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There's No R in Smoking: A Modified Rating System to Curb Adolescent Smoking

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There's No R in Smoking: A Modified Rating System to Curb Adolescent Smoking

by AMANDA E. BECKWITH*

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I. Introduction

Smoking is the most common preventable cause of death in the United States, accounting for over 480,000 deaths each year.¹ For most smokers, the addiction begins at a young age—nine out of ten smokers first tried a cigarette before age eighteen.² Unsurprisingly, cigarette advertising and

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1. *Health Effects of Cigarette Smoking*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/ (last updated Oct. 1, 2015) [hereinafter *Health Effects of Cigarette Smoking*].

2. *Youth and Tobacco Use*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm (last updated Oct. 14, 2015).

promotion has a causal link to smoking among adolescents.³ But this relationship persists notwithstanding the fact that advertising and promotion is either illegal or severely restricted in the media on numerous platforms including television, radio, and billboards.⁴ According to the Centers for Disease Control and Prevention (“CDC”), the leading cause of adolescent smoking may be one of the last forms of unrestricted “advertising”: movies.⁵ Movies can affect youths as significantly as advertisements, if not more.⁶ Eliminating the appearance of cigarettes and tobacco in movies directed at adolescents would play a significant part in preventing tobacco use among youth.⁷

Reducing adolescent smoking will help reduce the immense societal costs of smoking. Smoking causes many serious health conditions including lung cancer, heart attacks, and chronic lung disease.⁸ A recent study found that smoking may also cause infections, kidney disease, and intestinal disease.⁹ The CDC estimates that at the current rate, 5.6 million of today’s youth will die prematurely from smoke-related illnesses and diseases.¹⁰ These smoke-related illnesses cost individuals and states over \$175.9 billion each year in healthcare-related expenditures.¹¹ Suing tobacco companies is one way to reduce these effects, but those who smoke are typically left without adequate legal remedies for the harms stemming from cigarette use. The Cigarette Labeling and Advertising Act of 1966¹² (“CLAA” or “the Act”) preempts most state law claims against tobacco companies.¹³ For the few claims that are not preempted by the Act,

3. See DEP’T OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 522 (2012), http://www.ncbi.nlm.nih.gov/books/NBK99237/pdf/Bookshelf_NBK99237.pdf [hereinafter 2012 SURGEON GENERAL REPORT].

4. *Id.* at 600; DEP’T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 797 (2014), <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf> [hereinafter 2014 SURGEON GENERAL REPORT].

5. 2014 SURGEON GENERAL REPORT, *supra* note 4, at 797–98.

6. *Id.*

7. *Id.* at 798.

8. See *Health Effects of Cigarette Smoking*, *supra* note 1; Denise Grady, *Smoking’s Toll on Health Is Even Worse Than Previously Thought, a Study Finds*, N.Y. TIMES (Feb. 11, 2015), http://www.nytimes.com/2015/02/12/health/smokings-health-toll-worse-than-previously-thought-study-says.html?ref=health&_r=1.

9. Grady, *supra* note 8.

10. 2014 SURGEON GENERAL REPORT, *supra* note 4, at 675.

11. *Id.* at 867.

12. 15 U.S.C. § 1333 (2012).

13. *Id.* § 1334; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Tuosto v. Philip Morris USA Inc.*, 672 F. Supp. 2d 350 (S.D.N.Y. 2009).

tobacco companies often escape liability.¹⁴ Class action lawsuits against tobacco companies are generally unsuccessful,¹⁵ and tobacco companies take advantage of individual suits by exhausting plaintiffs' resources.¹⁶ Even if individuals are successful initially, appellate courts often reduce large damage awards on appeal.¹⁷

The legal system must do more to ameliorate the health and economic costs of cigarettes by curbing initiation of youth smoking. Despite advertising restrictions, smoking in the media is still widespread, especially prominent in films. Hollywood has done little in order to reduce the appearance and appeal of cigarettes among youth, despite numerous studies uncovering a strong correlation between youth smoking and cigarette use movies. One solution is to put moral pressure on filmmakers to reduce the allure of smoking in movies targeted at adolescents. Legal action against movie production companies for damages caused by cigarette-related injuries and illnesses is one way to put pressure on filmmakers. However, in similar suits against video game and production companies, plaintiffs encountered serious legal barriers. Production companies that create violent media have escaped liability because courts previously ruled that the companies owe no duty to victims of violent crimes allegedly motivated or fantasized by their violent games and movies.¹⁸ Similarly, to date, no court has found movie producers liable for damages suffered by young adults who began smoking in part due to depictions in films. Courts are hesitant because such a finding would effectively punish movie production companies for exercising their right to freedom of expression under the First Amendment.

An alternative to fighting the uphill legal battle against filmmakers is to bring legal action against the Motion Picture Association of America ("MPAA") to incentivize it to give R ratings to films with depictions of smoking. The harsher rating would deter filmmakers from placing cigarettes in films and thus decrease cigarette exposure to adolescents. Litigation against the MPAA could prove to be successful because the aforementioned legal barriers may no longer apply. The MPAA may owe a duty to moviegoers, or at least parents of young moviegoers, to adequately advise parents about cigarette use in films. Even if a lawsuit proves to be

14. Sara D. Guardino & Richard A. Daynard, *Punishing Tobacco Company Misconduct: The Case for Exceeding a Single Digit Ratio Between Punitive and Compensatory Damages*, 67 U. PITT. L. REV. 1, 37 (2005).

15. See 2014 SURGEON GENERAL REPORT, *supra* note 4, app. 14.2 at 4.

16. Guardino & Daynard, *supra* note 14, at 36.

17. See 2014 SURGEON GENERAL REPORT, *supra* note 4, app. 14.3 at 5, tbl.14.3.1.

18. See, e.g., *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002).

unsuccessful, the bad publicity and costs that accompany litigation may be sufficient to pressure the MPAA to act appropriately.

If litigation is unsuccessful, government regulation of the MPAA rating system may be an effective way to end youth exposure to cigarettes because the depiction of cigarettes in the media is already regulated. The CLAA significantly restricts cigarette advertisements or promotions.¹⁹ Additionally, an agreement between forty-six states and Big Tobacco²⁰ further limits the prevalence of cigarette advertisements.²¹ Although these restrictions are already in place, smoking among youth is still prevalent. A regulation requiring the MPAA to give all movies with significant depictions of cigarettes an R rating may reduce youth smoking significantly.

Part I discusses the litigation and legislative history surrounding tobacco regulation. Part II provides background in addition to past and present criticisms of the MPAA. Part III analyzes the potential liability of production companies to individuals with smoke-related health issues that could, in part, be caused by cigarette depictions in movies while discussing possible constitutional issues. Part IV argues that the best solution is to pursue legal action against the MPAA to pressure it to give R ratings to movies that depict cigarettes, and include “smoking” in its rating criteria. Part IV also considers other options, such as further government regulation in the form of government-sponsored ratings for movies that depict smoking. Finally, this note concludes by considering these alternative solutions and determining their likelihood of success.

II. Tobacco Legislation and Litigation

A. The Ban on Cigarette Advertising

Congress passed the CLAA in 1971 to address the problems with respect to smoking and health and to adequately inform the public about cigarettes.²² The Act prohibits the advertisement of cigarettes on any medium of communication governed by the Federal Communications Commission (“FCC”) and requires specific warning labels on cigarette packages.²³ Broadcasting companies challenged the CLAA as a violation

19. 15 U.S.C. § 1335 (2012).

20. For purposes of this note, “Big Tobacco” refers to large tobacco companies in the United States.

21. Master Settlement Agreement, NAT’L ASS’N OF ATTORNEYS GEN. § III(e), <http://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf> [hereinafter MSA].

22. See § 1331.

23. *Id.* §§ 1333, 1335 ([I]t shall be unlawful to advertise cigarettes . . . on any medium of electronic communication subject to the jurisdiction of the Federal Communications

of the First Amendment, and the court upheld the law.²⁴ The court reasoned that product advertising is commercial speech and, therefore, is entitled to less constitutional protection.²⁵ The court also noted that the broadcasting companies did not lose their right to speak, but only the right to collect revenue from third-party advertisers.²⁶ Further, the Act is within Congress' supervisory role to regulate the FCC.²⁷ The court also rejected the companies' Fifth Amendment argument and held that there is a rational basis for banning cigarette advertisements because substantial evidence showed that television and radio advertisements were highly persuasive to young people.²⁸

The CLAA expressly preempts any state law action regarding advertising or promotion of cigarettes.²⁹ Common law claims regarding failure to warn or fraudulent statements are thus preempted, and therefore easily dismissed.³⁰ However, the U.S. Supreme Court has held that the CLAA does not preempt cases involving intentional misrepresentation, fraud, or conspiracy.³¹

Advertising is only one of many factors that induce smoking among teens and young adults.³² Some social science studies show that peer pressure, parental smoking habits, and socioeconomic status are also significant causes of smoking in youths.³³ Given the variety of factors and the disparity between social science studies, Professor Clay Calvert notes that the evidence fails to demonstrate any causal relationship between cigarette advertising and smoking among youth.³⁴ He further warns that using speculative and inconsistent social science evidence to censor commercial speech raises important First Amendment issues.³⁵ According

Commission.”). The FCC governs all communications by radio, television, wire, satellite, and cable. FCC, *What We Do*, <http://www.fcc.gov/what-we-do> (last visited Jan. 19, 2016).

24. See *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972).

25. *Id.* at 584.

26. *Id.*

27. *Id.*

28. *Id.* at 585–86.

29. 15 U.S.C. § 1334 (2012).

30. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992); *Tuosto v. Philip Morris USA Inc.*, 672 F. Supp. 2d 350, 359 (S.D.N.Y. 2009).

31. *Cipollone*, 505 U.S. at 527–30.

32. Clay Calvert, *Excising Media Images to Solve Societal Ills: Communication, Media Effects, Social Science, and the Regulation of Tobacco Advertising*, 27 SW. U. L. REV. 401, 449–51 (1998) (listing fourteen factors associated with adolescent smoking).

33. *Id.* at 453–55.

34. *Id.* at 458.

35. *Id.* at 468 (“To censor media messages on speculative beliefs and ‘common sense’ about the harms they cause is simply foolhardy.”).

to the Supreme Court, however, Congress presented sufficient evidence to indicate a causal relationship and thus acted within its power to ban advertising.³⁶

B. State and Federal Tobacco Litigation and the Master Settlement Agreement

In 1994, state attorneys general from four states brought lawsuits against Big Tobacco demanding compensation for healthcare expenditures resulting from smoke-related illnesses and diseases.³⁷ By 1998, the companies settled with all states, creating the Master Settlement Agreement (“MSA”).³⁸ Big Tobacco agreed to make annual payments to the states for twenty-five years in exchange for the states abandoning their Medicaid reimbursement claims.³⁹ Most importantly, the MSA prohibits the companies from targeting underage smoking and engaging in any type of product placement agreement.⁴⁰

In 1996, the Department of Justice filed a civil suit under federal law⁴¹ against eleven major tobacco companies for allegedly defrauding the public by producing harmful and addictive products and deliberately misrepresenting the risks of tobacco.⁴² The trial court found the defendants liable for fraud and deceit because they continued to market cigarettes toward young people, encouraged young people to smoke, and controlled nicotine levels in order to maintain addictions, all while keeping their research regarding nicotine confidential.⁴³ Congress used the court’s factual findings as congressional findings when passing the Family Smoking Prevention and Tobacco Control Act of 2009, which gave the

36. *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 586–87 (D.D.C. 1971), *aff’d*, 405 U.S. 1000 (1972) (“Substantial evidence showed that the most persuasive advertising was being conducted on radio and television, and that these broadcasts were particularly effective in reaching a very large audience of young people Thus, Congress had information quite sufficient to believe that a proscription covering only the electronic media would be an appropriate response to the problem of cigarette advertising.”).

37. 2014 SURGEON GENERAL REPORT, *supra* note 4, at 798.

38. *Id.*

39. *Id.*

40. MSA, *supra* note 21, § III; Robin Miller, Annotation, *Validity, Construction, Application, and Effect of Master Settlement Agreement (MSA) Between Tobacco Companies and Various States, and State Statutes Implementing Agreement; Use and Distribution of MSA Proceeds*, 25 A.L.R.6th 435 §§ 49-50 (2007).

41. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (2012).

42. 2014 SURGEON GENERAL REPORT, *supra* note 4, at 800; Miller, *supra* note 40, § 3.

43. See *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006); Miller, *supra* note 40, § 3.

Food and Drug Administration (“FDA”) broad power to regulate cigarettes.⁴⁴

Plaintiff smokers have difficulty obtaining legal remedies for harms caused by cigarettes. Most class action suits against Big Tobacco fail because courts are unwilling to certify the classes. However, not all class actions are entirely unsuccessful. In *Castano v. American Tobacco Co.*, the Fifth Circuit refused to certify a nationwide class of addicted smokers.⁴⁵ The attorneys involved in *Castano* filed separate class actions in almost half the states.⁴⁶ Though only one case—the class action filed in Louisiana—succeeded, cigarette manufacturers were ordered to pay \$240 million to fund smoking cessation services.⁴⁷ In 2006, after a multi-phase class action trial, the Florida Supreme Court decertified a class of addicted Florida smokers and reversed the jury verdict of \$175 billion in punitive damages.⁴⁸ Despite this loss, the court allowed former class members to file individual suits based on the jury’s prior finding of defendants’ liability.⁴⁹ As of 2013, these individual suits resulted in seventy-one plaintiff verdicts and thirty-four defense verdicts.⁵⁰

Few individual suits succeeded against tobacco companies because Big Tobacco tends to avoid liability by exhausting plaintiffs’ resources with a “refuse to settle” policy.⁵¹ The companies investigate and extensively interview the plaintiff as well as acquaintances in order to discover damaging information, and then exploit that information until the case is dismissed.⁵² The only way to deter this tactic is to punish Big Tobacco, but only four individuals in California have obtained favorable jury verdicts, and only about nine plaintiffs in other states.⁵³ Although plaintiffs won significant compensatory damages, all punitive damage awards were reduced on appeal.⁵⁴

44. 2014 SURGEON GENERAL REPORT, *supra* note 4, at 800; 21 U.S.C. §§ 387, 387t (2012).

45. 84 F.3d 734 (5th Cir. 1996); *but see* Broin v. Philip Morris Cos., Inc., 641 So. 2d 888 (Fla. Dist. Ct. App. 1994) (reversing a trial court order denying class certification of nonsmoking flight attendants).

46. 2014 SURGEON GENERAL REPORT, *supra* note 4, app. 14.2 at 5.

47. Scott v. Am. Tobacco Co., Inc., 36 So. 3d 1046 (La. Ct. App. 2010).

48. Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006).

49. 2014 SURGEON GENERAL REPORT, *supra* note 4, app. 14.2 at 4.

50. *Id.* at 5, tbl. 14.2.1.

51. Guardino & Daynard, *supra* note 14, at 36.

52. *Id.* at 36–37.

53. 2014 SURGEON GENERAL REPORT, *supra* note 4, app. 14.3 at 4.

54. *Id.* at 5, tbl. 14.3.1.

III. The MPAA and the Rating System

A. History of the MPAA

In the early 1920s, public outcry against offensive and indecent films shown in public theaters led local and state governments to censor films.⁵⁵ In response, major film production studios and distributors organized and created the Motion Picture Association of America (“MPAA”), originally called Motion Picture Producers and Distributors of America (“MPPDA”).⁵⁶ In order to protect filmmakers from government censorship, the member studios essentially agreed to censor their own films via the Production Code—the first rating system.⁵⁷ Nearly all filmmakers and film distributors released their films under the new voluntary rating system. To do otherwise would have ensured economic failure because the film could have been subject to local censorship boards or boycotted by religious organizations.⁵⁸ Thus, almost all filmmakers and distributors adhered to the MPAA’s voluntary process of film release, laying the groundwork for the modern system.

Today, the MPAA sets out to advance the business and art of filmmaking, protect creative expression of filmmakers, and ensure the satisfaction of moviegoers.⁵⁹ The MPAA’s current rating board—the Classification & Rating Administration (“CARA”)—consists of parents who assign ratings based on violence, sex, language, and drug use.⁶⁰ The purpose of the ratings is to provide parents with information so they may decide which films are age-appropriate for their children.⁶¹

B. Criticisms of the MPAA

The MPAA is often criticized for ineffective and inaccurate ratings. *This Film Is Not Yet Rated*, a documentary that investigates the film rating system, notes that the ratings are much stricter on sexual content than violent content.⁶² According to another study conducted by Medscape, the

55. *Motion Picture Association of America*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/394174/Motion-Picture-Association-of-America-MPAA> (last visited Jan. 19, 2016).

56. *Id.*

57. *Id.*

58. Jason K. Albosta, *Dr. Strange-Rating Or: How I Learned That the Motion Picture Association of America’s Film Rating System Constitutes False Advertising*, 12 VAND. J. ENT. & TECH. L. 115, 125–26 (2009).

59. *Our Story*, MPAA, www.mpa.org/our-story/ (last visited Jan. 19, 2016).

60. *Film Ratings*, MPAA, www.mpa.org/film-ratings/ (last visited Jan. 19, 2016).

61. *Id.*

62. *THIS FILM IS NOT YET RATED* (BBC Films 2006).

MPAA ratings do not adequately provide information for parents because movies with the same rating differ greatly with regard to their content.⁶³

Courts have also expressed criticism of the MPAA and its rating system. In *Miramax Films Corp. v. MPAA*, for example, filmmakers challenged the MPAA's "X" rating of their film.⁶⁴ Although the court ultimately dismissed the filmmakers' claims, the court "question[ed] the integrity of the present rating system."⁶⁵ Specifically, the court found the MPAA's ratings were almost entirely subjective and did not adequately protect children because the rating board does not seek any professional guidance from child psychologists to assess any potential harm to children.⁶⁶ The court emphasized that the MPAA explicitly neglects the wellbeing of children that the rating system should protect.⁶⁷ The court also urged the MPAA to make changes to the rating system in light of these findings to avoid potential future liability.⁶⁸

More recently, the MPAA faced criticism for being unnecessary and powerless because it fails to address current issues in the industry.⁶⁹ For example, in December 2014, when Sony Pictures Entertainment—a member studio—was the victim of Internet hackers, the MPAA did nothing in Sony's defense.⁷⁰ Furthermore, the MPAA has remained silent on the net neutrality debate, despite obvious member support, because one member, Comcast, does not support net neutrality.⁷¹ Although unrelated to the issues discussed in this note, these incidents and inconsistencies call into question the MPAA's legitimacy.⁷² The current events involving the MPAA suggest that reform is necessary to preserve the organization's integrity.

63. Kimberly M. Thomas & Fumie Yokota, *Violence, Sex, and Profanity in Films: Correlation of Movie Ratings with Content*, MEDSCAPE GEN. MED. 6(3) (July 12, 2004), <http://www.kidsrisk.org/images/MGMmovies.pdf>.

64. 560 N.Y.S.2d 730, 731 (N.Y. Sup. Ct. 1990).

65. *Id.* at 733.

66. *Id.* at 734.

67. *Id.*

68. *Id.* at 736.

69. Alex Ben Block, *So, Just How Impotent Is Today's MPAA?*, HOLLYWOOD REP. (Feb. 26, 2015), <http://www.hollywoodreporter.com/news/how-impotent-is-todays-mpaa-777284>.

70. *Id.* In December 2014, internet hackers published confidential information of Sony Pictures Entertainment, including emails surrounding the release of a controversial film. Martin Fackler et al., *Sony's International Incident: Making Kim Jong-un's Head Explode*, N.Y. TIMES (Dec. 14, 2014), <http://www.nytimes.com/2014/12/15/world/sonys-international-incident-making-kims-head-explode.html>.

71. Block, *supra* note 69.

72. *Id.*

With respect to cigarettes, it was not until 2007 that the MPAA announced that it would include smoking as a factor for movie ratings.⁷³ Since then, only twelve percent of released films included “smoking” in the rating.⁷⁴ This number may lead parents to believe that the rest of the released films do not depict cigarettes or smoking because they do not include “smoking” in the rating description.⁷⁵ As a result, parents may inadvertently allow their children to watch films that expose them to smoking and cigarettes at a young age.

There has been some speculation that the MPAA and member production companies are involved in illegal cigarette product placement agreements with Big Tobacco. In the MSA, tobacco companies expressly agreed to end all product placement in films.⁷⁶ By 2000, smoking in movies returned to the levels observed in 1950, when smoking was twice as prevalent.⁷⁷ One explanation for this trend is that tobacco companies continue to engage in product placement deal in violation of the MSA. While there is no concrete evidence, the historical link between Hollywood and Big Tobacco, as well as the continued appearance of cigarettes in films, provides circumstantial evidence that cigarette product placement continues.⁷⁸ This persistent relationship may also explain why the MPAA has failed to include smoking as part of its rating criteria, since it may have a monetary incentive to refrain from doing so.

IV. Analysis of Production Company Liability

The history of tobacco litigation suggests that smokers who have suffered health injuries have a low likelihood of successfully obtaining any legal remedies. Federal law preempts certain claims against tobacco companies.⁷⁹ The MSA also prevents various state law claims against the

73. Jim Puzzanghera, *Hollywood Set to Filter On-Screen Smoking*, N.Y. TIMES (May 11, 2007), <http://articles.latimes.com/2007/may/11/business/fi-moviesmoking11>.

74. Sglantz, *Fox Readies PG-Rated Film with Smoking*, UCSF CTR. FOR TOBACCO CONTROL RES. & EDUC. (Nov. 21, 2013, 7:46 AM), <https://tobacco.ucsf.edu/fox-readies-pg-rated-film-smoking>.

75. *Id.*

76. MSA, *supra* note 21, § III(e)

77. Stanton A. Glantz et al., *Back to the Future: Smoking in Movies in 2002 Compared with 1950 Levels*, 94 AM. J. PUB. HEALTH 261, 261 (Feb. 2004), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1448240/pdf/0940261.pdf>.

78. C. Mekemson & S. A. Glantz, *How the Tobacco Company Built Its Relationship with Hollywood*, TOBACCO CONTROL (2002), http://tobaccocontrol.bmj.com/content/11/suppl_1/i81.full.pdf.

79. 15 U.S.C. § 1333 (2012); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992).

tobacco companies.⁸⁰ This part considers whether movie production companies can be held liable for damages as a result of these injuries.

A. Tort Liability of Production Companies

Courts have held that production companies are not liable for damages associated with violence in movies because they owe no duty to consumers.⁸¹ In *Sanders v. Acclaim Entertainment, Inc.*, family members of victims of the infamous Columbine High School shooting filed suit against video game companies and movie production companies under various negligence theories.⁸² The court granted the defendants' motion to dismiss these claims on the grounds that the companies owed no duty to the plaintiffs because they could not have foreseen the events that occurred at Columbine.⁸³ Further, the court concluded that there was insufficient evidence to prove that the violence was the result of exposure to video games or movies.⁸⁴

Similarly, in *James v. Meow Media, Inc.*, parents of students who were killed by a classmate alleged that violent movies and video games produced by defendants caused the perpetrator's actions.⁸⁵ The Sixth Circuit held that the defendants could not have possibly foreseen the perpetrator's violent criminal act.⁸⁶ The court reasoned that the defendants owed no duty to the plaintiffs because they did not even know the student existed, and the defendants' ideas and images could not have been the cause of the criminal act.⁸⁷

Courts have made it clear that the plaintiffs in *Sanders* and *Meow Media* could not overcome the issues of duty and causation. Although these legal barriers may arise, a similar claim against production companies for damages caused by cigarettes is distinguishable. First, health damages caused by cigarettes are more foreseeable than a random violent act. Smoking is commonplace,⁸⁸ whereas the incidents in the aforementioned

80. MSA, *supra* note 21, § XII; *Summary of the Master Settlement Agreement*, TOBACCO FREE KIDS 4–5 (July 9, 2003), <http://www.tobaccofreekids.org/research/factsheets/pdf/0057.pdf>; Miller, *supra* note 40, § 67.

81. *Sanders v. Acclaim Entm't Inc.*, 188 F. Supp. 2d 1264, 1273 (D. Colo. 2002).

82. *Id.* at 1268–70 (noting that plaintiffs sued video game companies and movie companies under negligence and strict liability theories).

83. *Id.* at 1273.

84. *Id.* at 1276.

85. 300 F.3d 683, 687 (6th Cir. 2002).

86. *Id.* at 693.

87. *Id.* at 695.

88. In 2012, over twenty-seven percent of adults aged eighteen and older used a tobacco product, and 2.3 million people aged twelve and older first tried a tobacco product. 2014 SURGEON GENERAL REPORT, *supra* note 4, at 750.

cases involved random acts of violence. Potential defendants are more likely to be aware of the negative health effects of smoking than random and unforeseeable violent acts. Teens who see depictions of cigarettes in movies are three times more likely to begin smoking than those who do not.⁸⁹ The evidence demonstrating depictions of smoking in movies as a main cause of adolescent smoking is clearly more than mere speculation. Thus, a court could find that the movie production companies owe a duty to consumers because it is foreseeable that the images portrayed in the media could easily influence young people.

Second, the actions of third-party individuals proximately caused the harm in *Sanders* and *Meow Media*, not the actions of the defendants. Typically, a third-party criminal action will break the chain of causation.⁹⁰ A cause of action involving smoking is distinguishable because there is no third party to break the chain of causation—the cigarette causes the harm to the smoker. Potential plaintiffs are the users of the product, and the defendants essentially “advertise” the product in films and thus become the “cause” of the harm. However, potential plaintiffs must show that the depictions actually caused the initiation of smoking.

Lastly, many social science scholars disagree about whether a correlation exists between violent media and violent actions.⁹¹ Psychologist and Professor Christopher Ferguson criticizes studies that find such a correlation because the findings are insubstantial.⁹² Ferguson concludes that no evidence supports a finding that violent video games influence aggressive behavior, and cautions other researchers to be conservative with any opposing conclusion.⁹³ Courts also reject findings that violent video games influence aggressive behavior and refuse to consider the studies as significant evidence.⁹⁴ On the other hand, social scientists generally agree that cigarette depictions significantly influence youth smoking. The 2012 Surgeon General Report concluded that adolescents who are exposed to depictions of smoking in movies are more likely to smoke.⁹⁵ According to a study from New Zealand, nonsmoking teens who watched smoking in films “were nearly three times as likely to

89. *Rating Might Be Unlikely to Affect Teens Exposure to Smoking in Movies*, PHYS.ORG (Sept. 27, 2007), <http://phys.org/news110117914.html#nRlv>.

90. *Meow Media*, 300 F.3d at 699.

91. Benedict Carey, *Shooting in the Dark*, N.Y. TIMES (Feb. 11, 2013), <http://www.nytimes.com/2013/02/12/science/studying-the-effects-of-playing-violent-video-games.html>.

92. Christopher J. Ferguson, *Video Games and Youth Violence: A Prospective Analysis in Adolescents*, 40 J. YOUTH ADOLESCENCE 377, 378 (Dec. 14, 2010).

93. *Id.* at 389–90.

94. *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2739 (2011) (noting that “[t]hese [violent video game] studies have been rejected by every court to consider them . . .”).

95. See 2012 SURGEON GENERAL REPORT, *supra* note 3, at 564–98.

be susceptible to begin smoking, even when the researchers controlled for age, gender, ethnicity, peer smoking, parental smoking, socioeconomic status, pocket money and household smoking rules.”⁹⁶ Although some scholars are wary about the use of social science data as evidence,⁹⁷ a court is likely to accept as evidence studies showing a relationship between smoking depictions in the media and youth smoking.⁹⁸

B. First Amendment Problems

Even if potential plaintiffs establish a prima facie case against movie production companies, current First Amendment jurisprudence likely bars any claim against movie production companies. The Sixth Circuit was reluctant to attach tort liability to the dissemination of ideas in order to avoid First Amendment problems.⁹⁹ Courts are hesitant to impede this fundamental right by creating tort liability because movies are considered artistic speech and thus are fully protected.¹⁰⁰ The courts in *Meow Media* and the court in *Sanders* both addressed potential First Amendment problems that would arise from holding defendants liable. The plaintiffs in *Meow Media* first attempted to argue that violent movies and video games were obscene, and thus unprotected speech.¹⁰¹ The Sixth Circuit declined to consider violent material as obscene because obscenity typically only pertains to sexually explicit content.¹⁰² The court was unwilling to create another category of unprotected speech.¹⁰³

Plaintiffs then argued, in the alternative, that the video games incited violence, which caused consumers to commit violent acts.¹⁰⁴ The court, applying the *Brandenburg* test¹⁰⁵ for violent speech, rejected this argument.¹⁰⁶ The court found that the defendants lacked the requisite intent to incite imminent violence, and the violence could not be considered

96. *Rating Might Be Unlikely to Affect Teens Exposure to Smoking in Movies*, PHYS.ORG, *supra* note 89.

97. See Calvert, *supra* note 32, at 439.

98. See, e.g., *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972) (noting Congress showed sufficient evidence showing a relationship between smoking and broadcasting cigarette advertisements).

99. *James v. Meow Media, Inc.*, 300 F.3d 683, 695 (6th Cir. 2002).

100. *Id.* at 695–96.

101. *Id.* at 697.

102. *Id.* at 698.

103. *Id.*

104. *Id.*

105. In *Brandenburg*, the Supreme Court established a test to determine whether violent speech is unprotected. Speech that is directed to inciting imminent lawless action, and is likely to incite such action is considered unprotected. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

106. *Meow Media*, 300 F.3d at 698.

imminent.¹⁰⁷ After a thorough analysis of unprotected speech, the court declined to make any resolution of the constitutional issues, except to note that the constitutional concerns created a policy reason for refusing to attach tort liability.¹⁰⁸ This case exemplifies potential smokers' uphill battle in such claims against production companies for damages caused by smoking.

The *Meow Media* plaintiffs went on to argue that some speech that is fully protected when directed at adults may be regulated when directed towards minors, and thus defendants should be liable for failing to prevent the inappropriate materials from reaching minors.¹⁰⁹ The Sixth Circuit refused to impose tort liability for protected speech that was not sufficiently prevented from reaching minors.¹¹⁰ The court reasoned that limitations on speech directed at minors is an issue for legislative bodies and courts cannot adequately interpret speech limitations created in the course of a trial.¹¹¹ As such, this case leaves open the question of whether a legislative body could limit speech of filmmakers—depictions of cigarettes in movies—to protect minors.

V. Proposal

Government regulation has already successfully limited various other depictions of cigarettes. The ban on cigarette advertising has been deemed constitutional, but, as previously mentioned, it does not extend to movies because the FCC does not govern movies.¹¹² Currently, no regulations control cigarette depictions in Hollywood films, aside from the aforementioned (and arguably ineffective) addition of “smoking” to the MPAA rating criteria. This part of the note proposes a policy that would prevent cigarette depictions in movies from reaching minors.

Smokefree Movies, a research organization at University of California, San Francisco, advocates for any movie that depicts smoking or cigarettes to rated R in order to reduce youth exposure to cigarettes.¹¹³ This policy would discourage movie producers from placing cigarettes or smoking in movies because R-rated movies generally are not as economically

107. *Id.*

108. *Id.* at 699.

109. *Id.* at 696; *see also* *Sable Commc'ns v. Fed. Commc'n Comm.*, 492 U.S. 115 (1989).

110. *Meow Media*, 300 F.3d at 696–97.

111. *Id.*

112. 15 U.S.C. § 1335 (2012); *see generally* *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972).

113. *Policy: R-Rate Films with Tobacco*, SMOKEFREE MOVIES, <http://smokefreemovies.ucsf.edu/policy-solutions/r-rate-films-tobacco> (last visited Jan. 19, 2016).

successful as movies with less strict ratings.¹¹⁴ There is sufficient evidence to support a causal relationship between adolescent smoking and cigarette depictions in movies. A recent study found that PG-13- and R-rated movies affected smoking among youths equally.¹¹⁵ However, youth exposure to PG-13 movies is three times greater than that of R-rated movies.¹¹⁶ More adolescents watch PG-13-rated movies than R-rated movies, therefore eliminating smoking from PG-13 movies would reduce adolescent smoking by roughly eighteen percent.¹¹⁷ The study argues that giving those movies an R rating would significantly reduce youth smoking, but the MPAA is a private entity with no obligation to implement such a policy. The next section contemplates ways to pressure the MPAA to implement a similar policy.

A. MPAA Tort Liability

Legal action against the MPAA to seek damages for costs incurred and injuries caused by cigarettes may pressure the MPAA to give movies with depictions of smoking an R rating. Potential plaintiffs who bring a claim against the MPAA may not encounter the same duty and causation issues as in *Sanders* and *Meow Media*. Unlike the defendant movie production companies, the MPAA may owe a duty to consumers. When an entity on its own accord assumes the responsibility of advising consumers, the entity may assume a special duty to its consumers.¹¹⁸ The publicly stated mission of the MPAA and CARA is “to provide parents the tools they need to make informed decisions about what their children watch” and according to their website, ninety-three percent of parents find the ratings and descriptors useful while seventy-nine percent believe they are accurate.¹¹⁹ By voluntarily assuming the responsibility to provide information to parents and rate movies, the MPAA possibly owes a special duty to those parents.

Other cases shed light on whether the MPAA owes a duty. In *Delgado v. American Multi-Cinema, Inc.*, the California Court of Appeal rejected the plaintiffs’ argument that the movie theater assumed a duty of care when

114. *Id.*

115. James D. Sargent et al., *Influence on Motion Picture Rating on Adolescent Response to Movie Smoking*, 130 PEDIATRICS 228, 233 (Aug. 2012), <http://pediatrics.aappublications.org/content/pediatrics/130/2/228.full.pdf>.

116. *Id.*

117. *Id.* at 228.

118. See *Hanberry v. Hearst*, 276 Cal. App. 2d 680, 684 (Cal. Ct. App. 1969) (finding that Good Housekeeping owed a duty of care to consumers when it voluntarily entered the market and used its reputation to market other products).

119. *Film Ratings*, MPAA, *supra* note 60; Joan Graves, *Survey Shows 93% of Parents Find Film Ratings Helpful in Making Movie Choices*, MPAA (Nov. 30, 2015) <http://www.mpa.org/cara/#.VtVIMJMrKkY>.

it adopted the rating system, and breached that duty by failing to prevent an unaccompanied minor from viewing an R-rated movie.¹²⁰ The court reasoned that the rating system is meant to advise parents, and therefore any duty, if any, extends only to parents.¹²¹ Despite this conclusion, the court did not address the question of whether the MPAA owed any duty. In *Miramax Films, Corp. v. MPAA*, the court strongly suggested the answer is yes.¹²² In dicta, the court stated, “[i]f the MPAA chooses to rate films for the benefit of children it is its duty to do so with standards that have a rational and professional basis”¹²³ Although the court ultimately dismissed plaintiffs’ challenge to the rating system, the court warned that failure to adequately protect children could result in a viable legal challenge.¹²⁴

Even if a court finds the MPAA owes a duty, causation still remains a potential legal barrier. Plaintiffs would have to show through social science evidence that they began smoking due to cigarette depictions in movies, and they watched those movies because the MPAA did not adequately rate them. The chain of causation may be too attenuated to support a successful cause of action. Nonetheless, a court may still find that the MPAA owes a special duty to potential plaintiffs and impose strict liability. Arguably, the MPAA is misleading parents by failing to include “smoking” on all films that depict cigarettes.

Social science data is persuasive evidence of causation, but alone it may be insufficient to hold the MPAA liable for damages. Because social science data cannot prove anything absolutely true or absolutely false, Professor Calvert argues for a threshold for accumulation of consistent social science data.¹²⁵ When this threshold is met, a causal relationship can be established in a legal context.¹²⁶ According to various studies, depictions of cigarettes in movies have a stronger influence than traditional advertising.¹²⁷ For example, a New Zealand study found that the more often adolescents watched R-rated films, the more likely they were to begin to smoke.¹²⁸ Because the evidence suggests that there is a strong

120. 72 Cal. App. 4th 1403, 1406-07 (Cal. Ct. App. 1999).

121. *Id.*

122. *See* *Miramax Films Corp. v. MPAA, Inc.*, 560 N.Y.S.2d 730 (N.Y. Sup. Ct. 1990).

123. *Id.* at 736.

124. *Id.*

125. Calvert, *supra* note 32, at 456.

126. *Id.*

127. *About the Evidence*, SMOKEFREE MOVIES, <http://smokefreemovies.ucsf.edu/research/about-evidence> (last visited Jan. 19, 2016) (estimating that exposure to on-screen smoking accounts for thirty-seven percent of U.S. smokers under the age of eighteen).

128. *Rating Might Be Unlikely to Affect Teens Exposure to Smoking in Movies*, PHYS.ORG, *supra* note 89.

correlation between smoking depictions in films and youth smoking, social science evidence should prove successful in court. Accordingly, potential plaintiffs may be able to show causation.

B. Consumer Protection Laws

Another theory of MPAA liability stems from state consumer protection laws. In California, consumers can file a claim under the Consumers Legal Remedies Act (“CLRA”),¹²⁹ Unfair Competition Law (“UCL”),¹³⁰ and False Advertising Law (“FAL”).¹³¹ Under a fraud theory,¹³² consumers must show that the MPAA materially misrepresented the goods or services, consumers actually relied on the misrepresentation, and the reliance caused the harm.¹³³ For a statement to be a material misrepresentation, it must objectively be more than mere “puffery,” meaning vague and generalized statements that are incapable of being proven arbitrary.¹³⁴

With respect to movie ratings, the ratings are undoubtedly “material” because, according to the MPAA’s own survey, eighty percent of parents use the rating system when choosing films.¹³⁵ Given the formal rating process for every individual movie, the statements are more than generalizations and mere puffery. Therefore, a reasonable person would perceive the rating as a material representation. Proving the rating to be “false” may be more difficult because the ratings are essentially subjective. However, the widespread criticisms of the MPAA¹³⁶ indicate a factual basis for the false ratings because the MPAA has no standard or structural system for the ratings. Thus, the inconsistencies in the ratings render them false, or at a minimum, capable of being proven false.

Actual reliance only requires consumers to indicate, with particularity, the statement relied upon, as long as the advertisement conveys the allegedly fraudulent statement.¹³⁷ In the case of ratings, films are always

129. CAL. CIV. CODE §§ 1750, 1770(a) (West 2014).

130. CAL. BUS. & PROF. CODE § 17200 (West 2014).

131. *Id.* § 17500.

132. For claims based on fraud, the analysis is essentially the same under CLRA, UCL, and FAL. *Rasmussen v. Apple, Inc.*, 27 F. Supp. 3d 1027, 1044–45 (N.D. Cal. 2014); *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 793–94 (9th Cir. 2012); *In re Tobacco II Cases*, 46 Cal.4th 298 (Cal. 2009).

133. *Rasmussen*, 27 F. Supp. 3d at 1039; *Sateriale*, 697 F.3d at 794.

134. *Rasmussen*, 27 F. Supp. 3d at 1039; *In re Tobacco II Cases*, 46 Cal.4th 298.

135. *Why: History of Ratings*, CLASSIFICATION & RATING ADMIN., www.filmratings.com/why.html (last visited Jan. 19, 2016).

136. *See supra* Part II.b.

137. *Rasmussen*, 27 F. Supp. 3d at 1044.

shown with the rating attached. Consumers can easily indicate the specific rating relied upon and thus clearly satisfy this element.

Lastly, under the CLRA, consumers must show that the misrepresentation was the immediate cause of the harm.¹³⁸ This may be more difficult to prove, given the likelihood that the damages from smoking could take years to materialize. However, if a lawsuit was brought as a class action, courts infer harm from the materiality of the statements.¹³⁹ In other words, if the court finds the statements to be material misrepresentations that were made to every class member, causation is inferred.¹⁴⁰ Here, since movie ratings are clearly “material,” a court could infer causation. With regard to causation, the UCL and FAL only require a showing that members of the public are likely to be deceived, meaning that a significant portion of consumers can reasonably be misled.¹⁴¹ A large portion of the population is likely to be deceived because the MPAA’s self-reported high approval rating is sufficient to show that a majority of the population relies on the ratings. Therefore, consumers may succeed under any of the three statutes.

Even if potential plaintiffs are unsuccessful, legal action may put pressure on the MPAA to give greater weight to smoking in the rating criteria. Given the criticism and perceived declining legitimacy of the MPAA, the organization may want to avoid the bad publicity that typically accompanies notable legal action.

C. Government Regulation

Government regulation of the rating system is another possible solution. The government already regulates cigarettes in a variety of ways. Many local and state governments have banned the smoking of cigarettes in public places¹⁴² and have imposed a special tax on cigarettes.¹⁴³ The federal government regulates cigarettes by way of the CLAA, which prohibits most cigarette advertising and requires tobacco companies to label all cigarette packages.¹⁴⁴ The Tobacco Control Act furthers government control by giving the FDA authority to regulate cigarettes.¹⁴⁵

138. *Sateriale*, 697 F.3d at 793.

139. *Allen v. Hyland’s, Inc.*, 300 F.R.D. 643, 668 (C.D. Cal. 2014).

140. *Id.*

141. *Id.* at 667.

142. *E.g.*, CALABASAS, CAL., MUN. CODE § 8.12.040 (2006), https://www.municode.com/library/ca/city_of_calabasas/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.12SENDSMCO.

143. *Cigarette & Tobacco Products Licensing*, CAL. STATE BD. OF EQUALIZATION, http://www.boe.ca.gov/sptaxprog/cig_n_tob_prod_tax.htm (last visited Jan. 19, 2016).

144. 15 U.S.C. §§ 1333, 1335 (2012).

145. 21 U.S.C. § 387a (2012).

Though Congress and local governments have taken significant steps with regard to cigarette regulation, they must do so with the aim of preventing adolescent smoking.

If the government can regulate cigarettes so strictly in other areas, it should be able to regulate their appearances in movies by imposing an R rating for any movie with depictions of smoking. Any federal regulation of speech must still withstand a constitutional challenge. A court would first determine whether the speech is commercial. Courts have not clearly defined what constitutes “commercial speech,” but a court will usually consider whether it is a form of advertisement, whether it refers to a specific product, and whether the speaker has an economic motivation for the speech.¹⁴⁶ Movie ratings may be considered a form of advertisement because consumers use ratings when deciding whether to view a specific product: the film. Although the ratings may not be directly economically related, it is related to an economic motive. For example, informational pamphlets, alcohol content labels, and alcohol prices are all considered commercial speech.¹⁴⁷ The MPAA’s stated mission is to promote the business of filmmaking,¹⁴⁸ and thus likely falls under commercial speech.

The MPAA would counter that the movies and ratings fall under artistic speech and are thus entitled to full protection under the First Amendment.¹⁴⁹ Some circumstantial evidence indicates that tobacco companies still engage in product placement by illegally paying Hollywood producers to depict a specific brand of cigarettes in their films.¹⁵⁰ If these allegations are proven to be true, there is no doubt that the ratings and the cigarette depictions in movies are commercial speech, and therefore are entitled to less protection. Further, even if movies are artistic speech, the ratings themselves are unlikely to be artistic speech given their purely commercial purpose.

In order to enforce a regulation requiring all movies with depictions of cigarettes to be rated R, Congress would have to show that the regulation directly advances a substantial government interest and materially alleviates the problems of youth smoking.¹⁵¹ However, speculation and conjecture are not enough to substantiate a government interest.¹⁵² Many

146. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983).

147. *See generally id.* at 68 (holding that informational pamphlets are commercial speech); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (analyzing alcohol content labels under commercial speech standard); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (analyzing alcohol prices as commercial speech).

148. *Our Story*, MPAA, *supra* note 59.

149. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682 (1968).

150. *Mekemson & Glantz*, *supra* note 78.

151. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980).

152. *Rubin*, 514 U.S. at 487.

recent studies have concluded that movies significantly influence youth smoking and implementing this policy will decrease the problem by almost twenty percent.¹⁵³ Though it should be noted that the varying degree of evidence from social science studies could create an obstacle because not all studies have come to the same conclusion. The government also has a legitimate interest in reducing health care costs. Smoking causes cancer, lung disease, and heart attacks,¹⁵⁴ and many of these costs fall on local, state, and federal governments. According to the 2014 Surgeon General Report, sixty percent of smoke-related health care expenditures, totaling \$175.9 billion in 2013, were paid by public funds.¹⁵⁵ In 2004, the health-related cost of smoking totaled \$9.6 billion in California.¹⁵⁶ The MSA reimburses states for most of these costs, but some costs still may fall on federal and local governments. Even if the monetary costs do not constitute a legitimate state interest, the government has a significant interest in protecting its citizens—namely young people—from the health harms caused by smoking.

If the ratings were not deemed to be commercial speech, then the regulation would likely be considered a content-based restriction of artistic expression. Content-based restrictions are presumptively invalid and subject to strict scrutiny, meaning the regulation must be narrowly tailored to the government's objective, and there is no less restrictive alternative.¹⁵⁷ The proposed regulation is narrowly tailored as it only applies to movies shown to minors that depict cigarettes. Production companies have a very broad right to creative expression, but regulations that limit speech in order to protect minors have been upheld, including profanity, incitements of violence, and obscenity.¹⁵⁸ The legal issue here would be whether depictions of cigarettes fall under one of these categories.¹⁵⁹ The proposed regulation, however, would not necessarily limit the speech of movie producers. Rather, the MPAA would be required to give a certain rating to movies with smoking to protect minors from the content, which is not censorship at all.

153. *About the Evidence*, SMOKEFREE MOVIES, *supra* note 127.

154. *Health Effects of Cigarette Smoking*, *supra* note 1.

155. 2014 SURGEON GENERAL REPORT, *supra* note 4, at 675 (“Annual smoking-attributable estimated health care expenditures are between \$132.5 billion in 2009 to \$175.9 billion in 2013.”).

156. HEALTH & ECONOMIC CONSEQUENCES, CAL. DEP’T OF PUB. HEALTH & CAL. TOBACCO CONTROL PROGRAM (Mar. 2010), http://www.cdph.ca.gov/programs/tobacco/Documents/CTCPHealthEconCon_10.pdf.

157. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)

158. *Sable Commc’ns v. FCC*, 492 U.S. 115 (1989); *Ginsberg v. New York*, 390 U.S. 629 (1968).

159. This note will not explore this issue at length.

In *Brown v. Entertainment Merchants Association*, the Supreme Court struck down a California regulation that banned the sale of violent video games to minors and required their packaging to be labeled “18.”¹⁶⁰ The Court rejected the state’s argument that violence falls into the unprotected speech category of obscenity, and therefore applied strict scrutiny.¹⁶¹ The Court reasoned that the self-regulating rating system was effective and filling the gap of concerned parents was not a compelling state interest since no significant link existed between violent video games and their influence on youth.¹⁶² The Court found that the regulation was overinclusive because it included children with parents who did not care if they purchased violent video games.¹⁶³ The regulation was also underinclusive because it failed to include other violent media, such as violent books or cartoons.¹⁶⁴

At first glance, *Brown* seems to indicate that the proposed legislation would also fail to survive a constitutional challenge. Courts and litigants should recognize, however, the significant differences between the California law and the proposed regulation. In tobacco-related cases, ample studies support the conclusion that movies have a significant influence on youth smoking.¹⁶⁵ This suggests that there are more concrete government interests with regard to adolescent smoking. The government has a legitimate interest in preventing the youth population from the harms of cigarettes. Smoking causes serious health problems,¹⁶⁶ thus raising the cost of medical expenses that are eventually borne by the state.¹⁶⁷ The proposed regulation is also narrowly tailored because it only pertains to depictions of cigarettes, as opposed to the blanket term of “violence.” Initially the regulation may appear underinclusive because it only applies to movies, rather than all media (such as television), but the government already regulates cigarettes through other mediums. Since the government has the ability to regulate cigarettes under the CLAA and the Tobacco Control Act, arguably the proposed regulation on the movie rating system is another form of regulating cigarettes. Nonetheless, a court may still find that the self-regulating MPAA rating system is effective, and therefore,

160. 131 S. Ct. 2729 (2011).

161. *Id.* at 2738 (“Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.”).

162. *Id.* at 2741.

163. *Id.*

164. *Id.* at 2740.

165. 2012 SURGEON GENERAL REPORT, *supra* note 3, at 564; Sargent et al., *supra* note 115, at 229.

166. See 2012 SURGEON GENERAL REPORT, *supra* note 3.

167. *Id.* at 674.

there is no need for government intervention. Although the proposed legislation would be a successful solution to the problem of adolescent smoking, many organizations would likely express opposition. Nevertheless, the regulation may withstand a constitutional challenge despite the broad protection afforded to production companies.

Lastly, one must consider whether the regulation would actually be effective. A study in New Zealand found that ninety-four percent of fourteen- and fifteen-year-olds in the sample watched R-rated movies, and thirty-eight percent watched them on a weekly basis.¹⁶⁸ According to the study, the proposed regulation would be ineffective because minors still have access to R-rated movies. The study did agree, however, that there is a strong correlation between adolescents who watch R-rated films and adolescents who smoke.¹⁶⁹ Further, this single study is not enough to conclude that the regulation would not be effective because studies conducted in the United States almost unanimously agree that depictions of cigarettes in movies is a major cause of youth smoking. As mentioned above, there is significant persuasive evidence supporting the conclusion that cigarettes in movies have a substantial influence on youth smoking.

VI. Conclusion

Currently, courts hesitate to impose tort liability on production companies due to constitutional issues. The companies may also claim that the First Amendment provides robust protection of creative expression in movies. Courts and legislatures, however, should recognize a serious problem with the number of individuals who begin smoking at a young age. It is widely conceded that depictions of cigarettes in movies and other media have a substantial influence on youth smoking habits. The best solution to this problem is to give an R rating to all movies that depict smoking. As a result, movie producers would be inclined to remove smoking from films because R-rated films are generally less profitable.¹⁷⁰

The MPAA is a private organization, and therefore it is difficult to enforce any type of regulation with regard to movie ratings. If the MPAA was held liable for damages caused by cigarettes due to inadequate ratings, the liability or threat of liability may pressure the organization to give stricter ratings to movies that depict smoking. Plaintiffs must overcome the many legal hurdles, most importantly the First Amendment. But holding the MPAA liable would not have any chilling effect on free speech because

168. *Rating Might Be Unlikely to Affect Teens Exposure to Smoking in Movies*, PHYS.ORG, *supra* note 89.

169. *Id.*

170. *Policy: R-Rate Films with Tobacco*, SMOKEFREE MOVIES, *supra* note 113.

the MPAA's speech would not be impeded. Rather, the MPAA could be held liable for failing to adequately provide film ratings to parents, which would not implicate any First Amendment issues.

If that is unsuccessful, the threat of government implementation of the proposed regulation may pressure the MPAA to act. Any legislation would be subject to strict or intermediate scrutiny, but there is a legitimate government interest in protecting youths from seeing that type of behavior. The government also has an interest in minimizing health care costs, which is negatively affected by smoke-related illnesses. The regulation would further pressure movie production companies to decrease the amount of smoking pictured in movies in order to avoid an R rating.

Regardless, any of these proposed solutions are a step in the right direction toward solving the problem of adolescent smoking. The enormous health risks as well as health care costs outweigh any hesitation to act. Fewer depictions of smoking in movies will lead to fewer individuals who will begin smoking at a young age.

* * *