

**SCREAMING FOR A SOLUTION:
REGULATING HOLLYWOOD VIOLENCE;
AN ANALYSIS OF LEGAL AND LEGISLATIVE REMEDIES**

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I. OVERVIEW

This Comment analyzes violent images depicted in film and their effects on children. It looks at how the government, entertainment industry, and public have responded to the growing concern about Hollywood violence and examines the legal arguments, legislative proposals, and self-regulation strategies that have been suggested in the aftermath of the Columbine massacre in Littleton, Colorado.

Although there is heightened concern about the proliferation of violent forms of entertainment, there is no consensus among the public, government, and Hollywood on what specific remedial actions to take. The First Amendment makes it difficult to draft a law that would place meaningful restrictions on violent entertainment. However, many politicians feel that even if they cannot successfully legislate, they can pressure the entertainment industry to monitor itself. This Comment concludes that the main objective of any regulation should be to protect an artist's freedom of speech while at the same time monitoring to whom the speech is targeted.

Section II of this Comment looks at recent criticisms directed toward the entertainment industry for the increase of gratuitous violence in films and at the argument that this increase has resulted in real-world violence. Section III overviews social-scientific data that reveals how children are often susceptible to violent images in films and are more prone to violence after viewing violent material. Section IV analyzes "mimicry" cases. Traditionally, courts deny plaintiffs relief when they sue members of the entertainment industry for negligence. Recently, however, state courts have awarded plaintiffs relief against members of the entertainment industry under certain circumstances. Section IV argues that tort liability is an inappropriate response to violent entertainment because it violates First Amendment principles. Finally, Section V examines the film industry's marketing practices, possible legislative and self-regulation strategies that could serve to monitor the marketing of violent entertainment to children, and the First Amendment issues surrounding these attempts.

Overall, the Comment argues that the entertainment industry

must scrutinize its own product and work with the government to prevent Hollywood from marketing its violent wares to children.

II. THE PROBLEM

In the aftermath of the school shootings at Columbine High School in Littleton, Colorado, Hollywood has come under vigorous attack and criticism for violent images depicted in movies and television.¹

Sift through teen movies of the past ten years, and you could create a hindsight game plan for Littleton. Peruse *Heathers* (1989), in which a charming sociopath engineers the death of jocks and princesses. Study carefully, as one of the Columbine murderers reportedly did, *Natural Born Killers* (1994), in which two crazy kids cut a carnage swath through the Southwest as the media ferociously dog their trail. Sample *The Basketball Diaries* (1995), in which druggie high schooler Leonardo DiCaprio daydreams of strutting into his home-room in a long black coat and gunning down his hated teacher and half the kids.²

While movies might not have the power to incite imminent lawless action,³ “[m]ost people would agree that ‘[t]he entertainment media play a powerful role in the formation of values,’” especially the values of very young children.⁴

Films engage and entertain audiences through compelling stories, but they also teach children about their surrounding culture, both in positive and negative ways.⁵ In the last few years, the entertainment

¹See, e.g., Richard Corliss, *Bang, You're Dead*, TIME, May 3, 1999, at 49, 49 (noting that after the school shootings in Littleton, many Americans wanted to place the blame on popular culture and the entertainment industry); Andrew Essex, *In The Line of Fire: In Littleton's Wake, Hollywood Suffers Aftershocks—and Criticism*, ENT. WKLY., May 7, 1999, at 8, 8 (“As attention turns toward who’s responsible, the entertainment industry—in a mixture of genuine concern and craven self-interest—is making an unprecedented effort to look accountable.”); John Leland & Corie Brown, *A Lower Body Count*, NEWSWEEK, Aug. 23, 1999, at 46 (discussing generally how Littleton has framed the public and the entertainment industry’s reactions toward violence in the media); Benjamin Svetkey, *D.C. to L.A. ‘Drop Dead’*, ENT. WKLY., June 4, 1999, at 45, 45 (“In the aftermath of the Littleton massacre, our nation’s capital and its entertainment capital—once more-than friendly bedfellows—are locked in mortal combat over the future of violence in TV and film. Can’t these two superpowers just get along?”).

²Corliss, *supra* note 1, at 49.

³See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Under the *Brandenburg* standard, speech “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action” does not enjoy First Amendment protection.

⁴Laura B. Schneider, Comment, *Warning: Television Violence May Be Harmful to Children; but the First Amendment May Foil Congressional Attempts to Legislate Against It*, 49 U. MIAMI L. REV. 477, 479 (1994) (quoting Anastasia Toufexis, *Our Violent Kids: A Rise in Brutal Crimes by the Young Shakes the Soul of Society*, TIME, June 12, 1989, at 52).

⁵A comedic take on the influence of movies occurs in the film *South Park: Bigger, Longer, and Uncut*. In this movie, the town’s parents blame a Canadian film for their children’s vulgar attitude—specifically their increased use of curse words. Somehow, this turns into a war between the United States and Canada. See Ed Tahancy, *Omigod! They Filmed Kenny!*, N.Y. DAILY

industry has been marred by a few tragic incidents when children modeled negligent behavior depicted in films.⁶ For example, in October 1993, two teenagers imitating a “bizarre male bonding scene” from the Disney football movie *The Program* laid down in the middle of a highway and were struck by a pickup truck.⁷ Unlike the movie, where the football heroes survive the dangerous stunt, one boy was instantly killed and the other was critically injured.⁸ Disney subsequently excised the scene from the film in response to its critics.⁹

Many films have also been criticized for influencing “copycat” murders,¹⁰ and in the last few years, a proliferation of law suits has been filed against various members of Hollywood. For example, in March 1995, Sarah Edmondson, an Oklahoma teen, and her boyfriend, Benjamin Darras, both eighteen years-old, went on a cross-state crime spree paralyzing one person and murdering another. Before embarking on their rampage, Edmondson and Darras had repeatedly watched Oliver Stone’s *Natural Born Killers*, a film about a couple who find fame on a brutally depicted murder spree.¹¹ In 1998, the shooting victim’s family filed suit against Time Warner Entertainment Company and Oliver Stone alleging that Edmondson and Darras “went upon a crime spree culminating in the shooting and permanent injury to Patsy Ann Byers as a result of seeing and becoming inspired by the movie *Natural Born Killers* produced, directed and distributed by the Hollywood defendants.”¹²

Similarly, in 1997, fourteen-year-old Michael Carneal shot three classmates and wounded five others after a daily, voluntary student prayer session in a high school in West Paducah, Kentucky.¹³ The

NEWS ONLINE EDITION, at http://www.mostnewyork.com/1999-06-29/New_York_Now/Movies/a-33302.asp (June 29, 1999).

⁶ See Mike Quinlan & Jim Persels, *It’s Not My Fault, The Devil Made Me Do It: Attempting to Impose Tort Liability On Publishers, Producers, and Artists for Injuries Allegedly “Inspired” by Media Speech*, 18 S. ILL. U. L.J. 417, 419 (1994).

⁷ See *id.* at 419.

⁸ *Id.* An immediate public outcry went up blaming the producers of the movie for “reckless irresponsibility” for including the scene without also showing possible consequences of such an act. *Id.*

⁹ *Id.* But see Michael deCourcy Hinds, *Not Like the Movie: A Dare Leads to Death*, N.Y. TIMES, Oct. 19, 1993, at A1 (noting that Touchstone Pictures defended the scene and argued that the film “clearly depicts this adolescent action as an irresponsible and dangerous stunt by a troubled and heavily intoxicated individual, and in no way advocates or encourages this type of behavior”).

¹⁰ “Copycat” murders or “mimicry” occurs when young people are “inspired” to commit violent acts by what they see on the large screen. See DEBORAH PROTHROW-STITH, M.D., DEADLY CONSEQUENCES 42 (1991) (“We are a suggestible species. We learn how to behave from each other. When we see one of our species act, their act becomes a model for us to emulate. In this way, we sometimes make the unthinkable thinkable, the undoable doable.”).

¹¹ See Josh Young, *Devil’s Advocate?*, ENT. WKLY., Aug. 6, 1999, at 26, 30 (Edmondson told police, “It was as if [Darras] was fantasizing from the movie . . .” (alteration in original)).

¹² *Byers v. Edmondson*, 712 So. 2d 681, 684 (La. Ct. App. 1998) (quoting plaintiff’s amended petition for damages).

¹³ See *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 800 (W.D. Ky. 2000).

families of the three victims filed suit, alleging that Carneal was unduly influenced by the film *The Basketball Diaries*. In a fantasy sequence from the film, a character played by Leonardo DiCaprio barges into a classroom in a long black cloak and riddles his teacher and classmates with bullets.¹⁴ An adolescent psychiatrist concluded that Carneal was profoundly influenced by violent/pornographic media, including *The Basketball Diaries*, and that "the media's depiction of violence as a means of resolving conflict and a national culture which tends to glorify violence further condone[d] his thinking."¹⁵

Another tragic incident occurred in England when two eleven-year-old boys murdered two-year-old James Bulger in a way that mimicked specific scenes from the film *Child's Play 3*. The children rented the film at a local video store.¹⁶

Because of the media attention that these incidents have received, it is not surprising that concern about "mimicry" has increased in the last few years.¹⁷ The entertainment industry has been accused of marketing violent movies such as *Scream* and *Natural Born Killers* to young audiences and also glorifying the violence depicted in movie trailers and advertisements.¹⁸ Defenders of Hollywood, however, are quick to dismiss these "copycat" incidents as rare anomalies¹⁹ and argue that since millions of people watch violent films and television and do not go out and murder neighbors, "feigned violence has no causal relation to actual violence."²⁰

Although Hollywood has braved the criticism of its product in the

¹⁴ See Nick Johnson, *Violence in Sci-Fi Movies*, About, at <http://scifimovies.about.com/movies/scifimovies/library/weekly/aa011600a.htm> (last visited Apr. 10, 2001).

¹⁵ *James*, 90 F. Supp. 2d at 800 (quoting plaintiff's complaint).

¹⁶ See David B. Kopel, *Massaging the Medium: Analyzing and Responding to Media Violence Without Harming the First Amendment*, 4 KAN. J.L. & PUB. POL'Y 17, 17 n.3 (1995). In the film, *Chucky*, a baby doll, comes alive and its face is splashed with blue paint. Mimicking the movie, the two boys put blue paint on James Bulger's face. The film also includes a kidnapping, and Bulger was abducted before being killed. The climax of the film shows two boys mutilating and killing the doll on a train. Similarly, James Bulger was mutilated, bludgeoned, and left on a railroad track to be run over. *Id.* See also *The Video that Caused the Murder*, N.Y. GUARDIAN, Dec. 1993, at 3.

¹⁷ Laura Brill, *The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Imitative Harm*, 94 COLUM. L. REV. 984, 989-90 (1994) (citing Leonard M. Marks & Robert P. Mulvey, *Spur to Crime? Suits over Violent Art Proliferate*, NAT'L L.J., Mar. 2, 1992, at 25).

¹⁸ See, e.g., Gregg Easterbrook, *Watch and Learn*, NEW REPUBLIC, May 17, 1999, at 22, 24 (noting that the theater sections of newspapers contain "an ever-higher percentage of movie ads in which the stars are prominently holding guns").

¹⁹ But see PROTHROW-STITH, *supra* note 10, at 42 ("Researchers have established that copycat events are not an anomaly. Statistically-speaking, they are rare, but predictable, occurrences.")

²⁰ Easterbrook, *supra* note 18, at 24. Easterbrook notes that Novelist Martin Amis dismissed Hollywood's responsibility for the *Child's Play 3* incident. In the *New Yorker Magazine*, Amis wrote that he had rented and watched *Child's Play 3* and that it had not made him want to kill anyone. Easterbrook criticizes Amis' narrow observation: "But Amis isn't homicidal or unbalanced. For those on the psychological borderline, the calculus is different." *Id.*

past,²¹ “the image of all those teenage corpses in Colorado has given the issue a heightened sense of seriousness and urgency.”²² According to a *Newsweek* poll conducted shortly after the massacre in Littleton, seventy-eight percent of people polled said that violence in the media deserved some or a lot of the blame for the school shootings.²³ Further, eighty percent of adults believe that there is a connection between violence in entertainment and violent conduct.²⁴ In the wake of Littleton, the question most Americans are now asking is “not whether a romanticized and sanitized vision of violence the entertainment media presents to our kids is in fact harmful, but what we as a national family are going to do about it.”²⁵

In response to the public’s outcry, many political figures have also spoken out against the glorification of violence in Hollywood. “[T]he entertainment industry must do its part . . . there is still too much violence on our nation’s screens, large and small,” declared President Clinton in his May 15, 1999, radio address.²⁶ “[T]here are still too many vulnerable children who are steeped in this culture of violence, becoming increasingly desensitized to it and to its consequences.”²⁷ In fact, as a direct result of the Littleton tragedy, President Clinton asked the Federal Trade Commission to study the marketing practices of the major media conglomerates to determine the extent to which they target the sales of ultra-violent products to children.²⁸

Violent images in film also became a major topic of the presidential election. During the 2000 presidential campaign, both George W. Bush and Al Gore berated the entertainment industry and called on Hollywood to take responsibility for the violent imagery depicted in film. Similarly, Senators John McCain and Joseph Lieberman joined together and introduced legislation to create a national commission to examine the factors, including films, video games, and music, that are suspected of contributing to the youth violence crises.²⁹ According to the Senators, the entertainment industry has failed to respond to the “growing chorus of concerns about the harm-

²¹ See Senator Joseph Lieberman, *The Dance of Denials*, NEW DEMOCRAT, July, 1999, at 15, 15 (explaining Hollywood’s denial of responsibility in the face of criticism: “Hollywood’s standards plummet, advocacy groups and political leaders alternately express outrage or appeal for restraint, industry leaders claim there is no evidence that their products have negative effects, more violent and prurient products get sold, and little changes except for the profit margins.”).

²² *Id.* (noting that “Littleton has momentarily halted this fruitless dance”).

²³ Leland & Brown, *supra* note 1, at 46. This was a higher percentage of people than blamed the increased availability of guns—seventy percent. *Id.*

²⁴ David E. Rosenbaum, *Studios to Curb Marketing of R-Rated Films to Youth*, N.Y. TIMES, Sept. 27, 2000, at A21.

²⁵ Lieberman, *supra* note 21, at 15.

²⁶ President William Clinton, Radio Address (May 15, 1999).

²⁷ *Id.*

²⁸ FED. TRADE COMM’N, *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*].

²⁹ Lieberman, *supra* note 21, at 16.

ful influence of the entertainment media's romanticized and sanitized vision of violence, about its part in the toxic mix that is turning too many of our kids into killers.³⁰ Further, McCain stated that "the various entertainment industries should declare a cease-fire in the marketing of ultra-violent products to children."³¹ In response to the school shootings, Congress has initiated a slew of post-Littleton proposals aimed at toning down violence in movies.³²

Because of the harsh criticism directed toward Hollywood, many industry leaders are gradually accepting a greater sense of responsibility³³ and are now scrutinizing their own product closer than they had done before.³⁴ "We who create entertainment must honestly acknowledge and urgently address the responsibility we all have to eliminate excessive or gratuitous or unpunished violence," one veteran screenwriter said at a conference entitled *Guns Don't Kill People Writers Do*.³⁵ At the conference a playwright added, "We in Hollywood are Dr. Frankenstein . . . we have created a monster. I'm not saying it's all our fault. But in the equation of lethal violence in schools, I say we are a factor."³⁶ One of the main concerns is the amount of needless violence in movies. As one industry leader suggested, "I'm against gratuitous violence. The violence where there is no remorse. Violence that is made to look like fun, filmed in slow-motion, lighted beautifully and adorned with glib lines and uncaring heroes."³⁷ In response to the concern over gratuitous violence, Disney decided to tone down and "sanitiz[e] the violence" in at least one of its own movies.³⁸

³⁰ Senators John McCain & Joseph Lieberman, *The No-Show Summit*, N.Y. TIMES, May 12, 1999, at A25.

³¹ *Id.*

³² See Svetkey, *supra* note 1, at 45. These proposals have included legislation making it illegal to film violent images on public property, as well as making it a federal crime to sell a ticket for an R-rated film to a minor. *Id.*

³³ Leland & Brown, *supra* note 1, at 46. The head of one studio stated that the Colorado shootings made him more sensitive to an emerging responsibility: "Not that I believe [violent entertainment] causes street violence. But there is a validity to the idea that it is a contributing factor, along with guns." *Id.* (alteration in original).

³⁴ Essex, *supra* note 1, at 8. Sony, noting the "newfound sensitivity" after the Littleton shootings and the recent lawsuits against Time Warner over copycat murders, decided to postpone *Arlington Road*, a film about a conspiracy theorist who blows up buildings. *Id.* Similarly, MGM Home Entertainment announced that it would temporarily recall tapes of *The Basketball Diaries*, "perhaps the first politically motivated video recall in modern times." *Id.*

³⁵ Claudia Puig, *Hollywood Examines Its Soul Worried About Censorship*, USA TODAY, June 7, 1999, at D1 (quoting Sy Gomberg).

³⁶ *Id.* (quoting William Mastrosimone).

³⁷ *Id.* At the conference, the writers discussed the "pumped-up volume" of violence. Screenwriter Steven DeSouza (*Die Hard*, *Die Hard 2*) stated, "Every picture I have done has come out more violent than what I wrote . . . I have sat at the screening of one of my movies and been stunned at the level of mayhem that somebody put on the screen." *Id.*

³⁸ Leland & Brown, *supra* note 1, at 46 (quoting director Wes Craven discussing the reworked *Scream 3*). But see Gregg Easterbrook, *supra* note 18, at 23 (claiming that Disney is actually one of the leading promoters of violent images in American culture).

But other industry leaders and critics are adamant against blaming youth violence on Hollywood and popular culture.³⁹ Sumner Redstone, Chairman of Viacom International, Inc., expressed this view at a conference of cable-TV professionals: "I'm outraged by a lot of what we hear blaming the media for what's going on," he argued. "I don't think we have anything to be ashamed of."⁴⁰ Wes Craven, the director of the *Scream* trilogy, denied that his movies could influence children to recreate actual real-world violence.⁴¹ Indeed many producers and directors argue that movies do not urge viewers to commit violent behavior but only reflect the violence already in society. As critic Kristen Baldwin stated:

[W]hile graphic images can affect us—desensitize us, even—they do not, cannot, create dangerous urges in people who don't already have those urges inside them. A well-adjusted kid who watches *Natural Born Killers* over and over . . . is not suddenly going to feel the need to commit a murderous act. Movies simply don't have that much power.⁴²

Other artists are concerned about the threat of censorship lurking behind the public outcry over violent entertainment. Many screenwriters and directors argue that any legislation or industry self-regulation would tread on an artist's right to free speech. "[T]here is always a real danger in the government trying to make artistic decisions, which could lead to censorship," said a veteran screenwriter.⁴³ "I wouldn't know how to respond to a code or a consensus as to what's responsible and what isn't acceptable. That is only for me to answer in my mind," claimed one director.⁴⁴ In addition, some critics argue that politicians unfairly focus on violent entertainment to "grab headlines" instead of focusing on more serious issues.⁴⁵ One critic charged that politicians "stake out the moral high ground confident that the First Amendment will protect them from having to actually write legislation that would be likely to alienate the entertainment industry. Some use the issue as a smokescreen to avoid having to

³⁹ See Carl M. Cannon, *Honey I Warped the Kids*, MOTHER JONES, July-Aug. 1993, at 17 (assessing the standard Hollywood argument that the media does not cause violence but merely reflects it).

⁴⁰ Leland & Brown, *supra* note 1, at 46.

⁴¹ *Director: Films Don't Inspire Violence*, The Columbian (Vancouver, WA), Nov. 2, 1999, at A5 (revealing that, according to Craven, the producers of *Scream 3* had considered making the film without any blood, partly due to criticism of violent films in the wake of school shootings across the country).

⁴² Kristen Baldwin, *There's No Why*, ENT. WKLY., May 7, 1999, at 9, 9. See also Ben J. Wattenberg, *Is America's Pop Culture Getting a Bad Rap?*, INSIGHT ON THE NEWS, Dec. 18, 1995, at 18, 18 ("I do not like much violence in drama. But market tests show lots of Americans do. Shakespeare understood the popular lust for blood and so did Sophocles, in whose plays characters tear each other's eyes out on stage.").

⁴³ Rick Lyman, *The 2000 Campaign: The Entertainment Issue*, N.Y. TIMES, Sept. 18, 2000, at A17 (quoting Budd Schulberg).

⁴⁴ Puig, *supra* note 35 (quoting Brian Helgeland, director of *Payback*).

⁴⁵ Lyman, *supra* note 43 (noting an industry executive's remark that "[politicians] attack the easy issue because the hard issue doesn't make for such big headlines for them").

confront gun control."⁴⁶ Lastly, the Motion Picture Association of America also disputes the claimed impact of violent entertainment on real-world violence, pointing to a recent drop in the crime rate.⁴⁷

III. THE IMPACT OF VIOLENCE IN ENTERTAINMENT MEDIA

"The violence to which American children are exposed in the name of entertainment is affecting their values and behavior," according to the American Medical Association, the American Academy of Pediatrics, the American Psychological Association, and the American Academy of Child and Adolescent Psychiatry.⁴⁸ There have been over 3,000 studies assessing the effects of violent entertainment,⁴⁹ and "a majority of the investigations into the impact of media violence on children find that there is a high *correlation* between exposure to media violence and aggressive and at times violent behavior."⁵⁰ Researchers have also concluded that a child's exposure to violent entertainment leads to an exaggerated perception of the amount of actual violence in society.⁵¹ The studies, however, are less conclusive regarding *causation*. "Most researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and that it is not the sole, or even necessarily the most important, factor contributing to youth aggression, anti-social attitudes, and violence."⁵²

Although all television and film viewers are inundated with daily doses of violent media, experts say that children are the most likely to

⁴⁶ Richard Rhodes, *Hollow Claims About Fantasy Violence*, N.Y. TIMES, Sept. 17, 2000, at A19.

⁴⁷ See Christopher Stern, *FTC Finds Hollywood Aims Violence at Kids*, WASH. POST, Sept. 11, 2000, at A1 (quoting Jack Valenti, President of the Motion Picture Association of America, as stating, "If movies are causing moral decay, then crime ought to be going up, but crime is going down").

⁴⁸ Jeanie Davis, *Should Parents Worry About Violence in Movies, Music, Games?* Lycos Health, at <http://webmd.lycos.com/content/article/1728.61236> (Sept. 12, 2000).

⁴⁹ Cannon, *supra* note 39, at 18. According to University of Kansas professor Aletha C. Huston, chairwoman of the American Psychological Association's Task Force on Television and Society, "There is more published research on this topic than on almost any other social issue of our time." *Id.*

⁵⁰ FTC REPORT, *supra* note 28, app. A, at 1 (2000) (citing L. Rowell Huesmann et al., *The Effects of Media Violence on the Development of Antisocial Behavior*, in HANDBOOK OF ANTISOCIAL BEHAVIOR 181 (David Stoff et al. eds., 1997)) (noting, however, that although the research on this topic is extensive, the majority of studies focus on the effects of television). Similarly, five principal commissions and review boards have looked at the range of studies regarding media violence and "[a]ll five reviews note the existence of a significant empirical association between exposure to television violence and aggressive behavior among youthful viewers." *Id.* at 8-9 (citation omitted). See also Davis, *supra* note 48 (emphasizing that of the thousands of studies assessing a link between violent behavior and violent entertainment, "all but 18 have shown an association between exposure to media violence and violent behavior. Twelve of the 18 were funded by the entertainment industry.").

⁵¹ See FTC REPORT, *supra* note 28, app. A, at 1 (citing SISELA BOK, *MAVHEM: VIOLENCE AS PUBLIC ENTERTAINMENT* 61-81 (1998)).

⁵² *Id.* (citing Huesmann et al., *supra* note 50, at 183).

be influenced by it.⁵³ Huesmann and Eron identified three psychological processes through which exposure to violent entertainment could lead a child to behave aggressively: observational learning, attitude change, and scripts.⁵⁴ A discussion of each follows.

A. Observational Learning

Observational learning occurs when children act aggressively while imitating violent actions depicted in films and television programs. Children learn to behave aggressively by watching others use violence to their advantage and then imitate what they have seen. This process is called "modeling,"⁵⁵ and the *Child's Play* and *Natural Born Killers* copycat murders are two real-world examples of observational learning. "A majority of experimental investigations undertaken in the laboratory report that exposure to violent programming leads children to act more aggressively."⁵⁶ For example, one study indicated that children who watched films of adults hitting inflatable bobo dolls acted more aggressively toward the bobo dolls and their playmates than did children who did not see the film.⁵⁷

Social scientists have also concluded that watching violent movies and television increases a child's appetite to expose himself to the

⁵³ See Diane Brady, *The Power of 'Cowabunga'; Does TV Violence Influence Behavior?*, MACLEAN'S, Dec. 7, 1992, at 50 (noting that the most susceptible viewers are young people who were raised in families where there was frequent physical violence); PROTHROW-STITH, *supra* note 10, at 34 ("The mass media lie about the physical and the emotional realities of violence On film or videotape violence begins and ends in a moment. 'Bang bang, you're dead.' Then the death is over. This sense of action-without-consequences replicates and reinforces the dangerous 'magical' way many children think.")

⁵⁴ FTC REPORT, *supra* note 28, app. A, at 2 (citing L. Rowell Huesmann & Leonard D. Eron, *The Development of Aggression in Children of Different Cultures: Psychological Processes and Exposure to Violence*, in TELEVISION AND THE AGGRESSIVE CHILD 1, 14-16 (L. Rowell Huesmann & Leonard D. Eron eds., 1986)).

⁵⁵ PROTHROW-STITH, *supra* note 10, at 44.

⁵⁶ FTC REPORT, *supra* note 28, app. A, at 4 (citing Huesmann et al., *supra* note 50, at 184; Haejung Paik & George Comstock, *The Effects of Television Violence on Antisocial Behavior: A Meta-Analysis*, 21 COMM. RES. 516, 518-19, 536-38 (1994); Russell G. Geen, *Television and Aggression: Recent Developments in Research and Theory*, in MEDIA, CHILDREN, AND THE FAMILY 151, 152 (Dolf Zillmann et al. eds., 1994)).

⁵⁷ See FTC REPORT, *supra* note 28, app. A, at 4 (citing Barrie Gunter, *The Question of Media Violence*, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 170-71 (Jennings Bryant & Dolf Zillmann eds., 1994)). Note, however, that there are many criticisms of experimental studies monitoring aggressive behavior: "At issue . . . is the applicability of these results to more realistic settings." *Id.* Moreover, "The experimental setting for teenagers and young adults departs from the everyday in the perceptions of the subjects, in the brevity of the television exposure, in the absence of the possibility of retaliation for aggression, in the exclusion of competing and countervailing communications, and in the criterion of immediacy of the measure of effects." *Id.* (citing Haejung Paik & George Comstock, TELEVISION AND THE AMERICAN CHILD 241 (1991)). Others argue that youthful subjects will respond to what the researcher wants them to do. See Jonathan L. Freedman, *Viewing Television Violence Does Not Make People More Aggressive*, 22 HOFSTRA L. REV. 833, 841 (1994) (providing a detailed critique of the notion that research shows violent television causes aggressive behavior).

risk of violence. This is known as the self-socialization effect.⁵⁸ "Imitative violence" is the most frequent actualization of this effect.

B. Attitude Change

The more violent films and television programs a child watches, the more accepting the child becomes of aggressive behavior. Many social scientists argue that violent films and television programs desensitize viewers and create "mean world syndrome" in which the image of a dangerous and violent world is cultivated among young viewers.⁵⁹ As one doctor explained, "[V]iolence in media is perpetrated by heroes as an acceptable means of conflict resolution It's our Clint Eastwoods and Arnold Schwarzeneggers, not the bad guys, who are wasting people. So what's happening is [children are] being exposed to violent behavior as an acceptable means of conflict resolution."⁶⁰

Longitudinal studies, which track and survey sample subjects at different points in their life time, are used to measure and investigate the relation between early exposure to violent entertainment and subsequent aggressive tendencies. Lefkowitz, Eron, and Huesmann conducted one of the most extensive longitudinal studies measuring attitudinal change. For twenty-two years, they closely scrutinized the viewing habits of a selected group of children in upstate New York. The researchers reported that "children with a preference for violent programs at age eight were more likely to exhibit aggressive behavior at age 19. Also, preference for violent television viewing at age eight was a predictor of serious crimes engaged in by subjects when they were 30 years old."⁶¹

Another study, conducted by Donnerstein and Linz, analyzed the effects that horror movies and "slasher" films had on young men.⁶² Male students were divided up into four groups. One group watched no movies, a second group watched nonviolent, X-rated movies, a third group watched teenage "sexual innuendo movies," and a fourth group watched the films *Texas Chainsaw Massacre*, *Friday the 13th Part II*,

⁵⁸ See Edward Donnerstein et al., *The Mass Media and Youth Aggression*, in 2 COMM'N ON VIOLENCE & YOUTH, AMERICAN PSYCHOL. ASS'N, VIOLENCE AND YOUTH: PSYCHOLOGY'S RESPONSE 17 (1994).

⁵⁹ FTC REPORT, *supra* note 28, app. A, at 6 (citing George Gerbner et al., *Growing up with Television: The Cultivation Perspective*, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH, *supra* note 57, at 30).

⁶⁰ Davis, *supra* note 48 (quoting Michael Rich, M.D., M.P.H., professor of pediatrics at Harvard Medical School).

⁶¹ FTC REPORT, *supra* note 28, app. A, at 5. *But see* Rhodes, *supra* note 46 ("[T]he correlation [between a preference for violent television at age eight and aggressiveness at age eighteen] only turned up in one of three measures of aggression: the assessment of students by the peers. It didn't show up in students' reports about themselves or in psychological testing.").

⁶² See Edward Donnerstein & Daniel Linz, *Mass Media Sexual Violence and Male Viewers: Current Theory and Research*, 29 AM. BEHAV. SCIENTIST 601 (1986).

Maniac, and *Toolbox Murders*. The young men were then placed on a mock jury panel and asked a series of question designed to measure their empathy for an alleged female rape victim. The fourth group measured lowest in empathy for the specific victim in the experiment and for rape victims in general. Based on those results, Donnerstein and Linz concluded that depictions of violence, and not sex, desensitized people.⁶³

C. Scripts

Social behavior is controlled to a great extent by "strategies" or "scripts" that people store in memory and use as behavioral guides when they confront particular situations. The "Notel" Study analyzed how children's scripts were impacted by the exposure to violent media when television was first introduced into their community.⁶⁴ In 1973, Notel, a town in Western Canada, was wired for the first time to receive television signals. For the next two years, researchers from the University of British Columbia observed first and second grade students in Notel and compared them to children in two nearby communities that previously had access to television. They measured aggression by observing children's interactions in the schoolyard, as well as through teacher and peer ratings. According to the researchers, rates of physical aggression and violence increased by 160% in Notel, but did not change significantly among children in the nearby communities.⁶⁵ The researchers concluded that viewing televised violence elevated the level of aggression in the children from Notel. Among some researchers, "[t]he Canadian investigation is considered the best controlled study of its type, and provides some of the most persuasive evidence in support of the hypothesis that violent media content stimulates aggressive behavior in children."⁶⁶

Despite these assertions, however, some experts contend that the link between violent media and actual violence is unproven and overstated.⁶⁷ First, they point out that "no direct, *causal* link between exposure to mock violence in the media and subsequent violent behavior has ever been demonstrated."⁶⁸ Second, they argue that the research studies that have influenced national policy and public opinion are riddled with contradictions, as well as with methodological

⁶³ See *id.* at 609-10.

⁶⁴ See Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where to Go From Here*, 267 JAMA 3059, 3060 (1992). Researchers withheld the true identity of the town, calling it instead "Notel."

⁶⁵ *Id.*

⁶⁶ FTC REPORT, *supra* note 28, app. A, at 7 (adding, however, that other results from the study indicate a more equivocal causal link between media violence and aggressive behavior).

⁶⁷ See, e.g., Brady, *supra* note 53, at 50 (discussing the view that the causal link between media violence and real-world aggression is not clear-cut).

⁶⁸ Rhodes, *supra* note 46 (emphasis added).

and data problems that should preclude the finding of any correlation between media violence and actual violence.⁶⁹

Despite the criticism, there appears to be general agreement among social scientists that the impact of media violence explains at least a small portion of the total variation in aggressive behavior by youths.⁷⁰ "As Huesmann . . . points out: 'What is important for the investigation of the role of media violence is that no one should expect the learning of aggression from exposure to media violence to explain more than a small percentage of the individual variation in aggressive behavior.'⁷¹

In 1992, the American Psychological Association Commission on Youth and Violence examined Hollywood's response to this voluminous research.⁷² The researchers reported that Hollywood executives, screenwriters, producers, and directors widely ignored the evidence of the effects of film and television violence on children. The Commission argued this evidence has "for decades been actively ignored, denied, attacked and even misrepresented in presentations to the American public."⁷³ Consequently, the Commission concluded that in America there is an "education gap" about the dangers of violent media because of the tendency to ignore television and film's documented contribution to the problems of violence.⁷⁴ Overall, the Commission determined that the industry is ignoring verifiable evidence that violent images depicted on screen can affect behavioral patterns of young children.

IV. FIRST AMENDMENT, MIMICRY, AND THE *BRANDENBURG* STANDARD

As concern over Hollywood violence intensifies, some members of the public have brought the battle into the courtroom, seeking judicial remedies against individual members of the entertainment industry.⁷⁵ Courts traditionally barred these tort claims and protected art-

⁶⁹ See *id.*

⁷⁰ See FTC REPORT, *supra* note 28, app. A, at 9.

⁷¹ *Id.* (quoting Huesmann et al., *supra* note 50, at 183).

⁷² See David S. Barry, *Screen Violence and America's Children*, SPECTRUM: J. OF STATE GOV'T, Summer 1993, at 37, 39 (discussing the APA study that was conducted by Edward Donnerstein, Leonard Eron, and Ron Slaby).

⁷³ *Id.* at 42 (quoting the APA study). See also PROTHROW-STITH, *supra* note 10, at 40 ("Television executives have used all their energy and resources to prove that television-viewing does not teach children to behave violently.").

⁷⁴ Barry, *supra* note 72, at 42.

⁷⁵ Plaintiffs mostly allege negligence and other tort claims. If the First Amendment did not traditionally bar these negligence claims, states would permit recovery to victims who could prove that the defendant owed a duty to the public or to the specific plaintiff; the defendant breached the duty by disseminating a form of entertainment that would cause harmful audience response; the depiction actually caused such a response; and the response resulted in foreseeable harm to the plaintiffs. See Brill, *supra* note 17, at 986.

ists' speech under the First Amendment.⁷⁶ In recent years, however, the number of mimicry cases to reach the courts has grown considerably,⁷⁷ and judges have not been as quick to dismiss the civil actions.⁷⁸ The question remains, however, whether lawsuits against the entertainment industry best serve the public interest of protecting children from excessive Hollywood violence. This Comment argues that allowing mimicry cases to proceed to trial creates a legal dilemma because an artist's freedom of speech will be jeopardized if plaintiffs are able to recover generous damages against the entertainment industry.⁷⁹

A. *The Brandenburg Standard*

Most courts deciding First Amendment issues in mimicry cases apply the rigid incitement standard of *Brandenburg v. Ohio*⁸⁰ and bar

⁷⁶ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press."). The Free Speech Clause is incorporated against the states through the Due Process Clause of the Fourteenth Amendment. See *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

⁷⁷ In recent years, there have been lawsuits over the films *Natural Born Killers*, and *The Basketball Diaries*. See, e.g., *Byers v. Edmondson*, 712 So. 2d 681 (La. Ct. App. 1998) (the "*Natural Born Killers* case"); *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798 (W.D. Ky. 2000). Further, in *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997), cert. denied, 523 U.S. 1074 (1998) (the "*Hit Man* case"), the relatives of murdered victims sued the publisher of an instruction book, *Hit Man: A Technical Manual for Independent Contractors*, which allegedly assisted the murderer in soliciting, preparing, and committing the murders.

⁷⁸ In the last few years, courts have refused to block civil actions brought by the victims' families. In the *Hit Man* case, the Court of Appeals for the Fourth Circuit held that *Paladin Enterprises* was not protected by the First Amendment in its publication of *The Hit Man*, after the book allegedly assisted a reader in soliciting, preparing, and committing three murders. See *Rice*, 128 F.3d at 267. The district court's ruling in favor of the publisher was reversed and the case was remanded for trial. See *id.* The trial, however, never occurred because the parties settled. Similarly, in the *Natural Born Killers* case, the Louisiana First Circuit Court of Appeals refused to dismiss the lawsuit against Oliver Stone. See *Byers*, 712 So. 2d at 684. The court held that "based on the allegations of the petition which we must accept as true for purposes of a peremptory exception raising the objection of no cause of action, the Warner defendants are liable as a result of their misfeasance in that they produced and released a film containing violent imagery which was intended to cause its viewers to imitate the violent imagery." *Id.* at 687. Further, the court held that discovery should take place to determine whether this intent existed. See *id.* at 691. In another case that received heightened media attention, a Michigan court found that Warner Brothers, as owners, producers and distributors of *The Jenny Jones Show*, negligently caused the death of Scott Amedure. The program invited Jonathan Schmitz to the program so Scott Amedure could reveal his "secret crush" on him. Schmitz fatally shot Amedure four days after the program was taped. Warner Brothers had to pay the family members of Amedure twenty-five million dollars. See *Jury Awards \$25 Million in 'Jenny Jones' Lawsuit*, CHI. TRIB., May 7, 1999, at 1.

⁷⁹ See also Carolina A. Fornos, Comment, 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, 441 (2000) ("Society as a whole, and the legal system in particular, faces a crisis: should a plaintiff be permitted to state a valid cause of action against the various entertainment industries for inspiring viewers, readers, or listeners to commit intentional acts of violence, despite the right to freedom of speech?").

⁸⁰ 395 U.S. 444 (1969).

recovery. In *Brandenburg*, the defendant was convicted under an Ohio criminal statute for leading an "organizer's meeting" for the Klu Klux Klan.⁸¹ At this meeting, the defendant made derogatory statements toward African-Americans and Jews and also claimed that revenge might be taken if whites continued to be treated unfairly.⁸² The Supreme Court reversed the conviction, finding the Ohio statute that *Brandenburg* was convicted under unconstitutional because it outlawed mere advocacy of violence, without regard to whether the speech was likely to incite imminent lawless action.⁸³

In *Brandenburg*, the Supreme Court created the modern test for the protection of speech with a "tendency to lead to violence."⁸⁴ Under the *Brandenburg* test, speech is unlawful when advocacy is directed to inciting or producing "imminent lawless action" and is likely to incite or produce such action.⁸⁵

The *Brandenburg* test significantly increased protection under the First Amendment.⁸⁶ No longer could draft resisters, union activists, or political dissidents be convicted because their rhetoric criticized the government and called people together. Most importantly, unlike the "clear and present danger" test,⁸⁷ the *Brandenburg* test did not solely depend upon the danger of the environment.⁸⁸

⁸¹ *Id.* at 446. The persons in attendance were members of the KKK who carried firearms and burned a large wooden cross. *See id.* at 445.

⁸² *See id.* at 446 (noting that defendant had said "[w]e're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues [sic] to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken").

⁸³ *See id.* at 448.

⁸⁴ This particular formulation of *Brandenburg*-type speech was first used in *Hess v. Indiana*, 414 U.S. 105, 109 (1973). *See* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 4 (1994). Crump notes that before *Brandenburg*, the Supreme Court had looked primarily to the gravity and probability of this kind of danger in cases involving draft resisters, labor activists, and suspected communists. But in the *Brandenburg* opinion, it also focused upon the quality and context of the utterance. *See id.*

⁸⁵ *See Brandenburg*, 395 U.S. at 447 (holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

⁸⁶ *See Crump, supra* note 84, at 12-13.

⁸⁷ Early efforts to treat the problem of speech inciting violence were based upon the "clear and present danger test" outlined in *Schenck v. United States*, 249 U.S. 47 (1919). In that case, the defendant was charged with violating the Espionage Act by causing insubordination in the military and obstructing recruiting. *See id.* at 48-49. The defendant had circulated a handbill, criticizing politicians and the press and urging citizens to exercise "your right to assert your opposition to the draft." *Id.* at 51. The jury convicted Schenck, and the Supreme Court upheld the conviction. Justice Holmes wrote the opinion and argued that "[t]he question in every case is 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." *Id.* at 52. The overall effect of the clear and present danger test was that it denied protection to outrageously harmful utterances with little communicative value.

⁸⁸ Crump, *supra* note 84, at 13 ("A speaker can be held responsible for his own utterances, but not for the countless possibilities that violence may ensue when the words are interpreted by unknown persons at an indefinite time in the future.").

Thus, under the *Brandenburg* standard, the only way courts can hold individual members of the entertainment industry negligent for inspiring a real-world activity would be if such a film urged or incited the viewer to imitate the activity. While scenes from *The Basketball Diaries* and *Natural Born Killers* depict violent acts that in fact have been imitated by children and teenagers, none of them, in any way, "exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers."⁸⁹ Therefore, the *Brandenburg* standard should bar defendants' liability in mimicry cases.⁹⁰

B. Mimicry Cases Applying *Brandenburg*

One example of a mimicry case rejected under the *Brandenburg* standard is *Olivia N. v. NBC*,⁹¹ in which the California appellate court denied recovery for a nine-year-old rape victim assaulted with a bottle by teenagers imitating a scene from the film *Born Innocent*.⁹² In her complaint against NBC, the plaintiff alleged that the movie was the proximate cause of her attack. However, when the plaintiff's counsel stated in his opening statement that he would only prove negligence and not incitement, as the *Brandenburg* standard required, the trial court dismissed the case, and the plaintiff appealed.⁹³ The California Court of Appeals affirmed the trial court and declared that fictional

⁸⁹ *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989) (denying liability for the wrongful death of a sixteen-year old boy who was murdered by another teenager who had just seen, and allegedly was imitating, the gang violence in the movie *The Warriors*).

⁹⁰ One case that suggests a lower standard than *Brandenburg* when children are involved is *Walt Disney Prods. v. Shannon*, 276 S.E.2d 580 (Ga. 1981). In that case, the plaintiff was injured after he tried to imitate a stunt depicted on the *Mickey Mouse Club*. To create a sound effect, the child put a piece of lead into a balloon. The balloon burst, shooting the lead into the plaintiff's eye and partially blinding him. After this accident, the plaintiff brought a tort suit against Walt Disney Productions. Although the Georgia Supreme Court refused to grant relief, it did not rest its decision on *Brandenburg*. Instead, it ruled that the *Schenck* formulation of the "clear and present danger" doctrine provided the appropriate analytical framework for resolving the case. *See id.* at 582. This is a very important distinction, because unlike the *Brandenburg* standard, the *Schenck* clear and present danger test contains no intent requirement and a weaker requirement of temporal proximity. Therefore, it is less speech-protective than the incitement standard of *Brandenburg*. *See also* Brill, *supra* note 17, at 1005 ("The court's desire to apply *Schenck*'s standard rather than *Brandenburg*'s when speech is directed at very young audiences . . . may be an effort to accommodate non-speech-related interests of private parties in general or of children in particular.").

⁹¹ 178 Cal. Rptr. 888 (Cal. Ct. App. 1981).

⁹² *See* Quinlan & Persels, *supra* note 6, at 422 (describing the facts of *Olivia N.*). On September 10, 1974, NBC broadcast the movie *Born Innocent*. One scene in the film showed a young girl being artificially raped with a toilet plunger by a gang of other girls. Before the assailants attacked Olivia N., they had viewed and discussed the rape scene. Thus, the plaintiffs alleged that the movie was the proximate cause of her attack. *See id.*

⁹³ *Olivia N.*, 178 Cal. Rptr. at 890 n.1 (noting that plaintiff's counsel specifically said that "there will be no evidence that NBC ever told anybody or incited anyone to go out and rape a girl with an artificial instrument or in any other way"). *See also* Quinlan & Persels, *supra* note 6, at 422.

materials such as the film *Born Innocent* are accorded protection under the First Amendment.⁹⁴ The court noted the "obvious" chilling effects that tort actions would have on broadcasters if mere negligence were enough to subject them to liability for imitative conduct. The court reasoned that such deterrence would lead to self-censorship, which, in turn, would "dampen the vigor and limit the variety of public debate."⁹⁵

Similarly, in *Yakubowicz v. Paramount Pictures Corp.*,⁹⁶ the father of a sixteen-year-old boy sued Paramount Pictures, the producer of the film *The Warriors*, for wrongful death after a person who had just seen the film knifed his son to death.⁹⁷ Before stabbing the victim, the attacker had uttered one of the lines from the film.⁹⁸ The father argued that Paramount was negligent in producing the film and that Paramount had produced, distributed, and advertised the film "in such a way as to induce film viewers to commit violence in imitation of the violence in the film."⁹⁹ The trial court granted summary judgment for the defendants and the plaintiff appealed. The Massachusetts Supreme Court affirmed, holding that although the defendants "owed a duty of reasonable care to members of the public including the plaintiff's decedent,"¹⁰⁰ the film did not "exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers."¹⁰¹ As the court noted, "speech does not lose its First Amendment protection merely because it has a 'tendency to lead to violence.'"¹⁰² These two cases exemplify how the *Brandenburg* standard traditionally bars tort liability and protects First Amendment principles.¹⁰³

⁹⁴ See *Olivia N.*, 178 Cal. Rptr. at 891.

⁹⁵ *Id.* at 892 ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964))). See also *Quinlan & Persels*, *supra* note 6, at 423 & n.29 (discussing this aspect of *Olivia N.*).

⁹⁶ 536 N.E.2d 1067 (Mass. 1989).

⁹⁷ See Brill, *supra* note 17, at 997 (noting that *The Warriors* contained many scenes of gang violence and was also widely believed to be responsible for two other murders in California).

⁹⁸ See *id.* (citing *Yakubowicz*, 536 N.E.2d at 1070).

⁹⁹ *Yakubowicz*, 536 N.E.2d at 1068. This is the same argument made in the *Natural Born Killers* case. See *Byers v. Edmondson*, 712 So. 2d 681, 684 (La. Ct. App. 1998).

¹⁰⁰ *Yakubowicz*, 536 N.E.2d at 1071.

¹⁰¹ *Id.*

¹⁰² *Id.* (citing *Hess v. Indiana*, 414 U.S. 105, 109 (1973)).

¹⁰³ A few other mimicry cases that follow the *Brandenburg* standard are noteworthy. In *De-Filippo v. NBC*, 446 A.2d 1036 (R.I. 1982), involving a teenager who hanged himself after watching a mock hanging of Johnny Carson on an episode of *The Tonight Show*, the parents of the thirteen-year-old unsuccessfully sued NBC, arguing that the network was negligent in broadcasting the stunt. The Rhode Island Supreme Court affirmed the lower court and granted summary judgment holding that First Amendment protections barred the suit. *Id.* at 1042. In its decision, the court noted the obvious chilling effects that tort actions would have on broadcasters' free speech if they were found liable for imitative conduct. See *id.* at 1041-42. In *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Cal. Ct. App. 1988), plaintiffs sued *Ozzy Osbourne* and CBS Records after their nineteen-year-old son shot himself in the head after re-

Since Littleton, however, courts are not as quick to dismiss mimicry cases.¹⁰⁴ One example is the *Natural Born Killers* case, *Byers v. Edmondson*.¹⁰⁵ In *Byers*, the Louisiana Court of Appeals refused to dismiss the negligence action against Time Warner and Oliver Stone. Plaintiffs accused Stone and Time Warner of negligently producing and distributing *Natural Born Killers*, a film "which they should have known would cause or incite persons" to copy the murders glorified on screen.¹⁰⁶ The court stated that if the plaintiffs could prove its allegation that Warner Brothers and Stone "intended to urge viewers to imitate the criminal conduct of . . . the main characters in the film, the risk of harm to a person such as [the victim] would be imminently foreseeable, justifying the imposition of a duty . . . to refrain from creating such a film."¹⁰⁷ In May 1998, Stone and Time Warner Entertainment requested that Louisiana's highest court and the U.S. Supreme Court review the ruling, but both denied certiorari.¹⁰⁸ The result of the Courts' denial was that discovery in the case continued. Since the plaintiff must prove at trial that Stone and Time Warner intended to incite violence through *Natural Born Killers*, the plaintiff requested to see documents relating to the film, including production notes, private journals, and unused footage shot by Stone.¹⁰⁹

The *Byers* decision relied heavily on *Rice v. Paladin Enters.*,¹¹⁰ a Fourth Circuit decision that also caught the attention of the public and raised concern among the entertainment industry.¹¹¹ In that

peatedly listening to Ozbourne's song Suicide Solution. The song contained the lyrics "Where to hide, suicide is the only way out. Don't you know what it's really about . . . why try, why try. Get the gun and try it. Shoot, shoot, shoot." *Id.* at 190-91. The court found that the song was not intended to bring about the imminent suicide of listeners. *See id.* at 193. Therefore, the speech was protected under the Brandenburg standard.

¹⁰⁴ *See* Fornos, *supra* note 79, at 446 ("The crisis which the legal system faces . . . is not that the entertainment industries are being sued under tort law, but rather that courts no longer seem to automatically dismiss these claims on the ground that they are barred by the First Amendment's right to free speech.")

¹⁰⁵ 712 So. 2d 681 (La. Ct. App. 1998). CNN legal analyst Greta Van Susteren emphasized the importance and high-profile nature of this case: "Both Hollywood and First Amendment activists are nervously monitoring this civil action, since it promises to transfer the battle over movie violence from the op-ed pages into the courtroom, where any decision could set a landmark precedent." *See* Young, *supra* note 11, at 30.

¹⁰⁶ *Byers*, 712 So. 2d at 684.

¹⁰⁷ *Id.* at 688.

¹⁰⁸ *See* *Byers v. Edmondson*, 712 So. 2d 681 (La. Ct. App. 1998), *writ denied*, 726 So. 2d 29 (La. 1998), *cert. denied*, *Time Warner Entertainment Co. v. Byers*, 119 S. Ct. 1143 (1999).

¹⁰⁹ *See* Young, *supra* note 11, at 30. In fact, Stone's own words may come back to haunt him. In a New York Times interview in April 1996, Stone said, "The most pacifistic people in the world said they came out of this movie and wanted to kill somebody." Peter M. Nichols, *With Video, 'Cut!' Needn't Be the Director's Final Word*, N.Y. TIMES, Apr. 14, 1996, § 2, at 15.

¹¹⁰ 128 F.3d 233 (4th Cir. 1997).

¹¹¹ *See, e.g.*, Martin Garbus, *Deliberate Intent: A Lawyer Tells the True Story of Murder by the Book*, 222 N.Y. L.J. 2 (1999) (criticizing the holding in *Rice*). *See also* *Byers*, 712 So. 2d at 690 (noting that *Paladin* was joined "by a spate of media amici," including the major networks that recognized that "even a potential cause of action against *Paladin* will have far-reaching chilling effects on the rights of free speech and press").

case, the court held that the publisher of *Hit Man*, an instruction book for would-be-assassins, could be held civilly liable for the deaths of victims killed by a third person who followed the book's steps in order to commit a murder.¹¹² According to the court, *Hit Man* should not be afforded First Amendment protection because it "so overtly promotes murder in concrete, nonabstract terms."¹¹³

Are these two cases setting new legal precedent that the entertainment industry should be concerned about? As one legal analyst explained: "There's a climate of wanting to teach Hollywood a lesson on violence . . . [T]he courts are one place that's happening."¹¹⁴ Hollywood, however, should not worry about courts becoming more active in monitoring and censoring violence in films. *Rice* was a "rare" case because the publisher "stipulated in almost taunting defiance that it intended to assist murderers and other criminals."¹¹⁵ And according to the *Byers* opinion, recognizing a cause of action against Paladin did not subject filmmakers to liability whenever someone copied conduct depicted in their movies.¹¹⁶ The court stated that:

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 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, not, as [in *Rice*], used precisely as 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.¹¹⁷

Further, the *Byers* court did not reject the *Brandenburg* standard that has traditionally barred plaintiff victories in mimicry cases. Rather, it noted that courts almost always refuse to hold members of the entertainment industry liable for injuries sustained from imitating actions depicted in films but emphasized that "many of these dismissals came after the filing of a motion for summary judgment, or even after a trial on the merits, and thus, after the parties had the

¹¹² *Rice*, 128 F.3d at 233. See also *Byers*, 712 So. 2d at 690 (discussing the *Hit Man* case); Garbus, *supra* note 111 (noting that the case settled right before jury selection and that "Paladin Press's reported settlement paid to the families of three murdered people is the first payment of its kind in American legal history").

¹¹³ *Byers*, 712 So. 2d at 690 ("The unique text of *Hit Man* alone, boldly proselytizing and glamorizing the crime of murder and the 'profession' of murder as it dispassionately instructs on its commission, is more than sufficient to create a triable issue of fact as to Paladin's intent in publishing and selling the manual."). Further, Paladin admits that it intended and knew that its book would be used in the commission of murder. See *id.*

¹¹⁴ Young, *supra* note 11, at 30 (alteration in original) (quoting CNN legal analyst Greta Van Susteren).

¹¹⁵ *Byers*, 712 So. 2d at 691 ("In fact, neither the extensive briefing by the parties and the numerous amici in this case, nor the exhaustive research which the court itself has undertaken, has revealed even a single case that we regard as factually analogous to this case.").

¹¹⁶ See *id.*

¹¹⁷ *Id.*

opportunity to conduct discovery pertinent to the alleged facts."¹¹⁸ Therefore, the *Byers* court's ruling was consistent with the precedent of other mimicry cases.

Lastly, the *Byers* court indicated that Oliver Stone and Warner Brothers were not precluded from invoking the First Amendment guarantee of free speech to bar *Byers*' claim after discovery had taken place.¹¹⁹ In fact Oliver Stone and Time Warner sought summary judgment to end the case in January 2001, after three years of discovery.¹²⁰ In an affidavit filed with the motion, Stone stated that his film was not intended to incite violence but was a satire "to encourage the audience to think critically about society's contradictory relationship to violence."¹²¹ Stone's attorney said, "At the heart of this [summary judgment] motion are First Amendment issues that could affect filmmakers, writers, artists and the entire creative community in the country."¹²²

The *Natural Born Killers* case is controversial because as much as the public would like to protect its children from gratuitous screen violence, using the courts to punish Hollywood through mimicry lawsuits is problematic. If courts permit negligence actions to proceed against individual members of the entertainment industry, then freedom of speech will be "chilled" because "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."¹²³ Imposing liability on the entertainment industry would therefore lead to self-censorship.¹²⁴ Self-censorship would result because producers, artists, directors, and other creators within the entertainment industry would fear that images depicted in their films might lead to mimicry. They would censor these ideas and images in response to potential damage liability. Liability imposed on a simple negligence theory would render movie producers and directors significantly more inhibited in the selection of controversial materials.¹²⁵ Free expression is not given full protection if it depends on the vote of a jury. "Allowing judges and juries to

¹¹⁸ *Id.* at 688.

¹¹⁹ *See id.* at 691.

¹²⁰ *See* Janet Shprintz, *Oliver Stone, Time Warner Eye End to 'Killers' Case, Yahoo*, at http://dailynews.yahoo.com/h/nm/20010111/re/film_killers_dc_1.html (Jan. 11, 2001).

¹²¹ *Id.* (quoting Oliver Stone).

¹²² *Id.*

¹²³ *Olivia N. v. NBC*, 178 Cal. Rptr. 888, 892 (Cal. Ct. App. 1981) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1981)).

¹²⁴ *See id.* at 892-93 (noting that the imposition of tort liability on television broadcasters would "dampen the vigor and limit the variety of public debate" and effectively "could reduce the U.S. adult population to viewing only what is fit for children"); *DeFilippo v. NBC*, 446 A.2d 1036, 1041-42 (R.I. 1982) (noting that permitting plaintiffs to recover in mimicry case would invariably lead to broadcaster self-censorship and limit viewers' access to diverse programming).

¹²⁵ *Olivia N.*, 178 Cal. Rptr. at 892 ("[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964))).

decide whether a media defendant is liable for damages would be to sanction a system of *de facto* censorship.¹²⁶ Moreover, self-censorship will not only violate the entertainment industry's right to make its own creative decisions, it will also violate the "paramount rights of the viewers to suitable access to 'social, esthetic, moral, and other ideas and experiences.'¹²⁷ Therefore, imposing negligence liability would deprive both filmmakers and viewers of freedom of choice.

"[I]n a free and democratic society, it is unacceptable '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.'¹²⁸ Imposing such a duty would limit artistic expression "to only the broadest standard of taste and acceptance and the lowest level of offense, provocation, and controversy."¹²⁹ Unfortunately, some people, notably young children, react violently to movies that depict gratuitous violence. "It is typically impossible 'to predict what particular expression will cause such a reaction, and under what circumstances.'¹³⁰ Therefore, although there is concern about children's exposure to Hollywood violence, censoring movie violence through trials and damage awards violates an artist's freedom of speech.

V. REGULATING HOLLYWOOD: FTC REVELATIONS

After the school shootings in Littleton, President Clinton commissioned a Federal Trade Commission report (FTC Report) on the marketing of violent movies, music, and video games to children and teenagers.¹³¹ On September 11, 2000, after investigating the marketing practices of the major media conglomerates, the FTC concluded that Hollywood targets sales of ultra-violent products to children.¹³² According to the FTC Report, the film industry aggressively markets

¹²⁶ Quinlan & Persels, *supra* note 6, at 433. See also *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("One's right to . . . free speech, a free press, . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

¹²⁷ *DeFilippo*, 446 A.2d at 1041 (quoting *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)).

¹²⁸ Schneider, *supra* note 4, at 494 (quoting *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 197 (Cal. Ct. App. 1988)).

¹²⁹ *Id.*

¹³⁰ *Id.* (quoting *Bill v. Superior Ct. of San Francisco*, 187 Cal. Rptr. 625, 629 (Cal. Ct. App. 1982)).

¹³¹ See FTC REPORT, *supra* note 28, at i; see also Stern, *supra* note 47 ("The Columbine killings put the spotlight on a spate of deadly killings in schools and raised questions over whether violent films . . . were contributing to this increase in violence."). News reports suggested that the boys responsible for the Columbine killings were immersed in a violent subculture.

¹³² See FTC REPORT, *supra* note 28, at i. In commissioning the Report, "[t]he President raised two specific questions: Do the industries promote products they themselves acknowledge warrant parental caution in venues where children make up a substantial percentage of the audience? And, are these advertisements intended to attract children and teenagers?" The Report concluded that the answers to these questions are "plainly 'yes.'" *Id.*

violent movies to children, even when its own ratings board labels the films inappropriate for young children without adult supervision.¹³³ The Report stated that “[t]he practice of pervasive and aggressive marketing of violent movies . . . to children undermines the credibility of the industries’ ratings and labels. Such marketing also frustrates parents’ attempts to make informed decisions about their children’s exposure to violent content.”¹³⁴

The FTC Report was extremely critical of the film industries’ marketing and advertising techniques. First, the Report criticized the amount of violence depicted in movie trailers that are seen before feature films.¹³⁵ The Report cited numerous examples of trailers approved for “all audiences” that contained violence.¹³⁶ For example, in the trailer for *I Know What You Did Last Summer*, there were references to a decapitation as well as a person being “gutted with a hook.”¹³⁷ Similarly, the trailer for *Scream 2* depicted several violently graphic images including a woman being pursued by a knife-wielding masked killer.¹³⁸ The Report also noted that despite a self-regulating policy established by the National Association of Theater Owners,¹³⁹ the studios routinely placed trailers for R-rated movies at PG-13 and PG-rated films. For example, R-rated trailers including *The General’s Daughter* and *South Park: Bigger, Longer, and Uncut* regularly preceded *Star Wars Episode 1: The Phantom Menace*, which was rated PG.¹⁴⁰

Second, the FTC Report criticized the film industry’s self-regulatory system because it did not monitor advertisement placement or marketing directed at children.¹⁴¹ In studying the motion picture industry’s marketing techniques, the FTC analyzed the promotion of forty-four violent R-rated films and twenty violent PG-13-rated films distributed by nine major studios from 1995-1999.¹⁴² Thirty-five of the forty-four R-rated films analyzed by the FTC (eighty

¹³³ See *id.* at iii (“individual companies . . . routinely market to children the very products that have the industries’ own parental warnings or ratings with age restrictions due to their violent content”).

¹³⁴ *Id.* at i. See also David E. Rosenbaum, *Panel Documents How Violent Fare is Aimed At Youth*, N.Y. TIMES, Sept. 12, 2000, at A1. Rosenbaum notes that for years the entertainment industry has repeatedly denied that their companies deliberately direct advertisements toward children. They have often claimed that it is “impossible in modern communications to keep promotions of products for young adults away from the eyes and ears of children.” *Id.*

¹³⁵ See FTC REPORT, *supra* note 28, at 9.

¹³⁶ *Id.* at 9.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Under the policy, films rated PG and higher could exhibit trailers for films within one rating of the feature presentation. *Id.* at 16.

¹⁴⁰ *Id.* at 16-17.

¹⁴¹ See FTC REPORT, *supra* note 28, at 11.

¹⁴² *Id.* at 5. The FTC analyzed “media plans” which indicated where television, radio, print, and Internet advertising were placed and described the target audiences the studios intended to reach. *Id.*

percent) targeted children under seventeen.¹⁴³ Further, promotional reports for twenty-eight of the forty-four films (sixty-four percent) contained "express statements" that the film's target audience included children under seventeen.¹⁴⁴ Records indicated that studios routinely recruit teenagers and children as young as ten years to evaluate story concepts, commercials, trailers and rough cuts for R-rated movies.¹⁴⁵ For example, before Hollywood Pictures released *Judge Dredd*, an R-rated film about urban crime, the studio tested the film before a focus group that included more than one hundred youths aged thirteen to sixteen.¹⁴⁶ Similarly, MGM/United Artists tested advertising for the R-rated film *Disturbing Behavior* by showing two thirty-second commercials to more than four hundred twelve- to twenty-year-olds,¹⁴⁷ and Columbia Tristar's research staff sampled one hundred children ages nine to eleven to evaluate concepts for the slasher sequel *I Still Know What You Did Last Summer*.¹⁴⁸

Third, the FTC Report revealed that the movie studios marketed their R-rated films by buying advertising spots during television programs that specifically appealed to young viewers.¹⁴⁹ According to the Report, "[t]he studios repeatedly advertised films rated R for violence on television programs that were the highest rated among teens or where teens comprised the largest percentage of the audience."¹⁵⁰ In fact, MTV, the music network with a core teen demographic, was found to be the largest cable advertising outlet for R-rated films.¹⁵¹ Studio marketing materials also indicate that the film industry reached young audiences with advertisements that ran during "after school" viewing hours as well as on weekends, the times when children predominately watch television.¹⁵²

The FTC Report stated that the Cartoon Network and Nickelodeon heavily advertised PG-13 movies, which caution that violent material may be inappropriate for young children, particularly during the afternoons and during Saturday morning cartoons.¹⁵³ For example, Universal Studios attempted to market the film *The Mummy* to

¹⁴³ *Id.* at 13.

¹⁴⁴ *Id.* at 13-14.

¹⁴⁵ *Id.* at 14.

¹⁴⁶ See Doreen Carvajal, *How the Studios Used Children to Test-Market Violent Films*, N.Y. TIMES, Sept. 27, 2000, at A1 (noting that the company's research and surveys indicated that young male teenagers were the most enthusiastic about the film).

¹⁴⁷ See *id.* (noting that children were asked to rate the advertising commercials "scene by scene," including one scene in which a girl's head was bashed into a mirror and another where a needle was forced toward a clamped eye).

¹⁴⁸ See *id.*

¹⁴⁹ See FTC REPORT, *supra* note 28, at 14.

¹⁵⁰ *Id.* The most popular programs for studios to market their films included *Buffy The Vampire Slayer*, *WWF Raw*, *WCW Wrestling*, and *Xena: Warrior Princess*. *Id.* at 15.

¹⁵¹ *Id.* at 15.

¹⁵² *Id.*

¹⁵³ See *id.* at 15.

young teenagers by advertising it on television shows that appealed to young viewers such as *Pokémon*, *Mighty Morphin Power Rangers*, and *Spi-derman*.¹⁵⁴ Columbia Pictures attempted to advertise its ultra-violent *The Fifth Element* on Nickelodeon, but “MTV Networks, which oversees Nickelodeon, refused to allow an advertisement because it considered the movie inappropriate for [Nickelodeon] viewers, who are mostly under 12.”¹⁵⁵ “The studio unsuccessfully appealed the ban, arguing in part . . . that the violence would be suspect to ‘the children of today who are more sophisticated.’”¹⁵⁶ The marketing of these PG-13 films is further broadened through toy tie-ins which may attract children as young as four years old.¹⁵⁷

The studios also attract children to their films through promotional activities intended to generate film interest.¹⁵⁸ The FTC Report found that one of the more popular methods to attract teens to R-rated movies was to distribute free merchandise, such as t-shirts and posters, at places where teens congregate.¹⁵⁹ One marketing plan for an R-rated film revealed that:

[O]ur goal was to find the elusive teen target audience and make sure everyone between the ages of 12-18 was exposed to the film. To do so, we went beyond the media partners by enlisting young, hip “Teen Street Teams” to distribute items at strategic teen “hangouts” such as malls, teen clothing stores, sporting events, Driver’s Ed classes, arcades and numerous other locations.¹⁶⁰

Overall, the FTC Report concluded that despite warning labels, the entertainment industry aggressively markets its violent products to young children.¹⁶¹

Despite its criticism toward Hollywood marketing practices, the FTC decided not to pursue legal charges against the major film studios for deceptive or unfair advertising practices.¹⁶² Traditionally, laws against deceptive advertising have been used to punish companies making false product claims. To bring a successful case, the FTC would have to prove that the film industry intended to mislead consumers to their detriment or that the advertisement caused injury that was not reasonably avoidable.¹⁶³ In this case, FTC attorneys determined that the First Amendment would bar effective legislation of

¹⁵⁴ See Carvajal, *supra* note 146.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (quoting Columbia Pictures).

¹⁵⁷ *See id.*

¹⁵⁸ FTC REPORT, *supra* note 28, at 17.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (quoting anonymous film-marketing plan).

¹⁶¹ *See id.* at 13-15.

¹⁶² See Christopher Stern, *FTC Says It Won't Sue Hollywood*, WASH. POST, Nov. 22, 2000, at A1.

¹⁶³ See Jube Shiver & Fave Fiore, *Heat on Hollywood as FTC Ponders Curbs on Violence*, L.A. TIMES, Sept. 12, 2000, at A1 (quoting William C. MacLeod, a Washington antitrust lawyer and former head of the FTC's Bureau of Consumer Protection).

marketing campaigns.¹⁶⁴ The FTC acknowledged that if it took legal action against major film studios, the agency would be forced to explain which movies are appropriate for children and which are not.¹⁶⁵ The First Amendment bars this type of censorship. Robert Pitofsky, the Commission's Chairman, expressed concern about government bureaucrats picking apart a film's content: "I don't want the Federal Trade Commission to be the thought police."¹⁶⁶ The Report, however, urged the entertainment industry to strengthen its attempts at self-regulation.¹⁶⁷

Nonetheless, Pitofsky did warn that if the industry did not expand self-regulation, the FTC would take action under existing laws or encourage Congress to pass new ones.¹⁶⁸ These actions could include introducing mandatory rating or labeling systems, limiting advertisements for violent films to restricted venues that are not likely to attract children, and requiring the entertainment industry to regularly report to the FTC on its marketing practices (not unlike the reporting requirement the tobacco industry has faced since 1967).¹⁶⁹ According to Pitofsky, legal action would be a "sanction of last resort" if the industry did not clean up its act, and FTC officials noted that any legislation would be crafted in a way that did not violate a company's right to free speech.¹⁷⁰

But many scholars believe that the First Amendment bars effective legislation of marketing practices and thus hinders the FTC and politicians from making such idle threats. Historically, the First Amendment has been interpreted broadly, protecting individuals from government restrictions on artistic freedoms of expression, including films.¹⁷¹ In limited circumstances, however, the government may regulate the content of that speech. Under the strict scrutiny test, the Supreme Court has carved out content-based exceptions to the First

¹⁶⁴ See Stern, *supra* note 162. In a letter addressed to John McCain, FTC Chairman Robert Pitofsky said that bringing a case against Hollywood would "place the agency in a position that raises serious questions under the First Amendment." *Id.*

¹⁶⁵ See *id.*

¹⁶⁶ Rosenbaum, *supra* note 134. See also Stern, *supra* note 162 (quoting Jack Valentí, who stated that "Chairman Pitofsky's letter plainly states that any attempt to charge the movie industry with deceptive advertising of R-rated films would be fatally infected with serious constitutional problems").

¹⁶⁷ See Stern, *supra* note 162 (quoting Lee Peeler, the FTC's Associate Director for Advertising Practices, as saying self-regulation "would do more and do it quicker than government law enforcement actions").

¹⁶⁸ See Shiver & Fiore, *supra* note 163.

¹⁶⁹ See Stern, *supra* note 162.

¹⁷⁰ See Shiver & Fiore, *supra* note 163.

¹⁷¹ FTC REPORT, *supra* note 28, app. C, at 1, 10 n.3 (citing *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981)). In striking down an ordinance prohibiting live nude dancing, the *Schad* Court declared that "[e]ntertainment, as well as political and ideological speech is protected; *motion pictures*, programs broadcast by radio, and television and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee." *Schad*, 452 U.S. at 65 (emphasis added).

Amendment. "[T]he government must prove that: (i) the regulation serves a compelling governmental interest; (ii) the means chosen to achieve that interest are narrowly tailored; and (iii) it has chosen the 'least restrictive means' of accomplishing the government's objective."¹⁷²

By contrast, the First Amendment provides less protection for commercial speech.¹⁷³ Commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience."¹⁷⁴ It often does "no more than propose a commercial transaction,"¹⁷⁵ such as television advertisements for commercial products.¹⁷⁶ Under the *Central Hudson* test,¹⁷⁷ the government may restrict commercial speech that is "neither misleading nor related to unlawful activity" only if it asserts an interest that is substantial and proves that the restriction directly advances, and is no more excessive than necessary to serve, that interest.¹⁷⁸ In forming legislation, the government does not have to employ the least restrictive means available, but it must at least narrowly tailor the regulation to the asserted interest.¹⁷⁹ Thus, the success of legislation restricting the marketing of violent entertainment will depend largely on whether courts treat advertisements and marketing plans for movies as commercial or non-commercial speech.

Some critics argue that movie trailers and television spots should be deemed commercial speech because they are "merely advertising products that have been placed in the stream of commerce for

¹⁷² See FTC REPORT, *supra* note 28, app. C, at 5, 15 n.39 (citing *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987)). Although content-based regulations are considered presumptively invalid, the Court has upheld restrictions when speech is obscene as well as when speech is deemed harmful to minors. "Nonetheless, the government's interest in protecting children does not always outweigh First Amendment considerations." FTC REPORT, *supra* note 28, app. C, at 6. For example, the Supreme Court recently struck down a regulation requiring cable operators to either scramble sexually explicit channels or limit programming to late-night hours because it infringed on adults' First Amendment rights. See *United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878 (2000).

¹⁷³ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1979) ("[O]ur decisions have recognized the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978))).

¹⁷⁴ *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 561.

¹⁷⁵ *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

¹⁷⁶ See FTC REPORT, *supra* note 28, app. C, at 3. The Supreme Court has upheld limits on commercial speech "such as restrictions on targeted direct mail solicitations by lawyers to families of accident or disaster victims and bans on solicitations by commercial enterprises on public university premises." *Id.* at 3, 14 nn.20-21 (citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Board of Trustees of SUNY v. Fox*, 492 U.S. 469 (1989)).

¹⁷⁷ See *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 562.

¹⁷⁸ See *id.* at 564.

¹⁷⁹ See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999).

profit.”¹⁸⁰ In contrast, members of the entertainment industry contend that film advertisements should be considered non-commercial speech and therefore are protected from undue government restrictions. They argue that movie advertisements are non-commercial speech because they promote products that are themselves entitled to full protection and because they usually incorporate parts of the filmmaker’s artistic expression, therefore constituting a “subset of the content of the non-commercial expression.”¹⁸¹ The Supreme Court has not ruled whether film advertisements are commercial or non-commercial speech, and existing federal and state court opinions are not uniform.¹⁸²

If Congress proposed a bill limiting the violent content of film advertisements and trailers marketed to children or a bill that restricted advertisements for these products to certain media venues that did not attract children, the level of First Amendment scrutiny would depend on whether the speech was classified as commercial or non-commercial speech. The government would first have to prove, by using scientific, psychological, or empirical evidence, that either there is a “compelling” (non-commercial speech) or “substantial” (commercial speech) reason to protect children from viewing violent entertainment or advertisements promoting such films. Second, the government would have to prove that its regulation either is “narrowly tailored” to achieve (non-commercial speech) or “directly advances” (commercial speech) that interest. Third, the government would have to argue that such restrictions are either the “least restrictive means” of accomplishing (non-commercial speech) or a “reasonable fit” with (commercial speech) the government’s objectives.¹⁸³

Regardless of which standard is eventually applied, the legislature and the courts will find it very difficult to formulate a clear regulation that could effectively monitor that to which a child is exposed. Questions would arise regarding the precise meaning of “violence,” and it would be hard to draw a line between the types of Hollywood violence to which a child may and may not be exposed. There are many films that are violent but also socially valuable, like *Saving Private Ryan* and *Glory*, to which children should be exposed. One could imagine FTC lawyers watching films and counting the type, range, and content of violent depictions. Surely a movie “featuring murder, suicide, gang violence, and knife fighting is violent, but does anybody want

¹⁸⁰ FTC REPORT, *supra* note 28, app. C, at 3.

¹⁸¹ *Id.*

¹⁸² *Id.* The FTC Report notes, however, that one state court has held that a movie advertisement “goes beyond proposal of a commercial transaction and encompasses the ideas expressed in the motion picture which it promotes; thus it is afforded the same First Amendment protections as the motion picture.” *Id.* (quoting *Lewis v. Columbia Pictures Indus.*, 23 Media L. Rep. 1052 (Cal Ct. App. 4th Dist. Nov. 8, 1994)).

¹⁸³ See FTC REPORT, *supra* note 28, app. C, at 8.

the FTC to ban the broadcast of *Romeo and Juliet*?¹⁸⁴ Further, the restrictions should not be so overbroad as to affect adults. “The Supreme Court has repeatedly emphasized that regardless of the government’s interest in protecting children, it may ‘not reduce the adult population . . . to . . . only what is fit for children.’”¹⁸⁵ As Senator John McCain explained, “The notion of letting unelected bureaucrats at the [FTC] commission decide what can be broadcast and when it can be broadcast is objectionable to most free people.”¹⁸⁶ Therefore, self-regulation is probably the best recourse for the entertainment industry. But unlike in years past, the industry must now take proactive measures to develop regulations that will be effective in protecting children.

The film industry must now decide what appropriate actions to take to curtail the marketing of violent movies to children.¹⁸⁷ In September 2000, in response to the FTC Report, the major film studios announced a new twelve-point plan for marketing R-rated movies. This plan prohibits R-rated movies from being advertised along with G-rated pictures or video releases.¹⁸⁸ It also bans children under seventeen from focus groups for R-rated films unless an adult accompanies them.¹⁸⁹ Advertisements for movies have also started to carry detailed advisories about their ratings system. Some studios have gone even further. Warner Brothers and 20th Century Fox announced that they would no longer advertise R-rated films on any television program for which thirty-five percent or more of the audience is under the age of seventeen, and Disney implemented a policy not to advertise R-rated films on any of its networks before 9 p.m.¹⁹⁰ Each stu-

¹⁸⁴ David E. Rosenbaum, *Violence on the Screen: Unlovely and Invulnerable*, N.Y. TIMES, Sept. 24, 2000, § 4 (Week in Review), at 4.

¹⁸⁵ FTC REPORT, *supra* note 28, app. C, at 6 (quoting *Reno v. ACLU*, 521 U.S. 844, 875 (1997)).

¹⁸⁶ Rosenbaum, *supra* note 184.

¹⁸⁷ See Jerry Beck, *FTC blasts kids marketing*, Kidscreen, at <http://www.kidscreen.com/articles/200011/ks30308.asp> (Nov. 2000). According to Beck, Ira Meyer, President of EPM Communications, explained:

Hollywood is now asking ‘OK, I know we need to do something, but realistically what do we do?’ There are some things we can do relatively simply, and there are a lot that are more difficult When you’re trying to reach a general audience that kids may, in fact, tune into—is that different from targeting kids directly? Is that going to satisfy the FCC or parent groups or anybody else? These are difficult issues that are only beginning to be explored now.

*Id.*¹⁸⁸ See Rosenbaum, *supra* note 24 (quoting Jack Valenti, President of the Motion Picture Association of America, who explained that each studio had set a “goal of not inappropriately specifically targeting children in its advertising of films rated R for violence”).

¹⁸⁹ See Carvajal, *supra* note 146. Jack Valenti admitted that the FTC Report had prompted studios to take a “fresh new look at the way we market films.” Disney was the first studio to announce that it would no longer test R-rated films to focus groups with members under seventeen. See *id.*

¹⁹⁰ See Rick Lyman, *Overhaul of R-Rated Movies Gets a C Rating: Confusing*, N.Y. TIMES, Nov. 1, 2000, at A18.

dio has also appointed a compliance official responsible for monitoring its marketing practices.¹⁹¹ These steps are voluntary, however, and the entertainment industry has not set up any type of enforcement mechanism.¹⁹² Therefore, the entertainment industry should appoint an independent group to monitor the self-regulation techniques.

However, the leaders of the film industry reject the notion that they stop marketing all R-rated movies to children. "[T]he motion picture studios . . . believe that it is appropriate to target advertising for R-rated films to children under 17 and to target advertising for PG-13-rated films to children under 13, on the grounds that these ratings are merely cautionary warnings to parents."¹⁹³ According to Jack Valenti, President of the Motion Picture Association of America, "Some movies with an R rating because of violent scenes like *Saving Private Ryan* are not only acceptable but worthwhile for some children."¹⁹⁴

Overall, the film industry must work together and use common sense in its marketing practices. It must be conscious of its power to influence young minds and it must act more responsibly in the depictions it is marketing to young children. However, even with more self-regulation, it will ultimately be up to parents to protect children from what they feel is questionable material. Parents play an important role in monitoring what films their children watch. "Any action against the entertainment industry is just one piece of the puzzle . . . 'It all falls back on the judgment of parents. We can't legislate the lack of parenting."¹⁹⁵

¹⁹¹ See *id.*

¹⁹² See Rosenbaum, *supra* note 24.

¹⁹³ FTC REPORT, *supra* note 28, app. C, at 11-12 (noting also the industry's argument that filmmakers have the right to draw as much attention to their work as possible, even the attention of children who are allowed to see the films in the company of their parents).

¹⁹⁴ Rosenbaum, *supra* note 24.

¹⁹⁵ See Stern, *supra* note 162 (quoting parent Erik Braun).