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## Ban(ned) in the USA: Popular Music and Censorship

Popular music has rarely faced direct First Amendment challenges. However, in recent years it has had to face many indirect challenges to its freedom of expression. Most recently, one such challenge has centered on rap music.

The controversy surrounding rap is as difficult to avoid as the music itself. Rap groups such as 2 Live Crew, NWA, Public Enemy and Digital Underground are causing a stir as big as or bigger than any rock group did in the 1960s. 2 Live Crew and NWA have been singled out for particular scrutiny, the former for sexually explicit lyrics and the latter for allegedly advocating violence against the police. Even in small midwestern communities like Eau Claire, Wisconsin, law enforcement officials have asked record store owners to keep copies of 2 Live Crew's album *As Nasty As They Wanna Be* off the shelves and to not sell them to minors.

There is more to this controversy, though, than the seemingly simple attempt to silence controversial voices. Popular music had been an outspoken and controversial form long before the advent of rap music. Indeed, popular music has been a dissenting voice, one that threatens authority, from its earliest manifestations. To understand the full extent to which its censorship is historically grounded and its power validated, this essay presents an analysis of attempts to curb its power. Additionally, it will examine non-First Amendment-based legal challenges to popular music that, although not directly related to censorship, nevertheless affect popular music's ability to speak to its audiences.

### Popular Music and Power

A form of popular music prevalent in the middle ages throughout Eastern Europe was based on epic poetry. The "guslars," or wandering minstrels

of Slavic cultures, sang songs relating the exploits, deeds and misdeeds of heroes, noblemen and scoundrels, and were accompanied by a one-stringed violin-like instrument called a "gusle." A guslar's songs were handed down from person to person, slightly altered each time they were sung or told, and existed intact largely because the music accompanying the stories served as an adequate mnemonic device. Though it empowered its listeners, its power clashed with other forms of power only when it physically intersected with the other powers—namely, when it was sung before an authority figure (or, for instance, when guslars would compete with each other). Tales of these storytellers' demise at the hands of rulers who disliked their interpretation of a battle or other event are numerous.

But modern popular music is far more pervasive. It is transmitted electronically, mass-produced and mass-communicated. And the ability to record sound is a kind of power over sound. And it is at this level that we must begin to understand the current controversies over censorship in popular music. If sound can be recorded, it can be played back. It can be played forward, backward, faster, slower. Only parts of the recording can be played, sound can be cut out, put together with other sounds and played back, and so on. The fundamental goal of recording technology is to provide this power over sound, and is squarely within the realm of Innis' notions of bias and control in communication (Innis, 1972).

Without recording technology, popular music would not have the power it does. As Ong states, "sound exists only when it is going out of existence" (Ong, 1982, p. 32). Sound is essentially ephemeral. It occurs over time, cannot be stopped, and is irreducible. It cannot be examined in the same way that one can examine music via a musical manuscript, note for note, measure for measure. One can listen to or perform a piece of music, measure for measure, over and over, but as each second passes so does the sound that has occurred. Sound cannot be frozen for close examination like notes on a page of sheet music. Its experience takes place over time, while reading sheet music is not time-bound. As musical notation allows us to capture music, recording allows us to capture sound.

The ability to preserve or modify organized sound is a means of controlling sound independent of its creation and creator. Therefore the recording of sound is a profoundly political act, as Jacques Attali indicates:

Recording has always been a means of social control, a stake in politics, regardless of the available technologies. Power is no longer content to enact its legitimacy; it records and reproduces the society it rules. Stockpiling memory, retaining history or time, distributing speech, and manipulating information has always been an attribute of civil and priestly power, beginning with the Tables of the Law. But before the industrial age, this attribute did not occupy center stage: Moses stuttered and it was Aaron who spoke. But there was already no mistaking: the reality of power belonged to he who was able to reproduce the divine word, not to he who gave it voice on a daily basis. Possessing the means of recording allows one to monitor noises, to maintain them, and to control repetition

within a determined code. In the final analysis, it allows one to impose one's own noise and to silence others (Attali, 1985, p. 87).

### *Popular Music Styles*

One can find evidence of censorship in virtually any artistic form, but it appears especially prevalent in popular music.<sup>1</sup> Perhaps this stems from the struggles between marginal styles and more powerful cultural and economic formations, or from popular music's association with youth culture and rebellion. Perhaps it is because the combination of music and words forms such a powerful mnemonic device. However, it is not solely music with lyrics that has been censored over time. Jazz music in particular has a history of censorship that was justified in musical terms. Skvorecky (1980) mentions the plight of Eastern European jazz musicians who were sent to Nazi concentration camps for their adherence to a "profane" musical culture. He lists a set of rules, including:

So-called jazz compositions may contain at most 10 percent syncopation; the remainder must consist of natural legato movement devoid of the hysterical rhythmic reverses characteristic of the music of the barbarian races and conducive to dark instincts ... On no account will Negroid excesses in tempo (so-called "hot jazz") or in solo performances (so-called "breaks") be tolerated (Skvorecky, 1980, p. 91).

Skvorecky does identify rules specifying acceptable lyrics:

Preference is to be given to compositions in a major key and to lyrics expressing joy in life rather than Jewishly gloomy lyrics ... Musicians are likewise forbidden to make vocal improvisations (so-called "scat") (Skvorecky, 1980, p. 92).

Rock 'n' roll was initially criticized not for its lyrics, but for having a "sexual" beat. It was reviled for its adoption of African rhythms. Broven (1974) points out that rock 'n' roll was often called "nigger music," a reminder of the racial dimensions of attempts at popular music censorship. The racism attending the development of jazz music in America spilled over into popular music early on with record companies' preferential treatment of recordings of black musicians' songs by white artists (e.g., Elvis Presley's recordings of Arthur Crudup's songs, which launched Presley's career). In the 1950s, many black artists were not recorded unless their songs had a message which could cross over to a white audience, in a recording by white artists. And record companies made a practice of adulterating rhythm & blues music: "Pop arrangers and stylists went to great pains and absurd lengths to filter whatever was fresh (or raunchy) out of ... r&b originals (Broven, 1974, p. 12)." And, as reported in a *Rolling Stone* editorial,

In 1955, as black music was midwifing the birth of rock & roll, the Ku Klux Klan circulated a poster that is now a classic of bigot literature: "Help save the youth of America: Don't buy Negro records. The screaming, idiotic words and savage music of these records are undermining the morals of our white youth in America" (Peck, 1978, p. 19).<sup>2</sup>

Today racism is a charge raised by anti-censorship activists against proponents of record-stickering and record-banning. Indeed, given the high percentage of black artists specifically targeted by those groups, it is not difficult to build a case for racism.

By the 1960s, popular music was grappling with censorship primarily based on its lyrics. At Ed Sullivan's insistence, The Rolling Stones changed the lyric of one song from "Let's spend the night together" to "Let's spend some time together." The Jefferson Airplane were fined several times for not honoring clauses in their performance contracts that prohibited verbal abuse. Country Joe McDonald was fined for saying "fuck" during a performance in Massachusetts. And in one of the most celebrated cases, Jim Morrison of the Doors was arrested and imprisoned in Florida for indecent exposure and obscenity. Such cases are often told and retold as some of the era's war stories.

Meanwhile, folk music came to adopt the confrontational technology of rock 'n' roll. The advent of the electric guitar and amplification, embodied in Bob Dylan's performance at the 1965 Newport Folk Festival, raised conflict to new heights. Dylan is not the first protest singer to have come under scrutiny for his political messages. Pete Seeger, among others, was investigated by the House Un-American Activities Committee during the McCarthy era and blacklisted by TV and radio stations. But when Dylan during his Newport performance switched from acoustic to electric guitar in one stroke (strum), although he alienated much of his folk audience *musically*, he proved the political power of sound in popular music. The experience and ideology of folk music were based on the acoustic guitar, an instrument that could be played anywhere and was designed to be heard by a small group of people. The electric guitar carried the image of rock music and amplification intended to increase its reach to a large audience. Dylan's folk audience was well aware of this and considered his switch to electric guitar a form of "selling out." However, Dylan's move had a greater symbolic effect. By switching to an electric guitar, he acknowledged the rock 'n' roll credo in a political vein: Turn It Up. In other words, if my voice is being suppressed, or I cannot be heard, I have recourse to amplification.

During the 1960s, many songs were banned by the BBC as well—including the Beatles' "With A Little Help From My Friends," because of what it called explicit references to drugs. And in the United States, right-wing and religious groups staged record-burnings, events which preceded the revival-style anti-rock campaigns of contemporary evangelists. The Federal Communications Commission (FCC) followed suit in the early 1970s when it warned

all broadcast licensees to be aware of the lyrics they were broadcasting. Their notice ... reads: "Whether a particular record depicts the danger of drug abuse, or, to the contrary, promotes such illegal drug usage is a question for the judgment of the licensee" (Fong-Torres, 1971, p. 6).

But not until the late 1980s does direct U.S. government intervention in the distribution of popular music arise. Prompted by the Parents Music Resource Center (PMRC) (a group composed of the wives of various Washington luminaries, with Tipper Gore and Susan Baker the most prominent founders) and renewed fundamentalist lobbying, Congress in general and the Senate Commerce Committee in particular held hearings on popular music lyrics. Indeed, this is the closest popular music has come to a collision with the First Amendment, in the sense of explicit government intervention.

The collision was avoided when, in 1985, the Recording Industry Association of America (RIAA) agreed to the PMRC's request for labels on sound recordings warning of explicit lyric content. Perhaps the PMRC can evade criticism via traditional First Amendment interpretations by not being an official agency; in any case, the PMRC itself wants to avoid the use of the word "censorship." In a 1986 position paper it includes among its goals to "keep the issue of labeling and script display solidly in the sphere of consumer [sic] affairs, not in the realm of censorship nor First Amendment proposals" (Lansing, 1986).

Though the PMRC has received contributions from religious organizations, its directors have chosen to keep a distance from such groups. Popular music, though, has long been the target of religious groups (record-burnings are not uncommon even today). In recent years, religious accusations have focused on alleged connections with Satanism.

This was a subtext in the case of Jello Biafra, leader of the well-known West Coast political punk band the Dead Kennedys, who was arrested for allegedly distributing harmful matter to minors. The charge stemmed from the Dead Kennedy's *Frankenchrist* album, which included a poster of H. R. Giger's "Penis Landscape." The charges brought against Biafra and others in the case did not call into question musical or lyrical content. Nonetheless, at the trial, much more than the poster was called into question; jurors were played tracks from the album and read its lyrics. Biafra was acquitted in August 1987.

A well-publicized recent case involved the accusation that a song by the rock group Judas Priest caused the suicides of two Nevada youths. The case came to trial in 1990. The youths' parents claimed that subliminal messages in Judas Priest's "Better By You, Better Than Me" had led the boys to kill themselves. Attorneys for the band and its record label, CBS, argued that "record companies and artists cannot be held entirely responsible for actions some listeners may take after hearing their records" (Zimmerman, 1990, p. 8). Again, though, what was not called into question were the song's lyrics, but the allegedly backward-masked subliminal messages included in the recording. Technical experts claimed they could not find evidence of backward-masking, but an interesting precedent was set when the judge in the case "ruled that subliminal messages and 'backmasking' . . . are not protected speech under the First Amendment" (Zimmerman, 1990, p. 8).

Due to continued PMRC and others groups' efforts at record-stickering, by 1989 several states had legislation pending that mandated record stickers. In March, 1990, the RIAA itself unveiled a plan for uniform stickering, and the bills were withdrawn. But the upshot is that many record stores, including large record store chains like Disc Jockey and Record World, refuse to stock stickered records. The efforts of the PMRC and other pro-stickering groups are, thus far anyway, targeted only toward rock 'n' roll and rap music.

With this in mind it is easier to understand the controversy surrounding 2 Live Crew. In 1987 a record store clerk in Florida was charged with felony obscenity for selling 2 Live Crew's *Is What We Are* cassette to a 14-year-old. The arrest came after the girl's parents called police to complain of the cassette's explicit lyrics. Ultimately prosecutors dropped the charges, but some damage was done; the Camelot Music chain removed 2 Live Crew product from its stores. A retailer in San Antonio, Texas, was arrested in 1990 for selling a 2 Live Crew album (local authorities were reportedly emboldened by 2 Live Crew's arrest in Florida), but again, charges were dropped after the not guilty verdict in 2 Live Crew's Florida obscenity trial.

The removal of recordings from retail outlets has become an effective means for anti-rock proponents to work within the commercial arena of the popular music industry and stem the distribution of music they find offensive. When the California State Attorney's office was preparing charges in the *Frankenchrist* case, the retail outlet that sold the record "escaped prosecution by agreeing not to sell any more Dead Kennedys records in California" (Wishnia, 1987, p. 444).

Record companies seem unimpressed by such efforts, though. A major reason may be that record-stickering and the publicity attendant to a band's arrest and court appearances seem to serve as effective promotional and sales tools. Some record labels have jumped on the stickering bandwagon, reasoning that stickered records will sell because they are stickered. In fact, proponents themselves have questioned the effects of calling attention to "offensive" records by stickering them because it appears that such efforts may actually increase sales of recordings with explicit lyrics:

... if there's a choice involved between a stickered and a sanitized version of the same album, kids almost always choose the "street version" because it indicates provocative—read "hip"—content, say representatives from the Peaches, Spec's and Q Records chains (Murphy, 1989, p. 10).

The best publicized controversy is of course the case of 2 Live Crew. In June, 1990, a record store owner in Fort Lauderdale, Florida was arrested and convicted on obscenity charges for selling 2 Live Crew's *As Nasty As They Wanna Be*. The day after the arrest 2 Live Crew were themselves arrested after a performance. The charge, in both cases, was selling obscene material. Oddly, 2 Live Crew's album carried a warning sticker, and

their performance on the night they were arrested was at an adults-only club. 2 Live Crew subsequently released a record, "Banned in the USA" (a rap to the tune of Bruce Springsteen's "Born in the USA") that championed First Amendment rights. The group was found not guilty in November, 1990.

2 Live Crew's record sales during this time skyrocketed. In an interview just prior to the verdict, 2 Live Crew founder Luther Campbell said,

I'm not really like the way I talk on records and act on stage. I'm not gonna try to disrespect you and call you all those names like I do on those records. I would never do that to a young lady, especially a sister. I'm degrading you to try to get me some money . . . Just let me talk about you for a little while, you know what I'm saying? And make me a little money (Jones, 1990, p. 171).

### *Industry Self-Censorship*

Recent examples of attempts by parents' and citizens' coalitions, state and local governments and religious organizations to limit or prohibit the sale or performance of popular music recordings or videos are numerous. And sometimes these efforts produce results: MTV's refusal to air Madonna's video "Justify My Love" is a prime example. Self-censorship among artists is not unknown in the music industry—several groups, including 2 Live Crew, have released "clean" versions of their records. But, as Chapple and Garofalo note,

The role of record companies in relation to anti-establishment music has not been, at least since the fifties, one of heavy handed repression or censorship. Far from it. Music with left-leaning lyrics would most likely be recorded by most (not all) record companies if it was judged to have commercial potential. Folk music, the genre of a great deal of American music with political content, is certainly not commercial any longer. A decision not to record political folk music is therefore economically motivated, not politically motivated (Chapple and Garofalo, 1977, p. 309).

The industry's bottom line, they reason, will ultimately dictate what is and what is not recorded. To a degree this is true, although with the spread of home recording studios and affordable production costs, the industry has less of a hold on such decisions than they did just ten years ago. Yet, considering the need for radio play as a tool to promote recordings, and the industry's virtual stranglehold on distribution channels, it is still industry executives who hold the cards. And their motivation to maintain or increase bottom line profit is ultimately responsible for the vast majority of popular music that reaches the public.

Nervousness over legal confrontations has, however, prompted at least one major record label (MCA Records) to create a committee to screen lyrics before they are publicly released (Ballinger and Marsh, 1990, p. 4). Indeed, a record company maintains in almost all cases the right to decide what is and what is not "commercially acceptable" in a recording. Clauses concerning the record company's sole approval of commercially satisfactory recordings are standard in recording contracts.

Within this framework, it must be remembered that the odds of an artist establishing a successful career are astronomical. Consequently, as Chapple and Garofalo, put it,

Artists could be roughly, although artificially, placed into two groups: those who want to make it more than anything else, and those who care more about their music than they do for money and adulation (Chapple and Garofalo, 1977, p. 311).

Admittedly simplistic, this model accounts for the vast disinterest many popular music artists seem to take in censorship issues, and may also account for the PMRC's abandonment of attacks on Prince and Madonna, and their concentration on newer and non-established acts such as 2 Live Crew, Gwar, and Public Enemy. It also accounts for the turn many anti-rock groups have taken to attack record companies by limiting or stopping the sale and distribution of records they deem unsuitable.

## Related Legal Battlefields

Throughout the collision between popular music and censors, the First Amendment has remained intact insofar as a *direct* assault on it has not been mounted. Still, it is easier to see how First Amendment rights may be eroded by actions taken against 2 Live Crew and other groups than by legislation enacted by the federal government in accord with the recording industry. Thus far such legislation has focused on three discrete though related fronts: immigration law, copyright law and trade law. The recording industry has in fact been quite successful at enlisting the aid of government to stem the flow of non-U.S. music across its borders.

### *Popular Music and the U.S. Immigration Laws*

Recent changes in U.S. Immigration and Naturalization Service (INS) laws have made it more difficult for non-U.S. musicians to enter America and perform their music. Opposition to the changes has been scant, perhaps due in part to the lack of publicity surrounding their adoption (despite prominent notice in a *Village Voice* article in December, 1986).

The issue revolves primarily around H-1 work permits for entertainers. In the past, the INS required applicants for permits to make their way through a forest of paperwork and include documentation (in the form of press clippings, recordings, etc.) that proved the entertainers' "distinguished merit." The wording in the INS law has changed, however, so that the term "distinguished merit" has been replaced by "preeminence." If distinguished merit was difficult to document (the INS provided no definition of it), at least it had a vagueness to it that allowed broad interpretation. The implication of preeminence, though, is that a performer must be a star. According to Char Eberly, who books groups for Sounds of Brazil, a New York club that features Latin America, African and Caribbean music:

Currently the regulations for obtaining H-1 status are so difficult and time-consuming that many artists/petitioners who qualify are denied. The artist and petitioner become caught in a Catch-22 by factors such as 1) having to prove a level of "stardom" to bureaucrats who know nothing of international music and its award, festivals, history, etc.; 2) having to offer proof of advertising, promotion, and publicity before knowing if the artist will be allowed into the country to perform; and 3) having to offer proof of commercial success in the face of a system which makes commercial success extremely difficult to achieve (Titus, 1987, p. 9).

Among groups that have been affected by enactment of the new law are Britain's Blow Monkeys, Membranes and New Model Army, West Germany's Bochumer Ensemble, Poland's Stry Teatr, East European folk-jazz ensembles, reggae group Third World, and countless African performers (among them the noted guitarist Chief Commander Ebenezer Obey). One wonders if the Beatles or Rolling Stones would have passed such scrutiny early on in their careers.

### *Technology, Music and Copyright*

Copyright has traditionally been regarded as an author's protection against the copying and pirating of music. But it has also been a means for record companies and music publishers (who usually own the copyrights to songs) to insure income during periods of low sales. Copyrights are bought, sold and exploited via licensing fees and royalties, and as such influence decisions about which songs shall be recorded. But new technologies that enable a diffusion of authorship and ready reproduction are wreaking havoc with traditional copyright protection. Music is by no means the only creative field struggling with copyright problems. The film industry and computer industry are still engaged in negotiation over copyright and copy protection.

The United States government has provided a means of copyrighting music since passage of the Copyright Act of 1909. In 1972, an amendment to the Copyright Act provided for copyrighting of "sound recordings." Four years later, the 1976 Copyright Act provided copyright protection for both published and unpublished sound recordings. The 1976 Copyright Act defines sound recordings as

works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied (Copyright Act, 1976, 17 USC 101, paragraph 26).

Despite the publicity surrounding home taping and copyright legislation, little public issue has been made about another pending copyright problem: namely, the ownership of sound. Modern synthesizers have enabled creation of unique sounds, and some of the programmers and musicians who create the sounds are keeping close watch on copyright matters. The issues can be roughly divided into two categories. First is the

issue of digital sampling of sound. Musicians involved in the recording of popular music have a habit of referring to sounds created by other musicians. For instance, during a recording session, a drummer may ask the engineer if he could get a "Phil Collins" type of drum sound. Samplers such as the Ensoniq Mirage, Kurzweil 250, Fairlight, Akai S900, and many others permit recording of sound events and subsequent manipulation and playback via a keyboard. Thus a musician can sample the drum sounds from a Led Zeppelin record, assign the bass drum to one key of the keyboard, the snare drum to another, cymbals to another, and so on. This of course does not mean that the musician can then *play* drums like John Bonham of Led Zeppelin—but he can *sound* like John Bonham, and that is of crucial importance.

The second category with which copyright legislation is struggling is the copying of synthesized sounds by means other than sampling. As with the computer software industry, there is little to prevent someone from purchasing a set of sounds and copying them at will, or from programming a sound heard on another's recording into his own synthesizer.

In fact, the point is almost moot since many of the most popular recordings use sounds created by manufacturers, and built into synthesizers. They are, in computer software terms, "public-domain" sounds, free to be copied. A problem arises, however, because once they are used on a recording, it could be argued that the copyright notice on the record covers the sounds. Two forms of copyright can be filed for a published (i.e. publicly released) recording; a "circle-C" which denotes a musical copyright, and a "circle-P" which denotes copyright of the sound recording. As synthesist and programmer Bryan Bell has said, "The circle-P copyright is for the whole record album. The musical copyright is 8 bars or whatever it is. The circle-P is for anything that's on there for any amount of time. Sounds included" (Bell, 1987). In general, the "circle-P" copyright is owned by the record company; will record companies claim ownership of sounds and samples?

Sampling has created resentment among some musicians, as the following, excerpted from a *Wall Street Journal* article, illustrates:

Frank Doyle, a New York engineer, recently plugged into his sampler the sound of Madonna screaming "hey!" on her song "Like A Virgin," raised it an octave and dropped the new sound into a few parts of a coming song by Jamie Bernstein. He took a horn blast from a James Brown song and turned it into a lush, mellow tone for a Japanese singer's love ballad. "I didn't feel at all like I was ripping James Brown off," he says.

That's not the way James Brown sees it. "Anything they take off my record is mine," says the soul-music pioneer ... "Is it all right if I take some paint off your house and put it on mine? Can I take a button off your shirt and put it on mine? Can I take a toenail off your foot—is that all right with you?" (*Wall Street Journal*, 1987, p. 16).

Frank Zappa, a musician who has spoken loudly against censorship, features sampled sounds prominently on his new recordings, but nevertheless

includes the following statement on his *Jazz From Hell* LP: "Unauthorized reproduction/sampling is a violation of applicable laws and subject to criminal prosecution."

The issue of sampling and copyright has important implications regarding labor, income and control. Copyright in the music industry has traditionally been associated with income, since royalties are paid on the basis of copyright ownership. It has also been a means of control, since copyright owners can determine the uses to which a song is put, or whether it can be recorded or not. The administration of copyright, royalty and control is performed by a music publisher. Copyright of sound was not an issue until sound could be marketed. And with an administrator of sound copyright, an entirely new branch of the music industry may grow.

Curiously, the issue becomes one of deciding who *owns* an expression—and who can say what has already been said. While discussing reggae and hip-hop cultures (that pursue a folk/oral tradition using modern technology), Dick Hebdige writes:

At the centre of the hip-hop culture was audio tape and raw vinyl. The radio was only important as a source of sounds to be taped... The hip-hoppers "stole" music off air and cut it up. Then they broke it down into its component parts and remixed it on tape. By doing this they were breaking the law of copyright. But the cut 'n' mix attitude was that no one owns a rhythm or a sound. You just borrow it, use it and give it back to the people in a slightly different form. To use the language of Jamaican reggae and dub, you just *version* it... And anyway, who *invented* music in the first place? Who ever *owned* sound and speech? (Hebdige, 1987, p. 141).

The mix of technology and folk-culture only accentuates the question of who owns sound, music and rhythm. In a sense, we have come full circle to a discussion of popular music as oral tradition.

### *The Import "Blockade"*

With the discussion of sound and copyright as a background, we can now consider two cases regarding importation of sound recordings with U.S. copyrights that threaten to block the availability of many hard-to-find recordings issued by foreign labels. The cases set a precedent for blocking importation of recordings (legally licensed for manufacture and distribution abroad) whose copyrights are held by American record companies.

In the first case, *Columbia Broadcasting System, Inc. v. Scorpio Music Distributors, Inc.* (decided in 1983), the court held that "phonorecords manufactured abroad and imported by a third-party intermediary without the consent of the copyright owner constituted unlawful importation of phonorecords under section 602 of the U.S. Copyright Act... 'importation' infringed the plaintiff's copyright in the phonorecords" (Sloane & Thorne, 1986, p. 69). The second case, *Harms Music v. Jem Importers* (decided in 1987), upheld the copyright of a music publisher against the importation of sound recordings containing the publisher's copyrighted

songs. Out-of-court settlements between major labels and import distributors followed these cases.

Each case deals with what is commonly referred to as "parallel imports," and the result has been a chilling effect on U.S. importers. Lawyers advised importers that

the prudent United States purchaser of phonorecords from abroad would have determined, before entering into a purchase agreement, the nature and extent of any American copyright owner's rights to the phonorecords at issue. Since Scorpio Music, however, such a determination would be wise not only with respect to purchases from abroad but also purchases within the United States because of the possibility that the domestic purchaser would be found to be acting within the chain of importation and deemed a contributory infringer (Sloane & Thorne, 1986, p. 73).

Ostensibly, major labels and music publishers perceived a threat to their profit margin created by importation of recordings that had been manufactured more cheaply outside the U.S. More likely is that they felt that U.S. consumers' budget was stretched too thin to afford more-expensive imported recordings. Though unable to completely halt the importation of records into the U.S., at least they could damage the importers to a greater or lesser extent. Along the way they damaged the U.S. independent record label, as U.S. distributors (Caroline, Important, JEM, Rough Trade, Twin Cities) act as importers but also generally stock 50 percent independent label releases. U.S. independent labels have a difficult enough time getting paid by distributors already, and undoubtedly any financial difficulties placed on the distributors would surely make their way to the independent labels.

The implications are great for fans of hard-to-find American music that is released by European labels such as Charly, Ace, Demon, and Pathe-Marconi. In Europe there is a great appreciation for jazz and blues records that have long been deleted from the catalogs of U.S. record companies—but whose copyrights those companies still hold. Presumably the average person in Europe will be able to buy records by American artists that the American public will not have access to.

## Conclusion

Each of the issues discussed is, at heart, not an issue of artistic quality or merit, but an issue of freedom. Most obviously at stake are First Amendment constitutional rights, but freedom of choice is equally embattled.

One can perhaps understand the protectionist nature of these legal challenges by viewing the American music industry in the context of the global popular music market. Not only does an increased internationalization of popular music mean that foreign artists are becoming more prominent in the U.S. (this is not a major concern for U.S. record companies, as history has shown—for instance, the British invasion of the 60s was a blessing, not a curse) but that U.S. artists, due in some cases to con-

nections and collaborations with foreign artists, are becoming more popular overseas as well. Record sales may thus increase overseas, but royalty payments on publishing and licensing become more difficult to obtain, and often they are divided among foreign copyright holders. Since a vast portion of a record company's income is from publishing and licensing, it is not surprising that they are concerned about record importation, foreign acts performing in the U.S., and so on.

It is doubtful that any of the above issues will be resolved to the satisfaction of all participants, not because the sides are too far apart on any one issue but because the players speak different languages. On one side are major labels, oriented toward profit margins, on the other side are independent labels, promoters, artists, etc., oriented toward attaining access to the public and to music, and on yet another side are those who wish to somehow "cleanse" popular music of obscenity. Interests are similar, but the rewards are different, and until there is a reconciliation of the two, it appears that the only true winners will be attorneys.

Still, if we recall the passages quoted from Ong and Attali, it is evident that, in the popular music industry, control of sound—and thus expression—lies in the hands of the record companies and other corporate entities with the resources to pursue lengthy and complicated litigation. It is not surprising that the California State Attorney's office chose to prosecute the Dead Kennedys rather than, say, Prince or Madonna, for then they would be matched against a major label's battery of attorneys, and may, in cases where vertical integration has caused the record company to become a subsidiary of a larger conglomerate, offend a larger media outlet and/or campaign contributor.

Within any discussion of popular music and censorship it is important to recall as background that popular music does indeed have an empowering role for youth. As Grossberg points out:

Rock and roll has, repeatedly and continuously, been attacked, banned, ridiculed, and relegated to an insignificant cultural status. The fact that so much effort has been brought to bear in the attempt to silence it makes it reasonable to assume that some struggle is going on, some opposition is being voiced (Grossberg, 1990, p. 114).

Grossberg goes on to define rock and roll's capacity for empowerment in terms of its celebration of youth and rejection of "straight" social structures. It is likely that attempts to silence popular music arise not because popular music empowers youth but because it empowers via the flaunting and or breaking of rules and authority. The interesting and problematic issue surfaces when one asks "What happens when the rules are broken?" For, as a commercially constructed text, as a commodity, popular music must then strain at the limits of what is taboo and must continually push those limits—lest it lose its ability to empower.

Many musicians, record industry executives, DJs and fans seem to feel that it is a good thing the PMRC and other anti-rock groups exist, because these groups remind us that rock and roll is a rebellious form. Yet, one

must ask: What role does censorship play as a form of resistance? Is it possible that popular music has moved toward the center and become less a part of the margins of everyday life, and the very groups espousing censorship are in some sense establishing an oppositional discourse? This is indeed slippery terrain, for, as Fiske writes,

Popular culture always is part of power relations; it always bears traces of the constant struggle between domination and subordination, between power and various forms of resistance to it or evasions of it, between military strategy and guerrilla tactics. Evaluating the balance of power within this struggle is never easy: Who can say, at any one point, who is "winning" a guerrilla war? (Fiske, 1989, p. 19)

It is still instructive to return to the roots of popular music, to understand it as a form of oral culture, and make a comparison. Rap music, as well as other popular music forms, employs the same memory aids—rhythm, rhyme, harmony—as epic poetry. In their time, such stories and poetry were not thought of as art. Much of what we now consider great art was, in its own time, considered a lowly form of expression—or not considered artistic in any sense at all. It does appear that the struggle over rap music's lyrics, and other challenges to expression in various forms of popular music, is a fundamental social and cultural battle.

In *The Book of Laughter and Forgetting*, Milan Kundera wrote "the struggle of man against power is the struggle of memory against forgetting" (Kundera, 1980, p. 3). The words, ideas and values in popular music are—by virtue of recording—unforgettable. Yet, the problems that are recorded in much of popular music, problems such as crack addiction, gang violence, and rape, are problems that we would much rather forget.

It is thus quite a powerful form. We are in an age when one crisis makes us forget another, when events vie for our attention and memory. News from Panama makes us forget about China, news from Lithuania makes us forget about Panama, and on and on. And it now appears the point of the Reagan years was to attest to the power of forgetting. Very few things stay in our memory for long. Indeed, human memory has taken a back seat to recording. The stories we told each other were the means by which our culture preserved itself. Recordings, movies, CDs, TV shows, have taken over that function. The struggle over rap lyrics, heavy metal music, and so on, thus assumes dimensions beyond artistic merit. It is a struggle of one culture to maintain itself in the face of another culture.

What is most interesting is that rap music is being silenced because it is outspoken. But if the problems sung about in 2 Live Crew, NWA and Public Enemy lyrics exist, silencing these voices will not bring a solution. If these problems cannot be talked about, can they be solved? Where there is only silence and no communication, there is no coexistence. There is ignorance—and forgetting.

## NOTES

1. For example, Verdi was censored in the 1840s (Weaver, 1988, p. 127).
2. In an interesting twist, the editorial was in response to the Rev. Jesse Jackson's call for a boycott of the Rolling Stones' song "Some Girls" for its portrayal of black women.

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