Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries: From the Mickey Mouse Club to Hustler Magazine

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Rediscovering Traditional Tort Typologies
to Determine Media Liability for
Physical Injuries: From the Mickey
Mouse Club to Hustler Magazine

by JOHN L. DIAMOND*
and
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Introduction

Confusion exists in the courts over when to impose liability on media defendants for physical injuries. While media defendants are regularly subjected to claims of defamation,1 invasion of privacy,2 and sometimes intentional infliction of emotional

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distress,3 claims of liability for physical injuries caused by media publication have most often been rejected over concern about infringing on first amendment protection.4 Courts have inappropriately denied liability by failing to differentiate among kinds of media liability cases and by failing to analyze them as they would other similar tort cases.5

Imposing tort liability on media speech involves the type of regulation “aimed at communicative impact” because liability is imposed for specific effects produced by awareness of the information conveyed.6 The communicative impact of speech is usually deemed “fully protected” and can only be restricted in extraordinary circumstances. Only if speech falls into that class of speech which is considered subordinate will the courts more routinely uphold the direct regulation of content.7

Supreme Court decisions have acknowledged that some

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4. But see the discussion of Weirum v. RKO Gen., Inc., infra notes 73-80 and accompanying text.


6. L. Tribe, AMERICAN CONSTITUTIONAL LAW 581 (1978). Professor Tribe suggests that speech regulation can be viewed as one of two types, that which is aimed at communicative impact or that which is “aimed at non-communicative impact but nevertheless having an adverse effect on communicative opportunity.” Tort liability falls under the type aimed at communicative impact since it singles out “actions for government control or penalty either (a) because of the specific viewpoint such actions express, or (b) because of the specific effects produced by awareness of the information such actions impart.” Id. at 580 (emphasis added).

7. “Except when low value speech is at issue, the Court has invalidated almost every content-based restriction that it has considered in the past quarter-century.”
speech is inherently less worthy of protection than other speech. In *Chaplinsky v. New Hampshire*, the Court observed that

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. Those include the lewd and obscene, the profane, the libelous and the insulting or fighting words. . . . [These classes of speech are] no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Since *Chaplinsky*, the Court appears to have consistently stratified speech, finding certain classes to be subordinate to others on a hierarchical scale.

Efforts to impose liability on media induced physical injuries commonly focus on the incitement category of subordinated speech. Media liability is, consequently, often limited to injuries arising only when the incitement test of *Brandenburg v. Ohio* is met.

*Brandenburg* reversed the criminal conviction of a Ku Klux Klan leader who had been charged with violating Ohio’s criminal syndication act. Overruling an earlier decision which had upheld a similar syndication law, the Court held that advocacy of violence was protected so long as it did not intention-

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8. 315 U.S. 568 (1942).
9. Id. at 571-72 (footnote omitted).
13. Id.
ally incite people to imminent lawless action.\textsuperscript{15}

The Brandenburg test is commonly construed to require the fulfillment of three elements for speech to be deemed incitement: "(1) the speaker subjectively intended incitement; (2) in context, the words used were likely to produce imminent lawless action; and (3) the words used by the speaker objectively encouraged and urged incitement."\textsuperscript{16}

The Brandenburg standard provides an almost impenetrable barrier to plaintiffs seeking redress for injuries caused by media defendants.\textsuperscript{17} Most media portrayals do not involve direct advocacy of unlawful conduct, but will only indirectly incite someone to action.

However, it may not always be appropriate to apply the limits against criminal sanctions imposed by Brandenburg in civil liability cases.\textsuperscript{18} Some speech may be regulated more appropriately according to traditional tort typologies. Historically, common law tort doctrine in specific contexts has routinely imposed civil liability for communications proximately causing injuries. Carrying the traditional common law tort analysis into the realm of the mass media, within some narrowly defined classifications, should prove more constructive than routinely imposing the Brandenburg incitement standard.

The purpose of this Article is to suggest how some cases involving physical injuries caused by media defendants should be classified into traditional tort typologies. The proper differentiation of these cases would insure against diminution of first amendment rights, minimize unreasonable risks of physical injuries, and provide just compensation for culpably caused injuries.

\textsuperscript{15} 395 U.S. at 447.

\textsuperscript{16} J. Nowak, R. Rotunda, & J. Young, Constitutional Law 864 (1986) (emphasis in original). Professor Tribe suggests that the Brandenburg test combines the best of two previous views: Judge Learned Hand's incitement test and Justices Holmes' and Brandeis' concern that harm is likely to occur—usually expressed as the clear and present danger test. L. Tribe, supra note 6, at 615.


\textsuperscript{18} Some commentators have suggested that under Brandenburg, only direct incitement is sufficient to pass the standard. Linde, "Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concept, 22 Stan. L. Rev. 1163, 1185 (1970). Others have felt that it "is at best unclear as to whether the requirement [of direct incitement] has been adopted." Shiffrin, Defamatory Non-Media Speech & First Amendment Methodology, 25 UCLA L. Rev. 915, 947-48 n.206 (1978).

Three categories of cases are presented. Category One contains cases involving instructions or directions promulgated by media defendants. This section argues that media defendants should be subject to the same negligence liability which has traditionally been applied to instruction cases. Category Two considers potential tort liability for media sponsored or promoted activities and examines the liability imposed on promoters and sponsors. Again it is argued that there should be no distinction between media and non-media defendants. Finally, Category Three includes cases involving media stimulated violence which causes physical injuries. In contrast to Categories One and Two, negligence is inapplicable. Except for certain limited exceptions involving obscene or commercial speech, the balancing test to determine liability would require that the value of ideas be weighed impermissibly against their potential for causing harm.

I

Category One: Instructions

In *Walt Disney Productions, Inc. v. Shannon*, the Georgia Supreme Court considered a child plaintiff's suit against companies responsible for the broadcast of the "Mickey Mouse Club" on television. On the particular show that was the subject of the lawsuit, the following was announced: "Our special feature on today's show is all about the magic you can create with sound effects." Following this announcement, one of the participants in the special feature showed the audience "how to reproduce the sound of a tire coming off an automobile by putting a BB pellet inside a 'large, round balloon,' filling the balloon with air, and rotating the BB inside the balloon.

Shannon Craig, the eleven-year-old plaintiff, attempted to repeat the sound effect he had just seen on television by using a piece of lead twice the size of a BB pellet and placing it inside a "large skinny balloon." Craig inflated the balloon and it burst, propelling the lead into Craig's eye, partially blinding

20. Id. at 402, 276 S.E.2d at 581.
21. Id.
22. Id. The trial court granted the defendants' motion for summary judgment under general tort principles and on first amendment grounds. The state court of appeals reversed the summary judgment, declining to rule as a matter of law that the defendants could not be held liable. Id.
him. The Georgia Supreme Court held that the first amendment banned the suit.23

The court ruled that the first amendment required greater protection for the media defendant than would be afforded under the ordinary tort typology of negligence.24 The Georgia court considered the Brandenburg test, concluding that it was inappropriate to the case.25 Instead, the Disney court adopted a clear and present danger standard whereby "an utterance can be suppressed or penalized on the ground that it tends to incite an immediate breach of peace, 'if the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent.'"26

Under this standard, the court balanced the risk of injury against the harm caused by suppression of speech. The court concluded that there may have been a foreseeable risk of injury. However, only one out of fourteen million children who viewed the program actually suffered an injury. Consequently, the court held that there was insufficient evidence to sustain a finding of clear and present danger of injury and ruled in favor of the defendants.27 The court, expressing the concern that there could be a future chilling effect on speech, decided that

23. Id.
24. Id. at 404, 276 S.E.2d at 582.
25. Id. at 403 n.2, 276 S.E.2d at 582 n.2. See the discussion of the Brandenburg standard, supra notes 12-17 and accompanying text. In Disney, the court reasoned that even if Brandenburg was applicable, there was nothing in what the plaintiff was allegedly invited to do that was "imminently lawless."
26. Id. at 404, 276 S.E.2d at 582 (quoting Schenck v. U.S., 249 U.S. 41, 42 (1919)). The clear and present danger test may actually represent an attempt at a somewhat easier to reach standard than Brandenburg. The Brandenburg test was developed in the 1960s when the Supreme Court was attempting to protect the advocacy of unpopular ideas. See J. Nowak, R. Rotunda & J. Young, supra note 16, at 862. Before Brandenburg, the clear and present danger test had been viewed as a balancing test which could sometimes result in the suppression of speech. Under the clear and present danger balancing test, courts weighed the competing interest of free speech against the seriousness of the danger to be regulated. It could sometimes result in severe limitations on speech, since the danger did not have to be imminent or even lawless, but merely great. Thus, in one case in the 1950s, the court found that the advocacy of violent overthrow of the government could be suppressed even if doomed from "the outset because of inadequate numbers or power of the revolutionists" because the danger of violent overthrow of the government was a very grave danger. Dennis v. United States, 341 U.S. 494, 509 (1951).
27. 247 Ga. at 405 & n.4, 276 S.E.2d at 582 & n.4. The Georgia Supreme Court distinguished the Disney case from "'Pied Piper' cases, in which street... vendors attract children into the street [and] have been held liable for failure to protect them
the risk of suppression of speech was considerably greater.\textsuperscript{28} Thus, the opinion reasoned that the minimal danger presented by the speech, as evidenced by the low number of reported injuries, did not outweigh the greater risk of a chilling effect on speech.\textsuperscript{29}

The court in \textit{Disney} would have more properly decided the

\begin{quote}
against traffic.” \textit{Id.} at 405, 276 S.E.2d at 583 (quoting \textit{W. Prosser, Law of Torts} 172 (4th ed. 1971)).

An example of one such “Pied Piper” case is \textit{Roberts v. American Brewed Coffee}, 40 Ohio App. 2d 273, 319 N.E.2d 218 (1973). In \textit{Roberts}, the plaintiff, a four-year-old, was struck by a car when attempting to cross a street to reach the defendant’s ice cream truck. The plaintiff accused the defendant of negligence for stopping the ice cream truck at a spot where there was no intersection or crosswalk, when the defendant knew children would be encouraged, by the sight of the truck and the music it played, to cross the street. In reversing an order dismissing the complaint, the court quoted a previous Ohio Appellate Decision: “for children to cross without direct supervision is fraught with danger... In our opinion, the risk to a child is obvious and substantial. The defendants owed a duty to exercise reasonable care to protect the child customer from that obvious hazard.” \textit{Id.} at 275, 314 N.E.2d at 220 (quoting \textit{Thomas v. Goodies Ice Cream Co., 13 Ohio App. 2d 67, 68, 233 N.E.2d 876, 878 (1968)}).

See also \textit{Neal v. Shieles Ice Cream Co.}, 166 Conn. 3, 347 A.2d 102, (1973); \textit{Ellis v. Trower Frozen Prods., Inc.}, 264 Cal. App. 2d 499, 70 Cal. Rptr. 487 (1968); \textit{Reid v. Swindler}, 249 S.C. 483, 154 S.E.2d 910 (1967). The \textit{Disney} court concluded that the “Pied Piper” cases require “(1) an express or implied invitation extended to the child to do something posing a foreseeable risk of injury and (2) the defendant must be chargeable with maintaining or providing the child with the instrumentality causing the injury.” 247 Ga. at 405, 276 S.E.2d at 583. The \textit{Disney} court stated that the second element was “undisputably absent” and, consequently, the risk must constitute a clear and present danger of injury, and not merely ordinary negligence. \textit{Id.}

It is not clear how the court in the \textit{Disney} case could characterize “Pied Piper” cases as requiring that the defendant be chargeable with “maintaining or providing the child with the instrument causing the injury.” \textit{Id.} The section from Dean Prosser’s treatise includes “Pied Piper” cases as among those where a defendant’s standard of reasonable conduct must take into account the likelihood that children will behave with less care and prudence than adults. Consequently, the treatise cites, along with “Pied Piper” cases, the danger that a child will dash into the path of a car, meddle with a turntable, or scramble for candy that is thrown at them. \textit{W. Prosser, Law of Torts} 172-73 nn.43-44, 477 (4th ed. 1971). Yet it is a misreading of both the treatise and the actual facts of the “Pied Piper” cases to infer a need for liability to depend on supplying an instrumentality.

Further, the particular vulnerability of children does not affect the general tort practice of imposing liability for negligent acts or misrepresentations involving the risk of physical harm. The \textit{Restatement of Torts} commentary expressly recognizes that the unreasonable “risk may lie in the probability that the third person may conduct himself carelessly or unskillfully, or without adequate preparation or warning, in doing an act which the actor’s conduct is intended or likely to cause him to do.” \textit{Restatement (Second) of Torts} § 303 comment c (1965). Section 303 states: “An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of another, a third person, or an animal in such a manner as to create an unreasonable risk of harm to the other.” \textit{Id.}

\textsuperscript{28} 247 Ga. at 404 & n.2, 276 S.E.2d at 582 & n.2.
\textsuperscript{29} \textit{Id.} at 405 & n.4, 276 S.E.2d at 582 & n.4.
case under a negligence theory of liability. Cases such as Disney should be treated in the same manner as courts have treated erroneous instruction cases outside of the media context. Liability has frequently been imposed on manufacturers for errors in instructions in navigational charts and for errors in instructions accompanying products. Indeed, not only has negligence liability been imposed on chart makers and other manufacturers, but strict liability for defects in the product's design has been imposed regardless of fault in the manufacturing and design process.

The purveyor of a product may often be held liable, even without proof of negligence, for the dangerous condition of the product if it results in an injury to the user. This notion has


Articles which do not disclose to the ordinary intelligence their properties, either by their appearance or by the information contained on their labels, must be bought and used in reliance upon the competence and care of those who put them out to make them safe for the purposes for which they are advertised and sold, and in reliance upon the directions, in the advertisement or on the containers, given as adequate to make it safe to use the chattel in the manner directed. The maker of such article is, therefore, required not only to exercise reasonable care to adopt a formula which will make the chattel safe for its advertised use, but also to exercise reasonable care to make such directions as he appends to the chattel adequate to secure its safe use. If the chattel is one which can only be safely used for the purposes for which it is sold if adequate directions are given, a maker is required to exercise care to bring such directions home to those who may be expected to use it. If the improper use of the chattel involves grave risk of serious bodily harm or death, the maker of it does not satisfy his duty by informing the person to whom the chattel is supplied. In such case, he is required to make the chattel carry its own directions by placing them upon the container.

32. The definition of design defect may be open to question. Rather than attempting to define design defects in terms of consumer expectations, strict products liability should be viewed in terms of traditional notions of strict liability. Traditional strict liability avoided the definitional ambiguities of the concept of what constitutes a defective product by focusing on the dangerousness of the activity engaged in by the defendant. See Diamond, Eliminating the "Defect" in Design Strict Liability Theory, 34 HASTINGS L.J. 529 (1983).

Special Liability of Seller of Product for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dan-
been termed strict products liability by both the Second Restatement of Torts and case law. While the application of strict products liability to media defendants is probably inappropriate, the reasoning of strict products liability cases argues for, at the very least, the imposition of negligence liability in the mass media context.

The courts have advanced at least three rationales for holding the manufacturer of a product strictly liable. These reasons apply equally to some mass media entities.

First, courts and commentators have suggested that the costs associated with injuries resulting from unreasonably dangerous defective products are best borne by the manufacturers. Manufacturers are viewed as being in the best position to spread the risk of loss among all who buy the product.

It is also argued that strict products liability will actively promote safety. Allowing injured plaintiffs to avail themselves of the theory of strict products liability will “cause manufacturers to take cautionary steps to prevent the marketing of dangerously defective products.”

A third rationale for strict products liability is the notion that the costs and institutional stresses on the judicial system outweigh the need for proof of fault of negligence under the circumstances of the sale of an unreasonably dangerous and


35. Lewis v. Timco, Inc., 716 F.2d 1425, 1434 n.2 (5th Cir. 1983).


37. First Nat'l Bank, 88 N.M. at 87, 537 P.2d at 695; but see Raleigh, The "State of the Art" in Product Liability: A New Look at an Old "Defense", 4 OHIO NORTH L. REV. 249 (1977). Raleigh argues that strict liability applied to product manufacturers may actually operate to chill innovation in new product design and manufacture. Thus, while we may arguably create a safer world through the imposition of strict products liability, we may find fewer products available.
defective product.\textsuperscript{38} To some degree, this reasoning hinges on a limited and unambiguous definition of product defect.\textsuperscript{39}

When and if strict products liability should be applied, and what in fact constitutes a defect in the context of media induced physical injury remains problematic. Arguably, however, the rationales of strict products liability, including the manufacturer's ability to spread the economic loss due to injury, increased safety precautions, and allocation of stress on the judicial system, could apply equally as well to mass media products as they do to any other mass produced consumer item.

Mass produced writings are commonly the focus of strict products liability actions. Often, the defective part of a product may be a set of accompanying instructions, or the failure to provide adequate warnings. While there may be some distinctions between defective warnings and defective instructions, each case clearly involves that which is mass produced speech, resulting in physical injury to the consumer.\textsuperscript{40}

A recent case, \textit{Emerson G.M. Diesel v. AK Enterprises},\textsuperscript{41} upheld a judgment against a manufacturer in a strict products liability action for injury resulting from insufficient instructions provided with shipping components. The manufacturer failed to specifically instruct its customers on the installation of temperature sensing devices. When the temperature sensing device was left out, the engine of the ship was destroyed. The court applied strict products liability theory and found that the inadequate instruction rendered the product defective.\textsuperscript{42}

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\textsuperscript{38} \textit{See First Nat'l Bank}, 88 N.M. at 87, 537 P.2d at 695. The imposition of strict products liability will cause "preventive measures [to be taken which] may avert tragedies . . . and thereby save our system the cost of lawsuits."

\textsuperscript{39} \textit{See Prosser & Keeton}, supra note 33, at 693.

\textsuperscript{40} Warnings and instructions are distinguishable since the duty to warn is not necessarily eliminated by furnishing instructions if additional dangers may be encountered if the instructions are not properly followed. \textit{See American Law of Products Liability 3d} 19 § 32:15 at 2b (1987) ("Blant instructions, which if followed involve no risk, are no substitute for a skull and crossbones warning."). \textit{But see} Antcliff v. Stock Employees Credit Union, 414 Mich. 624, 630, 327 N.W.2d 814, 820 (1982), noting that the distinction between instructions and warnings is nebulous at best and there may be little reason to attempt to distinguish them.

Commentators and courts have suggested that warnings and instructions should be distinguished. One treatise points out that "[i]nstructions are to be followed to secure the most efficient or satisfactory use of the product; warnings are instructions as to dangers that may arise if the instructions are not followed." \textit{American Law of Products Liability 3d}, supra, § 32:15 at 26.

\textsuperscript{41} 732 F.2d 1468 (9th Cir. 1984).

\textsuperscript{42} \textit{Id.} at 1475. \textit{See also} Contcarriers & Terminals, Inc. v. Borg-Warner Corp., 593 F. Supp. 400, 403 (E.D. Mo. 1984) (failure of manufacturer to properly instruct vessel's
The failure to provide sufficient written warning has often resulted in a product being termed unreasonably dangerous even though the product is otherwise free of other design or manufacturing defects. The producers of a product have been found liable in cases where warnings attached to products, as well as verbal warnings, were found to render a product dangerously defective. The courts focus in these cases on the inadequacy of the speech to protect the consumer from what is otherwise a safe product.

Strict products liability has been regularly imposed in at least one area of what may be termed mass communications: the mass produced aviation chart. Aviation charts are essentially maps, although they contain much more detailed information than would commonly be found on a road map. Indeed, they may actually be said to graphically present instructions.

In *Saloomey v. Jeppesen & Co.*, the court imposed strict products liability on the chart publisher, despite the fact that the error in data was attributed to the government. The defective nature of the chart was found to be the proximate cause of a resulting plane crash. Since the court ruled that strict products liability applied, the finding that the chart's defect was the proximate cause of the crash was sufficient to hold the

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owner and installer resulting in damage to ship, properly resulted in the application of strict products liability); Hoychick v. Gulf States Toyota, Inc., 386 So. 2d 681 (Ct. App. La. 1980) (sufficient instructions were given in a car owner's manual concerning the proper method in removing the car's oil filter and, thus, the product was not rendered defective).


47. There are essentially three types of aviation charts available: enroute charts, describing large geographic areas, e.g., several states; area charts, which provide a more detailed account of a local metropolitan area; and approach charts, which depict the precise area near a runway. Approach charts, often the subject of litigation, may include information about obstructions along an approach course, as well as symbols and abbreviations informing a pilot of pertinent information on a given approach, all on a 4x7 inch card. *See McLowen, Liability of the Chartmaker*, 1980 INS. COUNCIL J. 360.

48. 707 F.2d 671 (2d Cir. 1983).

49. *Id.* at 677.
Publisher liable for the death of the pilot. 50

Courts considering whether to impose strict products liability to media representations are most concerned with whether there is actually a product involved. The court in Salooomey found the airplane chart to be a product since there had been no "substantial change in contents — they were simply mass-produced." 51 The mass production of the charts distinguished them from the situation involving the rendition of service where strict products liability does not apply. As one court has pointed out, "[i]f suitable for mass marketing, the information is in some sense a fungible good for which manufacturer[s] placing it on the market must assume responsibility." 52

The majority of cases outside of the chart area involving the mass media have not found media creations to be products. A recent case, Cohen & Co., Inc. v. Dun & Bradstreet, Inc., 53 held that a credit report issued by Dun & Bradstreet was not a product. The court sought to distinguish the credit report from the chart cases by explaining that the charts "did not constitute speech protected by the First Amendment." 54 Indeed, the court found that the "imposition of liability without fault on the publisher of a credit report . . . would be just a short step from the imposition of liability without fault on an investigative reporter, a political columnist or a documentary filmmaker." 55

Within the realm of books, the courts have been quick to acknowledge that books are products, but only to the extent that the book can be said to constitute the tangible items of printing

50. Id. Other cases involving charts manufactured by Jeppesen have come out similarly. See Aetna Casualty & Surety Co. v. Jeppesen Co., 642 F.2d 339 (9th Cir. 1981); De Bardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971).

51. Salooomey, 707 F.2d at 676.

52. Halstead v. United States, 535 F. Supp. 782, 791 (D. Conn. 1982); See RESTATEMENT (SECOND) OF TORTS § 402A comments c, f (1965). A service is said to have been provided, rather than the sale of a good or product where "(1) there is a pure personal service transaction and no tangible chattel is involved in the transaction, as in the case of a soils engineer who gives his opinion on whether or not a particular building site is suitable; or, (2) a defendant contracts to 'render service' in repairing or installing a non-defective product (tangible chattel)." McLowan, supra note 47, at 363.

53. 629 F. Supp. 1425 (D. Conn. 1986). The court recognized that "the Supreme Court has indicated that credit reports, while not meriting the level of protection accorded to debate on matters of public concern, are nonetheless a form of speech protected by the First and Fourteenth Amendments" (citing Dun & Bradstreet, Inc. v. Greenmoos Builders, Inc., 105 Sup.Ct. 2939 (1985)).

54. Id. at 1431 n.8.

55. Id. at 1431.
and binding, and other items of a physical nature. In *Cardozo v. True*, the court distinguished between the tangible properties and the thoughts and ideas conveyed by a cookbook. The court suggested that in cases such as these, imposing strict liability would restrict the flow of ideas. "The common theme running through these decisions is that ideas hold a privileged position in our society. They are not equivalent to commercial products."

Judicial attempts to articulate a truly principled distinction between the in part non-verbal communications in navigational charts from a presumably non-pictorial credit report may, like other borderline cases, be problematic. Nevertheless, the intangible nature of communication, whether written or broadcast, renders it unlike the ordinary commercial product. Indeed, such media speech is more akin to services where liability clearly lies in negligence, not in a strict products liability action. As with services, such as an attorney providing advice, or a travel agency selecting transportation for a client, it is the communication, and not a tangible physical good for its own sake, which is being sold. Consequently, strict products liability appears inappropriate.

However, writings and oral communications may often expose one to a negligence action. Most of these cases occur in an interpersonal communication setting. Yet, there is no reason

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58. *Id.* at 1056. The case involved a cookbook which was an anthology of recipes using tropical fruits and vegetables. Ingrid Cardozo purchased the cookbook and, while following a recipe for the Dasheen plant (elephant ears), ate a small slice of the plant and became severely ill, requiring medical care. *Id.* at 1054. The plaintiff alleged that the book had inadequate instructions. Additionally, Cardozo claimed failure to warn that uncooked Dasheen roots are poisonous and breach of the implied warranty that the book was reasonably fit for its intended use. *Id.* at 1054-55.

59. *Id.* at 1056.


61. *See Frosser & Keeton, supra* note 33, at 720.


for the courts to distinguish such cases on a media-nonmedia basis. Instead, the courts should impose the traditional tort typology of negligence if the elements of the tort are met.

Thus, within the area of professional malpractice, doctors are often held liable for failing to communicate fully to a patient the effects of an operation. This is the so-called doctrine of informed consent which requires doctors to disclose the potentially harmful effects of a treatment to a patient so that he or she can make an informed decision as to whether or not to go through with the treatment. Here the doctors are held to a negligence standard rather than strict liability since they provide a service and not a product.

Similarly, attorneys may be held liable in a malpractice action for negligently preparing written or verbal communications. The writings of the attorney, while often characterized as “work products” are actually part of his or her services and, thus, do not subject the lawyer to a strict liability standard.

Courts have sometimes recognized that the judicial system should not refrain from imposing liability for negligence merely because speech is disseminated widely. For example, in Reminga v. United States the United States was found negligent under the Federal Tort Claims Act for failing to show the proper location of a television tower in the proximity of the airport on a chart it produced. The court considered the improper notation on the mass produced maps as subjecting the defendant to the same potential liability as the failure of the Coast Guard to properly operate a lighthouse or the failure of an air traffic controller to inform an airplane pilot of the cor-

64. See generally, D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE 22.01 (1981); PROSSER & KEETON, supra note 33, at 189-93.
67. 631 F.2d 449, 451-52 (6th Cir. 1980).
68. The chart was a “sectional map” depicting a specific zone around a metropolitan area. Id. at 450.
69. 631 F.2d at 452 (citing Indian Towing v. United States, 350 U.S. 61 (1955)).
rect prevailing visibility.\textsuperscript{70}

The \textit{Reminga} court, if not precluded by the Federal Torts Claims Act from doing so, might have followed reasoning similar to that of the \textit{Saloomey} chart case and imposed strict products liability based on the map's mass production. On the other hand, maps may be more akin to services than to tangible products and should not, therefore, be treated under strict products liability. What is ironic, and particularly inappropriate, however, is for courts, in cases like \textit{Disney}, to find that mass-production, which, if anything, argues for strict products liability, is a basis for immunizing the media from ordinary negligence.

The fact that the negligent instructions which caused the injury in \textit{Disney} occurred in a mass communications context should not generate a different result than would occur in ordinary interpersonal settings, as in communications between air traffic controller and pilot or lawyer and client. While strict products liability should probably not be imposed on media defendants for purely verbal communication,\textsuperscript{71} an action in negligence should not be precluded where it traditionally has arisen in interpersonal communication settings simply because a media defendant is involved. At the very least, mass production and the harm mass defects can potentially cause, strengthens the argument for liability. Nor is it likely that imposing liability for negligence would pose constitutional problems in this context. The United States Supreme Court has required a showing of no more than "fault" or negligence in private defamation cases against the media.\textsuperscript{72} Victims of physical injury would appear to command an even more compelling justification for imposing liability for injuries caused by media negligence.

\section{II}

\textbf{Category Two: Media Sponsored Activities As a Basis for Liability}

Not only has the media been insulated from liability when providing instructions, but courts have also given undue protec-

\textsuperscript{70} Id. (citing Ingham v. Eastern Air Lines, Inc., 373 F.2d 227 (2d Cir.), \textit{cert. denied}, 389 U.S. 931 (1967)).

\textsuperscript{71} Maps and charts may create a special category on the fringes of products liability, but this Article does not decide if the analysis in cases like \textit{Saloomey} was appropriate.

tion to media defendants when sponsoring or promoting activities. When media defendants act as sponsors and promoters they, like non-media defendants, should be subject to negligence liability.

In *Weirum v. RKO General, Inc.*, the California Supreme Court upheld a wrongful death verdict against the owner of a Los Angeles radio station (KHJ). The station, which commanded a 48 percent plurality of the teenage audience in the Los Angeles area, sponsored a promotion entitled "The Super Summer Spectacular," which was designed to make the radio station "more exciting." The promotion included a contest broadcast in which KHJ disc jockey and television personality, "The Real Don Steele," traveled in a conspicuous red automobile to different locations in the Los Angeles area. Periodically, the station would broadcast information on Don Steele's destination to its listeners and offer a cash prize to the first to physically locate him and also meet other specified conditions. Two teenage listeners rushed to locate Steele based on broadcast clues. One of them forced a third car off the road, resulting in the driver's death.

The California Supreme Court rejected the defendant's argument that the first amendment protected the radio station from civil liability. The court observed that "the First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act." The court described the giveaway contest as "a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit."

A subsequent California appellate decision, in commenting on the "broad" language used in *Weirum*, emphasized its relatively limited application. "The *Weirum* broadcasts actively and repeatedly encouraged listeners to speed to announced locations. Liability was imposed on the broadcaster for urging listeners to act in an inherently dangerous manner."
In fact, it is questionable whether the broadcaster’s statements “urged” listeners to engage in “inherently dangerous driving” or encouraged “speeding,” if that word is used to connote unlawful speeds. What the radio station clearly did, however, was effectively promote a group activity which, without even promoting unlawful or dangerous driving, posed unreasonable risks as the race was conducted. In this sense, Weirum clearly conforms with other decisions imposing liability for the negligent manner in which a race is conducted by its promoters.

Promoters are routinely held liable for negligence in organizing races. In American Motorcycle Association v. Superior Court, the plaintiff sued the promoter of a cross-country motorcycle race for having negligently “designed, managed, supervised and administered the race.” The California Supreme Court acknowledged that such liability was possible and determined that the sponsor could seek indemnity from a joint tortfeasor. Indeed, in most cases promoters who are negligent are liable unless they can present evidence of a valid express or implied assumption of risk by participants. Nevertheless, courts continue to fail to apply traditional tort decisions to activities promoted by the media. In Bill v. Superior Court, the plaintiff sued the producers of an allegedly violent film after she was shot by other patrons also leaving a showing of the movie “Boulevard Nights” at the Alhambra Theater in San Francisco. The plaintiff alleged that the producer “knew or should have known that said movie was a violent movie and would attract certain members of the public who would prove to be violent.” Consequently, the plaintiff argued that the defendant was negligent in its failure to warn the plaintiff or “to take sufficient steps to protect patrons . . .

81. 20 Cal. 3d. 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).
82. Id. at 584, 578 P.2d at 902, 146 Cal. Rptr. at 185.
83. Id. at 604, 578 P.2d at 916, 146 Cal. Rptr. at 199.
84. In some jurisdictions, implied assumption of risk may only partially negate a claim of negligence. Under comparative fault analysis, each tortfeasor is responsible for his proportionate share of a claim, and a claim is not negated wholly by the implied assumption of risk by one party. See, e.g., Li v. Yellow Cab Co. of Cal., 13 Cal. 3d 804, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975).
86. Id. at 1002, 187 Cal. Rptr. 625 (1982).
or near the theatre." Furthermore, the plaintiff alleged that the defendant represented to the general public that the movie "could be viewed in safety."

The traditional duty to provide crowd control and security at a media sponsored event is to be distinguished from efforts to impose liability because the content of the media event is found to invoke hostile audience reactions. The Bill court failed to make this distinction, choosing instead to blend the notion of crowd control with the content of the speech the media is presenting.

The plaintiff in Bill claimed that the movie being exhibited would tend to attract violence-prone individuals. Thus, as stated in the Restatement (Second) of Torts, the traditional tort duty would require an exhibitor to "exercise reasonable care . . . to protect the members of the public by controlling the conduct of the third persons."

The court ignored this traditional tort analysis and instead held that the first amendment rights of the defendants would be violated if the defendants were made to account for the possible violent nature of the crowd attending the show. The court reasoned that

if the showing of the movie "Boulevard Nights" tended to attract violence-prone persons to the vicinity of the theater, it is precisely because of the film's content, and for no other reason. . . . It is thus predictable that the exposure to liability in such situations would have a chilling effect upon the selection of subject matter for movies.

87. Id.
88. Id.
89. See infra, text accompanying notes 104-27 for a discussion of media stimulated violence. See also United States v. Abel, 469 U.S. 45 (1984).
90. Bill, 137 Cal. App. 3d at 1008, 187 Cal. Rptr. at 628.
91. Section 344 imposes a duty on landowners who hold their property open to the public to protect members of the public by controlling the conduct of third persons:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
(a) discover that such acts are being done or are likely to be done, or
(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

92. Id.
93. 137 Cal. App. 3d at 1007, 187 Cal. Rptr. at 628.
94. Id.
Thus, the court concluded that any risks associated with the presentation’s content could not lead to liability without constituting an unconstitutional restraint on speech.

Tort decisions have traditionally demanded adequate security and logistical protection for those attending public performances.\textsuperscript{95} Whether it is a baseball game, a rock concert, or an evening of poetry, the type of event and the patrons expected to attend may impact on what reasonable precautions are necessary to insure the safety of the crowd. The percentage of juveniles and a variety of other specific factors, including location, must be considered in determining what are reasonable procedures for crowd control.\textsuperscript{96}

The Bill case is in part comparable to cases which impose upon operators or owners of entertainment attractions, such as motion picture theaters, a duty to protect their audiences from assaults by other patrons. For example, in Moran v. Valley Forge Drive-In Theatre Inc.,\textsuperscript{97} the Pennsylvania Supreme Court upheld a $12,000 verdict against the owners and operators of a drive-in theatre for the personal injury the plaintiff suffered from a lighted firecracker explosion while he was in the theater’s restroom. Prior to entering the restroom, the plaintiff had observed six or eight teenagers acting in a “boisterous manner” near the restroom.\textsuperscript{98} The record indicated that on frequent occasions prior to the plaintiff’s injury, firecrackers had been exploded and other acts of rowdyism had taken place.\textsuperscript{99}

Following Section 344 of the Restatement (Second) of Torts,\textsuperscript{100} the court held that the security precautions provided

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95. See Prosser & Keeton, supra note 33, at 392.
96. See, e.g., McLaughlin v. Home Indem. Ins. Co., 361 So. 2d 1227 (La. Ct. App. 1978). The court, in imposing liability for a failure to turn lights on at intermission of a rock concert, took into consideration the nature of the crowd and the fact that they might be a “little out of control” and need lights turned on at intermission in order to move safely about the auditorium.
98. Id. at 435, 246 A.2d at 877.
99. Id. See also Wometco Theatres Corp. v. Rath, 123 So. 2d 472, 473 (Fla. Dist. Ct. App. 1960). In this case, a patron of the theater was knocked against a seat and onto the floor when a suspected child molester attempted to escape apprehension by the theater management. The issue was whether or not the theater was liable to its patrons for the negligent actions of another patron. Id. at 473. The court held that since there “is nothing in the record to indicate that the defendant’s employees should have known or anticipated this violent reaction,” the owner or operator should not be held liable for the injuries to the other patron. Id.
100. Moran, 431 Pa. at 436-37, 246 A.2d at 878. See also supra note 91, for text of Section 344 of the RESTATMENT (SECOND) OF TORTS.
by the theater owners for its patrons must take into account the general nature of those who would be attracted to the exhibition.\footnote{\textit{Moran}, 431 Pa. at 436-37, 246 A.2d at 878. See also Silva v. Showcase Cinemas Concessions of Dedham, Inc., 736 F.2d 810 (1st Cir. 1984), \textit{cert. denied} 469 U.S. 883 (1984) (The court held the theater liable when a movie patron was stabbed in the theater's parking lot following a movie during which the victim's group had repeatedly asked the assailant's group to quiet down.).}

The \textit{Bill} case differs significantly from cases like \textit{Moran} in that the producers of the film, rather than the proprietor of the theater, were being sued for allegedly failing to take reasonable precautions to protect those in attendance at a theater watching their film. Consequently, in determining potential liability, the court in \textit{Bill} should have focused on whether the producers, through advertising, general promotion, or their share in the revenue at the San Francisco theater, should be held responsible for the safety of the audience.

It is plausible to impose liability on the promoter of a public event for dangerous conditions or inadequate crowd control without limiting the potential negligence liability to the owner or tenant of the property where the public is invited. The promoter may be negligent in his or her organization of the activity or vicariously liable for co-participation in the joint enterprise sponsoring the activity.

For example, in \textit{Bowers v. Cincinnati Riverfront Coliseum},\footnote{12 Ohio App. 3d 12, 465 N.E.2d 904 (1983).} the concert promoter was held liable along with the City, which owned the Coliseum, when the doors to the premises opened late at a concert featuring the rock band the "Who." The delay resulted in extreme congestion at the entrance and the death of several concert-goers who were crushed when the crowd tried to stream in too quickly. Other cases also suggest that promoters may be responsible for dangerous conditions created by a sponsored activity. In \textit{McLau glin v. Home Indemnity Insurance Company},\footnote{361 So. 2d 1227 (La. Ct. App. 1978).} the promoter and the owner-operator of the premises where the concert was held were both held liable for the plaintiff’s slip and fall when the lights were not turned on during intermission. In \textit{Bill}, it is, of course, arguable whether the security arrangements at the theater were in any manner negligent. Nevertheless, the court record indicated facts, based on earlier analogous cinematic productions, from which the promoter might have recognized that a rowdy crowd would be
attracted.\textsuperscript{104} Although the defendants in \textit{Bill} did receive a share of the revenue based on attendance, it appears that Warner Brothers, not a defendant in \textit{Bill}, was responsible for distribution and publicity.\textsuperscript{105} If Warner Brothers' actions as a distributor were in the nature of a promoter,\textsuperscript{106} then they could be liable for any negligence in promoting the film in a manner that unreasonably endangered public safety. While the functions of some distributors may seem to be similar to promoters, such as arranging and/or paying for publicity of a film, other factors, such as providing the film to be shown, might not suffice to open one up to the liability of promoters.\textsuperscript{107}

Courts must be wary of decisions like \textit{Bill} which obscure the distinction between media sponsored gatherings and activities, as seen in \textit{Weirum}, and the far more controversial imposition of liability for alleged content-stimulated acts of violence as will be seen in the discussion in category three. Operators of entertainment attractions and others who promote these activities must continue to be held liable for an unreasonably unsafe road race, stadium or theater. In evaluating what constitutes reasonably safe conditions, reasonable predictions on the nature of the crowd, including its age, temperament, and propensity for violence, should be considered in evaluating the potential liability for negligence.

\section*{III}
\textbf{Category Three: Stimulated Violence}

In several decisions, courts have considered imposing negligence liability for physical injuries arising as a result of violent behavior stimulated by media portrayals. Media instructions\textsuperscript{108}

\textsuperscript{104} \textit{Bill}, 137 Cal. App. 3d at 1005-06, 187 Cal. Rptr. at 627 (1982).

\textsuperscript{105} Id.

\textsuperscript{106} This Article does not conclude whether distributors of films should be deemed promoters. It may often be a question of fact as to whether the film distributor has taken on the characteristics of a film promoter.

\textsuperscript{107} There was some indication in \textit{Bill} that the event may not have occurred on the premises of the theater. A question of the duty owed by the defendant to the plaintiff may then arise. The recent California case of \textit{Owens v. Kings Supermarket}, 198 Cal. App. 3d 379, 243 Cal. Rptr. 627 (1988) points out that no duty was owed to a supermarket patron for injuries caused by a third person when the injuries occurred in a public street adjacent to the premises. It is the position of this Article that this may not constitute a significant difference and that a duty may lie with the defendant even for torts which occur in the immediate vicinity of the premises.

\textsuperscript{108} \textit{See supra} notes 19-72 and accompanying text.
or promotional activities'109 should be subject to liability for negligence. With limited exceptions, however, media portrayals stimulating imitative violence should be immunized from negligence liability.'110

The recent case of Herceg v. Hustler,111 may provide a useful example. In that case, Hustler magazine published an article describing the practice of auto-erotic asphyxia whereby the practitioner rigs up a noose and cuts off his air supply at the height of sexual excitement. A seventeen year old boy attempted the technique and was found, by a friend, hanging dead. The Hustler article emphasized the "often-fatal dangers of auto-erotic asphyxia" and recommended that "readers seeking unique forms of sexual release DO NOT ATTEMPT this method."112 The magazine also noted that "[t]he facts are presented here solely for an educational purpose."113 Applying the Brandenburg incitement test, the Fifth Circuit held that the speech could not be found to constitute incitement, and was, therefore, fully protected.114

This case may be distinguished from cases like Disney, which involved directions given over the air on how to make sound effects at home.115 In the Disney case, the mass media portrayal was designed to elicit action by directing and instructing the viewer. To the contrary, Hustler did not appear to desire that its readership follow the instructions which were presented. The court noted that Hustler attempted to "dissuade its readers from conducting the dangerous activity it

109. See supra notes 73-107 and accompanying text.
110. Media portrayals rarely urge audiences to behave in a certain way, but may instead merely provide a model for behavior while other unrelated factors will actually incite an audience member to action. As will be discussed, when the media merely provides a model for behavior or the stimulus for injurious behavior, the speech is appropriately regulated under the incitement test of Brandenburg. See infra notes 111-153 and accompanying text.

Under the modeling theory, a child is said to learn a behavior pattern, e.g., aggressiveness, from the media, just as he or she learns from parents or other adults. Later behavior, set off by stimuli unrelated to the original media depiction, may actually have its roots in behavior learned through the media. Prettyman & Hook, supra note 5, at 327-28 (1987). Other theories explain that media depictions may not be seen to urge a behavior but generate the effect of desensitizing the audience member in such a way that he is likely to be more accepting of violent behavior. This, in turn, may lead to increased aggressiveness by the viewer. Id. at 328-29.
111. 814 F.2d 1017 (5th Cir. 1987).
112. Id. at 1018.
113. Id.
114. Id. at 1023-24.
115. See supra notes 19-29 and accompanying text.
describes."\textsuperscript{116}

Like the \textit{Herceg} case, several cases involve media depictions which are imitated by the audience member without any manifestations of intent on the part of the media to elicit such imitations. These cases clearly fall outside of directions and instructions cases, but efforts have been made to impose a negligence standard on media defendants for acts allegedly stimulated by media defendants.

In \textit{De Filippo v. NBC},\textsuperscript{117} a young plaintiff hanged himself after viewing a Johnny Carson episode which featured a stunt man performing a skit in which he appeared to hang himself.\textsuperscript{118} Several times during the broadcast, the audience was advised not to try the stunt themselves. The young plaintiff, however, attempted the stunt and killed himself.\textsuperscript{119} He was later discovered dead with the television set still tuned to the local NBC affiliate which broadcast Carson’s show.\textsuperscript{120}

The court refused to apply a negligence standard, requiring a showing of incitement in order for liability to attach to the media defendant for its speech.\textsuperscript{121} Applying the \textit{Brandenburg} incitement test, the court found no liability, holding that the test had not been met.\textsuperscript{122}

In \textit{Olivia N. v. National Broadcasting Company},\textsuperscript{123} NBC broadcast a film entitled “Born Innocent,” which depicted the harmful impact of a state-run home upon an adolescent girl. In one scene, four other adolescent girls were shown using a “plumber’s helper” to artificially rape the girl while she was attempting to take a shower.\textsuperscript{124} Four days after the program’s broadcast, the plaintiff, a nine-year-old girl, was “artificially raped” with a bottle by teenagers at a San Francisco beach.\textsuperscript{125}

\textsuperscript{116} \textit{Herceg}, 814 F.2d at 1024. There was undoubtedly a statistical risk that could have been foreseen, but there appeared to be no indication that \textit{Hustler} intended, with either desire or knowledge intent as defined by the Restatement, the directions to be followed. \textit{See} Jung & Levine, \textit{Whence Knowledge Intent? Whither Knowledge Intent?}, 20 U.C. DAVIS L. REV. 551 (1986).

\textsuperscript{117} 446 A.2d 1036 (R.I. 1982).

\textsuperscript{118} \textit{Id.} at 1038.

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Id.} at 1039-40.

\textsuperscript{122} \textit{Id.} at 1042.


\textsuperscript{124} \textit{Id.} at 491, 178 Cal. Rptr. at 891.

\textsuperscript{125} \textit{Id.} at 492, 178 Cal. Rptr. at 891.
The assailants later admitted having viewed and discussed the artificial rape scene broadcast by NBC.126

The California Court of Appeal rejected the plaintiff’s effort to obtain a judgment based on “negligence liability because [of] . . . programming choices” by the broadcaster.127 Rather, the court concluded that the “Born Innocent” program constituted protected speech under the first amendment because the plaintiff conceded that “the film did not advocate or encourage violent acts and did not constitute an incitement”128 as required by Brandenburg v. Ohio.129 Because the plaintiff in Olivia N. conceded that there was no “incitement” and that the fictional account did not constitute obscenity, the court concluded that the first amendment precluded liability.130

In still another case, plaintiffs, rather than focusing on a particular broadcast, argued that overall television programming had stimulated a crime. In Zamora v. Columbia Broadcasting System,131 a teenage boy and his parents sued the three television networks alleging that negligent programming had resulted in the boy becoming involuntarily addicted to and “completely subliminally intoxicated”132 by viewing television violence. The teenage plaintiff was convicted of murdering an 83-year-old neighbor. He and his parents alleged he “developed a sociopathic personality . . . desensitized to violent behavior” as a result of the networks’ failure “to use ordinary care” to prevent the teenager from “being ‘impermissibly stimulated, incited and instigated’ to duplicate the atrocities he viewed on television.”133

The court in Zamora rejected the contention that the networks had a duty to avoid making “violent” shows and that such programming could constitute negligence.134 The court concluded that imposing potential negligent liability would restrain the defendants’ exercise of their first amendment rights.135 The court noted that the right of the public to view

126. Id.
127. Id. at 494, 178 Cal. Rptr. at 892.
128. Id.
129. 395 U.S. 444 (1969); see supra notes 12-18 and accompanying text.
130. Olivia N., 126 Cal. App. 3d at 496, 178 Cal. Rptr. at 894.
132. Id. at 200.
133. Id.
134. Id. at 202-03.
135. Id. at 205.
programming “should not be inhibited by those members of the public who are particularly sensitive or insensitive.”

Cases like Herceg, DeFilippo, Olivia N. and Zamora fall outside of the typology of the instruction cases in Category One, and the sponsorship cases in Category Two. The balancing standard required by negligence theory to determine what constitutes an unreasonable risk of harm is inappropriate in these cases.

Under the traditional tort analysis, defendants who intend to cause another to act out a certain behavior have always been liable for negligence, whether promoting a race or instructing another in a proper racing method. Where the media defendant does not intend to elicit a behavior, but merely to convey ideas, negligence theory is insufficient to protect unpopular views and is therefore offensive to first amendment values.

The determination of negligence liability involves the balancing of the risks versus the potential advantages of conduct. In order to impose liability, the likelihood of harm must outweigh the potential benefits. To evaluate this balance, the court must be prepared to measure the social benefit of the defendant’s behavior. In the case of mass media presentations not designed to elicit behavior, this requires making a value judgment on the worth and utility of the ideas conveyed. As the court in Herceg pointed out, “[s]uch an endeavor would not only be hopelessly complicated but would raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality.”

The risk, for example, of a television show provoking imitative behavior, cannot, under negligence theory, be evaluated without also evaluating the value of the ideas conveyed in that production. Contemporary majoritarian notions might allow an anti-war movie to include vivid violent depictions, despite the possibility of imitation. On the other hand, the same portrayals and risks might be deemed unacceptable to some in a film that depicts juvenile gang violence in an urban context,

136. Id.
137. See Prosser & Keeton, supra note 33, at 171.
138. Id.
139. Id.
140. See Herceg, 814 F.2d at 1024.
141. Id.
since the utility of the ideas is deemed less compelling than the possibility of imitative harm.\footnote{142}

Although some have argued that acts of media stimulated violence must always be a product of incitement, and thus meet the \textit{Brandenburg} incitement test before liability will be imposed,\footnote{143} some speech causing acts of stimulated violence may actually fall into other categories of less protected speech. In both obscenity and some aspects of commercial speech, a negligence standard may be imposed on media defendants because the balancing test required by negligence is not problematic where first amendment values are not at issue.

If speech is characterized as legally obscene,\footnote{144} it does not enjoy first amendment protection.\footnote{145} Since such speech is unprotected, it may be regulated like any other behavior normally subject to a negligence standard. The balancing of the potential harm from obscene speech with the utility of the ideas it presents is not problematic since protected first amendment communication is not involved. If, for example, an intensely violent media presentation were held to be legally obscene under the current \textit{Miller} standard\footnote{146} (or subsequent constitutional refinements as to what constitutes obscenity), the danger of balancing the utility versus the risk of harm under a negligence standard would not threaten protected speech.\footnote{147}

\footnote{142. See, \textit{e.g.}, the recent controversy surrounding the film \textit{Colors} depicting gang violence in Los Angeles. The movie prompted discussion as to whether its showing posed an unreasonable risk of danger which would justify its suppression. \textit{Gang Movie Pulled After Disruption at Theater}}, \textit{L.A. Times}, Apr. 17, 1988, \textsection\textit{2}, at 12, col. 1. At least one murder has been attributed to the movie. \textit{Police Blame Killing at Stockton Theatre on "Colors"}, \textit{The Sacramento Bee}, Apr. 26, 1988, at B1. This Article argues that liability for imitative behavior should be distinguished from the duty of theater owners and promoters to provide reasonably safe environments from foreseeable risks of criminal and tortious acts.

\footnote{143. See Prettyman \& Hook, \textit{supra} note 5, at 344 n.109.}

\footnote{144. It is beyond the scope of this Article to consider the appropriateness of characterizing some speech as obscene or precisely what speech, either sexually oriented, or intensely violent, should constitute obscenity and, consequently, not be subject to first amendment protection.}


\footnote{146. The test from \textit{Miller} is as follows:}

\footnote{147. See also the dissent in \textit{Hercog} which would subject even indecent or pornographic speech to the same negligence standard as other commercial speech.}
Certain types of commercial speech\(^{148}\) may be deserving of less constitutional protection. At one time, commercial speech was thought to be completely unworthy of first amendment protection.\(^{149}\) In recent years, however, commercial speech has received increasing protection.\(^{150}\)

Government regulation of commercial speech will not be upheld today if the restriction fails to meet the test developed in *Central Hudson Gas & Electric v. Public Service Commission.*\(^{151}\) Under this doctrine, commercial speech which is truthful, non-misleading and concerns a lawful activity will not be regulable without a showing of a substantial governmental interest in restricting such speech.\(^{152}\) By implication, however, misleading, non-truthful or unlawful speech is likely to be unprotected.\(^{153}\)

Thus, if commercial speech concerning an illegal activity resulted in media-stimulated violence and injury, it would be proper to subject the media defendant to a negligence standard, since such speech is of reduced first amendment value.\(^{154}\) The balancing test required by negligence could properly be applied, since, similar to obscene speech, fully protected first amendment speech is not threatened.\(^{155}\)

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\(^{148}\) The definition of commercial speech is problematic. One definition is "speech of any form that advertises a product or service for profit or for business purposes." J. NOWAK, R. ROTUNDA, & J. YOUNG, supra note 16, at 904.

\(^{149}\) See Valentine v. Chrestensen, 316 U.S. 52 (1942); J. NOWAK, R. ROTUNDA, & J. YOUNG, supra note 16, at 904-05.


\(^{151}\) 447 U.S. 537 (1980). In *Central Hudson*, the Court invalidated a New York regulation which prohibited all activity promoting the use of electricity. *Id.* at 566. The Court held that for commercial speech to come within the first amendment it "must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* at 566.

\(^{152}\) *Id.*

\(^{153}\) See Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968 (1986). The Supreme Court upheld a government ban on the advertising of gambling. The Court found a substantial governmental interest in restricting advertising for gambling directed at residents of Puerto Rico. *Id.* at 2978. This may have been in part due to the fact that the underlying activity, gambling, could have constitutionally been banned altogether. *Id.* at 2979.


\(^{155}\) See supra text accompanying notes 143-47.
For example, if an advertisement solicited a murder-for-hire, as was alleged in a recent case involving an advertisement in Soldier of Fortune Magazine, then the media defendant might properly be subjected to a negligence standard of liability for resulting physical harm. The requisite negligence balancing test could be applied, as there is arguably little, if any, first amendment value in such speech.

Thus, speech which stimulates individuals to act aggressively and bring harm to themselves and others is regulable only to the extent that it tends to incite or to the extent the speech otherwise falls out of the purview of the first amendment, as in the examples above. A negligence cause of action is otherwise inappropriate here because courts would be forced to balance the worth and utility of ideas conveyed by media defendants with the likelihood of harm that might result from the speech. If the speech is fully protected, such balancing is unacceptable.

Conclusion

On many occasions the courts have continued to ignore traditional categories of tort liabilities when media liability is being determined. Cases where directions or instructions are given as in Category One, or sponsored activities as in Category Two, may properly be subjected to liability under negligence theory because there is an intent to elicit action. Media instructions and media-sponsored activities should not be confused with claims based on Category Three cases asserting imitative violence where negligence is an improper remedy.

Claims based on negligently provided instructions or directions which result in injury, should be subject to liability under traditional negligence concepts. There should be no distinction between directions which are given through mass media from those given in a more interpersonal setting. Indeed, it is at least arguable that directions promulgated by mass media are akin to warnings and instructions accompanying tangible products subject to strict liability. Media communicated instructions, however, are more like services than distinct tangible products and, consequently, should probably not be subject to strict liability. Nevertheless, the conceptual similarity between

156. Soldier of Fortune Magazine was held liable in a wrongful death action for an ad which ran in its magazine soliciting a hired killer. Belkin, Magazine is Ordered to Pay 9.4 Million for Killer's Ad, N.Y. Times, Mar. 4, 1988, at 12, col. 1.
the mass produced products and mass communicative instruction at least supports an argument that media defendants not gain immunity from negligence liability that ordinarily could be imposed in a non-media context.

The media has also sometimes been insulated from liability in the case of media-sponsored activities which result in physical injury, despite the fact that such injuries would be compensable if a non-media sponsor was involved. While the California Supreme Court upheld a wrongful death verdict in a case involving a media-sponsored race, courts have sometimes been hesitant to find promoter liability, arguing that it may bring about a chilling effect on speech. These courts have failed to differentiate between acts of violence stimulated by the content of a media defendant’s production and those brought about by a media defendant’s failure to provide a reasonably safe environment for a gathering or activity that it sponsors.

Claims involving media-stimulated acts of imitative violence should generally only be subject to liability under the Brandenburg incitement test. While the first and second categories reflect claims where media involvement should not immunize defendants in areas where liability has been traditionally imposed, the third category would require courts to evaluate the merits of ideas in a negligence formula—a prospect which appears to be constitutionally impermissible. An exception are cases where communications lose full first amendment protection, such as obscenity and specific types of commercial speech. In these cases, media depictions causing imitative violence may properly be subject to a negligence standard.

Media tort cases, like other tort cases, should not be lumped indiscriminately together. Instead, the courts should benefit from the wealth of case law addressing the different kinds of potential liability. By properly differentiating these cases, both the defendant’s first amendment rights, as well as the rights of injured plaintiffs, will be better guarded.