EVOLVING ENTERTAINMENT TECHNOLOGY: CAN NEW TYPES OF FUN LEAD TO NEW TYPES OF LIABILITY?

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ABSTRACT

The proliferation of mass-market entertainment in the late 20th century saw the emergence of "violent-entertainment cases"—claims alleging that producers of entertainment have some type of duty to prevent the consumers of their violent media from causing harm. With one notable exception, each and every one of these twenty or so claims has been dismissed. Courts have almost unanimously held that there either exists no such duty or that the entertainment in question is protected expression under the First Amendment. But will courts continue to so hold? Overwhelming technological advances in both the software and the hardware behind the entertainment industry have transformed the modern entertainment landscape into one characterized by immersion and pervasiveness—it is now technologically possible to be fully immersed in the entertainment experience, anywhere, all the time. Such technological advances in entertainment have the potential to so significantly alter the type of entertainment produced that certain types of entertainment could potentially lose First Amendment protection. That is, modern entertainment technology—interactive in home gaming, realistic looking avatars, 3D projection, etc.—could potentially facilitate expression that could constitute unprotected incitement under Brandenburg. However, although modern technology could enable the producers of mainstream entertainment to cross a line from simply displaying violence into facilitating violence, whether entertainment producers will actually produce violent content that utilizes these new technological developments in inappropriate ways remains to be seen.

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INTRODUCTION

Boys love video games. In 1997 at least one boy loved to play the violent video game Mortal Kombat, which, at the time, was played by simultaneously moving a joystick and pressing buttons on the video game controller. On November 22, 1997, that boy, named Yancy, reenacted a move from his favorite Mortal Kombat character. In so doing, Yancy killed another boy, Noah, by stabbing him in the chest with a kitchen knife.

Noah's mother responded by suing the creators of the Mortal Kombat, alleging that, "at the time Yancy stabbed Noah, [he] was addicted to [Mortal Kombat] and . . . was so obsessed with the game that he actually believed he was [one of its] character[s]."[1] Wilson claimed that the creators of the game had negligently and intentionally used "extremely sophisticated futuristic technology"[2] to addict players to the violence in the game and thus were responsible for her son's death.[3] The U.S. District Court for the District of Connecticut disagreed. It ruled that the video game, though both violent and technologically advanced, was protected expression under the First Amendment, and thus could not form a basis for Wilson's claims under state tort law.[4]

At least seventeen other cases in the past thirty years have brought similar claims, alleging that producers of entertainment

[1] Wilson v. Midway Games, Inc., 198 F. Supp.2d 167, 169 (2002).
[2] *Id.* at 170.
[3] *See id.* at 169-70 (claiming that "[Wilson] was entitled to damages under theories of product liability, unfair trade practices, loss of consortium, and negligent and intentional infliction of emotional distress"). This analysis will focus only on those claims that are based in tort. *See infra* note 10.
[4] *Wilson*, 198 F.Supp.2d at 181.

have some type of duty to prevent the consumers of their violent media from causing harm. With one notable exception,[5] each and every one of these claims has been dismissed. Courts have almost unanimously held that there either exists no such duty or that the entertainment in question is protected expression under the First Amendment.

Fourteen years after Noah's death, however, it is far from clear that courts will continue this nearly unbroken streak of ruling in favor of the defendants in such cases. For example, a modern-day Noah and Yancy may not spend all their time at the arcade playing joystick-controlled video games. Instead, they might listen to music they downloaded from the Internet on their iPods or play the newest app on their iPads. Perhaps they would stream the latest episode of Jersey Shore to their computer or flatscreen TV or go to an IMAX Theater to see the newest 3D blockbuster. Or perhaps they would still play video games. But in 2011, they likely would not be using joysticks and buttons to play them. Rather, a modern-day Noah and Yancy would use a Wii remote or other motion sensing technology to control video game avatars through their own physical motions made in the comfort of their living rooms.

What if a tragedy, like what happened to Noah, occurred again under these modern circumstances? What if, when Yancy killed Noah, he had been consumed by a new interactive video game or a program recently watched in a 3D theater? Would the courts again refuse to impose liability on the producer of such entertainment?

This Article attempts to explore that question by examining the American judicial system's treatment of claims that the producers of entertainment should be liable under tort law for the violence committed by individuals who, at the time they committed that violence, were imitating actions expressed within the entertainment. (For simplicity's sake, these claims will hereinafter be referred to as "violent-entertainment claims.") Specifically, this Article will examine violent-entertainment claims in the context of the modern entertainment landscape.

Several other authors have previously explored violent-entertainment claims. However, these authors have largely focused on the normative aspect of the cases—whether specific types of entertainment should be entitled to First Amendment protection in violent-entertainment cases, and, if so, why. With but a few exceptions,[6] these articles have generally concluded that

[5] Rice v. Paladin Enters. Inc., 128 F.3d 233 (1997).

[6] *See e.g.*, S. Elizabeth Wilborn Malloy, *Taming Terrorists But Not "Natural Born Killers,"* 27 N. KY. L. REV. 81 (2000) (arguing that the *Brandenburg* test is inappropriate for cases in which producers of entertainment advocate lawless, but not imminent behavior, but suggesting that entertainment that does not

violence in entertainment should continue to enjoy First Amendment protection and that plaintiffs' claims of tort liability should continue to be dismissed by the courts.[7]

This Article accepts that general conclusion as correct: the expression in previous violent-entertainment cases was deserving of First Amendment protection and thus was unable to yield liability in tort. With that as a given, this Article instead looks to the future and asks whether modern entertainment will continue to merit such First Amendment protection in violent-entertainment cases. Or, could the technology behind modern entertainment so alter the content of that expression that it could lose its First Amendment protection and thus eventually form the basis for a violent-entertainment claim?

This issue will be analyzed in four sections. Part I will explore violent-entertainment claims as they have been levied against different forms of entertainment. For clarity's sake it is important to note here that although many types of communication are entertain*ing*, in this work the term "entertainment" will only be used to refer to mainstream entertainment distributed by professional entertainment companies—for example, movies, television programs, professionally-produced music, board games,

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instruct the viewer on illegal behavior should enjoy First Amendment protection); Jonathan M. Proman, Note, *Liability of Media Companies for the Violent Content of their Products Marketed to Children*, 78 ST. JOHN'S L. REV. 427 (2004) (arguing that the health and safety of children merits regulation of media violence despite the First Amendment).

[7] *See e.g.*, Amanda Harmon Cooley, *They Fought the Law and the Law (Rightfully Won): The Unsuccessful Battle to Impose Tort Liability Upon Media Defendants for Violent Acts of Mimicry Committed by Teenage Viewers*, 5 TEX. REV. ENT. & SPORTS L. 203 (2004) (arguing that courts correctly apply First Amendment protection and deny tort claims in such cases); Julie Dee, *Basketball Diaries, Natural Born Killers and School Shootings: Should There be Limits on Speech which Triggers Copycat Violence?*, 77 DENV. U.L. REV. 713 (2000) (arguing that society should employ extra-judicial measures to put a stop to media violence, and suggesting approval for the First Amendment protections afforded such speech); Abby L. Schloessman Risner, Comment, *Violence, Minors and the First Amendment: What is Unprotected Speech and What Should Be?*, 24 ST. LOUIS U. PUB. L. REV. 243 (2005) (arguing that no exception to the First Amendment should be created for media violence); Lisa Kimmel, Comment, *Media Violence: Different Times Call for Different Measures*, 10 U. MIAMI BUS. L. REV. 687 (2002) (arguing that First Amendment protections should apply, but that the media industry should also engage in self-regulation with respect to its violent content); Christopher E. Campbell, Comment, *Murder Media – Does Media Incite Violence and Lose First Amendment Protection?*, 76 CHI.-KENT L. REV. 637 (2000) (analyzing such cases within the different theories that underlie the First Amendment and concluding that entertainment containing technical detail should be subjected to an altered *Brandenburg* incitement test).

video games, magazines and books.[8] Part I will discuss how violent-entertainment claims against the producers of such mass entertainment have been treated by the courts, and the basis in tort and the First Amendment upon which they have been dismissed. Part II will discuss the modern entertainment landscape and how entertainment technology has evolved over time. Part III will analyze how these changes in the modern entertainment industry may affect determinations of liability in future violent-entertainment cases. Specifically, it will investigate the ways in which modern technology could eventually cause certain expression inherent in entertainment to be considered incitement and thus weaken or eliminate its First Amendment protection. Part IV will offer a brief conclusion, noting that, if the producers of mainstream entertainment choose to use modern technology to express violence in a detailed manner, the technological advancements may so alter the way that violence is expressed that courts may determine it to be impermissible incitement under the First Amendment. In such a way, courts may actually consider imposing liability in violent-entertainment cases.

I. VIOLENT-ENTERTAINMENT CASES AND THE COURTS[9]

A. Violent-Entertainment Claims Based in Tort Law

At least seventeen major violent-entertainment lawsuits have arisen in the past 30 years. They have been brought nationwide against directors, producers and distributors of entertainment content (hereafter referred to as "entertainment-defendants"), have arisen in both state and federal court, and allege liability under a surprisingly large number of legal theories.[10]

[8] The term "entertainment" therefore specifically does not include fringe or user-generated content (such as independent YouTube videos) or self-published works (such as blogs). Nor does "entertainment" include speech from professional entertainment companies that was produced for an explicit purpose other than artistic expression, such as commercial speech. Thus, advertisements like those at issue in *Weirum v. RKO General, Inc.*, (123 Cal. Rptr. 468 (P.2d 1975)) are not considered entertainment here, and are in fact distinguished in a number of violent-entertainment cases on the grounds that commercial speech receives less First Amendment protection and may involve harm that actually is foreseeable. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1023-1024 (5th Cir. 1987); Waller v. Osbourne, 763 F. Supp. 1144, 1152 (M.D.Ga. 1991); McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 196 (1988) (referencing Olivia N. v. National Broadcasting Company, 178 Cal. Rptr. 888 (1981)).

[9] The violent-entertainment claims made in these cases and their treatment by the courts have been discussed in detail in previous scholarship. *See supra* notes 6 & 7. Because of this and because of space constraints, this Article will engage in only a brief, broadstrokes discussion of violent-entertainment case precedent.

[10] In addition to claims based in tort, plaintiffs in violent-entertainment cases have also claimed that the entertainment-defendants should be held liable under

However, all violent-entertainment lawsuits share the same fundamental claim: that the entertainment-defendants have some type of duty to prevent the consumers of their violent media from causing harm.

In 1979, the first major violent-entertainment case, *Zamora v. CBS*, was brought in the U.S. District Court for the Southern District of Florida against the three television broadcast networks of the time—CBS, ABC and NBC.[11] Seeking civil damages, the plaintiffs argued that their son became so "involuntarily addicted to and 'completely subliminally intoxicated' by the extensive viewing of television violence offered by the three defendants"[12] that he was "'impermissibly stimulated, incited, and instigated' to duplicate the atrocities he viewed on television,"[13] thus causing him to shoot and kill his eighty-three-year-old neighbor. The Court refused to uphold such allegations, finding the duty "generally to avoid making 'violent' shows available for voluntary consumption . . . has no valid basis and would be against public policy."[14] Additionally, the court determined that an imposition of such a duty would constitute a prior restraint on communication in violation of the First Amendment,[15] and would impermissibly "provide no recognizable standard for the television industry to follow."[16]

Learning from *Zamora*, the majority of other violent-entertainment cases have been brought only against specific violent expression and usually against no more than one major entertainment producer at a time. For example, cases have been

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a variety of other theories including (1) failure to adequately warn consumers (*see* DeFilippo v. Nat'l Broad. Co., Inc., 446 A.2d 1036 (R.I. 1982); Bill v. Super. Ct. of San Francisco, 187 Cal. Rptr 625 (1982); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989); James v. Meow Media, Inc., 90 F. Supp. 2d 798 (W.D.Kl. 2000); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264 (D.Colo. 2002); Watters v. TSR, Inc, 904 F.2d 378 (1990); Wilson v. Midway Games, Inc., 198 F. Supp.2d 167 (2002)); (2) products liability (*see DeFilippo*, 446 A.2d 1036; *James*, 90 F. Supp. 2d 798; *Sanders*, 188 F. Supp. 2d 1264; Davidson v. Time Warner, Inc., 25 Media L. Rep. 1705 (1997); *Herceg*, 814 F.2d 1017; *Wilson*, 198 F. Supp.2d 167); (3) failure to provide adequate, on-site protection for moviegoers (*see Bill*, 187 Cal. Rptr 625; *Yakubowicz*, 536 N.E.2d 1067); (4) RICO (*see James*, 90 F. Supp. 2d 798; *Sanders*, 188 F. Supp. 2d 1264); (5) unfair trade practices (*see Wilson*, 198 F. Supp.2d 167); and a (6) Pied Piper theory (*see* Walt Disney Prods., Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981)). However, because not all violent-entertainment cases include such claims, this paper will instead focus on the common claim of a breach of duty.

[11] Zamora v. CBS, 480 F. Supp. 199 (1979).

[12] *Id.* at 200.

[13] *Id.*

[14] *Id.* at 200, 202.

[15] *Id.* at 203.

[16] *Id.* at 202.

brought against the producers of movies such as Born Innocent,[17] Boulevard Nights,[18] the Warriors,[19] The Basketball Diaries,[20] Natural Born Killers,[21] and The Fast and the Furious,[22] etc.[23] Plaintiffs in such cases claim that the entertainment-defendants should bear civil liability for the harm committed by someone who had recently seen the film, and thus allegedly caused by the film itself. These allegations are, directly or indirectly, based in tort, but vary in their allegations of intent. Most of the violent-entertainment cases about movies assert at least some negligence or recklessness on the part of the entertainment-defendants;[24] however, some cases go so far as to assert that the producers of the movies *intended* that moviegoers imitate the onscreen violence and therefore intended the plaintiffs to suffer injury.[25]

Similar claims have been made regarding television programs[26] such as the Tonight Show[27] and the Mickey Mouse

[17] Olivia N. v. NBC, 178 Cal. Rptr. 888 (1981).
[18] Bill v. Super. Ct. of San Francisco, 187 Cal. Rptr 625 (1982).
[19] Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (1989).
[20] James v. Meow Media, Inc., 90 F. Supp. 2d 798 (W.D. Ky. 2000), *aff'd*, 300 F.3d 683 (6th Cir. 2002); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002).
[21] Byers v. Edmondson, 826 So. 2d 551 (La. Ct. App. 2002).
[22] Widdoss v. Huffman, 62 Pa. D. & C.4th 251 (2003).
[23] Violent-entertainment claims have reportedly also been brought against the producers of other movies. *See e.g.*, Dee, *supra* note 7, at 724-25 (alleging that violent-entertainment claims had also been engendered by the movie Boyz 'n' the Hood). However, because the author was not able to obtain the court materials forming the basis for or explaining the decisions regarding such claims, they are not included in this analysis. This is also true for the other forms of entertainment herein—such as TV programs, songs, board and video games, magazines, and books.
[24] *See* Olivia N. v. Nat'l Broad. Co., Inc., , 178 Cal. Rptr. 888, 892 (Cal. Ct. App. 1981) ("[Plaintiff] asserts civil liability premised on traditional negligence concepts."); *Bill*, 187 Cal. Rptr at 626 (Plaintiff alleges "that petitioners 'knew, or should have known, that said movie . . . would attract certain members of the public . . . who . . . would, or were likely to cause grave bodily injury upon other members of the general public at or near the showing of said movie'"); *Yakubowicz*, 536 N.E.2d at 1070 (plaintiffs "allege, in essence, that Paramount was negligent in the way it produced, distributed, advertised, and exhibited the film, 'The Warriors'"); *James*, 90 F. Supp. 2d at 801 ("Plaintiffs bring some twenty-three claims sounding in negligence and strict products liability); *Sanders*, 188 F. Supp. 2d at 1270 ("Defendants knew that their products and materials created an unreasonable risk of harm . . .").
[25] *Byers*, 26 So. 2d at 554 ("Byers . . . alleged that these defendants produced and released a film containing violent imagery that was intended to cause viewers to imitate the violent imagery"); *Widdoss*, 62 Pa. D. & C.4th at 254 ("Count II alleges that the [entertainment-defendants] produced, distributed, and showed 'The Fast and the Furious' so that its content would incite viewers to commit violence in imitation of the violence in the film.").
[26] Televised content that is produced for an explicit purpose other than expression, such as commercials, is not included in this analysis. *See supra* note

Club.[28] In these cases, children imitated stunts they saw on television programs, and injured or killed themselves in the process. Subsequently, plaintiffs alleged that the producers of the television programs should bear liability because, in broadcasting television shows displaying such stunts, they negligently and "reckless[ly] disregard[ed] [the viewer's] welfare"[29] by essentially "invit[ing] him to do something posing a foreseeable risk of injury."[30]

Games, magazines and songs have also served as the foundation for violent-entertainment claims. At least one woman alleged that producers of the board game Dungeons and Dragons should be held liable for her son's death, claiming that he committed suicide after becoming "absorbed by the game to the point of losing touch with reality."[31] Other teen suicides caused violent-entertainment claims to be levied against the producers of Ozzy Osbourne[32] albums and Hustler magazine.[33] Plaintiffs in these claims argued that the lyrics of the music or the text of the article "proximately caused the wrongful death of their [relative] by inciting him to commit suicide."[34] The music of renowned rapper Tupac Shakur has also produced a violent-entertainment claim, after a man listening to Shakur's album *2Pacalypse Now* shot and killed a police officer.[35]

Unsurprisingly, video games, which routinely garner criticism for being too violent, have served as a basis for several violent-entertainment cases. In addition to the *Wilson* case described above,[36] two violent-entertainment cases against video game manufacturers have been brought by family members of victims of high school shooting sprees.[37] Plaintiffs alleged that the manufacturers were negligent in "suppl[ying] to [the perpetrators] video games which made violence pleasurable and attractive and

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8. For this reason, violent-entertainment claims against the producers of commercials, such as that at issue in Sakon v. Pepsico. Inc., 553 So. 2d 163 (1989), are not included here.

[27] *See* DeFilippo v. Nat'l Broad. Co., Inc.,,446 A.2d 1036 (R.I. 1982).

[28] Walt Disney Prod., Inc. v. Shannon, 276 S.E.2d 580 (1981).

[29] *DeFilippo*, 446 A.2d at 1038.

[30] *Walt Disney*, 276 S.E.2d at 582.

[31] Watters v. TSR, Inc, 904 F.2d 378, 380 (1990).

[32] *See* McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Cal. Ct. App. 1988); Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991).

[33] Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987).

[34] *Waller*, 763 F. Supp. at 1145.

[35] Davidson v. Time Warner, Inc., 25 Media L. Rep. 1705 (1997).

[36] *See* discussion, *supra* p. 1.

[37] James v. Meow Media, Inc., 90 F. Supp. 2d 798 (W.D. Ky. 2000), *aff'd*, 300 F.3d 683 (6th Cir. 2002); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002).

disconnected the violence from the natural consequences thereof, thereby causing [the perpetrators] to act out the violence."[38]

However, perhaps the most interesting case against a producer of violent entertainment, *Rice v. Paladin Enterprises, Inc.*,[39] deals with a book. In that case the Fourth Circuit considered whether the publishers of "an instruction book on murder"[40] could be held civilly liable for three murders committed by a man who followed the book's directions. Shockingly, the publishers in this case stipulated that, in publishing the book, *Hit Man: A Technical Manual for Independent Contractors*, they "not only knew that its instructions might be used by murderers, but that [they] actually *intended* to provide assistance to murderers."[41]

Rice stands unique among the violent-entertainment cases in that the Fourth Circuit actually found that the First Amendment posed no bar to claims of civil liability. In so ruling, the Fourth Circuit pointed to, *inter alia*, the fact that the speech at issue—the book containing one hundred thirty pages of "detailed, focused

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[38] *Sanders*, 188 F. Supp.2d at 1269; For a nearly identical allegation see *James*, 90 F. Supp. 2d at 801.

[39] Rice v. Paladin Enter., Inc., 128 F.3d 233 (4th Cir. 1997). It is, in fact, questionable whether or not the book at issue in this case qualifies as "mainstream entertainment" similar to the other examples of entertainment in this Article. The publishers of the book claimed that the book was intended, in part, for entertainment purposes, asserting that the "marketing strategy was and is intended to maximize sales of its publications to the public, including sales to . . . persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment." *Rice*, 128 F.3d at 267. The publisher also suggested that "the book is essentially a comic book whose 'fantastical' promotion of murder no one could take seriously." *Id.* at 254. However, the court found that it would not be unreasonable for a jury to reject the publisher's contention that the book was designed for entertainment purposes, *id.* at 255, and that the book evidently lacked "any even arguably legitimate purpose beyond the promotion and teaching of murder." *Id.* at 267. Given these contentions, this case could possibly be classified as a case about instructional publications, see *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 172-73 (D. Conn. 2002), rather than a violent-*entertainment* case. Nevertheless, the author includes this case here because, (1) the book was ostensibly claimed to be entertainment, at least for some audiences; (2) although the publishers stipulated the fact that it intended to aid and abet criminal action, a statement that seemed to greatly influence the court in finding that *Hit Man* had no other purpose than to facilitate murder, it is entirely possible that such a stipulation was made disingenuously only as part of a legal strategy designed to isolate First Amendment issues for consideration by the court and would have been contested in subsequent proceedings; (3) the case includes a helpful discussion of "copycat cases"—the Court's term for the violent-entertainment cases considered here; and (4) the case includes a helpful discussion of how to apply the *Brandenburg* incitement test to violent-entertainment cases, which is directly relevant to the this discussion.

[40] *Rice*,128 F.3d at 235 (citing the author's description of the book in question).

[41] *Id.* at 242 (emphasis in the original).

instructional assistance to those contemplating or in the throes of planning murder"[42]—was not entitled to "heightened First Amendment protection"[43] because it constituted incitement to imminent lawless conduct.

The Fourth Circuit's conclusion in *Rice* was extraordinary. No other violent-entertainment cases have been found that similarly impose civil liability on the producers of mass entertainment as a result of their expression. Rather, courts considering the issue have found that civil liability is barred either under general tort principles, First Amendment principles, or both.

B. Court Analysis of Violent-Entertainment Claims Under the First Amendment

In evaluating violent-entertainment claims, certain courts apply an analysis of state-specific tort law before, or in some cases, without[44] explicitly reaching a First Amendment analysis. In doing so, the majority of the courts have found that, because the injuries suffered in these cases were the result of unfortunate consequences unforeseeable to the defendants as a matter of law[45] and because imposing a legal duty in such a situation would be contrary to both common sense[46] and the democratic commitment to free speech,[47]

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[42] *Id.* at 249.

[43] *Id.*

[44] *See* Watters v. TSR, Inc., 904 F.2d 378, 380 (1990) (referencing "the venerable and salutary principle that constitutional questions should be decided only where necessary"). *See* James v. Meow Media, Inc., 90 F. Supp. 2d 798, 806 (2000) (rejecting the presence of a legal duty in order to avoid bringing a constitutional issue to the fore).

[45] *See, e.g.*, *James*, 90 F. Supp. at 804, 806 ("Reasonable people would not conclude that it was foreseeable to Defendants that . . . a boy who played their games, [and] watched their movie . . . would murder his classmates . . . . Nothing Defendants did or failed to do could have been reasonably foreseen as a cause of injury."); *Watters*, 904 F.2d at 381 ("To submit this case to a jury . . . it seems to us, would be to stretch the concepts of foreseeability and ordinary care to lengths that would derive them of all normal meaning. . . . [I]f Johnny's suicide was not foreseeable to his own mother, there is no reason to suppose that it was foreseeable to defendant TSR."). Davidson v. Time Warner, Inc., 25 Media L. Rep. 1705, at *13 (1997) ("Defendants could not reasonably foresee that distributing *2Pacalypse Now* would lead to violence. To be sure, Shakur's music is violent and socially offensive. This fact, by itself, does not make violence a foreseeable result of listening to [the album] . . . . Considering the murder of Officer Davidson was an irrational and illegal act, Defendants are not bound to foresee and plan against such conduct."); McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 196 (1988) ("John's tragic self-destruction, while listening to Osbourne's music was not a reasonably foreseeable risk or consequence of defendants' remote artistic activities.").

[46] *See e.g.*, *Zamora*, 480 F. Supp. at 202-03 ("A recognition of the 'cause' claimed by the plaintiffs would provide no recognizable standard for the television industry to follow. . . . [S]uch a wide expansion in the law of torts in

entertainment-defendants are under no legal obligation to plaintiffs in violent-entertainment cases.[48] Thus, in applying tort principals, the majority of courts find that entertainment-defendants cannot have violated an obligation to the plaintiffs because they were under no obligation in the first place.

More often, however, analysis of liability in violent-entertainment cases turns on the court's application of the First Amendment. That is, courts determine whether the entertainment/expression involved merits First Amendment protection and thus whether constitutional free speech guarantees bar the claim under state tort law.

With two notable exceptions,[49] courts that have analyzed violent-entertainment cases under the First Amendment have found that the speech at issue is protected expression. Such courts have made principled arguments for maintaining this protection for the entertainment involved. For example, in arguing that a magazine article on auto-erotic asphyxiation deserved First Amendment

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Florida . . . is not warranted."); *Davidson*, 25 Media L. Rep. 1705, at * 37 ("To create a duty requiring Defendants to police their recordings would be enormously expensive . . . ."); Bill v. Superior Court of the City of San Francisco, 187 Cal. Rptr 625, 629 (1982) ("To impose upon the producers of a motion picture the sort of liability for which plaintiffs contend in this case would, to a significant degree, permit such persons to dictate, in effect, what is shown in the theaters of our land.").

[47] *See, e.g.*, *McCollum*, 249 Cal. Rptr at 197 ("[I]t is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy. No case has ever gone so far. We find no basis in law or public policy in doing so here."). *See also* Sanders v. Acclaim Entm't, 188 F. Supp. 2d 1264, 1275 (2002) ("Because plaintiffs' legal theory would effectively compel Defendants . . . to . . . refrain from expressing the ideas contained in [their] works, the burden imposed would be immense and the consequences dire for a free and open society.").

[48] *But see* Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1071 (Mass. 1989) (holding that although entertainment-defendants are under a duty of reasonable care toward the public, they cannot properly be found to have violated that duty by merely producing and distributing such entertainment because such activities are protected by First Amendment guarantees of free speech); Widdoss v. Huffman, 62 Pa. D. & C.4th 251 (2003) ; Byers v. Edmonson, 826 So. 2d 551 (2002).

[49] *See* Rice v. Paladin Enters., 128 F.3d 233 (1997) (finding that the book in question did not qualify for First Amendment protection because of the publishers' acknowledged intent to aid and abet criminal activity); Byers v. Edmonson, 712 So. 2d 681 (1998) (finding that, under Louisiana civil procedure, plaintiff's allegations that the entertainment-defendants intended that the violence in their movie be imitated were sufficient to prevent the movie from receiving First Amendment protection).

protection, the Fifth Circuit noted that "[t]he constitutional protection accorded to freedom of speech . . . is not based on the naïve belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs . . . ."[50] Discussing similar principles, the Court of Appeal of California grounded its analysis in the chilling effects of civil liability and the robustness of public debate,[51] and the Supreme Court of Rhode Island examined the right of producers of entertainment to artistically express themselves and the right of the public audience to have wide access to "social, esthetic, moral, and other ideas and experiences."[52] At the most basic level, however, courts generally acknowledge that it is well settled law that the specific embodiment of the entertainment speech at issue—be it a movie, television program, board game, song, magazine, video game or book—receives First Amendment protection.[53]

Anticipating this, plaintiffs in violent entertainment tort cases have generally argued that such speech was undeserving of First Amendment protection because it incited the relevant act of violence. Incitement to imminent illegal conduct is one of the four acknowledged exceptions to the First Amendment. Incitement is determined as a matter of law according to *Brandenburg v. Ohio*, a United States Supreme Court case. *Brandenburg* held that incitement is defined as advocacy of unlawful action that is (a) "directed to inciting or producing imminent lawless action" and (b) "likely to incite or produce such action."[54]

Only in the extraordinary case of *Rice*, in which the publishers of the book actually stipulated to the fact that they

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[50] Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1019 (1987).

[51] *Olivia N.*, 178 Cal. Rptr at 891 (noting that the chilling effect of permitting liability in such situations is "obvious" because "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statue") (citing New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).

[52] *DeFilippo*, 446 A.2d at 1039.

[53] *See, e.g.*, *McCollum*, 249 Cal. Rptr 191-192 (noting that "all artistic and literary expression, whether in music, concerts, plays, pictures or books" is guaranteed protection under the First Amendment" and explicitly confirming that "[music] is a form of expression that is protected by the first amendment") (internal citations omitted); *Byers*, 826 So. 2d at 555 (noting that "[m]otion pictures are a significant medium for the communication of ideas . . . are protected by the First Amendment") (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-502 (1952)); *Olivia N.*, 178 Cal. Rptr at 891 (reviewing the basis upon which television programming is granted First Amendment protection); *Herceg*, 814 F.2d at 1020 (noting that the magazine article in question is protected speech under First Amendment principles and exceptions); *Watters*, 904 F.2d 378 (implicitly acknowledging board games receive First Amendment protection); *Wilson*, 190 F.Supp.2d at 179-182 (concluding after a lengthy discussion that video games definitively fall within the scope of the First Amendment).

[54] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

intended to aid and abet murder, has a court found entertainment to constitute incitement. In each and every other violent-entertainment case that applied an incitement analysis, courts have found that the specific expression of the entertainment-defendants did not constitute incitement under *Brandenburg*. In so finding, the courts have held that such entertainment could not be incitement because (1) the entertainment-defendants did not *intend* that the violence presented be immediately imitated and result in harm;[55] (2) in "causing" only one or two copycat cases at most, the expression was not *likely* to incite such action;[56] (3) the content of the speech did not *incite* such unlawful conduct in that it did not "exhort, urge, entreat, solicit, or overtly advocate or encourage"[57] "[unlawful] concrete action"[58] to any specific group,[59] and (4) most importantly, the expression did not emphasize that that the unlawful action must be undertaken *immediately*.[60]

In short, over the past thirty years, courts have thoroughly considered the question of whether the producers of entertainment should be held civilly liable for violence that is allegedly facilitated

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[55] *See, e.g.*, *Byers*, 826 So.2d at 556-557 (concluding that the content of the movie provided no basis for finding or inferring any intent on the part of the producers to "assist and facilitate the criminal conduct") (citing *Rice*, 128 F.3d at 266); *Waller*, 763 F.Supp. at 1151 (concluding there was no incitement because, *inter alia*, "there is no evidence that defendants' music was intended to produce acts of suicide, nor could one rationally infer such a meaning from the lyrics); *McCollum*, 249 Cal. Rptr at 193 (concluding that music and lyrics are not intended to be a call to action as they are figurative expressions).

[56] *See, e.g.*, *Davidson*, 25 Media L. Rep. 1705 (refusing to find that *2Pacalypse Now* was likely to incite illegal conduct, given that there had been over 400,000 copies of the album sold but only one allegation that the album caused violence); *DeFilippo*, 446 A.2d at 1041 (concluding that the television program was not likely to incite violence because the boy in question was the only one alleged to have emulated the action he saw on the program).

[57] *Yakubowicz*, 404 Mass. at 631.

[58] *McCollum*, 249 Cal. Rptr. at 193. For other support for the idea that the incitement must be to some specific action, see also *Yakubowicz*, 404 Mass. at 631 ("speech does not lose its First Amendment protection merely because it has a 'tendency to lead to violence'") (citing Hess v. Indiana, 414 U.S. 105, 109 (1973)); *Waller*, 763 F.Supp. at 1151 (differentiating "an abstract discussion of the moral proprietary or even moral necessity for a resort to suicide" from the directness and encouragement required by incitement).

[59] *See, e.g.*, *Waller*, 763 F. Supp. at 1151 (concluding there was no incitement because, *inter alia*, "there is no indication whatsoever that defendants' music was directed toward any particular person or group of persons"); *Davidson*, 25 Media L. Rep. 1705 (concluding that, even if *2Pacalypse Now* was directed specifically to a violent black "gangsta" subculture, such a targeted audience was too large to determine that it was directed specifically at the individual who perpetrated the violence in question).

[60] *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1022 (5th Cir. 1987) ("The crucial element to lowering the first amendment shield is the imminence of the threatened evil.") (referencing *Hess*, 414 U.S. 105).

or inspired by the content of the entertainment in question. In virtually every case, the answer of the court has been an unequivocal "no." The producers of entertainment are generally under no duty to prevent individuals from imitating their expression and causing harm. Furthermore, even assuming that they are so obligated, such expression may not form the basis for a violation of that duty as it enjoys First Amendment protection.

II. THE MODERN ENTERTAINMENT LANDSCAPE[61]

Although the types of entertainment platforms—movies, music, TV, video games, books—discussed above are, in general terms, virtually identical to the entertainment platforms we enjoy today, consider the technological details of the entertainment at issue in such cases. The television and movies complained of were available for in-home viewing only on boxy television sets playing VHS tapes, not on flatscreens playing HD Blu-Ray Discs. Songs were bought on records, not downloaded online. The text of books and magazines appeared on paper, not the screens of iPads and Kindles. And "playing video games" meant pressing the buttons "A" and "B" and a joystick with your thumbs, not virtually bowling with a Wii controller or dancing for the motion sensor of an Xbox360 Kinect. Indeed, the technology behind mass entertainment has rapidly evolved in the thirty-two years since *Zamora* was decided in 1979.

Such extensive technological innovation in the entertainment industry over the past thirty years is due, in part, to the twin achievements of digitization and the Internet.

Digitization is a "digital means of representing information—in which complex messages (such as the sounds emitted by an orchestra or the pattern of colors in an image) are represented by combinations of electric pulses and the spaces left between them."[62] Contrasted to its predecessor, analog technology—"in which information . . . represented in the form of some continuously variable quantity: the shape of a record groove, voltage, the position of magnetic particles on a tape, and so on"[63]—digital technology yields three great advantages for the entertainment industry: (1) better quality for sound and visual images; (2) the ability engage in large-scale reproduction of a

[61] A detailed description of the evolution of the modern entertainment landscape over the past 30 years is beyond both the general scope and the practical constraints of this paper. Consequently the author contents herself with describing this technological transformation in a general manner, confident that courts in violent-entertainment cases would the do the same.

[62] WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 14 (2004).

[63] *Id.* at 12-13.

recording without degradation in quality; and (3) the ability to store and manipulate compressed, discrete digital recording files on personal computers.[64]

The Internet has also had a major impact on the entertainment industry. Access to broadband Internet (the fastest, most efficient means of accessing relatively large entertainment files online) has increased sevenfold in the past decade: from nine to sixty-four percent of all American households.[65] Nowadays, roughly seventy-seven percent of American households have at least one person who accesses the Internet on some type of connection, either at home or at work.[66] Such widespread access to the Internet means that a larger percentage of Americans than ever before are able to engage in the relatively quick, simple, and inexpensive transfer and consumption of digital entertainment files online.[67]

Together, digitization and the Internet have formed the foundation upon which innovators have created an extraordinary modern entertainment landscape. Crucial to this landscape are software programs that facilitate Internet-based consumption of discrete entertainment content, such as iTunes. iTunes allows its users to buy and manage a library of high-quality music, movies, television episodes, and audiobooks and stream podcasts, radio broadcasts, and digital previews of video or audio content.[68] The iTunes platform is as pervasive as it is popular—the iTunes store is the self-proclaimed number one music store in the world[69] and the program is available on all major computer operating systems, as well as other devices like iPhones, iPads, iPods, and Apple TV.

iTunes, dominant as it is, shares the limelight with numerous other software applications dedicated to online content access. Notable examples include audio entertainment streaming websites such as Pandora.com,[70] Rdio.com[71] and YouTube;[72]

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[64] For a more in-depth discussion of such advantages, see *id.* at 13-16.

[65] U.S. DEP'T OF COMMERCE, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, EXPLORING THE DIGITAL NATION: HOME BROADBAND INTERNET ADOPTION IN THE UNITED STATES 35 (2010).

[66] *Id.* at 5.

[67] For a more detailed discussion this aspect of the Internet, *see* FISHER, *supra* note 62, at 16-17.

[68] *See What is iTunes?*, ITUNES, http://www.apple.com/itunes/what-is/ (last visited Mar. 30, 2011) (outlining the uses of iTunes and describing it as a service "that has everything you need to be entertained. Anywhere. Anytime.").

[69] *What is iTunes: iTunes Store*, ITUNES, http://www.apple.com/itunes/what-is/store.html (last visited Apr. 16, 2011).

[70] *See Press Room*, PANDORA, http://blog.pandora.com/press/ (last visited Mar. 30, 2011) (describing Pandora as a music service that uses personalized stations to "giv[e] people music they love anytime, anywhere, through connected devices").

websites and applications dedicated to web-based television and film access such as hulu.com[73] and Netflix;[74] television set-based programs facilitating flexible access to visual content such as TiVo[75] and cable "on-demand" services[76] and internet-based technologies that facilitate geographically-diverse multiplayer video gaming such as those found in the games Halo[77] and Call of Duty.[78] Such innovative software applications have made it possible for large audiences to non-exclusively gain access to discrete portions of mass entertainment products in a time-flexible format.

Hardware utilized by the entertainment industry has perhaps been even more noticeable in its rapid evolution. Consider the iPod. Introduced in 2001, the iPod achieved instant success by capitalizing on the shift from analog to digital recording in the

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[71] *See Press*, RDIO.COM, http://www.rdio.com/#/press/ (last visited Mar. 30, 2011) (describing rdio.com as "an unlimited, on-demand social music service").

[72] *See About YouTube*, YOUTUBE, http://www.youtube.com/t/about_youtube (last visited Mar. 30, 2011). Although YouTube describes itself as a service by which people can "discover, watch and share originally-created videos," it is included here in the music section because in practice much of the professionally created visual content is removed from YouTube because of copyright issues, while professionally produced music of the type included in this paper is still largely available and widely accessed on YouTube.

[73] *See About*, HULU, http://www.hulu.com/about (last visited Mar. 30, 2011) (describing Hulu as a service aimed at helping "people find and enjoy the world's premium video content when, where and how they want it").

[74] *See Media Center*, NETFLIX, http://www.netflix.com/MediaCenter (last visited Mar. 30, 2011) (describing Netflix as "the world's leading Internet subscription service for enjoying movies and TV shows").

[75] *See What is TiVo?*, TiVo, http://www.tivo.com/what-is-tivo/tivo-is/index.html (last visited Mar. 30, 2011) (describing TiVo as "the most advanced DVR ever built" that shows "all the TV, movies, music and web you want, on your TV").

[76] *See, e.g.*, *Xfinity TV from Comcast*, Comcast, http://www.comcast.com/Corporate/Learn/DigitalCable/digitalcable.html?lid=1 LearnDigitalCable&pos=Nav& (last visited Mar. 30, 2011) (describing Xfinity on Demand with the slogan: "Watch when you want, when you want, with thousands of On Demand choices—from hit movies to primetime TV shows—all available instantly, on TV and now online. It's TV anytime, anywhere and anyway you want it.").

[77] Charles Herold, *Halo 3 Mimics Halo 2, with Some Improved Graphics*, N.Y. TIMES, Sept. 27, 2007, *available at* http://www.nytimes.com/2007/09/27/technology/circuits/27games.html (last visited Mar. 30, 2011) ("[W]hat keeps fans playing the games obsessively, day after day, week after week, year after year, is online multiplayer games.").

[78] Alex Pham & Ben Fritz, *Call of Duty: Black Ops Launches Tuesday; Will It Measure Up?*, L.A. TIMES, Nov. 9, 2010, *available at* http://articles.latimes.com/2010/nov/09/business/la-fi-ct-duty-20101109 (last visited Mar. 30, 2011) ("[F]or many gamers, the ability to compete online against friends and strangers is what makes Call of Duty worth buying.").

music industry. Selling a million units in just eighteen months,[79] Apple has since sold more than 275 million iPods,[80] including four different versions and six generations, ranging in storage capacity from 2 to 160 GB.[81]

Other entertainment markets have similarly been revolutionized through hardware developments. The audio market has seen such innovations as noise-cancelling headphones,[82] wireless headphones,[83] and high-quality surround sound speaker systems.[84] The television and film industries have been transformed by the arrival of "smartphones" such as the iPhone[85] and Android,[86] and electronic displays such as the iPad[87] and the Samsung Galaxy Tab.[88] Such devices allow users to view TV episodes or films in HD quality in any location while maintaining a compact, user-friendly hardware format. And, though stationary television sets themselves have become smaller (think: flatscreen), the screens themselves have become larger, with screens over five feet across (and with 3D capabilities) commercially available.[89] Cable and satellite television, with their increases in programming and image quality, have come to dominate the television broadcasting market.[90] In-home film consumption has evolved

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[79] *iPod and iTunes Timeline*, APPLE, http://www.apple.com/pr/products/ipodhistory/ (last visited Mar. 30, 2011).

[80] *Id*.

[81] *See Product Info for Media*, APPLE, http://www.apple.com/pr/products/ (last visited Mar. 30, 2011) (describing the iPod variations and capabilities).

[82] *See, e.g.*, *Noise Cancelling Headphones*, BOSE, http://www.bose.com/controller?url=/shop_online/headphones/noise_cancelling_headphones/index.jsp (last visited Mar. 30, 2011).

[83] *See, e.g.*, *Dolby Digital Wireless Headphones*, SONY, http://www.sonystyle.com/webapp/wcs/stores/servlet/ProductDisplay?storeId=10151&catalogId=10551&langId=-1&productId=11035276 (last visited Mar. 30, 2011).

[84] *See, e.g.*, *Lifestyle® V-35 Home Theater System*, BOSE, http://www.bose.com/controller?url=/shop_online/home_theater/51channel_systems/component_systems/lifestyle_v_class/index.jsp (last visited Mar. 30, 2011).

[85] *iPhone 4 Technical Specifications*, APPLE, http://www.apple.com/iphone/specs.html (last visited Mar. 30, 2011).

[86] *Vibrant Android Smartphone*, SAMSUNG, http://www.samsung.com/us/mobile/cell-phones/SGH-T959ZKATMB (last visited Mar. 30, 2011).

[87] Apple iPad, Tech Specs, http://www.apple.com/ipad/specs/.

[88] Samsung, Galaxy Tab, http://galaxytab.samsungmobile.com/.

[89] *See, e.g.*, Sony, 60" BRAVIA LX900 Series 3D HDTV, http://www.sonystyle.com/webapp/wcs/stores/servlet/ProductDisplay?catalogId=10551&storeId=10151&langId=-1&productId=8198552921666193169.

[90] NIELSEN, SNAPSHOT OF TELEVISION IN THE U.S. (Sept. 2010), *available at* http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/09/Nielsen-State-of-TV-09232010.pdf (describing American television programming trends and noting that an estimated 55% of American audiences use some type of cable as their source for television programming).

from Betamax to Blu-ray, and the in-theater experience now includes the option of watching digitally recorded HD, 3-D movies on giant IMAX screens.[91] Even the print entertainment industry is evolving, as e-book readers such as the Kindle,[92] Sony Reader,[93] and iPad come into use.

However, one of the most interesting hardware innovations the entertainment industry has recently seen has arisen in the video game industry. The video game industry is often been on the cutting edge of interactive entertainment, using graphic imagery, first-person perspective and even three-dimensional technology to incorporate the gamer into the game.[94] However, a recent gaming development, Microsoft's Kinect, takes video game interactivity to a new level. Introduced in November 2010, Kinect is a controller-less gaming system that allows the gamer to engage in a full-body simulation within the game.[95] The Kinect uses a video camera, infrared projector, distance sensor, and four microphones to "trac[k] 48 parts of [the player's] body in three-dimensional space,"[96] allowing it to sense the player's motion, track her skeletal movements, and recognize her face and voice.[97] The result is a in-home video game experience unlike anything ever seen before: one in which the player's physical movements in her living room are mirrored by her avatar on the screen in front of her. That is, using Kinect, the player directly interacts, both physically and verbally, with a fictional, gaming environment, all while located in her own home.

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[91] *See, e.g.*, Mark Milian, *Which 'Avatar' to See? A Look at IMAX, Dolby 3-D, RealD (And, Yeah, Boring Old 2-D),* L.A. TIMES, Dec. 25, 2009, *available at* http://herocomplex.latimes.com/2009/12/25/which-avatar-to-see-a-look-at-imax-dolby-3d-reald-and-boring-old-2d/.

[92] *See* Amazon, Kindle Page, http://www.amazon.com/dp/B002Y27P3M/ref=kindlesu-1.

[93] *See* Sony, Reader Page, http://www.sonystyle.com/webapp/wcs/stores/servlet/CategoryDisplay?storeId=10151&langId=-1&catalogId=10551&categoryId=8198552921644523779&N=4294954529&Name=Reader%20Digital%20Books#/heroPocketReader

[94] *See, e.g.*, Gabriel Perna, *Nintendo Glasses-Free 3DS Arrives In U.S. March 27*, INT'L BUS. TECH., Jan. 19, 2011, *available at* http://www.ibtimes.com/articles/102678/20110119/nintendo-outlines-3ds-pricing-availability.htm.

[95] *See* David Pogue, *Kinect Pushes Users into a Sweaty New Dimension*, N.Y. TIMES, Nov. 4, 2010, *available at* http://www.nytimes.com/2010/11/04/technology/personaltech/04pogue.html; Ashlee Vance, *With Kinect, Microsoft Aims for a Game Changer*, N.Y. TIMES, Oct. 23, 2010, *available at* http://www.nytimes.com/2010/10/24/business/24kinect.html?pagewanted=1

[96] Pogue, *supra* note 95, at 1.

[97] *Id. See also* Xbox: About Kinect, http://www.xbox.com/en-US/Kinect/GetStarted.

In short, overwhelming technological advances in both the software and the hardware behind the entertainment industry have transformed the modern entertainment landscape into one characterized by immersion and pervasiveness. To clarify, the modern entertainment industry to a large degree focuses on immersion—making the consumer feel like they are part of the fictional entertainment experience as much as possible. Accomplished through mammoth movie screens, increasingly large in-home TV screens, crystal clear high definition visual programming, actual interactive technology such as that found in cutting-edge video games and, to a lesser degree, in three dimensional video programming, and *surround*-sound programming, modern entertainment does just that: surround the viewer with the entertainment experience, making them feel as involved in it as possible.

Moreover, modern entertainment is pervasive; it is everywhere, all the time. In addition to the traditional media of portable music, books, and video games, television programs and movies can now be viewed anywhere, in excellent quality, on easy-to-use compact devices. Furthermore, the viewer is no longer beholden to strict programmer schedules. As long as the television episode has already been initially aired, or the song, book, movie or game released, the entertainment consumer can choose when to watch or play discrete parts of that movie, episode, song or game at any time through internet downloads and streaming on-demand systems. Truly, we now live in a world where it is technologically possible to be fully immersed in an entertainment experience, anywhere, all the time.

III. DISCUSSION: IMPLICATIONS OF EVOLVING ENTERTAINMENT TECHNOLOGY ON INCITEMENT IN VIOLENT-ENTERTAINMENT CASES

Claims about the technology of entertainment have formed the basis for earlier violent-entertainment cases. Ms. Wilson, for example, claimed that the producers of the Mortal Kombat used "extremely sophisticated futuristic technology"[98] to addict children to their video game.[99] Although that claim was not persuasive enough to sway the U.S. District Court of Connecticut in 2002, it is possible that courts of the new decade would view arguments about modern technology differently. After all, no technology offering the realistic, high-quality imaging and sound, interactivity and omnipresent pervasiveness of the type and availability offered

[98] Wilson v. Midway Games, Inc., 198 F. Supp.2d 167, 170 (D.Conn. 2002).
[99] *Id.*

today has ever been considered by the judicial system in a violent-entertainment case.

The features of modern entertainment would impact a court's incitement analysis. That is, new technological advances in entertainment may have so altered the type of entertainment produced that they could cause courts evaluating violent-entertainment claims to question whether the entertainment merits First Amendment protection or whether it loses such protection because the expression constitutes incitement as defined in *Brandenburg.*

Although there is no controlling law in this area—the Supreme Court has never directly addressed incitement in a violent-entertainment claim—analysis of the jurisprudence in this area suggests that modern entertainment could cause courts to move toward findings of incitement. The discussion below analyzes the four elements that courts highlight when evaluating incitement in a violent-entertainment case: (a) the content of the expression, (b) the imminence of the activity incited, (c) the likelihood of unlawful activity actually occurring because of the expression, and (d) the intent to incite immediate unlawful activity.

A. The Content of the Expression

Modern technology enables new types of speech that weigh in favor of incitement. For example, cutting-edge, interactive video games are now able to directly address the player and give him commands or encouragement.[100] Using this format, it would be but a small step for video game makers to create games in which the avatars directly "exhort, urge, entreat, solicit, or overtly advocate or encourage"[101] the viewers in unlawful or violent activity.

For example, imagine a video game, which, in keeping with current trends in gaming, employs this new technology in a violent format. The player learns how to fight and kill—box, street brawl, use weapons—and employs such skills as they move through the levels of the game. With the new motion sensing technology, the player would actually be acting out such motions in his living room in order to make his avatar virtually imitate them. If the player is not doing well, the game could encourage him: "Player 1: focus!" Or, because the system includes voice and face recognition as well as personalized avatars, it could actually address him by name: "John! Attack now!" If John had a modern enough system, these directions could even be said by a character broadcast in 3-D or surround sound, seemingly commanding John in his own home.

[100] *See* Pogue, *supra* note 95.
[101] Yakubowicz v. Paramount Pictures Corp., 404 Mass. at 631 (1989).

Such fictional, yet conceivable, direct dialogue could constitute impermissible urging, exhortation, encouragement, and ordering to violent activity. Indeed, the more repetitive, detailed, and specific the commands, ("John, get your gun and shoot him!" rather than "let's go!"), the more likely a determination of impermissible incitement.[102] Moreover, in such a scenario, the offending dialogue would be directed at a narrow audience—the player himself, possibly by name—as is required by the incitement test.[103] Additionally, the content of the references—the violent actions offered by the video game makers—themselves suggest the existence of incitement, especially if the player's actions lead to virtual beatings or deaths of characters. Modern video games that could teach skills that lead to and actually virtually facilitate this type of concrete, illegal action could possibly yield court decisions in favor of incitement.[104] This is especially true if the games teaching instructions are especially detailed[105] (i.e., if they incorporate how-to training sessions on fighting and killing with evaluation and feedback) or involved no lawful alternative uses for such action [106] (i.e., if the game does not allow the option of engaging in virtual karate matches rather than a bloody street brawl).

This is but one example in which modern technology, by enabling new and profoundly different entertainment experiences, could open the door to liability in violent-entertainment cases. One can also imagine other means by which modern technology could contribute to a finding of incitement. For instance, findings of incitement are affected by the directness and personalization of the speech.[107] New 3D technology increases that by enabling characters in visual programs to directly address viewers both by speaking into the camera and by appearing to physically move into their personal space. Findings of incitement are also affected by

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[102] *See* Rice v. Paladin Enter., 128 F.3d at 249 (4th Cir. 1997) (suggesting that the extreme detail (photographs, diagrams, narration) present in *Hit Man* caused the court to determine that the speech was incitement rather than just abstract advocacy); Olivia N. v. Nat'l Broad. Co., 178 Cal. Rptr. at 892-94 (refusing to find incitement because there was no repetitive, specific advocacy of illegal action as there was in a previous case).

[103] *See* cases cited *supra* note 59.

[104] *See* McCollum v. CBS, Inc., 249 Cal. Rptr. at 193 (referencing incitement as an order or command to concrete action); Rice v. Paladin Enter., 128 F.3d at 249 (noting that facilitation of this type of violence and terror is deliberately left unprotected).

[105] *See* cases cited *supra* note 102.

[106] *See* Rice v. Paladin Enter., 128 F.3d at 246 (suggesting that First Amendment protections for speech should be withheld where no lawful alternatives to illegal action are advocated or offered, referencing *U.S. v. Barnett*, 667 F.2d 835 (1982)).

[107] *See supra* note 101-103.

internal references to further information about the violence in question.[108] Magazines now have the capacity, via e-magazine applications for smartphones and iPads, to directly link the viewers to digital content that can detail and illustrate what is described in their articles. Real-time access to the speech also contributes to incitement.[109] Today, iPods and streaming podcasts make it possible to listen to live broadcasts anywhere in the world at anytime.

Essentially, modern technology has enabled a type of dynamic interaction with entertainment media that was not possible in the previous thirty years. Just a decade ago, there was a distinct difference in recorded versus live entertainment, and that difference contributed to court determinations that the entertainment in question was not incitement.[110] Nowadays, thanks to motion sensor enabled video games, streaming content, and enhanced hardware portability, it is possible to actually interact in real-time with recorded entertainment as if it were live. And, where it is not possible to interact with recorded entertainment, 3D imaging and enhanced sound and image quality at least make it possible to *feel* as though one were present in the virtual scenario. In such a way, entertainment that used to be strictly fantasy becomes increasingly real, and new technology creates the possibility for new liability.[111]

Certain courts have held that these types of claims of interactivity actually weigh against a finding of incitement, noting that interactivity can "*enhance* everything expressive and artistic about [the expression]."[112] However, that conclusion was based on technology that did not involve actual physical interaction like that which is now possible with advanced gaming systems and 3D programming. This type of modern technology (in which one physically reacts to technology, not just presses buttons to control it) could move beyond enhancing the expressive nature of the

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[108] *See Rice*, 128 F.3d at 257 (suggesting that the references as to where to find more information to facilitate murder contributed to the offending encyclopedic character of the book that merited a finding of incitement).

[109] *See Davidson*, 25 Media L. Rep 1705 at *68 (noting as part of the finding of no incitement, that the shooter did not listen to any live commands, only recorded speech).

[110] *Id.*

[111] Certain courts have noted that entertainment expression cannot constitute incitement because it incorporates various artistic devices used to signal to the consumer that the expression is art rather than serious action to be imitated. *See Byers*, 826 So. 2d at 556; *McCollum*, 249 Cal. Rptr. at 194. It stands to reason, then, that as technology allows producers of entertainment to blur the line between fantasy and reality, such reasoning will no longer apply and courts may be more likely to determine that such expression constitutes incitement.

[112] *Wilson*, 198 F. Supp. at 181 (emphasis in the original).

communication into actual facilitation of action. Put differently, entertainment technology can enable the "preparing [of] a group for violent action and steeling it to such action"[113] in ways never before considered.

Of course, just because technology *can* enable entertainment to incite violent action, does not mean that it *will* enable entertainment to incite violent action. The expression itself will ultimately determine whether the entertainment constitutes incitement. Even then, a conclusion of incitement still remains a matter of degree: the degree to which the expression is violent,[114] the degree to which that violence is presented with instructional prose and in a comprehensively detailed manner,[115] the degree to which the violent is integrated in a larger narrative,[116] and the degree to which that larger narrative is politicized.[117] However, assuming that producers of entertainment choose to express violence directly to the viewer utilizing at least some comprehensive, detailed, and possibly instructional prose or imagery, the technological advances in modern entertainment could certainly facilitate the expression of that content in such a way as to constitute incitement.

B. Imminence of the Incitement

Modern forms of entertainment are unlikely to affect an individual's free will about how and when to react to certain entertainment. However, the increased pervasiveness and portability of modern entertainment could cause courts to lean toward finding imminence.

In previous decades, options for consumer entertainment were geographically limited by size and technological capability. In 2011, high definition portable entertainment devices such as iPods, smartphones, Samsung tablets, and advanced portable gaming systems allow just about any type of entertainment to be consumed in high quality anywhere at anytime. This means that the chances of an individual consuming persuasive violent entertainment at a location or time where he has an opportunity or inclination to imitate what he has just seen are greatly increased.

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[113] Brandenburg v. Ohio, 395 U.S. 444, 448 (internal citations omitted).
[114] *See Rice*, 128 F.3d at 257 (describing the shooting, stabbing, poison, and incineration in "gory detail").
[115] *See supra*, note 101 – 108.
[116] *See Rice*, 128 F.3d at 249 (suggesting that the value of the violence within the story or narrative—the "noninstructional communicative value" of the violence—is an important consideration in an incitement analysis).
[117] *See id* at 262 (noting that advocacy of violence as part of a political discussion is more likely to be protected under *Brandenburg*).

It also bears mentioning that the generally strict interpretation of imminence in violent-entertainment cases has been challenged from several angles. Recent legal scholarship addressing violent-entertainment claims has argued for relaxing the current interpretation of imminence to situations involving the near future.[118] Even the U.S. government has suggested that the timeline for imminence should be expanded in certain situations involving the facilitation of extreme violence or terrorism.[119] Most tellingly, even where entertainment has been found to constitute "incitement to imminent lawless action,"[120] it is not clear that the violent action occurred imminently after reading the book, nor did the court attempt to explain how it arrived at such a conclusion.[121] With such contention and uncertainty surrounding this issue, it is possible and even likely that the pervasiveness and portability of new entertainment technology will yield more determinations of imminence in violent-entertainment cases.

C. The Likelihood of Action and the Intent to Incite

Although modern entertainment technology is likely to impact analysis of (a) "the content of the speech" and (b) "the imminence of the action" in such a way that favors court findings of incitement, the impact that such technology will have on the

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[118] *See* Mallory, *supra* note 6, at 100 (noting that the analysis of the courts in *Rice* and an early decision in *Byers* had to use "difficult, almost theological intellectual acrobatics" to satisfy the imminence requirements and arguing that this difficulty signals the inapplicability of the *Brandenburg* imminence test in violent-entertainment cases); Campbell, *supra* note 7, at 668 (arguing that the imminence prong of the *Brandenburg* test "should be extended to include the near future, which for serious crimes could be several months").

[119] *See* Mallory, *supra* note 6, at 107 (discussing the government's contention that "imminent . . . does not really mean imminent." Specifically, quoting the government's opinion that, "where it is foreseeable that [a] publication will be used for criminal purposes, the Brandenburg requirement that the facilitated crime should be 'imminent' should be of little, if any, relevance") (citing DEPT. OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION (1997)).

[120] *Brandenburg*, 395 U.S. at 449.

[121] *See Rice*, 128 F.3d 233 (nowhere in its opinion does the Fourth Circuit discuss the timeline of events such as when the book was published, when the murderer obtained a copy of the book and when the murders occurred in relation to his use of the book. Rather, the Fourth Circuit only summarily and abstractly addresses the imminence prong, and, in so doing, references the same government opinion, see *supra* note 119, which held that the imminence of the crime's occurrence after the speech is of little, if any, importance in determining whether such speech loses First Amendment protection).

remaining two incitement variables of (c) "likelihood of action" and (d) "intent to incite" is less certain.

The third prong of *Brandenburg's* incitement test—the likelihood that lawless action will occur immediately after the inciting speech—has not been addressed in detail in violent-entertainment cases. Courts often summarily conclude that the violence that inspired the case was not likely because it was the only incident of its kind with respect to that particular expression.[122] Meanwhile, in the only case in which the entertainment was actually deemed to be incitement, the court spends little to no time explaining why such action was likely.[123]

Given these problems, it is impossible to say whether modern entertainment will cause consumers to be more likely or less likely to respond to their entertainment. On one hand, the increased portability, availability, and immersion of the entertainment suggest that people will accept high-quality entertainment as a constantly available part of their life. This type of overexposure may lead audiences to become blithely accustomed to even highly interactive, persuasive entertainment and be less likely to act on its expression. On the other hand, the increased quality and portability of new entertainment may mean that entertainment becomes a larger, more significant element in people's lives, upon which they constantly rely. This type of passionate, concentrated consumption could lead individuals to be more easily influenced by entertainment, and thus more likely to act on its expression.

Modern technology's influence on the fourth prong of the *Brandenburg* test—the intent to incite lawless conduct—is similarly unclear. Just because new technology makes it possible to remotely, virtually incite an individual to action does not mean that the makers of the entertainment will want or intend to do so. In fact, aside from the fact that they presumably have no political interest in facilitating violence (or the bad press associated with it), entertainment producers are unlikely to intend to incite consumers to violence against possible future consumers simply because it is a bad business model.

Nevertheless, despite no acknowledged intent, a court or jury could still find that such an intent to incite lawless conduct was implied by the content of the work and the circumstances in

[122] *See supra*, note 56.

[123] *See Rice*, 128 F.3d at 249 (explicitly holding that "an exhaustive analysis of this likely limitation is not required in this case," and generally offering no other evidence for its conclusions that the book was likely to cause lawless action and unlikely to serve any other purpose. Additionally, the Court did not address the seemingly obvious point that even if the book was intended to aid and abet such action, it might not have been *likely* to do so).

which is was published.[124] For instance, the Fourth Circuit noted that a jury could infer the requisite intent from the facts that the declared purpose of the book was to aid illegal conduct, the content described and promoted illegal conduct in overwhelming detail, the marketing strategy suggested that the book's disclaimers—that it was for entertainment purposes only—were just sarcastic tools meant to entice readers, the content was aimed at and distributed only to criminals, and it had little or no expressive conduct outside the facilitation of illegal conduct.[125] Modern entertainment technology could enable the continuation or advancement of several of these factors. For instance, technologies such as interactive games, 3D visual effects, streaming Internet content, and hyperlinking allow entertainment presenters to create extremely detailed works. Similarly, information collection, personalization, and portability now available through the Internet and associated devices allow for extremely targeted advertising and use of creative, varied marketing strategies. If an entertainment-producer were to create an extremely detailed, instructive, overtly violent product and use such targeted marketing strategies to personally advertise it to a small demographic, it possible that a court could infer an intent to incite lawless conduct.

Of course, it is also possible that, even if these factors indicating intent are heightened by the use of new technology, a court may still not be convinced.[126] However, such changes, coupled with other dramatic shifts in violent-entertainment cases that entertainment technology could facilitate, may be just enough to at least cause the court to engage in a more detailed analysis of the elements of incitement or even yield the decision to a jury.

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[124] *See Rice*, 128 F.3d at 265-266 (implying that although such cases would be rare, it would be possibly for a jury to infer intent to incite criminal activity). *See also Waller*, 763 F. Supp. at 1151 (acknowledging that it is possible to infer an intent to incite from the content of the speech but holding that no such intent was inferable from the particular content of the present case).

[125] *Rice*, 128 F.3d at 253-55.

[126] This may be especially true considering the recent Supreme Court decision in *Synder v. Phelps*, 131 S. Ct. 1207 (2011), in which the Court held that the First Amendment protected Westboro Baptist Church from liability for intentional infliction of emotional distress. Although the speech considered in that case was not entertainment-related (rather, it involved members of a church picketing a military funeral with religious and political messages), it does evidence a strong Court deference to First Amendment protection, specifically when balanced with possible liability under state tort laws. This suggests that the current Court may be likely to find in favor of the entertainment-producers in the hypothetical violent-entertainment cases presented here.

CONCLUSION

In 1997, the Fourth Circuit noted that "for almost any broadcast, book, movie, or song *that one can imagine*, an inference of unlawful motive from the description or depiction of particular criminal conduct therein would almost never be reasonable."[127]

This claim unintentionally highlights the way in which modern technology has most profoundly altered violent-entertainment cases: imagination. Through the twin developments of the Internet and digitization, modern technology has allowed the entertainment industry to create interactive, portable, high quality, immersive entertainment that would not have even been imaginable in 1997, let alone 1979. Consequently, a court in a modern-day violent-entertainment case may encounter entertainment and thus factual circumstances that could barely have been contemplated by courts evaluating previous violent-entertainment claims.

Such advanced entertainment and changed circumstances surrounding its use have the potential to affect court determinations regarding liability in violent-entertainment cases. With one notable exception, every court in every violent-entertainment case has held (or at least suggested) that entertainment-defendants cannot bear liability in such a case because their expression is protected under the First Amendment. Entertainment technology has the potential to change that by raising questions as to whether the expression constitutes incitement to unlawful action.

Specifically, entertainment technology has the potential to make findings of incitement more likely in violent-entertainment cases. Modern technology has caused the content of entertainment to become markedly more interactive and detailed, either displaying or electronically referencing more, better-quality content in a more immersive format. Additionally, the phrase "anywhere, anytime" is king in today's entertainment industry—discrete, portable portions of high quality expression are now constantly available. And if the entertainment producers were to choose to use such technological advances to express violence in a detailed, instructional or gruesome manner, a finding of unlawful incitement may be more likely.

Essentially, modern technology has enabled the producers of mainstream entertainment to cross a line from simply displaying violence into facilitating violence. Whether or not entertainment producers will take advantage of that fact and actually produce violent content that utilizes these new technological developments

[127] *Rice*, 128 F.3d at 266 (emphasis added).

in inappropriate ways remains to be seen. However, if they do produce such entertainment, courts may depart from their previous collective opinion that such speech is protected under the First Amendment and actually consider imposing liability in violent-entertainment cases.