2 LIVE CREW AND JUDGE GONZALEZ TOO — 2 LIVE CREW AND THE *MILLER* OBSCENITY TEST

Obscenity regulation has become a very emotional and hotly contested issue. During the last two years, anti-obscenity forces have targeted many controversial artistic works. Perhaps the most publicized controversy came in South Florida, centering on "As Nasty As They Wanna Be" (hereinafter "Nasty"), an album by the rap group 2 Live Crew. This note will focus on that controversy and its implications for the obscenity debate in general.

Part II of this note discusses the particular facts of the Florida debates and gives some background on the recent efforts made to restrict explicit musical lyrics in the eighties and early nineties. Part III discusses the constitutional implications of regulating lyrics through statute. Part IV discusses the *Miller* obscenity standard and its applicability to popular music. Part V analyzes the district court opinion that labeled the "Nasty" album obscene. Part VI examines the possible drastic consequences that might result such an obscenity ruling.

I. THE FACTUAL BACKGROUND - TOO LIVE PROSECUTORS

The backlash against explicit lyrics dates back to 1985 when the Parents' Music Resource Center (PMRC) was formed by a group including Mary (Tipper) Gore, wife of Senator Albert Gore, Jr. (D, Tennessee) and Susan Baker, wife of Secretary of State James A. Baker, III.[1] Pressure from the PMRC and others ultimately led to a 1985 agreement between the PMRC and the Recording Industry Association of America (RIAA), a trade group that represents major United States record companies.[2] This agreement called for a voluntary system of labeling records that contained explicit lyrics.[3] All record companies, though, did not reach a consensus about voluntary labeling and, as a result, only some companies began to use the warning labels.[4]

On June 29, 1988, Tommy Hammond, co-owner of Taking Home the Hits music store in Alexander City, Alabama, was arrested on a misdemeanor charge of selling obscene material.[5] The arrest was based on the purchase by undercover police of two albums by the rap group 2 Live Crew entitled "2 Live Crew That's What We Are" and "Move Somethin'."[6] Mr. Hammond was subsequently

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1. Stan Soocher, *Anti-Labeling Forces Vigilant*; NAT'L L.J., June 4, 1990, at 26, col. 2.

2. Judy Sarasohn & Sheila Kaplan, *Label Fight: Rock Around the States*; LEGAL TIMES, May 7, 1990, at 5.

3. Richard Harrington, *On the Beat; Lyrics, the Stormy Issue for Labels*, WASH. POST, Feb. 28, 1990, at C7, col. 4. The labels carried the wording "Explicit lyrics — parental advisory" and contained no age restrictions.

4. *See supra* note 1.

5. Specifically, Mr. Hammond was charged with violating ALA. CRIM. CODE §§ 13A-12-150 and 13A-12-151 (1975). The former section defines the term "obscene" in accordance with the Supreme Court's finding in Miller v. California, *see infra* note 84. The latter section makes it a crime to "knowingly" sell an "obscene" work.

6. Tom Wicker, *In the Nation; Lyrics & the Law*, N.Y. TIMES, Feb. 1, 1990, at A23, col. 1. Of the two 2 Live Crew albums confiscated in the Hammond arrest, only "Move Somethin'" contained a warning label.

convicted in Municipal Court and fined $500.00.[7] This event marked only the second conviction in the United States for selling recorded obscenity.[8]

Under Alabama law, Mr. Hammond's appeal was heard in the Alabama Circuit Court by a jury. The defense presented experts who testified as to the cultural and musical developments of rap music to demonstrate that 2 Live Crew's recordings have artistic value.[9] The nine man, three woman jury deliberated for approximately ninety minutes on February 22, 1990, before overturning Mr. Hammond's conviction.[10]

On the same day, Florida Governor Robert Martinez announced a criminal investigation into potential violations of state racketeering and obscenity laws arising out of the distribution of 2 Live Crew records.[11]

Shortly thereafter, Broward County (Fla.) Deputy Sheriff Mark Wichner purchased a cassette tape of 2 Live Crew's third album "Nasty" from an open display at Sound Warehouse, a Broward County retail music store.[12] After listening to Nasty, Deputy Wichner filed an affidavit, a transcript of six of the eighteen songs on the album, and a copy of Nasty with the Broward County Circuit Court Judge Mel Grossman on February 28.[13] Deputy Wichner requested that the court find probable cause that the recording was obscene.[14] On March 9, Judge Grossman issued an order finding probable cause that Nasty was obscene under Fla. Stat. § 847.011 (1990) and applicable case law.[15]

The Broward County Sheriff's office distributed the court order to all businesses that might be selling Nasty and warned them that they should refrain from offering Nasty for sale to the public.[16] This action resulted in the withdrawal of Nasty from *all* retail stores in Broward County.[17]

On March 16, Skyywalker Records, Inc. (hereinafter Skyywalker Records) and the individual members of 2 Live Crew filed a federal civil rights action under 42 U.S.C. § 1983 (a federal statutory remedy for unlawful deprivations of

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7. *Id.*

8. The first reported decision involved the mail-order sale of obscene "party records." One "party record" was entitled "Erotica" and contained primarily percussion sounds while another "party record" was comprised of readings of acclaimed French poems. The defendant was found guilty by a jury of mailing an obscene label and party records in violation of 18 U.S.C. §§ 1461 ("Mailing obscene or crime-inciting matter") and 1463 ("Mailing indecent matter on wrappers or envelopes"). The conviction was upheld by the 2d U.S. Circuit Court of Appeals and the U.S. Supreme Court denied certiorari. United States v. Davis, 353 F.2d 614 (2d Cir. 1965), *cert. denied*, 384 U.S. 953 (1966).

9. Stan Soocher, *It's Bad, It's Def—Is It Obscene?*, NAT'L L.J., June 4, 1990, at 1, col. 1.

10. City of Alexander City, Ala. v. Hammond, CC-88-69 (Ala. Cir. Ct. 1990).

11. Richard Harrington, *On the Beat; Lyrics, the Stormy Issue for Labels*, WASH. POST, Feb. 28, 1990, at C7, col. 4.

12. The Nasty recording included a statement as follows: "WARNING: EXPLICIT LANGUAGE CONTAINED." 2 Live Crew also produced a recording entitled "As Clean As They Wanna Be" (Clean) which contained the same music as Nasty but did not contain explicit lyrics. Sales of Clean, though, are only approximately one-seventh of the total sales of Nasty to date. Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 582-83 (S.D. Fla. 1990).

13. *Id.* at 583.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

Constitutionally-guaranteed liberties and other federal rights) against Broward County Sheriff Nick Navarro.[18] The plaintiffs also sought a declaration of their legal rights and injunctive relief under 28 U.S.C. §§ 2201(a) and 2202(b) (the Federal Declaratory Judgment Act).[19] The plaintiffs contended that Nasty was not obscene and that Sheriff Navarro's distribution of Judge Grossman's court order was an unconstitutional prior restraint of free speech, thereby violating their First Amendment[20] rights, because no criminal court had ruled that Nasty was obscene. Thus, the plaintiffs sought to enjoin Sheriff Navarro from threatening any criminal action against retail stores which sold Nasty.

On March 29, the RIAA agreed to a new uniform voluntary system of warning labels on records, cassette tapes, and compact discs that contained lyrics which may be offensive.[21] The record industry acted in response to legislation pending in nineteen states that would have mandated warning labels for recordings which contained explicit lyrics dealing with sex, violence or illegal drugs.[22] The PMRC proclaimed the new plan as an improvement over the 1985 agreement even though the new labels would include the same wording ("Explicit lyrics — parental advisory"), design, and position on the covers of records, cassette tapes, and compact discs.[23] On April 5, the PMRC, the National Parent Teacher Association, and the National Association of Recording Merchandisers announced that their efforts and the RIAA's offer of a new uniform voluntary label had induced thirteen states to drop their mandatory labeling bills.[24] The other six states considering mandatory labeling legislation soon withdrew their proposals.[25]

Obscenity prosecutors were also handed a potentially powerful weapon on April 9, when the Fourth Circuit Court of Appeals ruled that obscenity convictions may form the basis for use of the forfeiture provisions of the Federal Racketeer Influenced and Corrupt Organizations Act.[26]

On April 19, the United States District Court for the Southern District of Florida, Fort Lauderdale Division, denied Skyywalker Records' motion for a preliminary injunction against Sheriff Navarro.[27] Judge Jose A. Gonzalez, Jr., of the United States District Court for the Southern District of Florida then held on June 6 that 2 Live Crew's Nasty album is obscene and not entitled to First Amendment protection.[28] This landmark decision was the first to declare music

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18. *Id.* at 582.
19. *Id.*
20. U.S. CONST. amend. I.
21. FACTS ON FILE WORLD NEWS DIG., Apr. 6, 1990, at 247, col. 2.
22. *Id.*
23. *Id.*
24. *See supra* note 2.
25. *See supra* note 1.
26. United States v. Pryba, 678 F. Supp. 1218 (E.D. Va. 1988), *aff'd*, 900 F.2d 748 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 305 (1990). In Pryba, the defendants sold six magazines and rented four adult video tapes which the jury found to be obscene. The jury, following verdicts finding violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), found that the defendants had property interests which afforded them a source of influence over the enterprise and directed that all shares of stock in their five corporations and corporate assets, as well as certain real estate and motor vehicles, be forfeited. The RICO statute had been amended in 1984 to add obscenity to the offenses constituting "racketeering activity."
27. Skyywalker Records, Inc., 739 F. Supp. at 582.
28. *Id.* at 596. The court also held that local law enforcement officials could not seize materials

lyrics obscene[29]; however, the court stressed that its determination was not conclusive as to whether 2 Live Crew had violated *criminal* obscenity laws.[30] Skyywalker Records filed notice of appeal to the Fourth Circuit on June 11.[31]

The obscenity ruling in the civil action paved the way for criminal charges to be brought by the Florida State's Attorney's Office. Within a week, the Broward County Sheriff's Office made two arrests related to Judge Gonzalez's obscenity ruling. On June 8, Charles Freeman, the owner of E-C Records in Fort Lauderdale, Florida who had publicly vowed to keep selling Nasty, was arrested for selling the Nasty album[32] less than three hours after receiving a new shipment of the recording.[33] Then on June 10, 2 Live Crew members Luther Campbell and Chris Wongwon were arrested by the Broward County Sheriff's Office after performing at the adults-only Club Futura in Hollywood, Florida.[34] Freeman, Campbell, and Wongwon all pled not guilty to a misdemeanor charge of promoting obscenity. The charge carried with it a maximum punishment of a $ 1,000.00 fine and one year in jail.[35]

Meanwhile, on July 6, a mandatory record labeling bill was passed by the Louisiana legislature.[36] The bill, introduced by State Rep. Ted Haik[37], required labeling of recordings determined to be harmful to minors.[38] "Harmful to minors" was defined as any recording which promotes (or has a central theme of) rape, incest, bestiality, sadomasochism, prostitution, homicide, unlawful ritualistic acts, suicide, criminal acts and unlawful drug and alcohol use.[39] Both the manufacturer and producer of an unlabeled recording deemed to be harmful to minors would have been subject to a civil offense punishable by a maximum fine of $5,000.[40] Furthermore, retailers, distributors and manufacturers who sold a labeled recording to an "unmarried person under the age of 17" could have been fined up to $1,000 and jailed up to six months.[41] Governor Buddy Roemer vetoed the bill on July 25,[42] because he felt that it infringed on constitutionally protected free

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suspected of being obscene without first obtaining a final judicial declaration of obscenity. *Id.* at 600. Therefore, the Broward County Sheriff's Office had acted improperly in distributing Judge Grossman's probable cause finding in the ex parte hearing to retail stores which sold Nasty before a final judicial determination upon the obscenity issue. *Id.* at 603.

29. Kyle Chadwick, AM. LAW., Sept. 1990, at 32, col. 4.

30. Skyywalker Records, Inc., 739 F. Supp. at 582.

31. *See supra* note 29.

32. *Id.*

33. *Civil Libertarians Are Decrying the Effect of Rap Album Ban*, NAT'L L.J., June 25, 1990, at 21, col. 1.

34. *See supra* note 29.

35. *Id.*

36. Edna Gundersen, *Musicians Fight Record Labeling in Louisiana*, U.S.A. TODAY, July 19, 1990, at D1.

37. Haik stated that the main target of his bill was the NAIRD because they include the heavy metal and rap artists most likely to use explicit lyrics. Haik branded them "outlaw labels" because, in late May 1990, the NAIRD refused to endorse the sticker adopted by the RIAA. The NAIRD, though, did recommend the new RIAA sticker if any of its companies individually chose to label a particular album. Richard Harrington, *The Hard Line in Louisiana*, WASH. POST, July 11, 1990, at C7, col. 4.

38. GANNETT NEWS SERVICE, July 7, 1990. According to this proposal, a warning sticker "Explicit lyrics - parental advisory" must be attached by the manufacturer or distributor to all recordings found to be harmful to minors.

39. *Id.*

40. Chuck Philips, *Louisiana Governor Vetoes Album-Warning Proposal*, L.A. TIMES, July 26, 1990, at P1. col. 2.

41. *Id.*

42. *Gov. Roemer Says 'No' to Record-Labeling Bill*, L.A. TIMES, July 25, 1990, at P8, col. 5.

speech rights.[43] He stated that "[t]he best method of informing the public is through voluntary compliance within industry standards, similar to what the movie industry has done with success."[44] Tipper Gore, PMRC president, supported Roemer's action and his call for voluntary compliance.[45]

Judge Gonzalez, after receipt of motions for attorneys' fees and costs in the civil action by both plaintiff Skyywalker Records and defendant Navarro, granted in part and denied in part both motions on July 31, 1990.[46] The net result of this action was to offset defendant Navarro's award against plaintiff's award for a final judgment in favor of Skyywalker Records in the amount of $21,922.41.[47]

Furthermore, Florida's civil obscenity ruling also led the Westerly, Rhode Island Town Council to attempt to revoke 2 Live Crew's entertainment license for a concert scheduled for October 6, 1990.[48] Consequently, the promoters of the 2 Live Crew concert filed a request for preliminary injunction to prohibit the revocation on the grounds that the town's licensing ordinances violated the First Amendment.[49] The United States District Court for the District of Rhode Island held on September 28 that the defendant was enjoined from revoking the entertainment license issued for the proposed 2 Live Crew concert because the town's licensing ordinances were unconstitutional under the First and Fourteenth Amendments.[50]

On October 3, Charles Freeman was convicted on obscenity charges for selling Nasty after the recording had been declared obscene by Judge Gonzalez.[51] The entirely white and mostly female six member jury deliberated for less than two hours in reaching its verdict.[52] Thereafter, the RIAA agreed to help Freeman finance an appeal of his conviction.[53] Freeman was sentenced by Broward County Judge Paul Backman to a $1,000.00 fine. The fine was split between the Walker Elementary School Program for the Performing Arts and the Broward County court.[54] Ultimately, Freeman was forced to close E-C Records because of financial difficulties.[55] Luther Campbell and Chris Wongwon were acquitted of the criminal obscenity charge on October 20 in Broward County court.[56]

Bexar County (Texas) Court-At-Law Judge Tony Jiminez III dismissed criminal charges of promoting pornography brought against San Antonio record store owner Dave Risher on December 10.[57] Risher was arrested in June for selling Nasty to Patrick Weaver, son of the president of Citizens Against Pornography. Weaver had complained to the police that the recording was obscene.[58]

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43. *See supra* note 40.
44. *Id.*
45. *Id.*
46. Skyywalker Records, Inc. v. Navarro, 742 F. Supp. 638 (S.D. Fla. 1990).
47. *Id.* at 641.
48. Atlantic Beach Casino, Inc. v. Morenzoni, 749 F. Supp. 38-39 (D.R.I. 1990).
49. *Id.*
50. *Id.* at 39.
51. *As Guilty as They Want Him to Be*, NAT'L L.J., Oct. 15, 1990, at 6, col. 1.
52. *Id.*
53. *Store Owner Convicted for Live Crew Sale*, WASH. POST, Oct. 4, 1990, at D1, col. 5.
54. U.P.I., Jan. 15, 1991 (BC Cycle).
55. *Man Convicted in 2 Live Crew Sale Closes Up Store*, L.A. TIMES, Jan. 9, 1991, at P10, col. 3.
56. Janice Heller, *Prosecutors Hit Wrong Chord in Rap Group Obscenity Trial*, LEGAL TIMES, Nov. 5, 1990, at 2.
57. *Charges Against Seller of 2 Live Crew Album Dropped*, CHI. TRIB., Dec. 11, 1990, sec. 1, at 11, col. 1.
58. *Id.*

Prosecutors later dropped the charges against Risher when Weaver decided that Nasty did not violate state obscenity laws.[59]

Too Much Joy, a little known band from New York, was acquitted on January 17, 1991, by a jury in Broward County, Florida of charges that it had performed an obscene act. The group had sang six songs from Nasty at an adults-only show on August 10, 1990. The show was held at Club Futura, the same place where 2 Live Crew had been arrested for performing the same songs.[60] Too Much Joy had performed the songs as a political protest of a violation of their First Amendment rights.[61] This second acquittal by a Broward County jury led Florida officials to drop "promotion of obscenity" charges against Club Futura owner Kenneth Gerringer.[62]

After the compromise between the PMRC and the RIAA in 1985 which resulted in voluntary record labeling,[63] several legal scholars and commentators wrote on how this controversy could develop in the future. Most felt that the censorship debate was over because a voluntary record labeling plan was the most that pro-labeling forces could hope to achieve. Other methods of regulation, such as state imposed rating systems or banning records on obscenity grounds were dismissed as impractical. However, during 1990, many states besides Louisiana have proposed record labeling statutes and Nasty has been declared legally obscene in southern Florida.

II. REGULATION OF EXPLICIT LYRICS BY STATUTE

A. The Theory

Legal commentators writing on the possibility of a statute that rated music lyric content felt, almost uniformly, that such a statute would be either unconstitutionally vague or overbroad.[64] The general outline of this argument comes from two Supreme Court cases, *Interstate Circuit Inc. v. City of Dallas*[65] and *Erznoznik v. Jacksonville*.[66] In *Interstate Circuit*, the court considered a Dallas ordinance that allowed a city council board to classify films as not suitable for children under sixteen. The ordinance read as follows:

> "Not suitable for young persons" means:
> (1) Describing or portraying brutality, criminal violence or depravity in such a

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59. *Id.*
60. Richard Harrington, *Country Music Goes to War*, WASH. POST, Jan. 30, 1991, at B7, col. 4.
61. *Id.*
62. *Id.*
63. *See supra* note 2.
64. Cecelie Berry et al., Comment, *Regulating Rock Lyrics: A New Wave Of Censorship?*, 23 HARV. J. ON LEGIS. 595, 605 (1986).
Michael A. Coletti, Comment, *First Amendment Implications of Rock Lyric Censorship*, 14 PEPP. L. REV. 421, 430-434 (1987).
Seth Goodchild, *Twisted Sister, Washington Wives, And The First Amendment: The Movement To Clamp Down On Rock Music*, 3 ENT. SP. L. J. 131, 171-174 (1986).
Paul E. Scheidemantel, Note, *It's Only Rock-and-Roll But They Don't Like It: Censoring "Indecent" Lyrics*, 21 NEW ENG. L. REV. 467, 507 (1986).
John W. Holt, Comment, *Protecting America's Youth: Can Rock Music Lyrics Be Constitutionally Regulated?*, 16 J. CONTEMP. L. 53, 65- 66, 75 (1990).
65. 390 U.S. 676 (1968).
66. 422 U.S. 205 (1975).

> manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or,
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> (2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.
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> A film shall be considered "likely to incite or encourage" crime or delinquency or sexual promiscuity . . . if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted.
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> A film shall be considered as appealing to the "prurient interest" . . . if, in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire.
>
> In determining whether a film is "not suitable for young persons", the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.[67]

The Court struck down this statute as unconstitutionally vague. To illustrate the problems in the wording of the law, the Court noted that the term "sexual promiscuity" was not defined in the statute. Thus, the term "could extend depending on one's moral judgment, from the obvious to any sexual contacts outside a marital relationship."[68] Allowing a review board this broad range of discretion was unacceptable to the Court.

The Court also described the ill effects that would be suffered by motion picture artists and the public in general that might be caused by these vague standards for classification:

> [O]ne who wishes to convey his ideas through [the medium of film], which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposes to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public.
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> Rather than run that risk, he might choose nothing but the innocuous, perhaps save for the so-called "adult" picture. Moreover, a local exhibitor who cannot afford to risk losing the youthful audience when a film may be of marginal interest to adults . . . may contract to show only the totally inane.[69]

The Court summarized the point by stating that vagueness is "not rendered less objectionable because the regulation is one of classification rather than direct regulation."[70] The Court also cautioned it is no "answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children."[71] These warnings have particular sig-

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67. Interstate Circuit, 390 U.S. at 681-682.
68. *Id.* at 687.
69. *Id.* at 684.
70. *Id.*
71. *Id.* at 689.

nificance in the explicit lyrics controversy. Pro-labeling forces generally advocate a ratings/classification system, not a system of suppression, and often use the protection of young people as their primary justification.

Besides surviving vagueness challenges, a constitutional record labeling statute must also avoid being overbroad. The Supreme Court made this clear in *Erznoznik*.[72] In that case, a Jacksonville, Florida ordinance prohibited any drive-in theater that was visible from public streets from showing films that contained nudity. Specifically, the ordinance stated:

> It shall be unlawful and it is hereby declared a public nuisance for any [owner or employer of a] drive-in theater in the City to exhibit, aid or assist in exhibiting, any motion picture in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide or other exhibit is visible from any public street or public place.[73]

The statute here is not unduly vague as was the case in *Interstate Circuit*, but it was still struck down by the Court. The problem is that the ordinance infringed on protected as well as unprotected speech. It was intended to protect minors from viewing unsuitable material but was, according to the Court, "overbroad in its proscription".[74] The Court further explained:

> The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. . .

Clearly all nudity cannot be deemed obscene even as to minors.[75]

The principles of these two cases would presumably apply to any state attempt to regulate music based on lyrical content. Under *Interstate Circuit* the law must contain extremely precise standards so that it does not allow "regulation in accordance with the beliefs of the individual censor rather than regulation by law."[76] Under *Erznoznik*, the law cannot be worded so as to allow government infringement on any legitimate protected speech. However, different meanings can often be ascribed to lyrics that are quite similar or even the same. Thus, a workable record labeling statute would have to allow the enforcing body some discretion to interpret record lyrics. Such discretion is at odds with *Interstate Circuit* and *Erznoznik*. Individual discretion increases the chances that individual values will dictate the law as well as increasing the possibility that the law will be used to restrict material that is protected.[77] This general argument was made by legal commentators shortly after the RIAA announced their voluntary record labeling compromise in 1986,[78] right up until 1990.[79]

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72. *See supra* note 66.
73. Erznoznik, 422 U.S. at 206-07.
74. *Id.* at 214.
75. *Id.* at 213.
76. 390 U.S. at 685.
77. Cecelie Berry et al., Comment, *Regulating Rock Lyrics: A New Wave of Censorship?*, 23 HARV. J. ON LEGIS. at 605 (1986).
78. "It would indeed be a Herculean task to draft a statute that restricted objectionable lyrics yet survived scrutiny for vagueness and overbreadth." *Id.* at 605.
79. "[A]" rating and labelling system may not avoid the problems of vagueness and overbreadth." John W. Holt, Comment, *Protecting Amercia's Youth: Can Rock Music Be Constitutionally Regulated?*, 16 J. CONTEMP. L. 53, 65 (1990).

B. The Reality

In 1990, mandatory record labeling bills were being considered in nineteen states.[80] Constitutional difficulties notwithstanding, the record industry took the threat of these bills quite seriously. In April 1990, the RIAA announced a plan for a new, more extensive voluntary labeling system,[81] and the state bills were dropped within a few months.[82] Even so, the record industry is still nervous as the President of the RIAA acknowledged "that some state bills that were withdrawn will likely resurface."[83]

Since no state has passed a record labeling bill, there is no way to know if one would survive a constitutional challenge. One can argue that the arguments made by legal scholars over the past six years appear to be sound and would likely prove to be correct. What is clear, however, is that the threat of these laws is enough to make the record companies step up their efforts at self-regulation. This development may carry with it some of the "chilling" effect on the artists' free speech that would be an unconstitutional result under a state statute. In other words, it is possible that states are regulating music through the threat of state action when, ironically, actual legislation with the same effect would probably be unconstitutional.

III. BANNING RECORDS WITH EXPLICIT LYRICS UNDER OBSCENITY LAW

A. What Is "Obscene"? — The Miller Test

The United States Supreme Court has relied on a three-prong obscenity test laid out in *Miller v. California*.[84] The test, as enunciated by the Court, is as follows:

> (1) Whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest;
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> (2) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; *and*
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> (3) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[85]

Each of the three prongs raise interpretive issues which have been only partly resolved by subsequent Supreme Court declarations.

All three prongs must be met for a work to be declared obscene material not protected by the First Amendment.[86] The message conveyed by an obscene work is not protected by the First Amendment. An obscene work is of such minimal value that this value is always outweighed by the compelling interests of society in general society, as manifested in the laws enacted by its legislators.

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80. WORLD NEWS DIG., Apr. 6, 1990, at 247.
81. *Id.*
82. Stan Soocher, *Anti-Labeling Forces Vigilant*, NAT'L L.J., June 4, 1990, at 26, at col. 2.
83. Judy Sarasohn & Sheila Kaplan, *Label Fight: Rock Around the States*, LEGAL TIMES, May 7, 1990, at 5.
84. 413 U.S. 15 (1973).
85. *Id.* at 24.
86. *See supra* note 20.

The Supreme Court has previously held that an expression by words alone, in written form, can be legally obscene even if no pictures accompany those words.[87]

The first prong requires prosecutors to show that the work, "taken as a whole," appeals to the "prurient interest in sex" of "the average person, applying contemporary community standards." The U.S. Supreme Court has defined prurient as "material having a tendency to excite lustful thoughts."[88] Expert testimony on the applicable community standards does not have to be submitted by prosecutors.[89] The fact finder must apply objective community standards, taking into consideration all members of the community (excluding children) and cannot apply their own subjective standards.[90] These objective community standards "represent not any widely-shared sense of value but merely an average of local extremes."[91]

Works that induce "a shameful or morbid interest in nudity, sex or excretion" have the required prurient appeal.[92] Works that only stimulate "normal and healthy sexual desires," do not constitute prurient appeal.[93] In *Mishkin v. New York*[94], the Supreme Court concluded that a fact finder may "adjust the prurient appeal requirement to social realities by permitting appeal to be assessed in terms of the sexual interests of the intended and probable recipient group."

The work must also be "taken as a whole" in assessing its appeal. Materials containing many diverse parts pose difficult issues for a court. In *Kois v. Wisconsin*[95], the Supreme Court held that photographs of a nude couple published in an underground newspaper could not be considered alone because the photographs were "rationally related" to a news article on the local district attorney's impoundment of similar photographs. As a result, the fact finder must consider an allegedly obscene work within the context of the physical object in which it is included, i.e. its "internal context."[96] The *Mishkin*[97] Court also held that the fact finder may consider who uses the allegedly obscene work and how that work is used, i.e. its "external context."

The second prong requires that the work contain "patently offensive" portrayals or descriptions of sexual conduct. Once again, the fact finder must consider the average person and apply contemporary community standards but does not have to consider the work taken as a whole. A common defense to an obscenity charge is to show community "acceptance" or "tolerance"[98] by intro-

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87. Kaplan v. California, 413 U.S. 115 (1973).

88. Roth v. United States, 354 U.S. 476, 487 (1957).

89. Kaplan, 413 U.S. at 121-22; Paris Adult Theater I v. Slaton, 413 U.S. 49, 56 (1973); Ginzburg v. United States, 383 U.S. 463, 465 (1966).

90. Pinkus v. United States, 436 U.S. 293, 299-301 (1978).

91. L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-16, at 912-13 (2d ed. 1988).

92. Roth v. United States, 354 U.S. 476, 487 n.20 (1957), quoting A.L.I. MODEL PENAL CODE, § 207.10(2) (Tent. Draft No. 6, 1957).

93. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504-05 (1985).

94. 383 U.S. 502, 508-09 (1966). Mishkin involved works "designed for and primarily disseminated to a clearly defined deviant sexual group."

95. 408 U.S. 229, 231 (1972).

96. R. George Wright, *Defining Obscenity: The Criterion of Value*, 22 NEW ENG. L. REV. 315, 320 (1987-88).

97. *See supra* note 94.

98. It is unclear whether the proper standard is community "acceptance" or "tolerance." Samuel T. Currin & H. Robert Showers, *Regulation of Pornography - The North Carolina Approach*, 21 WAKE FOREST L. REV. 263, 291-94 (1986).

ducing into evidence data which shows that the work in dispute has been "consumed" by a large amount of people in the applicable community.[99]

The third prong requires that the work "taken as a whole" lacks "serious literary, artistic, political or scientific value." In *Pope v. Illinois*[100], the Supreme Court concluded that serious value must be measured from the viewpoint of a "reasonable person" without consideration of "contemporary community standards." This case provides little guidance though because many cases can be perceived where reasonable persons might disagree on the value of a particular work.[101]

Critical acclaim and awards are evidence that the work is not patently offensive as a matter of law.[102] Once again, the work must also be "taken as a whole."[103]

Lastly, the pandering doctrine may come into play. The pandering doctrine holds that, in close cases, "[w]here the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity."[104]

B. The Miller Test Applied to Music — the Theory

Most legal commentators writing on the issue in the last six years have thought it impossible to regulate music through obscenity law. They have all been very confident that a court would not be able to declare an album obscene using the Miller test.[105] Generally, there were three major reasons for this view.

First, the work must be considered "as a whole" when applying the test.[106] Thus, an entire album, not just a single song, would have to be declared obscene before any regulatory action would be allowed. The assumption here is that an album would never consist entirely of an appeal to the prurient interest, as "most albums have only one or two lines which are ostensibly obscene."[107]

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99. RUDOLF & FARGO, THE OBSCENITY TRIAL IN RURAL AMERICA: PREPARING TO WIN, CHAMPION, 5,8 (1988).

100. 481 U.S. 497, 500-01 (1987).

101. *Id.* at 511 (Stevens, J., dissenting).

102. Jenkins v. Georgia, 418 U.S. 153 (1974). The Jenkins Court mysteriously did not find that critical success and/or awards was evidence of serious artistic value.

103. *See supra* notes 96-98. The court, though, has noted that "[a] quotation from Voltaire in the flyleaf of (an otherwise obscene) book" will not confer serious value on the book. *Kois*, 408 U.S. at 231.

104. Ginzburg, 333 U.S. at 470.

105. Paul E. Scheidemantel, Note, *It's Only Rock-and-Roll But They Don't Like It: Censoring "Indecent" Lyrics*, 21 NEW ENG. L. REV. 467, 479 (1986). "[Application of the *Miller* test] may present a special challenge given the unique characteristics of the recording industry."

Seth Goodchild, Twisted Sister, *Washington Wives And The First Amendment: The Movement to Clamp Down On Rock Music*, 3 ENT. SP. L. J. 131, 178 (1986). "Rock songs do not approach the *Miller* level of specificity."

Michael A. Coletti, Comment, *First Amendment Implications of Rock Lyric Censorship*, 14 PEPP. L. REV. 421,429 (1987). "[T]he vast majority of commercial [records] are unlikely to be considered obscene."

Wendy B. Kaufmann, Note, *Song Lyric Advisories: The Sound Of Censorship*, 5 CARDOZO ARTS ENT. L. J., 225, 256 (1986). "It is extremely likely that rock music is protected under [the *Miller*] analysis."

John W. Holt, Comment, *Protecting America's Youth: Can Rock Music Lyrics Be Constitutionally Regulated?*, 16 J. CONTEMP. L. 53, 62 (1990). "The *Miller* standard is difficult to apply to rock music."

106. *See supra* note 89 and accompanying text.

107. Michael A. Coletti, Comment, *First Amendment Implications of Rock Lyric Censorship*, 14 PEPP. L. REV. 421, 429 (1987).

Next, it was felt that rock lyrics generally do not rise to the level of "patent offensiveness" required by the second prong of the *Miller* test.[108] Lyrics in popular music usually only "involve short statements that sexual activities are occurring . . . and employ some sex terminology."[109] This is not sufficient to be declared obscene under *Miller*. Rather the records would have to contain some "hardcore sexual material before they can be prohibited."[110] In short, to be labeled obscene a song must constitute a "graphic description of hardcore pornography."[111] It was not thought possible that popular music lyrics could rise to this level of specificity.

Finally, commentators argued that records would almost certainly pass the third prong[112] of the *Miller* test because of the difficulty in declaring a musical work completely devoid of artistic or social value. There are several strong points in this argument. First, the "any artistic value" used in the *Miller* test is so broad it is practically all-inclusive. A song could be musically worthless and still have some artistic value if it contains separate artistic elements such as comedy or satire. The *Miller* test also protects any work that has political or social value. It has been argued that rock music (rap music particularly) "reflect[s] society's values and the realities of human conduct, both good and bad."[113] Therefore, it may be argued that rock and rap music have a political and social value even when the lyrical content is outrageous.

A second, more technical, argument also exists. The obscenity test can only be applied to the song's lyrics. Thus, it is possible that the song's musical component will always have an independent artistic value. Worded more strongly, "the accompanying lyrics are generally considered as being secondary to the music - it is the music itself which characterizes the nature of the recording."[114] Even without conceding that lyrics are "secondary", the argument is still logically appealing. If a song's musical component has any artistic value separate from its lyrics, that should be sufficient to prevent it from being labeled obscene under the *Miller* test's third prong.

Theses are persuasive arguments, as shown by the fact that many were featured in various legal articles and notes from 1986 to 1990. Variations of these arguments were used by council for 2 Live Crew to defend Nasty in the Spring of 1990, but, in the end, the judge was not persuaded.

IV. THE "AS NASTY AS THEY WANNA BE" OPINION

A. The First Two Prongs of the Miller Test

In the opinion,[115] the Honorable Jose A. Gonzalez, federal district judge for the Southern District of Florida, analyzed Nasty under Florida state obscenity

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108. *See supra* text accompanying notes 99-100.

109. Seth Goodchild, *Twisted Sister, Washington Wives, And The First Amendment: The Movement To Clamp Down On Rock Music*, 3 ENT. SP. L. J. 131, 178 (1986).

110. *Id.* at 179.

111. *Id.*

112. *See supra* text accompanying notes 100-03.

113. Wendy B. Kaufmann, Note, *Song Lyric Advisories: The Sound of Censorship*, 5 CARDOZO ARTS AND ENT. L. J. 225, 227 (1986).

114. *Id.*

115. *See supra* note 12.

law. He wrote that the Florida law is "intended to regulate obscenity to the maximum extent allowed by the Constitution of the United States."[116] The relevant statute incorporates the language of the Miller opinion,[117] and allows Gonzalez to apply the three prong test.

Gonzalez began by determining that the relevant community in this case is made up of three southern Florida counties, Brower, Palm Beach and Dade.[118] Next, based on his years of residence and experience as a judge in the relevant community, Gonzales found "as a matter of fact . . . the recording [Nasty] appeals to the prurient interest."[119] His decision is partly due to the fact that:

> [The] lyrics and titles are of the songs are replete with references to female and male genitalia, human excretion, oral-anal contact, fellatio, group sex specific sexual positions, sado-masochism, the turgid state of the male sexual organ, masturbation, cunnilingus, sexual intercourse and the sounds of moaning.[120]

Many of the acts described (ie. fellatio, cunnilingus, anal sex) qualify as "deviate sexual intercourse" under Florida obscenity law.[121] Furthermore, Gonzalez reasoned:

> [T]he frequency and graphic description of the sexual lyrics evinces a clear intention to lure hearers into this activity. The depictions of ultimate sexual acts are so vivid that they are hard to distinguish from seeing the same conduct described in the words of a book, or in pictures in periodicals or films.[122]

At this point Gonzalez first considered the argument that the music which underscores the offensive lyrics theoretically has an independent artistic value. He dismissed the argument by pointing out the unique emphasis that rap music places on its lyrics. He stated "the focus of the Nasty recording is its lyrics. . . Based on the evidence at trial, music of the rap genre focuses on verbal messages accentuated by a strong beat."[123] Thus, Gonzalez felt the musical component need not be seriously considered. He concluded that "the evident goal of this . . . recording is to reproduce the sexual act through musical lyrics."[124] As such it is an appeal to "dirty thoughts and the loins, not the intellect and the mind."[125]

Gonzalez next considered the second prong of the *Miller* test - patent offensiveness. He cited to the *Miller* opinion for two applicable examples of conduct that are present on the album and are subject to state regulation:

> (a) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated.

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116. Skyywalker Records, Inc., 739 F. Supp. at 585.
117. FLA. STAT. ANN. § 847.001 (7) (West, 1991) defines "obscene" as material which:
(a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
(b) Depicts or describes, in a patently offensive way, sexual conduct as defined herein; and
(c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.
118. Skyywalker Records, *Inc.*, 739 F. Supp. at 591.
119. *Id.*
120. *Id.*
121. FLA. STAT. ANN. § 847.001 (2) (West, 1991).
122. Skyywalker Records, Inc., 739 F. Supp. at 591.
123. *Id.*
124. *Id.*
125. *Id.*

> (b) Patently offensive representation or descriptions of masturbation, excretory functions and lewd exhibtions of the genitals.[126]

He then explained the "zoom lens" effect of the Nasty lyrics that raise the level of the album's content to patent offensiveness. Evidently, "the specificity of the descriptions makes the audio message analogous to a camera with a zoom lens, focusing on the sights and sounds of various ultimate sex acts."[127]

Gonzalez also noted that recorded music is more potentially intrusive to other members of society than other artistic mediums such as films, television or magazines. An unwilling listener may actually have music forced upon him in public places such as a traffic light or a beach.[128] This fact, while not given great weight, helped his finding of patent offensiveness. The judge also considered 2 Live Crew's "commercial exploitation of sex to promote sales"[129] and concluded that their "brazenness" slightly heightens Nasty's offensiveness. After considering all these factors, Gonzalez ruled that Nasty is patently offensive under the Miller standard.

B. The Third Prong and the "Cultural Defense"

1. Carlton Long's "cultural defense"

In order to satisfy the third prong of the Miller test, Judge Gonzalez had to find that the Nasty album completely lacks any serious artistic, political or scientific value.[130] Council for 2 Live Crew called Carlton Long as an expert witness on the cultural/artistic value of Nasty and of 2 Live Crew's music in general. Long is a Rhodes Scholar and an Assistant Professor of Political Science at Columbia University. He testified quite effectively in the same capacity in the Alabama trial of Tommy Hammond.[131]

Long asserts that 2 Live Crew's musical style is unique to Southeastern African-American culture and must be considered in its cultural context in order to pass judgment on its artistic value. This theory, after it was apparently accepted by the jury that acquitted Tommy Hammond, has come to be known as the "cultural defense."[132] The theory begins with the idea that not all rap or hip hop music can be put into a single category, just as it is not possible to put all the different types of rock music into one category. To label 2 Live Crew's music as part of African-American culture is not to say that all African-Americans like or even understand it. The music belongs to a "highly particularized sociological 'culture' — the culture of some African-Americans growing up jobless in the socially and economically desolate Liberty City 'ghetto' of Miami."[133] To generalize the music to African-Americans throughout the country is to commit

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126. *Id.* at 593.
127. *Id.* at 592.
128. *Id.*
129. *Id.*
130. *See supra* note 112.
131. Robert T. Perry & Carlton Long, *Obscenity Law Principles and the Hammond Case*, N.Y. L.J., July 20, 1990 at 6. "Undoubtedly, Carlton Long's testimony influenced the jury in the Hammond case . . . on the first and third prong of the obscenity [Miller] test."
132. Robert T. Perry & Carlton Long, *Obscenity Law, Hip Hop Music and 2 Live Crew*, N.Y. L.J. July 13. 1990 at 5. Long co-wrote this article and outlined many of the principles of the "cultural defense.
133. *Id.* at 6, col. 1.

the "monolithic error — the assumption that a part of any given culture reflects the whole of that culture."[134]

After establishing that frame of reference, the "cultural defense" next discusses the development of rap/hip-hop music and Miami's particular version of it. Rap/hip-hop began in New York City when African-American disc jockey's (DJ) would prolong the instrumental breaks in songs through various "scratching" and "cutting" turntable techniques.[135] This was done to allow dancers more time to enjoy the instrumental break.[136] Soon DJ's took a more active role and began to speak rhythmically in rhymes over the break and eventually over the entire record.[137] These original rappers had a particular dialogue that consisted primarily of slang used in New York ghetto areas.[138]

African-Americans from Miami were "not receptive to New York hip-hop."[139] Apparently, the dancers there preferred an "extended groove", and the people in Miami generally could not identify with New York "regional slang and accents."[140] Miami DJ's featured longer songs with emphasis on loud, driving bass sound. This Miami version of rap became known as "bass music."[141] This bass sound was "so weighty, so heavy and loud that there was little need for an MC's elaborate word play."[142] As a result, Miami rappers generally used "comic catch phrases and bawdy expressions"[143] to supplement the music.

After explaining 2 Live Crew's specialized brand of rap, Long next argues that their lyrics are full of devices common to the African-American "oral tradition."[144] Specifically the music contains examples of "boasting", "playing the dozens" and "improvisational call and response."[145] According to Long, stories in which the narrator glorifies himself or "boasts" excessively while dismissing or downgrading others are an established part of the "oral tradition". These boasts are most often grossly exaggerated for the comedic effect.[146] Long asserts this comical boasting style developed as a response to the submissive mannerisms many African-Americans were forced to adopt during the days of slavery and shortly afterward.[147] "Playing the dozens" is a folk game where escalating insults are told between friends. The insults "are never taken literally or even seriously."[148] Long argues that this game provides African-Americans with "verbal agility and self control . . . skills essential for their survival in a hostile racist world."[149]

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134. *Id.* Long writes that to conclude that Andrew Dice Clay's feelings about male-female relationships are representative of the feelings of white Americans generally would be a comparable example of the "monolithic error".
135. *Id.* at 6, col. 3.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. Leland, *Singles*, SPIN MAGAZINE, Feb. 1989, at 76.
142. Owen, *Pump The Bass*, SPIN MAGAZINE, Feb. 1990, at 22.
143. *Id.* at 24.
144. Robert T. Perry & Carlton Long, *Obscenity Law Principles and the Hammond Case*, N.Y. L.J., July 20, 1990 at 29.
145. *Id.*
146. *Id.*
147. *Id.* at 6.
148. *Id.*
149. *Id.* at 6.

The presence of these two conventions in Nasty's lyrics is relevant to two prongs of the Miller test. They may have independent cultural significance as examples of the African-American oral tradition and thus negate the third prong. Also significant is the fact that "boasting" and "playing the dozens" are not taken literally by African-Americans, but are known to be comic exaggerations. Thus, it is possible that the explicit lyrics are not taken literally by African-American listeners, but are heard strictly as parodies. Long claims that the "raps [are] so exaggerated and the vocal presentation so ridiculous that parody. . .becomes an inescapable conclusion."[150] If true, this would negate the first prong of the Miller test, that the recording appeals only to the prurient interest.

Finally, Long argues that the African-American oral convention of "improvisational call and response" is present on Nasty. This is a process where an individual calls out a "theme or idea . . . [and then] it is . . . repeated or affirmed by the group."[151] The process moves to new themes and ideas as callers improvise and "challenge the group, sometimes with provocative criticism based on the volume and spiritedness of the response."[152]Long claims the activity is "a form of social bonding" and can also be found in African-American political rhetoric and gospel music.[153]

Long also makes a more general argument that goes beyond the specific content of 2 Live Crew's music. He points out that over 90% of popular music in this country is controlled by six major recording companies.[154] For the most part, these companies are owned and controlled by whites. Long claims these record companies typically only sign African-American artists if they have the ability to "cross over" and appeal to a white audience.[155] As a result, "from the 1960's through the 1980's African-Americans have downplayed racial identity in pursuit of crossover success."[156] In light of that history, Long charges that 2 Live Crew's refusal to cross over and the fact that they record and distribute their work through their own independent record label is inherently a political statement. He testified at the Hammond trial that "2 Live Crew's refusal to compromise its 'voice' to pursue crossover success was politically significant."[157] Similarly, in the Florida trial he claimed that "[t]he music is political simply in that you have a group or artists who are saying 'I'm going to express myself the way I express myself.'"[158] In other words, the fact that the album can only be understood as a part of current African-American culture gives it some political value.

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150. Robert T. Perry & Carlton Long, *Obscenity Law Principles and the Hammond Case*, N.Y. L.J., July 20, 1990, at 29.

151. *Id.*

152. *Id.*

153. *Id.*

154. Robert T. Perry & Carlton Long, *Obscenity Law, Hip Hop Music and 2 Live Crew*, N.Y. L.J., July 13, 1990, at 6.

155. *Id.*

156. *Id.* at 6. Long gives the example of Michael Jackson undergoing cosmetic surgery to appear more caucasian.

157. Robert T. Perry & Carlton Long, *Obscenity Law Principles and the Hammond Case*, N.Y. L.J., July 20, 1990, at 6.

158. Gregg Braxton, *Morning Report: Pop/Rock*, L.A. Times, May 16, 1990, at F2, col. 1.

2. *The court's response*

Judge Gonzalez dismissed the "cultural defense" point by point. First, he found only two examples of "call and response" on Nasty.[159] He declared that neither has "significant artistic merit nor [were] they examples of black American culture."[160] Next, he opined that examples of "boasting" and "playing the dozens" are found in the cultures of several different races and have no unique significance in the African-American culture.[161]

Gonzalez next considered the argument that Nasty had comedic value, cautioning that "people can and do laugh at obscenity."[162] He noted that upon hearing the album the courtroom audience "giggled initially and fell silent."[163] The initial laughter can be interpreted as "a means of hiding embarrassment, concealing shame [or] releasing tension."[164] Gonzalez concluded that:

> It cannot be reasonably argued that the violence, perversion, abuse of women, graphic depictions of all forms of sexual conduct, and microscopic depictions of human genitalia contained on this recording are comedic art.[165]

Gonzalez was also unpersuaded by the argument that 2 Live Crew's uncompromised musical style has inherent political value. He explains that "[w]hile it is doubtless true that Nasty is a product of the group's background, including their heritage as black Americans, this fact does not convert whatever they say or sing into political speech."[166]

Gonzalez lastly reemphasized his point that the unique character of rap music allows him to consider the lyrics on their own without allowing for serious musical value in the musical component.[167] Then he finally ruled that the "explicit sexual lyrics . . . [on Nasty] are utterly without any redeeming social value."[168]

V. RICO AND OTHER POTENTIAL "DRACONIAN" CONSEQUENCES

> "The crusade to equate hard-core pornography with abstract artistic expression is putting this country's entire artistic community in jeopardy. The implications are immense."[169]
>
> - Mike Greene, President of the

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159. Skyywalker Records, Inc., 739 F. Supp. at 594 One was a "taste great—less filling" chant and another was an African-American college fraternity song.

160. *Id.*

161. *Id.* Gonzalez writes that "[Playing] the dozens is commonly seen in adolescents, especially boys, of all races. 'Boasting' seems to be part of the universal human condition."

162. *Id.* at 595.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 594.

167. *Id.* at 595. "The focus of the Nasty recording is predominantly (sic) on the lyrics. Expert testimony at trial indicates that a central characteristic of 'rap' music is its emphasis on the verbal message. Rhythm is stressed over melody, not for its own sake, but to accentuate the words of the song. The pounding beat and the presence of near continuous lyrics support this conclusion. 2 Live Crew's music is explicitly clear as to its message. Although music and lyrics must be considered jointly, it does not significantly alter the message of the Nasty recording to reduce it to a written transcription. *See also* text accompanying notes 123-25, *supra*.

168. *Id.* at 596.

169. Chuck Philips, *Artists for Racketeering Prosecution*, L.A. TIMES, Nov. 1, 1990, at F1, col. 6.

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On the last day of their October 1984 session, Congress passed several amendments to RICO.[170]

These amendments were buried in a bill designed to significantly overhaul the federal criminal code which itself was concealed within a continuing resolution intended to keep the federal government functioning.[171] The amendments incorporated legislation offered by Senator Jesse Helms (R., N.C.) which added violations of obscenity, pornography, and currency statutes to RICO's predicate offenses.[172]

This addition to the RICO statute received little notice until the first prosecution of an obscenity case under the statute was brought against Dennis and Barbara Pryba. The predicate offenses constituting the requisite pattern of racketeering activity[173] were fifteen prior obscenity convictions of the corporate defendant[174], and the $105 sale of six magazines and four videotapes subsequently deemed to be obscene. The defendants were ultimately convicted of racketeering[175] and the transportation of obscene materials in interstate commerce for sale or distribution.[176] The jury also decided that the defendants had certain interests in property that afforded them a source of influence over the enterprise (nine video rental stores and three bookstores) and directed the forfeiture of corporate stock, corporate assets, and certain real estate and motor vehicles. These items had a total value exceeding $1 million.[177]

The Fourth Circuit held that this forfeiture[178] did not violate the First Amendment[179] even though certain items forfeited were not obscene.[180] A nexus existed between the non-obscene items and the defendants' gains from racketeering activity allowing the items to be forfeited.[181] The court held that the use of RICO sanctions against racketeering based upon obscenity violations was not so "draconian" as to have a chilling effect upon First Amendment freedoms, and that the greater punishment under RICO was not constitutionally significant when compared to the punishment available under obscenity statutes.[182]

This decision would appear to open the door for a potential RICO prosecution against Skyywalker Records in Broward County, Florida (or any other

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170. 18 U.S.C. §§ 1961-68 (1988).
171. S. Rep. No. 225, 98th Cong., 2d Sess. 192, *reprinted in* 1984 U.S.C.C.A.N. at 3375.
172. 18 U.S.C. § 1963 (1988). *See also* Sec. Reg. & L. Rep. (BNA) (Dec. 14, 1984). Senator Helms revealed that profit from obscene material accounted for the third largest source of income for organized crime after drugs and gambling. 130 CONG. REC. 433-34 (1984).
173. 18 U.S.C. § 1962 (1988).
174. The United States Supreme Court held in Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989), that substantive obscenity violations could serve as predicate offenses under the Indiana RICO statute. The Indiana statute in question was patterned after the federal RICO statute.
175. 18 U.S.C. § 1962 (1988).
176. 18 U.S.C. § 1465 (1988).
177. United States v. Pryba, 678 F. Supp. 1218 (E.D. Va. 1988), *aff'd*, 900 F.2d 748 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 305 (1990).
178. 18 U.S.C. § 1963(a)(1) (1988).
179. *See supra* note 20.
180. Pryba, 900 F.2d at 755-56.
181. *Id.* at 755.
182. *Id.* quoting Fort Wayne Books, Inc., 489 U.S. at 59.

location which subsequently deems Nasty to be obscene) for the production of the Nasty recording.[183] Clearly, Skyywalker Records is an "enterprise." A prosecutor (or plaintiff in a civil RICO case) would also have to prove a "pattern of racketeering activity" to convict Skyywalker Records of a RICO violation. Pattern of racketeering activity is comprised of two requisite elements.[184] A prosecutor must show at least two racketeering predicates that are related (the relationship element) which amount to, or threaten the likelihood of, continued criminal activity (the continuity element).[185]

The relationship element is not more constrained than that used in Title X of the Organized Crime Control Act (OCCA).[186] The OCCA states that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[187] Arguably, two individual sales of Nasty in Broward County would satisfy the relationship element because of the interrelated characteristics of the two sales.

The continuity element of the pattern of racketeering activity "may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business."[188] Skyywalker Records has no other history of producing, manufacturing, or distributing obscene records. Therefore, a prosecutor probably could not establish the requisite continuity element of the pattern of racketeering activity. Skyywalker Records consequently could not be convicted of a RICO violation. Skyywalker Records would thus escape RICO's severe forfeiture provisions[189] which likely result in the loss of many of the tangible and intangible assets of the company.

The Child Protection and Obscenity Enforcement Act[190] and its rigid forfeiture provisions[191] has also been suggested in some circles as a potential tool

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183. Prosecutors also possibly could pursue similar charges against other entities involved in the manufacture, distribution, and sale of more than one copy of the Nasty recording in Broward County. Only prosecutorial discretion would prevent stretching such a tenuous claim through the economic cycle of Nasty to its ultimate conclusion of a retail sale by a store to two individual consumers.

184. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989).

185. *Id.* at 239.

186. 18 U.S.C. §§ 3575-80 (1988), *amended by* Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987 (1984).

187. H.J., Inc., 492 U.S. at 240 (quoting 18 U.S.C. § 3575(e) (1988)).

188. H.J., Inc., 492 U.S. at 242.

189. A person convicted of a RICO offense shall forfeit to the United States:
(1) any interest the person has acquired or maintained in violation of section 1962 [Prohibited activities]:
(2) any -
(A) interest in;
(B) security of;
(C) claim against; or
(D) property or contractual right of any kind affording a source of influence over;
any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and
(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.
18 U.S.C. § 1963 (1988).

190. 18 U.S.C. §§ 2251-57 (1988).

191. The act contains both criminal (18 U.S.C. § 2253 (1988)) and civil (18 U.S.C. § 2254 (1988))

against Skyywalker Records.[192] A prosecution under this act, though, would be unsuccessful because the act's only relevant focus is on "visual depictions" of sexually explicit conduct of minors.[193] Nasty fails to meet this criterion in two ways: first, Nasty's alleged references to sexually explicit conduct are general in nature and do not specifically associate minors, and; second and most importantly, Nasty is an audio recording which does not accompany any related visual depictions.

Skyywalker Records, though, could potentially face forfeiture of a significant amount of its assets under federal law.[194] Anyone convicted under Chapter 71 of the federal criminal code[195] would be subject to forfeiture penalties. With the current civil obscenity ruling in force in Broward County, federal prosecutors could potentially bring federal criminal obscenity proceedings against all persons involved in the production, distribution, manufacturing, and sale of Nasty. If any of these parties was convicted, it would result in the forfeiture of all the Nasty recordings they possess, any property constituting or traceable to proceeds of their role in Nasty's economic life cycle, and any property used to facilitate their role in the production, distribution, manufacture, or sale of Nasty.

Enforcement of these forfeiture provisions would effectively force Skyywalker Records (or other smaller enterprises involved with Nasty[196]) out of business. Only prosecutorial discretion would save these enterprises from economic extinction. These "draconian" consequences hardly seem equitable in light of the fact that what is "obscene" depends on community standards which are subject to change from one year to the next depending on the current popular thinking.

VI. CONCLUSION

Obviously, labeling a record obscene has very serious artistic and financial consequences. It is not clear that the material on Nasty deserves this label, however. This was demonstrated by the fact that 2 Live Crew was acquitted of a "promoting obscenity" charge after a live performance in Broward County, Florida.[197] A jury of south Florida residents heard tapes of the Nasty material

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191. The act contains both criminal (18 U.S.C. § 2253 (1988)) and civil (18 U.S.C. § 2254 (1988)) forfeiture provisions. These provisions include the actual item which enabled a conviction to be obtained as well as any property used (or intended to be used) to commit (or to promote the commission of) the offense and traceable to the proceeds obtained from the offense.

192. L.A. TIMES, Dec. 26, 1990, at F1, col. 2.

193. 18 U.S.C. §§ 2251-57 (1988).

194. 18 U.S.C. § 1467 (1988).

195. The offenses listed in Chapter 71 are:
1. Possession with intent to sell, and sale, of obscene matter on Federal property — 18 U.S.C. § 1460 (1988);
2. Mailing obscene or crime-inciting matter — 18 U.S.C. § 1461 (1988);
3. Importation or transportation of obscene matters — 18 U.S.C. § 1462 (1988);
4. Mailing indecent matter on wrappers or envelopes — 18 U.S.C. § 1463 (1988);
5. Broadcasting obscene language — 18 U.S.C. § 1464 (1988);
6. Transportation of obscene matters for sale or distribution — 18 U.S.C. § 1465 (1988); and
7. Engaging in the business of selling or transferring obscene matter — 18 U.S.C. § 1466 (1988).

196. *See supra* note 56 regarding Charles Freeman's subsequent bankruptcy after his criminal obscenity conviction.

197. *See supra* note 57.

and ruled they were *not* obscene. The jury presumably judged the material using the same "community standard" that Judge Gonzalez used in his opinion. A "community standard" that allows the group to perform the album's songs live and at the same time convicts a record dealer like Charles Freeman for selling the album is plainly unacceptable. The law in south Florida needs clarification.

The more general question is whether obscenity laws are truly intended to suppress material such as the Nasty album. Obscenity, most people concede, is more easily identified than explained. One reason for this is that true obscenity, while it may be capable of exciting an initial prurient curiosity, is basically repulsive. This fact is seen by the nature of unquestionably obscene material, such as child pornography or graphic depictions of sexual violence. This material arouses a basic outrage and obviously merits no constitutional protection. People do not openly purchase or enjoy this type of material, perhaps because of a sense it is somehow fundamentally wrong. Nasty is an album which over 750,000 people bought mainly as a dance record to play at parties. It does not seem logical that people would purchase truly obscene material in such great numbers or enjoy it so openly.

There is no doubt that many people honestly consider this album vulgar and offensive. These people do not have to listen to it and if they happen to be record merchants, they do not have to sell it in their stores. However, many people obviously consider the album amusing and entertaining. These people should be free to purchase or sell Nasty if they choose.

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