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# Media Violence: Different Times Call for Different Measures

Lisa Kimmel

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# MEDIA VIOLENCE: DIFFERENT TIMES CALL FOR DIFFERENT MEASURES

LISA KIMMEL\*

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When life imitates the media, the results can be disastrous.<sup>1</sup> This is especially true when individuals are imitating movies, television shows, and books that sensationalize violence. In the aftermath of recent school shootings and terrorist attacks, there has been heightened concern about the violent images portrayed in the media, and its ability to desensitize people to the consequences of such violence. In the past twenty years, there has been an increase in the number of claims against the entertainment industry alleging that the industry should be held liable for the violent acts committed by viewers, readers, and listeners.<sup>2</sup> However, the First Amendment has been used to bar tort liability in a vast majority of such cases.<sup>3</sup>

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<sup>1</sup> J.D., May 2002, University of Miami School of Law; B.A. 1999, University of Florida. The author would like to thank her family and friends for their love and support. The author also wishes to thank Professor Vivian Montz for her assistance in the preparation of this Comment.

<sup>2</sup> *NBC Nightly News* (NBC television broadcast, Oct. 19, 1993).

<sup>3</sup> See Carolina A. Fornos, *Inspiring the Audience to Kill: Should the Entertainment Industry Be Held Liable for Intentional Acts of Violence Committed By Viewers, Listeners, or Readers?*, 46 LOY. L. REV. 441 (2000).

<sup>4</sup> See *Olivia N. v. NBC*, 178 Cal. Rptr. 888 (Ct. App. 1982); *McCollum v. CBS*, 249 Cal. Rptr. 187 (Ct. App. 1988); *Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991), *Watters v. TSR*, 904 F.2d

Part I of this Comment reviews the First Amendment, and how the *Brandenburg* test<sup>4</sup> applies to media liability cases. Part II discusses media liability cases and the likelihood of a plaintiff bringing a successful claim against the entertainment industry. Part III argues that tort liability is not the appropriate method for deciding media violence cases since it intrudes on First Amendment rights. This section will also examine the implications of the *Rice v. Paladin*<sup>5</sup> decision on the entertainment industry in the future. Part IV will discuss the entertainment industry's marketing practices, and their system of self-regulation. Finally, Part V will discuss the industry's present task of making adjustments in response to the recent terrorist attacks on our country.

## I. MEDIA VIOLENCE AND THE FIRST AMENDMENT

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the government for a redress of grievances."<sup>6</sup> Historically, there has been an "overriding constitutional principle that materials communicated by the public media . . . including artistic expressions"<sup>7</sup> such as films, books, and music, are afforded protection from governmental restrictions under the First Amendment. When deciding cases that deal with speech that advocates harm, courts have consistently applied the *Brandenburg* test, which protects political speech and abstract advocacy of lawlessness.<sup>8</sup> This test, formulated in the case *Brandenburg v. Ohio*, represents the present status of freedom of speech.<sup>9</sup>

In *Brandenburg*, the defendant was a leader of an Ohio Ku Klux Klan (KKK) group who invited the press to attend a KKK rally.<sup>10</sup> At the rally, the defendant stated the KKK was "not a revergent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it is possible that there might be some revengeance taken."<sup>11</sup> Because of his speech, the defendant was charged with violating

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378 (6th Cir. 1990); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989); *Zamora v. CBS*, 480 F.Supp. 199 (S.D. Fla. 1979).

<sup>4</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>5</sup> See *Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997).

<sup>6</sup> U.S. CONST. amend. I.

<sup>7</sup> *McCullum*, 249 Cal. Rptr. at 191.

<sup>8</sup> See *Brandenburg*, 395 U.S. at 444.

<sup>9</sup> *Id.* at 444.

<sup>10</sup> *Id.* at 444-45.

<sup>11</sup> *Id.* at 446.

Ohio's Criminal Syndicalism Statute.<sup>12</sup> The Supreme Court struck down the Ohio statute, finding the words of the defendant were no more than mere advocacy of abstract doctrine.<sup>13</sup>

In doing so, the court articulated new requirements for statutes proscribing speech.<sup>14</sup> Under *Brandenburg*, speech advocating the use of force or crime could only be proscribed where two conditions were satisfied: (1) The advocacy is "directed to inciting or producing imminent lawless action;" and (2) The advocacy is also "likely to incite or produce such action."<sup>15</sup>

Since *Brandenburg*, the Supreme Court has decided other cases that present additional illustrations of the modern requirements of: (1) Incitement (as opposed to abstract advocacy); and (2) Imminent harm (as opposed to remote harm).<sup>16</sup> One instance is *Hess v. Indiana*.<sup>17</sup> This case grew out of a campus anti-war demonstration in which demonstrators blocked a street until the police moved them away.<sup>18</sup> The defendant then said, "we'll take the fucking street later (or again)."<sup>19</sup> The Court held that the defendant's statement was "nothing more than advocacy of illegal action at some indefinite future time."<sup>20</sup> The Court also stated the speech at issue needs to be directed to a specific person or group.<sup>21</sup> Furthermore, the Court concluded that since only words intended and likely to produce imminent disorder could be punished, the defendant's words were protected by the First Amendment.<sup>22</sup>

The Supreme Court again demonstrated the *Brandenburg* incitement test would be rigorously applied in *NAACP v. Claiborne Hardware*.<sup>23</sup> This case involved a boycott against white merchants by black citizens in a Mississippi county. During a public speech, a NAACP leader speaking in favor of the

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<sup>12</sup> *Id.* at 445. The Ohio statute punished all advocacy of the "duty, necessity, or propriety of crime or violence . . . as a means of accomplishing industrial or political reform." *Id.*

<sup>13</sup> *Id.* at 448-49.

<sup>14</sup> *Id.* at 447. Before *Brandenburg*, using the clear and present danger test drew the line between legal advocacy and illegal incitement of criminal acts. This test was first used in *Schenck v. U.S.*, 249 U.S. 47, 52 (1919) (stating that the issue was "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent").

<sup>15</sup> *Brandenburg*, 395 U.S. at 448.

<sup>16</sup> See *Hess v. Indiana*, 414 U.S. 105 (1973); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (*Claiborne*).

<sup>17</sup> *Hess*, 414 U.S. 105.

<sup>18</sup> *Id.* at 106.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 108.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 108-09.

<sup>23</sup> *Claiborne*, 458 U.S. 886 (1982).

boycott stated, "if we catch any of you going in any of them racist stores, we're going to break your damn neck."<sup>24</sup> The Court reversed the lower court's verdict for damages against the speaker. In doing so, the Court concluded that the NAACP leader's speech did not constitute incitement, and was therefore afforded protection under the First Amendment.<sup>25</sup> The Court acknowledged the NAACP leader had used strong language, but held "an advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause."<sup>26</sup>

## II. THE IMPLICATIONS OF THE *BRANDENBURG* STANDARD FOR MEDIA VIOLENCE CASES

The tension between allowing artists to express their ideas and the danger of imitation has increased dramatically in recent years. The number of mimicry cases that have come before the court has increased as well. Many of these cases were brought under a negligence theory of tort liability in which plaintiffs alleged the media defendant failed to protect the victims from a foreseeable harm.<sup>27</sup> Since the courts have traditionally applied the two part *Brandenburg* standard, a majority of claims against the entertainment industry for liability in relation to violent or dangerous acts have failed to prove the requirements necessary for success.<sup>28</sup> In applying the *Brandenburg* standard, courts have typically held the media work in question was not "directed to inciting or producing imminent lawless action," and/or that the advocacy was not "likely to incite or produce such action."<sup>29</sup> Recently, however, the court has relaxed the imminent requirement of the *Brandenburg* standard, especially when the media involves speech that seems to directly aid and abet crime.<sup>30</sup>

The following cases represent how courts traditionally deny plaintiffs' claims against the entertainment industry due to the strong First Amendment protection often approved in media-related cases. These cases will be grouped into the following categories: Motion Picture Cases, Television Broadcasting Cases, Music Cases, Game Cases, and Classified Advertisements/Commercial Speech Cases.

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<sup>24</sup> *Id.* at 902.

<sup>25</sup> *Id.* at 928.

<sup>26</sup> *Id.*

<sup>27</sup> See David C. Kiernan, *Shall the Sins of the Son Be Visited Upon the Father? Video Game Manufacturer Liability for Violent Video Games*, 52 HASTINGS L.J. 207, 227 (2000).

<sup>28</sup> See *Olivia N.*, 178 Cal. Rptr. 888; *McCollum*, 249 Cal. Rptr. 187; *Waller*, 763 F. Supp. 1144; *Watters*, 904 F.2d 378; *Yakubowicz*, 536 N.E.2d 1067; *Zamora*, 480 F. Supp. 199.

<sup>29</sup> *Brandenburg*, 395 U.S. 444.

<sup>30</sup> See *Rice*, 128 F.3d 233. See also *Byers v. Edmondson*, 712 So. 2d 681 (La. Ct. App. 1998).

### A. Motion Picture Cases

In *Yakubowicz v. Paramount*,<sup>31</sup> a young man who had just seen the violent movie, *The Warriors*, stabbed Martin Yakubowicz to death.<sup>32</sup> Before killing Yakubowicz, the assailant said to him "I want you, I'm going to get you," allegedly in imitation of a scene from the movie.<sup>33</sup> Consequently, the victim's father brought a wrongful death action against Paramount.<sup>34</sup> The plaintiff alleged that Paramount produced, distributed, and advertised *The Warriors* in such a way as to "induce film viewers to commit violence in imitation of the violence in the film."<sup>35</sup>

The plaintiff also alleged that Paramount caused the death of his son by "continuing to exhibit the film" after learning of other violent acts that occurred at or near movie theaters showing *The Warriors*.<sup>36</sup> Moreover, the plaintiff alleged that the defendant's negligence proximately caused the death of his son.<sup>37</sup> The lower court granted the defendant's motion for summary judgment.

In considering whether a duty of care existed,<sup>38</sup> the Supreme Court of Massachusetts determined the defendant owed a duty of reasonable care to the public, including Yakubowicz, with "respect to the producing, exhibiting and advertising of movies."<sup>39</sup> However, the court concluded that based on the First and Fourteenth Amendments, the defendant did not violate their

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<sup>31</sup> *Yakubowicz*, 536 N.E.2d 1067.

<sup>32</sup> *Id.* at 1068. The film included numerous violent scenes in which "a juvenile gang, 'the warriors,' was chased through the subways of New York with guns, knives, and other weapons." *Id.* at 1069.

<sup>33</sup> *Id.* at 1070.

<sup>34</sup> *Id.* at 1068.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1070.

<sup>38</sup> "In determining whether the law ought to provide that a duty of care is owed by one person to another, we look to existing social values and customs, and to appropriate social policy." *Id.* at 1070. See also *Delgado v. Am. Multi-Cinema, Inc.*, 85 Cal. Rptr.2d 838 (1999), in which parents, whose son was fatally shot by a 13-year old who had just watched the violent R-rated movie, *Dead Presidents*, sued the theater owner for negligence. The court rejected the parents' allegation that the theater owner violated a duty of care to the public when the theater failed to determine whether the teenager, who was unaccompanied adult, was old enough to see the movie. *Id.* at 840. The court stated that "measured by its goal of protecting children from objectionable films, the movie-rating system's duty flows to parents; it was not designed or intended to protect society at large." *Id.* at 841.

<sup>39</sup> *Yakubowicz*, 536 N.E.2d at 1067, 1070.

duty of reasonable care.<sup>40</sup> The court stated that motion pictures are a "significant medium for the communication of ideas,"<sup>41</sup> and that *The Warriors* did not fall within the recognized exceptions to the First Amendment.<sup>42</sup>

The plaintiff also tried to argue that *The Warriors* fell within the incitement exception of the First Amendment. However, the court concluded that the film did not constitute incitement based on its viewing of the movie.<sup>43</sup> The court, in explaining its reasoning, stated that "although the film is rife with violent scenes, it does not at any point exhort, urge, or encourage unlawful or violent activity on the part of viewers."<sup>44</sup> Moreover, the movie did not "purport to order or command anyone to any concrete action at any specific time, much less immediately."<sup>45</sup>

### B. Television Broadcasting Cases

In *Zamora v. CBS*,<sup>46</sup> 15-year old Ronnie Zamora, shot and killed his 83-year old neighbor. As a result, his family brought an action against the National Broadcasting Company (NBC), Columbia Broadcasting System (CBS), and American Broadcasting Company (ABC) for damages on the theory that Zamora had become "involuntarily addicted to and completely subliminally intoxicated" by the viewing of television violence that was shown on the defendants' networks.<sup>47</sup> The plaintiffs charged the networks with breaching their duty to use ordinary care "to prevent Ronnie Zamora from being impermissibly stimulated, incited, and instigated to duplicate the atrocities he viewed on television."<sup>48</sup> There was, however, no allegation that a particular program incited Ronny Zamora to kill his neighbor. Nor was

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<sup>40</sup> See *id.*; See also *Bill v. Superior Court*, 187 Cal. Rptr. 625, 630 (Ct. App. 1982) (stating that if the producers of an allegedly violent film:

[W]ere held to have a duty to warn potential patrons of the risk of attending their movie, they would have to anticipate that the warning would deter substantial portions of the public from attending it. And if, under such circumstances, they were held to be responsible for providing security protection at and in the vicinity of every theater at which the movie is shown, including public streets, the attendant costs might be substantial indeed. It is thus predictable that the exposure to liability in such situations would have a chilling effect upon the selection of subject matter for movies . . .").

*Id.*

<sup>41</sup> *Yakubowicz*, 536 N.E.2d at 1067, 1070.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1071.

<sup>44</sup> See *id.*

<sup>45</sup> *Id.* (quoting *McCollum*, 249 Cal. Rptr. at 193).

<sup>46</sup> *Zamora*, 480 F.Supp. 199.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

there an allegation as to a specific time period in the ten-year span of television viewing in which the suggested duty applied to the defendants.<sup>49</sup>

The networks moved to dismiss the complaint stating it violated their First Amendment rights, the duty of care alleged did not exist, and the complaint completely failed to set forth a legal or factual basis to support the charge of proximate cause.<sup>50</sup> The court agreed with these positions, and ruled that merely alleging a duty of care to refrain from violent programming is not enough to bring a successful claim.<sup>51</sup> In its opinion, the court stated that they have to look at all cases that could restrain First Amendment rights with suspicion. In addition, the court expressed "to permit such a claim by the person committing the act . . . would give birth to a legal morass through which broadcasting would have difficulty finding its way."<sup>52</sup> Furthermore, the court concluded that "the imposition of the duty claimed would discriminate among television productions on the basis of content and not on the basis of any of the First Amendment limitations."<sup>53</sup>

Similarly, a nine-year old girl, Olivia N., brought an action against NBC for injuries caused by artificial rape with a bottle by minors who allegedly were imitating a scene from the televised film *Born Innocent*.<sup>54</sup> *Born Innocent* showed a violent sexual attack of a young girl while she was showering.<sup>55</sup> In the film, the attackers raped the girl with a "plumber's helper."<sup>56</sup> In the attack giving rise to this case, it was alleged that Olivia was artificially raped with a bottle by a group of minors.<sup>57</sup> The plaintiff argues that the film caused the teenagers to commit an act similar to the one depicted in the film. In addition, the plaintiff attempted to show NBC had knowledge of studies on child violence, and argued the defendant should have known "susceptible persons might imitate the crime enacted in the film."<sup>58</sup> Interestingly, the

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<sup>49</sup> *Id.* at 200.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

The complaint does not suggest that the event in question was a reaction to any specific program of an inflammatory nature; or that the minor plaintiff was incited or goaded into unlawful behavior by a particular call to action. Rather, it is asserted that at some point (unspecified in any way) he became captive to the violence he viewed and turned to unlawful conduct.

*Id.* at 204.

<sup>52</sup> *Id.* at 206.

<sup>53</sup> *Id.*

<sup>54</sup> *Olivia N.*, 178 Cal. Rptr. 888.

<sup>55</sup> *Id.* at 890.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*



plaintiff's counsel, in his opening statement, indicated "that the evidence would establish negligence and recklessness . . . rather than incitement."<sup>59</sup>

The plaintiff contended that when there is negligence, the court should impose liability absent incitement. Moreover, the plaintiff argued in the alternative, the court should define incitement differently.<sup>60</sup> The court disagreed with the plaintiff's contention, stating that "the chilling effect of permitting negligence actions for a television broadcast is obvious."<sup>61</sup> After viewing the film, the court determined that the "film did not serve to incite violent and depraved conduct such as the crimes committed against the plaintiff."<sup>62</sup>

The cases mentioned above express the courts' view that although a movie or film may contain violent depictions, the violence in and of itself does not automatically strip the media's First Amendment rights. In addition, these cases represent the courts' position that when a plaintiff brings a claim against a media defendant, they will have to prove incitement rather than mere negligence in order to be successful.

### C. Music Cases

There have been two teen suicide cases<sup>63</sup> brought by the parents of the deceased against Ozzy Osbourne and CBS Records, alleging Ozzy Osbourne's song *Suicide Solution*, which "preaches that suicide is the only way out," caused the teenagers' deaths.<sup>64</sup> The plaintiffs attempted to establish liability by arguing incitement. In both cases, the court relied on the *Brandenburg* test refined in *Hess*, and concluded that to find a culpable incitement, the plaintiffs must prove that: (1) Osbourne's music was directed and intended toward the goal of bringing about the imminent suicide of listeners; and (2) It was likely to produce such a result.<sup>65</sup>

In *Waller v. Osbourne*, the parents of the deceased attempted to establish that Osbourne's song *Suicide Solution* contained subliminal messages that

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 892. "The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute. Realistically, television networks would become significantly more inhibited in the selection of controversial materials if liability were to be imposed on a simple negligence theory."

<sup>62</sup> *Id.* at 889.

<sup>63</sup> See *McCollum*, 249 Cal Rptr. 187; *Waller*, 763 F.Supp. 1144.

<sup>64</sup> The lyrics of the song *Suicide Solution* are as follows: "Ah know people . . . You really know where it's at . . . You got it . . . Why try, why try . . . Get the gun and try it . . . Shoot, shoot, shoot." *Id.* at 1146.

<sup>65</sup> See *McCollum*, 249 Cal Rptr. at 192; See also *Waller*, 763 F. Supp. at 1150-1151.

were "consciously intelligible only when the music was electronically adjusted."<sup>66</sup> The court stated that they must initially resolve the issue of whether the song contained subliminal messages since "the presence of a subliminal message, whose surreptitious nature makes it more akin to false and misleading commercial speech and other forms of speech extremely limited in their social value, would relegate the music containing such to a class worthy of little, if any, First Amendment constitutional protection."<sup>67</sup> After careful examination of the song, the court concluded that honoring the plaintiff's definition of subliminal message "would mean that all rock music or any music for that matter, which contains unintelligible lyrics could be found to contain a subliminal message, thereby subjecting an endless number of performers and producers to possible lawsuits."<sup>68</sup>

Although the court held that Osbourne's song did not contain subliminal messages, the court continued its analysis to determine if it still rose to the level of incitement. The court concluded that there was no evidence the "defendants' music was directed toward any particular person or group of persons," and the plaintiffs had made no showing the defendants' music should be categorized as speech that "incites imminent lawless behavior."<sup>69</sup> The *Waller* court also stated that even if the song *Suicide Solution* asserted "in a philosophical sense that suicide may be a viable option one should consider in certain circumstances,"<sup>70</sup> the audible song lyrics did not rise to the level of incitement as necessary to hold the creators of the song liable for the teenager's suicide.<sup>71</sup> Furthermore, the court contended that "an abstract discussion of the moral necessity for a resort to suicide is not the same as indicating to someone that he should commit suicide and encouraging him to take such action."<sup>72</sup>

The court in *McCollum v. CBS*<sup>73</sup> made similar findings. The court concluded that the plaintiffs' pleading "failed to allege any basis for overcoming the bar of the First Amendment's guarantee for free speech and expression."<sup>74</sup> Moreover, the plaintiffs in *McCollum* alleged that troubled teens, a specific target group that Osbourne sought to appeal to, were extremely susceptible to the influence from a person such as Osbourne who

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<sup>66</sup> *Id.* at 1146.

<sup>67</sup> *Id.* at 1148.

<sup>68</sup> *Id.* at 1149.

<sup>69</sup> *Id.* at 1150-51.

<sup>70</sup> *Id.* at 1151.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *McCollum*, 249 Cal. Rptr. at 187.

<sup>74</sup> *Id.*

had become a role model to many of them.<sup>75</sup> The plaintiffs also alleged that a special relationship existed between Osbourne and his fans.<sup>76</sup> The court stated that "musical lyrics and poetry . . . are simply not intended to be and should not be read literally on their face . . ." and that "no rational person would or could believe otherwise nor would they mistake musical lyrics for literal commands or directives to immediate action."<sup>77</sup> Moreover, the court concluded that the lyrics of the song can easily be "viewed as a poetic device, such as a play on words, to convey meanings entirely contrary to those asserted by the plaintiffs."<sup>78</sup>

The *McCollum* court also rejected the plaintiffs' allegations the defendants "intentionally disseminated to the public music . . . which overtly and intentionally intended to cause . . . an individual to commit . . . suicide or overtly and intentionally aided and/or advised and/or encouraged another person to commit . . . suicide."<sup>79</sup> The court held that some active and intentional participation in the events leading to the suicide were required in order to establish a claim of aiding and abetting.<sup>80</sup> Given that requirement, the court concluded the "plaintiff's allegations that the defendants intentionally produced and distributed Osbourne's music do not demonstrate that they intentionally aided or encouraged" the teen's suicide.<sup>81</sup>

The *Waller* and *McCollum* decisions have set up a very strong shield of protection for artists and claims against them. As a result, in order to even get close to overcoming the hurdles of the First Amendment, a plaintiff

<sup>75</sup> *Id.* at 190.

<sup>76</sup> *Id.* "Osbourne often sang in the first person about himself and about what may be some of the listener's problems, directly addressing the listener as 'you.'"

<sup>77</sup> *Id.* at 193. *See also* Davidson v. Time Warner, Inc., 1997 WL 405907 (S.D. Tex. 1997) (During a traffic stop, Ronald Howard fatally shot Officer Davidson with a handgun while listening to a cassette of "2 Pacalypse Now," a recording that was performed by Tupac Amaru Shakur and was produced, manufactured, and distributed by Time Warner). *Id.* The court held that the defendants were not liable for producing the violent music that allegedly caused the death of the police officer. The court expressed its fear that "permitting the Davidsons to proceed with this litigation, would invariably lead to self-censorship by broadcasters in order to remove any matter that may be emulated and lead to a law suit." In addition, the court concluded that although there was no question that "2 Pacalypse Now" depicted violence, it did "not appear that Shakur intended to incite imminent illegal conduct when he recorded '2 Pacalypse Now.'" *Id.* The court also concluded that the mere broadcasting of the song was not likely to incite or produce illegal violent action," and that "no rational person would or could believe otherwise nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action." (quoting *McCollum*, 249 Cal Rptr. at 193).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 197.

<sup>80</sup> *Id.* at 198.

<sup>81</sup> *Id.* at 18. The court stated it was not sufficient to allege the "defendants intentionally disseminated Osbourne's music to the general public although they knew, or should have known, that there were emotionally fragile people who could have an adverse reaction to it."

bringing a claim against the entertainment industry not only has to show a direct urging to act in a particular manner, but also has to show the media in question was supposed to have been taken literally.

#### D. Game Cases

A mother brought a wrongful death action against the manufacturer of the game *Dungeons and Dragons* for the suicide of her son.<sup>82</sup> The plaintiff alleged that her son was an "avid" player of *Dungeons and Dragons*, and that the game began to overcome his mind to such an extent that he committed suicide.<sup>83</sup> Furthermore, the plaintiff alleged the manufacturer violated a duty of care in publishing and distributing the game.<sup>84</sup> The plaintiff also alleged the defendant violated a duty to warn the public the game could have psychological effects on "fragile-minded children."<sup>85</sup>

In deciding whether the manufacturer was liable for the death of the plaintiff's son, the court stated they saw "no indication in the record that the game's materials glorify or encourage suicide, or even mention it."<sup>86</sup> In addition, the court stated that although strict liability may sometimes be used when dealing with an inherently dangerous product, the doctrine of strict liability has never been extended to words or pictures.<sup>87</sup> Therefore, the court concluded that in a case such as this one, there could be no recovery of damages without proof that the defendant violated its duty to exercise "ordinary care to prevent foreseeable injury."<sup>88</sup>

Similarly, in the recent case *James v. Meow Media, Inc.*,<sup>89</sup> the parents of three children who were murdered at school by Michael Carneal, a student, sued the creators and distributors of various video games.<sup>90</sup> The plaintiffs alleged that the defendants "manufactured and/or supplied to Michael

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<sup>82</sup> *Watters*, 904 F.2d 378.

<sup>83</sup> *Id.* at 379.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 380. Other cases in which courts have denied applying strict liability to words and pictures include *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036-37 (9th Cir. 1991) (holding that the publisher of a travel guide could not be held liable for strict liability for reliance on the publication, since it would seriously inhibit the flow of information); and *Birmingham v. Fodor's Travel Publications*, 833 P.2d 70 (Haw. 1992) (holding that the publisher of the book *Encyclopedia of Mushrooms* could not be held liable for strict liability since the book was not considered a product in product liability law, and to impose a product liability claim would place a severe restriction on the flow of information).

<sup>88</sup> *Watters*, 904 F.2d at 380.

<sup>89</sup> *James v. Meow Media, Inc.*, 90 F. Supp.2d 798 (W.D. Ky. 2000).

<sup>90</sup> *Id.*

Carneal violent video games which made the violence pleasurable and attractive, and disconnected the violence from the natural consequences thereof, thereby causing Michael Carneal to act out the violence."<sup>91</sup> Moreover, the plaintiffs alleged the defendants "trained Carneal how to point and shoot a gun in a fashion making him an extraordinarily effective killer without teaching him any of the constraints or responsibilities needed to inhibit such a killing capacity."<sup>92</sup>

The plaintiffs also claimed the defendants breached the legal duty of care owed to them by designing, manufacturing, and distributing products they knew or should have known "were likely to affect minors in such a way as to result in harm to others," and by "failing to warn the public of the unreasonably dangerous condition and characteristics of their products and materials."<sup>93</sup> The court concluded that it was clearly unreasonable to expect the defendants to have foreseen the injuries caused by Carneal's actions.<sup>94</sup> Since the plaintiffs' injuries were unforeseeable, the court concluded that the defendants did not owe a duty of care.<sup>95</sup>

The plaintiffs also alleged claims for strict liability due to the "alleged inherent dangerousness of the products in question."<sup>96</sup> The plaintiffs claimed that the video games were distributed and made in a "defective and unreasonably dangerous condition" due to their lack of warnings and content.<sup>97</sup> In analyzing this issue, the court concluded that it was not the "tangible physical characteristics of the products that plaintiffs claim make the products defective, but instead the intangible thoughts, ideas, and messages contained within the products."<sup>98</sup> The court concluded these intangible thoughts, ideas, and messages were not products within the doctrine of strict liability, and therefore the defendants were not liable.<sup>99</sup> Moreover, the court explained "the theories of liability sought to be imposed upon the manufacturer of a role-playing fantasy game would have a devastatingly broad chilling effect on expression of all forms."<sup>100</sup>

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<sup>91</sup> *Id.* at 802.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 804.

<sup>94</sup> *Id.* at 805.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 809.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 810.

<sup>99</sup> *Id.* at 811.

<sup>100</sup> *Id.*

### E. *Classified Advertisements and Commercial Speech*

Traditionally, courts have not afforded commercial speech the same level of protection as artistic speech under the First Amendment. It is well settled that the First Amendment does not protect commercial speech "related to illegal activity."<sup>101</sup> As a result, courts have not applied the *Brandenburg* standard when deciding commercial speech cases.<sup>102</sup>

In *Braun*, a wrongful death action was brought against Soldier of Fortune Magazine by the sons of a murder victim. The plaintiff's alleged that the magazine negligently published an advertisement, submitted by Michael Savage, that "created an unreasonable risk of solicitation of violent criminal activity."<sup>103</sup> Savage testified that an overwhelming number of the telephone calls he received in response to the ad dealt with criminal activity such as murder, assault, and kidnapping.<sup>104</sup> Two men, responding to Savage's ad, contacted Savage to discuss plans to murder Richard Braun, and shortly thereafter, the plan was carried out.<sup>105</sup> The jury in the district court awarded the plaintiffs two million dollars in damages. The appellate court held the district court "properly struck the risk-utility balance"<sup>106</sup> when giving the jury instructions, and determined there was sufficient evidence to sustain the jury's verdict.<sup>107</sup>

The appeals court held that the jury could find Soldier of Fortune Magazine liable for printing Savage's ad "only if the advertisement on its face would have alerted a reasonably prudent publisher to the clearly identifiable unreasonable risk of harm to the public that the advertisement posed."<sup>108</sup> Therefore, the magazine publisher did not have a duty to investigate every

<sup>101</sup> *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1116 (11th Cir. 1992).

<sup>102</sup> *See Braun*, 968 F.2d at 1110; *See also Eimann v. Soldier of Fortune Magazine*, 880 F.2d 830 (5th Cir. 1989).

<sup>103</sup> *See Braun*, 968 F.2d at 1110.

<sup>104</sup> *Id.* at 1112. The following advertisement ran in the June 1985 through March 1986 issues of Soldier of Fortune: GUN FOR HIRE: 37-year-old professional mercenary desires jobs. Vietnam Veteran. Discrete and very private. Body guard, courier, and other special skills. All jobs considered. *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1114. In applying the risk-utility balancing test, "liability depends upon whether the burden on the defendant of adopting adequate precautions is less than the probability of harm from the defendant's unmodified conduct multiplied by the gravity of the injury that might result from the defendant's unmodified conduct." *Id.* *See Risenhoover v. England*, 936 F.Supp 392 (W.D. Tex. 1996) (holding the First Amendment did not immunize newspaper or television stations from liability for negligence associated with news gathering activities).

<sup>107</sup> *Braun*, 968 F.2d at 1110.

<sup>108</sup> *Id.* at 1114-15.

ad it published.<sup>109</sup> Moreover, the court held that imposing liability on a magazine for publishing ads that "on its face created a clear risk of substantial danger of harm to the public did not violate the First Amendment."<sup>110</sup>

Another case dealing with commercial advertising is *Eimann v. Soldier of Fortune Magazine*.<sup>111</sup> In *Eimann*, the son and mother of a murder victim brought a wrongful death action against Soldier of Fortune Magazine alleging that the magazine published a "personal service ad through which the victim's husband hired an assassin to kill her."<sup>112</sup> The district court instructed the jury that it could find the magazine liable, "if a reasonable publisher would conclude that the advertisement could reasonably be interpreted as an offer to commit crimes."<sup>113</sup> The jury found for the plaintiffs. On appeal, the jury's verdict was reversed.<sup>114</sup> After applying the Texas risk-utility balancing principles, the court concluded "the standard of conduct imposed by the district court against Soldier of Fortune Magazine was too high," in that it would require a publisher to reject all ambiguous claims.<sup>115</sup> Furthermore, the court stated that "Soldier of Fortune owed no duty to refrain from publishing a facially innocuous classified advertisement when the ad's context- at most- made its message ambiguous."<sup>116</sup>

Some speculate that *Weirum v. RKO Gen., Inc.*,<sup>117</sup> has been categorized as a commercial speech case, since the court deviated from the strict application of the *Brandenburg* standard. In *Weirum*, a radio broadcaster was held liable for negligence in sponsoring a radio contest in which it was foreseeable that listeners, in order to win a prize, would race in their cars from place to place in order to arrive first at a particular destination.<sup>118</sup> The contest encouraged its largely teenage listening audience to be the first to locate "the real Don Steele," a disc jockey, at various places as he traveled around the Los Angeles area.<sup>119</sup> During Steele's broadcast, he exclaimed, "9:30 and the real Don Steele is back on his feet again with some money and is headed for the Valley.

<sup>109</sup> *Id.* at 1119.

<sup>110</sup> *Id.* at 1110.

<sup>111</sup> *Eimann v. Soldier of Fortune Magazine*, 880 F.2d 830 (5th Cir. 1989).

<sup>112</sup> *Id.* The ad which ran in the September, October, and November 1984 issues of Soldier of Fortune read: Ex-marines 67-69 'Nam Vets, Ex-DI, weapons specialist—jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas. *Id.* at 831.

<sup>113</sup> *Id.* at 838.

<sup>114</sup> *Id.* at 833.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Weirum v. RKO Gen., Inc.*, 539 P.2d 36 (Cal. 1975). See also Laura Brill, *The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Imitative Harn*, 94 COLUM. L. REV. 984 (1994).

<sup>118</sup> *Id.* at 40.

<sup>119</sup> *Id.* at 38.

Thought I would give you a warning so that you can get your kids out of the street."<sup>120</sup>

The family of a man who was killed when a listener who was trying to locate Steele forced his car off the highway, brought a wrongful death action against the radio station.<sup>121</sup> The court concluded that, implicit in Steele's speech itself, was a live interactive dynamic that urged dangerous activity. Moreover, the court stated it was foreseeable Steele's teenage listeners would race to arrive first at a site, and would disregard highway safety.<sup>122</sup> The court reasoned that "the First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."<sup>123</sup> Therefore, the court concluded that the First Amendment would not bar a plaintiff's action where it was foreseeable that the speech in question would create an undue risk of harm.

However, the fact that a live interactive dynamic was present between the speaker and audience, and that the speech was meant to be taken literally, makes *Weirum* a unique case. Although it is possible that other cases will possess these characteristics, a strong shield still exists, since it would be extremely difficult to carve out liability based on these factors.

#### F. *The Successes*

Recently, some courts have relaxed the *Brandenburg* prongs of likelihood and imminence, and have created a different slant on how courts review media cases.<sup>124</sup> One case in which the court has held that the First Amendment does not bar civil liability against a media defendant is *Rice v. Paladin Enterprises, Inc.*<sup>125</sup> In *Rice*, a man named Lawrence Horn hired James Perry to murder his eight year old quadriplegic son, his son's nurse, and his ex-wife so that he could receive the two million dollars his son was awarded in a settlement for his paralyzing injuries.<sup>126</sup> In preparing for and committing these murders, Perry, a contract killer, closely followed many of the instructions contained in the book *Hit Man: A Technical Manual for Independent Contractors*.<sup>127</sup> The relatives of the three victims brought a wrongful death

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 39.

<sup>122</sup> *See id.* at 40.

<sup>123</sup> *Id.*

<sup>124</sup> *See Rice*, 128 F.3d at 233. *See also Byers*, 712 So. 2d 681.

<sup>125</sup> *See Rice*, 128 F.3d at 233.

<sup>126</sup> *Id.* at 239.

<sup>127</sup> *Id.* Perry followed the instructions of *Hit Man* almost word for word on "requesting expense money from the employer prior to committing the crime," where to commit the murder, to use a rental car to reach the victim's location, to establish a base at a motel in close proximity to the "job site," to use



action against Paladin, the publisher of *Hit Man*, for civilly aiding and abetting Perry in committing the murders.<sup>128</sup>

The district court granted summary judgment in favor of Paladin, and the victims' relatives appealed. Paladin, for purposes of summary judgment, stipulated that, in marketing *Hit Man*, not only had Paladin intended to "attract and assist criminals and would-be criminals . . . [but] intended and had knowledge that *Hit Man* would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire."<sup>129</sup> After a thorough review of caselaw dealing with aiding and abetting, the court held the First Amendment does not pose a bar to a finding of civil liability as an aider and/or abettor.<sup>130</sup> Unlike the court in *McCollum*, the *Rice* court took a broader formulation of intent when analyzing the requirements for aiding and abetting. The court held that the solicitation to a group of catalogue subscribers for no other reason than to attract and assist criminals and would-be criminals should reach the jury.<sup>131</sup> In addition, the court explained that *Brandenburg* was meant to protect *abstract advocacy* and not literal factual instructions.<sup>132</sup> The court stated it was well established that "speech, which is tantamount to the legitimately proscribable non expressive conduct, may itself be legitimately proscribed, punished or regulated. . . ."<sup>133</sup> Moreover, the court emphasized that it found *Hit Man* to be "reprehensible and devoid of any significant redeeming social value,"<sup>134</sup> and that even absent the publisher's stipulations, *Hit Man* is at "the other end of the continuum from the ideation at the core of the advocacy protected by the First Amendment."<sup>135</sup> The court also concluded that it was satisfied that a jury could "readily find that the provided instructions (of *Hit Man*) not only have no, or virtually no, non-instructional communicative value, but also that their only instructional communicative value is the indisputably illegitimate one of training persons how to murder and to engage in the business of murder for hire."<sup>136</sup>

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a made up tag number, and what type of rifle to use to kill the victim. Perry also followed numerous instructions on how to commit the murder itself. For example, he followed the manual's instructions to kill their "mark" at close range, not shoot the victim at point blank, and to shoot the victim through the eyes, if possible. *Id.* at 240.

<sup>128</sup> *Id.* at 241.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 243.

<sup>131</sup> *Id.* at 253.

<sup>132</sup> *Id.* at 263.

<sup>133</sup> *Id.* at 243.

<sup>134</sup> *Id.* at 249.

<sup>135</sup> *Id.* at 256.

<sup>136</sup> *Id.* at 249.

In effect, the *Rice* holding has put a dent in the *art form* exception used in *McCollum* and *Waller*. After the court's analysis of *Rice*, it is possible that a mass marketed media work involving factual technical instruction can potentially create a jury issue.

Similarly, the Supreme Court sent a chill through Hollywood by allowing a lawsuit to move forward against Time Warner and director Oliver Stone.<sup>137</sup> The *Byers* suit relied heavily on *Rice*. In *Byers*, it was alleged that after repeatedly watching the defendants' movie *Natural Born Killers*, two teenagers went on a murderous rampage imitating scenes from the movie.<sup>138</sup> Byers, who was paralyzed as a result of the teenagers' shooting spree, sued based on negligence and intentional tort theories.<sup>139</sup> Byers contended that Time Warner and Oliver stone should have known that the film would "cause or incite people such as Edmondson and Darrus to commit violent acts . . ." that were glorified by the movie *Natural Born Killers*.<sup>140</sup> Moreover, Byers alleged that the Warner defendants did not warn viewers of the "potential deleterious effects that repeated viewing of the film can have on teenage viewers."<sup>141</sup>

The defendants filed a peremptory exception raising the objection of no cause of action, and the trial court dismissed Byers' claims against the defendants. The appellate court, however, reversed the findings and allowed the intentional tort action to go forward.<sup>142</sup> Without even viewing the film, the court found that under the allegations of the petition accepted as true, the defendants may have owed a duty to Byers.<sup>143</sup> The court stated that if Byers could prove the defendants "intended to urge viewers to imitate the criminal conduct of . . . the main characters in the film, then the risk of harm would be imminently foreseeable, justifying the imposition of a duty upon the defendants to refrain from creating such a film."<sup>144</sup> Moreover, the court stated that they must accept Byers' allegation, that the defendants intended to incite viewers, as true. Once accepted as true, the court concluded that the film would fall into the unprotected category of "speech directed to inciting or producing imminent lawless action."<sup>145</sup> The *Byers* decision implicates that as long as allegations taken as true on its face, allege incitement, then a plaintiff can sue a media defendant.

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<sup>137</sup> *60 Minutes* (CBS television broadcast, Apr. 25, 1999) (discussing *Byers*, 712 So. 2d 681).

<sup>138</sup> *See id.* at 684. The film is alleged to have been involved in more than a dozen copycat killings.

<sup>139</sup> *Id.* at 687.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 692.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 688.

<sup>145</sup> *See id.* at 689.

### III. MEDIA LIABILITY AND *RICE*'S IMPLICATIONS FOR THE FUTURE

The holding of *Rice* has affected the future of the entertainment industry in regard to: (1) The content of future films, television shows, music, and literature based upon a concern of lawsuits; and (2) *Rice*'s implication in a time of terrorism.

#### A. *The Content of Media in the Future*

The *Byers* decision depicts the way in which courts may interpret the holding of *Rice* in the future. This interpretation, in effect, could reduce the First Amendment's protection not only for instructional manuals, but for a variety of violent movies, literature, and music as well.<sup>146</sup> Critics argue that *Rice* and *Byers* have opened the floodgates to lawsuits for imitative harm.<sup>147</sup> No doubt, an answer that members of the entertainment industry are searching for is whether *Rice* and *Byers* are setting new precedent for the industry to be concerned about.<sup>148</sup> In response to the criticism of the *Rice* decision that recognizing a cause of action in *Rice* would subject broadcasters and publishers to liability whenever someone imitates what is described or depicted in their broadcasts, publications, or movies, the *Rice* court stated:

This is simply not true. In the copycat context, it will presumably never be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of a violent crime; rather, the information for the dissemination of which liability is sought to be imposed will actually have been misused vis-à-vis the use intended. It would be difficult to overstate the significance of this difference insofar as the potential liability to which the media might be exposed by our decision herein is concerned.<sup>149</sup>

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<sup>146</sup> See S. Elizabeth Wilborn Malloy, *Taming Terrorists But Not Natural Born Killers*, 27 N. KY. L. REV. 81 (2000).

<sup>147</sup> After *Rice* and *Byers*, plaintiffs may be encouraged to bring a lawsuit against a media defendant. See *James*, 90 F. Supp.2d 798 (dismissing a \$130 million suit brought by the parents of three murdered girls against the producers and distributors of the movie, *The Basketball Diaries*; the parents insisted that a scene from the movie was to blame for the death of their daughters).

<sup>148</sup> See Jonathan Seiden, *Screaming For a Solution: Regulating Hollywood Violence; An Analysis of Legal and Legislative Remedies*, 3 U. PA. J. CONST. L. 1010, 1027 (2001).

<sup>149</sup> See *Rice*, 128 F.3d at 265.

Moreover, many believe that *Rice* is a rare case, since the publisher had "stipulated in almost taunting defiance that it intended to assist murderers and other criminals."<sup>150</sup>

Although society as a whole wants to protect individuals from the possible harm that can result from violent images depicted in the media, punishing the entertainment industry by allowing copycat cases to proceed in court can have disastrous effects.<sup>151</sup> If courts permit negligence actions to proceed against media defendants, the freedom of speech will be chilled.<sup>152</sup> It is important to remember that "it is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals."<sup>153</sup> Imposing such a burden would "quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation, and controversy."<sup>154</sup>

In discussing why negligence actions against the entertainment industry violates an artist's freedom of speech, entertainment lawyer Robert Vanderet stated, "if we're going to have a society where we are only going to allow the distribution of films and movies that are not going to provoke, or may not provoke a response in some aberrant individuals, we're going to be watching *Bambi* without the shooting of the mother . . . because we can not predict what exactly is going to set off a particular individual."<sup>155</sup> Furthermore, Mr. Vanderet explained that we can not, in a society, allow access to films and books be "determined by the least common denominator."<sup>156</sup> In addition, media liability for third party actions is likely to lead to self-censorship, since the industry would be unable to predict which images depicted in the media would lead to mimicry.<sup>157</sup> The fact that producers, directors, artists, and other members of the entertainment industry will not be able to determine which speech will subject them to liability raises severe First Amendment concerns.<sup>158</sup>

Another implication of allowing actions against the media to proceed in court is that free expression under the First Amendment is not given complete protection if it depends on the decision of a jury. This jury issue

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<sup>150</sup> *Id.*

<sup>151</sup> See Seiden, *supra* note 148, at 1027.

<sup>152</sup> See *id.* at 1028.

<sup>153</sup> *Id.* at 1029 (quoting *McCollum*, 249 Cal. Rptr. at 197).

<sup>154</sup> *Id.*

<sup>155</sup> *60 minutes*, *supra* note 137.

<sup>156</sup> *Id.*

<sup>157</sup> Brill, *supra* note 117, at 1003.

<sup>158</sup> See *id.*

was apparent in *Rice*, when the court left it to the jury to decide whether the manual in question had a legitimate literary and artistic purpose or whether its real purpose was to aid in murder.<sup>159</sup> Allowing juries to decide whether a media defendant is liable for damages would almost certainly result in the "suppression of unpopular points of view."<sup>160</sup> Juries, "with their majoritarian biases, have been criticized for their unwillingness to protect controversial or unpopular speech."<sup>161</sup> The juror's view of the utility of the speech will likely depend on his or her fondness for the message that the speech sends. In addition, risk assessments will likely be connected to the juror's appreciation of the content of the speech.<sup>162</sup> Therefore, the jury would be given the power to decide what movies, television shows, novels, and music have political, artistic, or literary merit. Moreover, since placing liability on media defendants would create a chilling effect on the whole entertainment industry, the jury would also have to "consider the social utility of all speech that would be left unspoken because of the inhibiting effects of liability."<sup>163</sup> This task is something that juries may not be capable of doing.

#### B. *Rice's Implication in a Time of Terrorism*

Recent terrorist events have increased the need for a new approach in dealing with reference sources, including the Internet, that describe detailed instructions in manufacturing bombs, destructive devices, and other weapons of mass destruction.<sup>164</sup> The Department of Justice's study on the availability of instructional information confirmed that any member of the public at large who desired such information could easily obtain it.<sup>165</sup> Evidence suggests that in numerous crimes involving destructive devices and weapons, the defendants have relied upon instructions from accessible published

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<sup>159</sup> See *Rice*, 128 F.3d at 265.

<sup>160</sup> See Brill, *supra* note 117, at 1003.

<sup>161</sup> See *id.* (discussing Lillian R. Bevier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 229, 309-311 (1978)).

<sup>162</sup> See Brill, *supra* note 117, at 1003.

<sup>163</sup> *Id.* at 1004.

<sup>164</sup> DEPARTMENT OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION (1997).

<sup>165</sup> *Id.* at 5. At least fifty publications dealing with such information were found. They include DEADLY BREW: ADVANCED IMPROVISED EXPLOSIVES (Paladin Press, 1987), THE ANARCHIST'S HANDBOOK (J. Flores, 1995), IMPROVISED EXPLOSIVES: HOW TO MAKE YOUR OWN (Paladin Press, 1985), and the ANARCHIST ARSENAL (Harber, 1992).

information.<sup>166</sup> For instance, following the 1993 terrorist bombing of the World Trade Center, bombmaking manuals were found in the possession of the individuals responsible for the act of terrorism.<sup>167</sup> It is also believed that since the availability of this information is now increasingly accessible over the Internet and other sources, such instructional information "will continue to play a significant role in aiding those who intend upon committing future acts of terrorism and violence."<sup>168</sup>

In dealing with this concerning issue, the question arises as to whether an instructional manual could subject the speaker to criminal liability. If a strict reading of *Brandenburg* applied, a writer or publisher who has the "purpose of generally assisting unknown and unidentified readers in the commission of crimes," would probably not be held liable for creating a general publication of explosives information, since the speech was not directed at a specific person or group.<sup>169</sup> Moreover, if *Brandenburg's* imminence requirement was read literally, a writer could not be punished if he wrote instructional information about weapons for terrorist purposes if a year passed before anyone used the information for a terrorist attack.

However, people writing, publishing, and selling instructional information can be prosecuted for specific intent regardless of *Brandenburg's* imminence and likelihood prongs. It is also a possibility that in our country's current battle with terrorism, the imminence and likelihood prongs would be met due to the severity of the circumstances.

It has been suggested that "otherwise privileged publication of information can lose its First Amendment protection when the publisher has an impermissible motive."<sup>170</sup> In a "serious threat to American national security," such as our nation's current state, *Haig v. Agee*, supports the argument that publications of dangerous instructional information can be punishable by the government where the publication is motivated by an intent to aid in unlawful use of explosive and destructive devices.<sup>171</sup> It has been argued that in such an instance, the "*Brandenburg* requirement that the facilitated crime be imminent should be little, if any, relevance."<sup>172</sup>

During a senate debate on the need for additional laws relating to the dissemination of bombmaking information, two sets of circumstances in which such information should be prohibited were identified. The

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<sup>166</sup> DEPARTMENT OF JUSTICE, *supra* note 164, at 3.

<sup>167</sup> *Id.* at 8.

<sup>168</sup> *Id.* at 3.

<sup>169</sup> *Id.* at 24.

<sup>170</sup> *Id.* (discussing *Haig v. Agee*, 453 U.S. 280 (1981)).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

circumstances for prohibition are: (1) "Where the person disseminating the information intends that it be used for unlawful ends;" and (2) "Where the person disseminating the information has good reason to know that a particular potential recipient thereof plans to use that information to engage in unlawful activities."<sup>173</sup> According to the factors above, published instructional information dealing with devices that could be used for terrorist crime would be looked at according to the writer's, publisher's, or seller's intent and the conscious purpose of bringing about the crime. As a result of our present state of war, it would be beneficial and wise to adopt further legislation, like the one presented above, to directly address the significant role that instructional literature may play in aiding those who intend on using weapons and other explosive devices for criminal purposes, as well as terrorist acts.<sup>174</sup>

#### IV. REGULATING THE ENTERTAINMENT INDUSTRY

There has been great concern about the entertainment industry's practice of marketing violent entertainment to children. Most "people would agree that the entertainment media plays a powerful role in the formation of values, especially the values of very young children."<sup>175</sup> Moreover, it has been found that children have a hard time separating fiction from reality when watching violent images portrayed in the media.<sup>176</sup>

##### A. Regulation and The FTC Report

In response to a request from President Clinton in 1999, the Federal Trade Commission (FTC) conducted a study on the marketing of violent entertainment to children and teenagers.<sup>177</sup> The report found that even though the entertainment industry had taken measures to identify content that may not be suitable for children, the industry still regularly targeted children under seventeen in the marketing of products that their own ratings systems deem inappropriate, or where parental caution due to violent content would be exercised.<sup>178</sup> The FTC Report stated that "the practice of pervasive

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<sup>173</sup> *Id.* at 15.

<sup>174</sup> *Id.* at 10.

<sup>175</sup> Seiden, *supra* note 148, at 1010.

<sup>176</sup> *60 Minutes*, *supra* note 137.

<sup>177</sup> See FEDERAL TRADE COMMISSION, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES I (2000) [hereinafter *FTC Report*].

<sup>178</sup> See *id.* at iii.

and aggressive marketing of violent movies . . . to children undermines the credibility of the industries' ratings and labels."<sup>179</sup> Such marketing also "frustrates parents' attempts to make informed decisions about their children's exposure to violent content."<sup>180</sup>

The FTC Report made important findings illustrating the clear problems of the industry's marketing and advertising strategies. One issue that the FTC was concerned about was the high amount of violence shown in movie trailers before the feature movie was shown in a theater.<sup>181</sup> The FTC Report discovered that there were many trailers that were labeled as "approved for all audiences" that contained violent images.<sup>182</sup> For example, the all audience trailer for *I Know What You Did Last Summer* contained references to mutilations and drug use. Also, in a trailer for *Scream 2*, there were many violent scenes including a knife-wielding killer chasing a woman.<sup>183</sup> In addition, the FTC found that R-rated movie trailers were being shown at movies that were rated PG and PG-13.<sup>184</sup>

The FTC also found that of the forty-four R-rated movies the commission used for its research, thirty-five of the movies (80%) were explicitly targeted to children under seventeen.<sup>185</sup> Moreover, studio records indicate that children under the age of seventeen were included in marketing research events. Audiences that included teens under seventeen viewed thirty-three of the forty-four R-rated films in the FTC's study.<sup>186</sup> Marketing research in eight of the films included children as young as twelve years old.<sup>187</sup>

Another area of concern is television advertising. Research shows that moviegoers, especially teenagers, learn of particular movies while watching television. Consequently, studios target movie advertisements for certain times of the day in order to reach their teenage audience.<sup>188</sup> Such times include after school, before prime time programming at 8 P.M., and on the weekends.<sup>189</sup> MTV for example, with a majority of its viewers between the

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<sup>179</sup> See Seiden, *supra* note 148, at 1029 (discussing the *FTC Report*, *supra* note 177, at i).

<sup>180</sup> *FTC Report*, *supra* note 177, at i.

<sup>181</sup> *Id.* at 9.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 16-17.

<sup>185</sup> *Id.* at 13.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 14-15.

<sup>189</sup> *Id.*



ages of twelve to twenty-four, was the largest cable medium for almost all the movies the commission examined.<sup>190</sup>

The FTC also studied the entertainment industry's practice of marketing explicit content music recordings to children.<sup>191</sup> The FTC found that of the fifty-five music recordings with explicit content labels the commission used in their study, all of the recordings were targeted to children under seventeen. Fifteen of the recordings had marketing plans that "expressly identified children under seventeen as part of their target audience."<sup>192</sup>

The FTC commission also researched the marketing of violent M-rated electronic games to children.<sup>193</sup> In conducting their study, the FTC found that of the 118 electronic games with a mature rating that the commission used in its study, eighty-three games targeted children under seventeen. The marketing documents for the other twenty-three games, included "plans to advertise the games in magazines or on television shows with a majority under seventeen audience."<sup>194</sup>

In response to the apparent problems found by the FTC, the Commission suggested certain measures that would help the motion picture, music recording, and electronic game industries enhance their self-regulating efforts.<sup>195</sup> These suggestions include:

[C]omprehensive ratings or labels that provide parents with meaningful information about the nature, intensity, and appropriateness for children of depictions of violence; an accurate and consistent rating or labeling process with clear standards; clear and conspicuous disclosures of the rating or label- with related age and content information on packaging and in advertising; and sales and marketing policies that are consistent with the ratings or labels.<sup>196</sup>

Since the First Amendment affords protection against the government regulation of the content of various forms of media, self-regulation is extremely important. It would be very hard for the legislature and courts to create a regulation that could effectively monitor what children would be

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<sup>190</sup> *Id.* at 15.

<sup>191</sup> *Id.* at 31.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 45.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 53.

<sup>196</sup> *Id.*

viewing.<sup>197</sup> Since we as a society have changed our view of what constitutes violence, the meaning of violence would raise numerous questions. In addition, it would be hard to determine what types of violence a child should and should not be viewing.<sup>198</sup> For instance, many movies such as *Schindler's List* are in fact violent, but also have important educational and social value. Moreover, the Evening News, which usually contains violence, is a major channel for obtaining information about daily events. It is also important to remember that any restrictions placed on the industry should be limited to the exposure of violence to children, and should not affect the flow of information to the adult population.<sup>199</sup>

Because of the First Amendment's protections, it is up to the entertainment industry as a whole to improve on the already existing self-imposed regulation system. However, even with a more effective system of regulation, it will be up to the parents "to become familiar with the ratings and labels, and with the movies, music, and games their children enjoy, so that they can make informed choices about their children's exposure to entertainment with violent content."<sup>200</sup>

#### B. *The V-Chip and Television Ratings*

In response to congress' warnings and parents' concerns about the violence shown on television, the television industry established a rating system that identifies when a program contains "sex, violence, or language."<sup>201</sup> These ratings appear on the corner of the television screen at the beginning of a program. However, many believe that these ratings are "little utility to most parents" since they only appear for a few seconds, and unless you are watching the very beginning of a program, you will not see the rating at all.<sup>202</sup>

In addition to the television rating system, a technological device called the V-chip was created. The V-chip allows parents to block out programs on their television sets that contain inappropriate content such as violence and sex.<sup>203</sup> Many people believe that the V-chip will be extremely useful when

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<sup>197</sup> See Seiden, *supra* note 148, at 1034.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *FTC Report, supra* note 177, at 53.

<sup>201</sup> Benjamin C. Zipursky et al, *Panel 1: The V-Chip and the Constitutionality of Television Ratings*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 303 (1998).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 305.

children are between the ages of two and seven years old.<sup>204</sup> Benjamin Zipursky, a professor at Fordham University School of Law, explained that the point of the V-chip was that you do not need the television rating to appear on the screen in order for the rating to be useful.<sup>205</sup> Instead, a "signal will be sent over the air to V-chips, that, if activated by the owner of a television set, will block out specific programs, preventing viewers from ever seeing that material."<sup>206</sup> Although most parents consider the V-chip a "welcomed development," broadcasters view the V-chip and the use of ratings as a threat, and argue that they "constitute censorship in violation of the First Amendment."<sup>207</sup> In response to the broadcasters' claim that the V-chip violates the First Amendment, Mr. Zipursky explained that censorship is supposed to mean an "official attempt to control what you can see or hear."<sup>208</sup> The V-chip law, however, does not require the television industry to provide television ratings, but rather mandates that television set manufacturers build V-chips into television sets.<sup>209</sup> The television industry decides what rating a particular program should receive, not the government. Furthermore, it is not the government, but the parents who decided whether to use the ratings.<sup>210</sup> In response to the criticism that the ratings system constitutes censorship, many analysts have stated that television ratings are "similar to a label on a can of soup," since the ratings simply tell the consumer what is in the product.<sup>211</sup> For example, one program may contain violence and sexual content.

Although the V-chip and the television rating system provide a method to detect violence and sex on television, not everyone agrees that the V-chip, in actuality, will be helpful to parents. Critics argue that the V-chip and the rating system will create an excuse for the television industry to provide "morally unacceptable programming."<sup>212</sup> They claim that the industry would respond to complaints about the contents of programming by telling viewers to block out unacceptable programming by using the V-chip.<sup>213</sup> Critics also

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 308.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 306, 308.

<sup>208</sup> *Id.* at 308.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 309.

<sup>212</sup> *Id.* at 308.

<sup>213</sup> *Id.*

say that no rating system will ever be perfect.<sup>214</sup> Many parents will not use the rating system and those who do use the ratings may not use it wisely.<sup>215</sup>

Dick Wolf, the producer of the television show *Law and Order*, believes that "ratings might be the most serious threat to free speech since the beginning of broadcast television."<sup>216</sup> Moreover, Wolf and many others are concerned that ratings could become "a litmus test for sponsors and advertisers."<sup>217</sup> For example, advertisers might not want to be associated with shows that were given an L rating for harsh language.

Although we as a society have not yet found a perfect solution to violence and sex in the media, the V-chip, and the television rating system is a step in the right direction. As Mr. Zipursky explained, "ratings and the V-chip help busy parents restore control over the mayhem" seen on television.<sup>218</sup> Moreover, "it is parents taking control of the television set away from the brokers of power."<sup>219</sup>

## V. VIOLENCE IN A TIME OF TERRORISM

In today's time of terrorism, the entertainment industry is faced with a reality unlike ever before.<sup>220</sup> In light of the September 11th terrorist attacks, the entertainment industry is struggling to understand the new rules for violence in action movies, television, and books.<sup>221</sup> For years, authors such as Tom Clancy have written shivering stories of "terror grounded in plausibility."<sup>222</sup> These stories involved plots such as terrorists plotting to unleash lethal chemicals through a sprinkler system at the Olympics, and pilots crashing their planes into the Capital building.<sup>223</sup> Most people left one of Clancy's stories relieved to remember that it was only a story and that "even though he's shown you how these things could happen, they really couldn't . . . Some things, we think, are simply too horrible to happen."<sup>224</sup> However, recently we have certainly learned differently.

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 312.

<sup>217</sup> *Id.* at 314.

<sup>218</sup> *Id.* at 309.

<sup>219</sup> *Id.*

<sup>220</sup> Leonard Pitts Jr., *New Reality Changing the Role of Violence in TV, Flicks*, THE MIAMI HERALD,

Oct. 6, 2001, at 1E, 5E.

<sup>221</sup> *Id.* at 1E.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

Because of the September 11th terrorist attacks, the public's tolerance to violence has changed. There are probably millions of people for whom stories of terrorism and destruction have lost their appeal.<sup>225</sup> This is the problem that the entertainment industry is faced with today. The industry is "competing with a truth that shames fiction."<sup>226</sup>

In response to Americans' new sensitivity, the entertainment industry has made changes in certain films that no longer seem appropriate.<sup>227</sup> A Tim Allen comedy about a bomb on a plane, and a Jackie Chan movie about a window washer who discovers a terrorist plot to blow up the World Trade Center, have both been pulled from showing in theaters.<sup>228</sup> In trying to follow the market's needs, the entertainment industry could be "forced to make an even more fundamental adjustment in its treatment of violence."<sup>229</sup> Before September 11th the American public was not only used to seeing, but also was entertained by films that involved terrorist plots, destruction, and violence. "Once upon a time, it was fun to watch unthinkable things. But everything is different now . . . nothing is unthinkable anymore."<sup>230</sup>

## VI. CONCLUSION

The First Amendment's protection of free speech should, in most circumstances, bar a plaintiff's claim against the entertainment industry. Since the media does enjoy strong First Amendment protection, it is important for the industry to enforce self-regulation policies and to scrutinize their own work product. Furthermore, faced with our country's new reality, the entertainment industry is wrestling with the question of what happens to violence portrayed in the media. The answer seems to be that only time will tell.

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 5E.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*