic ideal of a “free marketplace of ideas” does not allow artistic expressions to go unprotected merely because they are found to be offensive, in bad taste, or controversial.

**Tort and Suicide Law Analysis**

The *McCollum* court stated that the plaintiffs failed to prove that Osbourne or CBS owed John the requisite duty to be held liable for his suicide. 101 Similarly, causation, an element of both tort and criminal law causes of action, presents unique difficulties of proof in so-called “causing suicide” cases. 102 Tort law emphasizes that proximate cause is the criti-

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99. Id. at 999, 249 Cal. Rptr. at 192 (quoting Schad v. Mt. Ephraim, 452 U.S. 61, 65 (1981)).
cal factor in establishing liability.\textsuperscript{103} Traditionally, courts have been reluctant to award damages for wrongful death where a suicide was allegedly caused by the defendant’s actions.\textsuperscript{104} With regard to audience acts of violence, the key issue is whether the violent act of the primary tortfeasor operates as an intervening cause to exempt the media defendant from tort liability.\textsuperscript{105} However, since juveniles have been involved in most cases of imitative violence, exceptions to the doctrine of intervening causation have arisen.\textsuperscript{106} Therefore, in a prima facie case, the element of proximate cause should not bar media liability for audience acts of violence.\textsuperscript{107}

In criminal law, the historical development of punishment for suicide and related crimes exemplifies the shifting policies in this area. At common law, suicide was a felony, punished by forfeiture of property to the king and an ignominious burial.\textsuperscript{108} Currently, no state has a statute making a successful suicide a crime.\textsuperscript{109} Most jurisdictions, including California, do not impose criminal liability on one who makes a suicide attempt.\textsuperscript{110} However, the law has retained culpability for aiding, abetting and advising suicide.\textsuperscript{111} The modern trend reduces the punishment for assisting a suicide by removing it from homicide law and “giving it a separate criminal classification more carefully tailored to the actual culpability of the aider and abettor.”\textsuperscript{112} One commentator has suggested that the absence of objective factors which can be used to support the analysis has created difficulty in establishing criminal liability for causing suicide. For example, the court was faced with a causation problem in \textit{McCollum}: the mere coincidence between Osbourne and CBS’s alleged pecuniary motive in selling records and John’s death. Proof problems arise when trying to link such an attenuated causal nexus. These “causing suicide” cases illustrate:

one of the most difficult problems in criminal law: When may one human being be held criminally liable for the self-destruction of another? . . . The problem lies, of course, in determining when, and if, an accused did in fact cause his alleged victim to

\begin{itemize}
  \item \textsuperscript{103} Knuth, \textit{supra} note 68, at 970.
  \item \textsuperscript{104} \textit{See generally Id.} at 974-87.
  \item \textsuperscript{105} Hilker, \textit{supra} note 73, at 545.
  \item \textsuperscript{106} \textit{Id.} at 546.
  \item \textsuperscript{107} \textit{Id.}
  \item \textsuperscript{108} Tate v. Canonica, 180 Cal. App. 2d 898, 902, 5 Cal. Rptr. 28, 32 (1960).
  \item \textsuperscript{109} Brenner, \textit{supra} note 102.
  \item \textsuperscript{110} In re Joseph G., 34 Cal. 3d 429, 433, 194 Cal. Rptr. 163, 165 (1983).
  \item \textsuperscript{111} \textit{Id.} at 434, 194 Cal. Rptr. at 166.
  \item \textsuperscript{112} \textit{Id.} at 434-35, 194 Cal. Rptr. at 166.
\end{itemize}
commit suicide. This difficult determination requires proof that the suicide was caused by the accused's actions and was not the result of the victim's own free will. Causing suicide statutes [such as Penal Code section 401] describe what is, in reality, murder; their uniqueness lies in the fact that the instrument of that murder is the victim himself. Causing suicide is murder by instigating self-murder. Because establishing causation requires proof that the perpetrator successfully overcame the victim's presumed "will to live," a causing suicide prosecution must become an exercise in psychology.\textsuperscript{113}

\textbf{McCollum's Significance}

\textit{McCollum} is the first case in California history to specifically extend first amendment protections to music recordings and lyrics. While recorded music and lyrics have always been "impliedly protected" by the first amendment, they now receive the additional protection of legal precedent. In addition, \textit{McCollum} further defines the legal meaning of "deliberately aiding, advising or encouraging suicide" under California penal code section 401.\textsuperscript{114} As a practical matter, the significance of these refinements remains to be seen.

More importantly, \textit{McCollum} is a victory for the music recording industry. This case follows \textit{Olivia II} and further protects the entertainment media from liability for acts of violence committed by its audience. More specifically, \textit{McCollum} protects the entertainment media from liability for audience acts of suicide. California's musicians, composers, owners of publication rights, and distributors of recorded music can now conduct business knowing that the first amendment is behind their work. They no longer have to worry about the threat of civil or criminal liability for the unforeseeable acts of violence committed by their audience.

As stated in CBS's appellate brief:

\textit{We do not yet live in Aldous Huxley's Brave New World,}\textsuperscript{115} but its suburbs can be seen in appellants' arguments . . . for if the first amendment means anything, it is that songwriters, poets, authors and the media have an absolute right and unfettered freedom to create and to publish nondefamatory, non-obscene musical, poetic and other literary and artistic works without the shadow of the prosecutor or the civil plaintiff falling across

\textsuperscript{113} Brenner, \textit{supra} note 102, at 63.
\textsuperscript{114} See \textit{supra} note 29.
\textsuperscript{115} A. Huxley, \textit{Brave New World} (1932).
LARGER IMPLICATIONS

Recent cases such as *McCollum* are part of a larger problem: that plaintiffs such as John's parents seek relief in the courts and consistently lose. These plaintiffs are often the parents of children who have been injured or killed, and they have stated a good case by showing that rock music may be a contributing factor to their child's injury or death. To understand the implications of the lack of judicial relief received by plaintiffs in the area of media liability for audience acts of violence, a look into the current controversy, the resulting public reaction and attempted solutions is necessary.

*The Controversy*

Publicity from *McCollum* has renewed greater public interest in acts of audience violence related to rock music. The creators of "heavy metal" and "punk rock" music are usually singled out because of their destructive lifestyles and the music's fast, aggressive beat and suggestive lyrics. The trend is toward curtailing free speech protections in order to "clean up" not only the airwaves, records, and concerts, but also to sustain convictions of the creators of controversial art. For example, Osbourne was again the subject of controversy in June 1986 when he headlined a concert in Long Beach, California, which resulted in the death of one man and the injury of three others. The police said the twenty-two year old man had overdosed and sustained a broken neck when he fell off the arena balcony. The others were injured when they jumped or were pushed off the balcony. Public concern over rock music related drug use and violence has led concerned parents to organize in an effort to hold the musicians and promoters liable.

Heavy metal music received its biggest blast of bad publicity during the summer of 1985 when the "Night Stalker" terrorized the city of Los Angeles, California. When he entered the houses of his prey, the mass murderer sprayed pentagrams and the logo of the heavy metal band "AC/DC" on the walls after he had tortured and killed his victims.

Richard Ramirez, the man on trial for these killings, is alleged to be a satanist and a fan of AC/DC. Unfortunately, this connection between murder and rock music is not new. The "Night Stalker" is a modern example of a demented style of homicide that struck fear in the nation two decades ago when Charles Manson was implicated in the Tate/LaBianca murders, which were supposedly inspired by the Beatles' song *Helter Skelter*.

Public Reaction

Such acts of violence have initiated recent social and political movements, which confront the problems associated with rock music, to restrict protections for artists and the media. These movements are run by individuals who are angered by the violence and who have set out to "right the wrongs" through self-help, legislative pressure, criminal and civil litigation, and calls for media self-restraint. These "pressure" groups have had limited success. Members of the recording industry, with strong financial backing, challenge at each step using the first amendment to protect their lucrative business interests.

The most visible self-help citizens' group is the Parents Music Resource Center ("PMRC"). The PMRC is a large and powerful group; they wield the influence of the 5.6 million member National PTA and list the wives of influential Washington politicians as their affiliates. The PMRC put pressure on legislators at the 1985 Senate Hearings in an attempt to censor records and music lyrics. After speeches by United States senators, presentations by PMRC representatives, and testimony by musicians, the hearings adjourned. No action was taken, nor was legislation proposed. Another Southern California parents group, named "Back in Control," has called for local concert halls to stop booking

121. Roldan, supra note 117, at 222.
123. Record Labeling: Hearing Before the Comm. on Commerce, Science, and Transp. on Contents of Music and the Lyrics of Records, S. HRG. No. 529, 99th Cong., 1st Sess. (1985) (hereinafter Record Labeling). The most outspoken critic of the PMRC record labeling proposal was musician Frank Zappa. His testimony questioned the bias and credibility of the PMRC in light of its political connections. His candid comments, such as calling the PMRC the "Wives of Big Brother" and saying their proposal was "the equivalent of treating dandruff by decapitation," triggered lively responses from the Committee members. Other musicians, such as folk-singer John Denver and rocker Dee Snider from the band "Twisted Sister," also testified at the hearings. See Record Labeling, S. HRG. No. 529, 99th Cong., 1st Sess. at 52-53 (statement by Frank Zappa), reprinted in Roldan, supra note 117, at 237.
124. Roldan, supra note 117, at 240.
heavy metal shows in the wake of reports of rock violence.\textsuperscript{125}

Pressure from citizens’ groups and threats of costly lawsuits have record company staff members engaged in a bitter debate, with some executives refusing to self-censor and others arguing against distributing certain controversial records at all.\textsuperscript{126} Recently, the record companies have experimented with ways to distance themselves from their most controversial artists.\textsuperscript{127} Under strong PMRC pressure, the Recording Industry Association of America ("RIAA") agreed to provide warning labels on some future recorded releases.\textsuperscript{128} Twenty RIAA companies, including A&M, Capitol/EMI, Columbia, Motown and Warner Brothers, agreed to label their albums "Explicit Lyrics—Parental Advisory" when lyrics reflected "explicit sex, explicit violence, or explicit substance abuse."\textsuperscript{129} For example, Warner Brothers has put two warning stickers on comic Sam Kinison’s latest album, "Have You Seen Me Lately?" because of its ugly AIDS jokes and ridicule of safe sex practices.\textsuperscript{130}

In 1986, under parental pressure, the Los Angeles City Attorney’s Office brought criminal charges of distributing harmful materials to minors against Jello Biafra, the lead singer of the San Francisco punk band the Dead Kennedys, and Michael Bonnano, the band’s producer.\textsuperscript{131} The case revolved around a poster of Swiss artist H.R. Giger’s painting "Landscape XX—Where Are We Coming From?" that was included in the band’s "Frankenchrist"\textsuperscript{132} album. The controversial painting, which has been shown in museums throughout Europe and the United States, is a nightmarish depiction of disembodied genitals, male and female, engaged in a sexual act.\textsuperscript{133} The charges were dismissed after a jury split 7-5 for acquittal and declared itself deadlocked.\textsuperscript{134} While this case did not deal with physical violence, it exemplifies how public outcry can lead to criminal prosecution which aims to restrict the artistic content of rock albums. Biafra, whose band and independent record label are now de-

\textsuperscript{125} Hilburn, Heavy-Metal Syndrome—What’s a Parent to Do?, L.A. Times, June 21, 1986, Pt. V, at 1, col. 1.


\textsuperscript{127} Goldstein, supra note 126, at 6, col. 4.

\textsuperscript{128} Roldan, supra note 117, at 240.

\textsuperscript{129} Id.

\textsuperscript{130} One warning sticker carries the novel disclaimer, "The material on this album does not reflect the views or opinions of Warner Bros. Records." After incessant pressure from gay activists, executives at Warner Bros. announced that future pressings of the Kinison album will contain an AIDS fact sheet. Goldstein, supra note 126, at 6, col. 4.

\textsuperscript{131} People v. Bonanno, No. 31496951 (L.A. Mun. Ct. 1986).

\textsuperscript{132} Frankenenchrist, Dead Kennedys (Alternative Tentacle Records, 1985).

\textsuperscript{133} Bolles, supra note 119.

funct due to the costs of his legal defense, heavily criticized the major labels for not assisting him in his fight against censorship. The fact that the Wherehouse, a large music retailer, removed all the band's albums from the shelves after the trial's initiation is an example of the resulting chilling effect from the criminal prosecution. Even with an acquittal, the end result of this litigation is less variety and diversity in the marketplace.

Currently, a civil case is pending in the Nevada state court which is strikingly similar to McCollum. Vance v. Judas Priest involves the suicidal death of one teenager and the injury of another after listening to the Stained Class album by heavy metal band Judas Priest. Interestingly, both Osbourne and Judas Priest are produced and distributed by CBS Records. The plaintiffs, the bereaved parents of the teenagers, claim that subliminal messages embedded in the album prompted the violence. This claim is analogous to the plaintiff's claim in McCollum that the music's driving rhythms combined with the "hemisync tones" were powerful enough to push John to suicide.

The Nevada Supreme Court refused to dismiss the case on jurisdictional grounds, and ordered CBS to submit the master tape of the album so it could be examined for subliminal messages. The plaintiffs have produced two sound and recording experts who have testified that the alleged subliminal message, "Do it," is discernible, while CBS's experts reported no such message exists. Like the plaintiffs in McCollum, the plaintiffs in Vance must prove the subliminal messages constituted the requisite "call to action" to fall under the scope of Brandenburg's incitement test, even if they prove the existence of these messages. Vance, which proceeded on the merits, unlike McCollum, is

the first case of its kind to reach the oral argument stage in an American court. While it seems unlikely that the plaintiffs will prevail, the case represents the court's willingness to listen to arguments based on the impacts of new technologies. This may lead to artists being penalized for incorporating such technology.

No Easy Suicide Solutions

The current controversy over media liability for audience acts of violence is caught in the tension between the parents' desire to protect their children and the artists' first amendment protections. Both sides present legitimate and compelling arguments. While no clear solutions exist to this complex problem, one thing is certain: censorship is not a viable answer. First, cases like *McCollum* and *Olivia II* exemplify the court's stand against censorship. The *Brandenburg* standard is difficult to meet, and most speech falls under the constitutional protection of the first amendment. Second, once something is restricted, it becomes more attractive. For example, during Prohibition illegal liquor ran rampant and the eighteenth amendment was repealed in 1933. Similarly, censoring artistic expression has the effect of making its subject even more titillating. Third, devising regulations that will satisfy all factions of society is nearly impossible. Restraints on the first amendment put a court on a "slippery slope," where one exception justifies another, and then another, until there is little, if anything, left of the first amendment.

In suicide cases such as *McCollum* and *Vance*, the major problem is getting help to lonely, desperate individuals before they lose control, because these individuals apparently are not concerned with constitutional rights or the elements of the cause of action for damages against third parties. These troubled people need compassion and guidance:

The essential point to make, and all parties seem to agree, is that the true answer lies with the parents. Sticker warnings, labels and ratings do not make any difference if parents aren't listening to their children's music, communicating mutual concerns and trying to understand what is being said. . . . In the final analysis, the consumer[s]—adults and children alike, decide what gets performed or broadcast. As a free market, con-

143. Hilburn, *supra* note 125, at 7, col. 2.
sumers have the option of ignoring the unpalatable. If they are not happy with what they encounter on the airwaves, the stereo, or concert stage, they have the option of tuning out, turning off or turning away. . . . [T]here will always be a "tension" as long as diversity exists in our society, [for the Constitution] encourages the free flow of expression and information. . . . That, however, is the beauty as well as the bane.\textsuperscript{146}

CONCLUSION

\textit{McCollum} is significant in that it represents a strong stand by the California courts to continue to support and strengthen protection of artistic and commercial expression. Following cases such as \textit{Olivia II}, California stands in the forefront of jurisdictions that recognize the importance of protections against assaults on free speech. However, tension remains in the area of media liability for audience acts of violence. An uneasy balance exists between parental concern over media-stimulated violence and the free speech guarantees of the first amendment. With limited success, concerned groups have resorted to self-help by putting pressure on the legislature, instituting criminal and civil litigation, and calling for media self-restraint. Their call for censorship is not a viable answer to this complex constitutional problem. While further media negotiations may later provide a better solution, the primary responsibility rests with parents—the example they set and the advice and counsel they give.\textsuperscript{147} \textit{McCollum} represents the continuing battle to define the meaning of the first amendment.

\textit{Scott Alan Hampton}

\textsuperscript{146} Roldan, \textit{supra} note 117, at 259-60.

\textsuperscript{147} Hilburn, \textit{supra} note 125, at 7, col. 2.