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**THE MEME MADE ME DO IT! THE FUTURE OF IMMERSIVE
ENTERTAINMENT AND TORT LIABILITY**

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ABSTRACT

In June of 2014, two teenage girls lured their friend into the woods and stabbed her nineteen times. The heinousness of the act itself was enough to make it a national news story. But the focus of the story turned to the unique motive of the crime. The girls wanted to appease the Slender Man, an evil apparition who had visited them in their sleep and compelled them to be his proxies. Many people had never heard of the Slender Man, a fictional internet meme with a sizeable following of adolescents fascinated with the macabre. Soon the debate raged as to the power and responsibility of such memes. As for legal remedies, media defendants are rarely held liable for harms caused by third parties. Thus, the producers of this violent meme are free from liability. But this law developed in an era of passive media where there was distance between the media and audience.

This paper examines how media liability may change as entertainment becomes more immersive. First, this paper examines the Slender Man phenomenon and other online memes. Then it outlines negligence and incitement law as it has been applied to traditional entertainment products. Finally, this paper posits how negligence and incitement law may be applied differently in future cases against immersive media products that inspire real-life crimes.

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INTRODUCTION

In June of 2014, a horrendous story captured the headlines: two Wisconsin pre-teens had lured their friend into the woods and attempted to murder her.¹ They stabbed her 19 times; fortunately, she survived.² The police arrested the two assailants.³ When the police interrogated the girls, they claimed that they did it to appease the Slender Man, so he would come and take them to his world.⁴

At that time, few people had heard of this character.⁵ That is because the Slender Man is a character on an obscure website that hosts horror stories.⁶ However, as the news media investigated the stories, they discovered a sizeable, cult-like, teenage following of these kinds of websites.⁷ More accusations surfaced claiming that these horror stories inspired other teenagers to commit heinous crimes.⁸

Wisconsin prosecutors have charged the girls who committed these acts with attempted murder.⁹ But what about the creators of this internet meme? Do they face any liability?

¹ Monica Davey & Steven Yaccino, *Milwaukee Suburb Tries to Cope With Girl's Stabbing*, N.Y. TIMES (June 7, 2014), <https://www.nytimes.com/2014/06/08/us/milwaukee-suburb-tries-to-cope-with-slender-man-stabbing.html>.

² *Id.*

³ *Id.*

⁴ Eric Killelea, *'Slender Man' Trial: What's Next for Morgan Geyser and Anissa Weier*, ROLLING STONE (Oct. 11, 2017), <http://www.rollingstone.com/culture/features/slender-man-trial-whats-next-for-geyser-and-weier-w508348>.

⁵ See Caitlin Dewey, *The complete history of 'Slender Man,' the meme that compelled two girls to stab a friend*, WASH. POST (July 27, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2014/06/03/the-complete-terrifying-history-of-slender-man-the-internet-meme-that-compelled-two-12-year-olds-to-stab-their-friend/?utm_term=.2ddd93c106a1.

⁶ *See id.*

⁷ *See id.*

⁸ See Rheana Murray, *Slender Man Now Linked to 3 Violent Acts*, ABC NEWS (June 9, 2014), <http://abcnews.go.com/US/slender-man-now-linked-violent-acts/story?id=24058562>.

⁹ Jason Hanna & Dana Ford, *12-year-old Wisconsin girl stabbed 19 times; friends arrested*, CNN (June 04, 2014, 11:58 AM), <http://www.cnn.com/2014/06/03/justice/wisconsin-girl-stabbed/index.html>.

Under tort liability laws, the First Amendment protects the creator.¹⁰ But other industries that create a product and sell it to the public are subject to some form of product liability.¹¹ These companies can be held liable if their products cause injury to customers or innocent bystanders.¹² The media industries also create products, but the media industry is essentially exempt from product liability when their entertainment products inspire violence and injury.¹³ Courts have ruled that creators of entertainment products receive significant First Amendment protection, giving media creators a preferred position over any other industry.¹⁴ Courts have reasoned that it is unlikely that entertainment producers intend to incite criminal misconduct.¹⁵ Further, courts have rejected much of the media effects research as causation and instead find it merely a correlation.¹⁶ Thus, entertainment producers have not been held liable for those who are inspired by their products.¹⁷

Crime inspired by a meme is a new twist to the old story of copycat crimes. But, the Slender Man case is still in the context of passive media: it is text on a website accompanied by

¹⁰ See *infra* Part III.

¹¹ See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. (AM. LAW INST. 1998).

¹² See *id.*

¹³ See, e.g., Juliet Dee, *Basketball Diaries, Natural Born Killers, and School Shootings: Should There Be Limits on Speech Which Triggers Copycat Violence?*, 77 DENV. U. L. REV. 713, 715–19 (2000).

¹⁴ *Id.* “The courts have almost always concluded that to find the media negligent for allegedly inducing people to harm themselves or others would set a dangerous precedent whereby more and more people would attempt to recover damages from media outlets . . .” *Id.* at 715.

¹⁵ *Id.* at 715–19.

¹⁶ See Lorraine M. Buerger, Comment, *The Safe Games Illinois Act: Can Curbs on Violent Video Games Survive Constitutional Challenges?*, 37 Loy. U. Chi. L.J. 617, 635–42 (2006).

¹⁷ See *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011). The exceptions are when the speech is commercial (less protection) or the speech is a category not protected by the First Amendment (e.g. incitement). See *infra* Part III.

hoax videos and Photoshopped pictures.¹⁸ But, what will happen when new immersive media technology, such as virtual reality, becomes commonplace? Will it be seen by the public and the courts as a lesser protected form of expression compared to traditional media? Will it have a more direct effect on users, thus creating a legitimate reason for courts to hold creators liable?

Unfortunately, when a “new” media phenomenon appears, it is usually followed by a social panic caused by fear and misunderstanding that is exacerbated by the focus on exceptionally odd cases.¹⁹ Accordingly, this paper posits that future advances in immersive technology may create a vulnerability for creators of media violence and explores how those harmed might exploit that vulnerability in the legal context.²⁰ First, this paper presents the history of the Slender Man and the crimes it allegedly inspired.²¹ Next, the paper outlines two common torts used in media inspired violence cases: negligence and incitement.²² Last, the paper analyzes the unique factors of virtual reality and how it could be exposed to tort liability in the future.²³

I. THE SLENDER MAN AND OTHER BOOGIE MEN

The Slender Man’s “home” is the *Creepy Pasta* website, which houses many user-generated, fictional horror stories.²⁴ The Slender Man may be the most popular (and infamous), but other stories have a large following.²⁵ “BEN Drowned” is about a boy

¹⁸ See *The Slender Man*, CREEYPASTA WIKI, http://creepypasta.wikia.com/wiki/The_Slender_Man (last visited Oct. 18, 2017).

¹⁹ MORAL PANICS, SOCIAL FEARS, AND THE MEDIA: HISTORICAL PERSPECTIVES (Sian Nicholas & Tom O'Malley eds., 2013) (containing case studies examining how moral panics come into existence).

²⁰ See *infra* Part IV.

²¹ See *infra* Part II.

²² See *infra* Part III.

²³ See *infra* Part IV.

²⁴ See CREEPY PASTA, <http://www.creepypasta.com> (last visited Oct. 18, 2017).

²⁵ See Farhad Manjoo, *Urban Legends Told Online*, NEW YORK TIMES (July 9, 2014), <https://www.nytimes.com/2014/07/10/technology/personaltech/slender-man-story-and-the-new-urban-legends.html>.

who was drowned by his father and now haunts anyone who uses his old video games.²⁶ Many online movies allegedly show “found footage” of “real” instances of Ben haunting people.²⁷ “Jeff the Killer” is about a thirteen-year-old boy who was attacked at a birthday party.²⁸ His assailants put bleach and alcohol on him before setting him on fire.²⁹ Jeff survived but went insane, cutting out his own eyelids and carving a permanent smile out of his own face.³⁰ Jeff then killed his parents with a knife, and then went to kill his brother.³¹ The brother awoke to find Jeff standing over him with a knife and whispering “go to sleep.”³² “Jeff the Killer” has many incarnations written primarily by and for young girls, called “Fan Girls.”³³

²⁶ See *BEN Drowned*, CREEPY PASTA, http://creepypasta.wikia.com/wiki/BEN_Drowned (last visited Oct. 29, 2017).

²⁷ See *id.*

²⁸ See *Jeff the Killer*, FANDOM: CREEPY PASTA CLASSICS WIKI, http://creepypastaclassics.wikia.com/wiki/Jeff_the_Killer (last visited Oct. 29, 2017).

²⁹ *Id.*

³⁰ See *id.* This aspect of ‘Jeff the Killer’ is said to be inspired by an image that went viral in 2008. Analee Newitz, *Who is ‘Jeff the Killer’? And is His Picture Haunted by a Real Death?*, 109 (Aug. 5, 2013, 10:00 AM), <https://io9.gizmodo.com/who-is-jeff-the-killer-and-is-his-picture-haunted-by-1016241494>. The image shows a ghastly white with a clown-like smile. *Id.* The myth has an added layer in that it is said to be a photo-shopped image of a teenager who went on to commit suicide. *Id.*

³¹ *Jeff the Killer*, *supra* note 28.

³² *Id.*

³³ See *Lawyer Asks that 12-Year-Old Accused of Stabbing Friend in Wisconsin be Moved to Mental Facility*, 10TV (June 3, 2014, 10:10 AM), <http://www.10tv.com/content/stories/2014/06/03/us--girls-stabbing-plot-wisconsin.html>. The administrator of the Creepy Pasta site claimed that he was concerned about the Fan Girl obsession with Jeff the Killer:

[T]he Jeff the Killer fangirls and spin-offs, I did find somewhat troubling—I’ve mentioned before that I feel romanticizing serial killers is not really something I feel comfortable with promoting via publishing all the Jeff love stories and self-inserts that people tried to submit; the only Jeff spin-off I did let through was one that I felt had a decidedly non-romantic view.

A. THE SLENDER MAN

The Slender Man is a fictional character that originated as an internet meme.³⁴ The character is described as an unusually tall man with a thin-build.³⁵ He wears a black suit and he has no facial features.³⁶ The stories of the Slender Man usually feature him abducting and presumably murdering people, primarily children.³⁷

The Slender Man's creator is Eric Knudson, whose internet name is Victor Surge.³⁸ The meme began on the online forum *Something Awful*.³⁹ The idea arose on the forum from a

Id.

³⁴ See *The Slender Man*, CREEPYPASTA WIKI, http://creepypasta.wikia.com/wiki/The_Slender_Man (last visited Oct. 28, 2017). The site describes him as:

The Slender Man is an alleged paranormal figure purported to have been in existence for centuries, covering a large geographic area. Believers in the Slender Man tie his appearances in with many other legends around the world, including; Fear Dubh (or, The Dark Man) in Scotland, the Dutch Takkenmann (Branch Man), and the German legend of Der Grobmann or Der Grosse Mann (the Tall Man).

Id.

³⁵ *Id.*

³⁶ *Id.* "He sometimes is portrayed wear[ing] a hat, which is sometimes a bowler, a fedora, or sometimes a top hat. He may also be seen wearing a long flowing necktie or scarf, which is either red or grey." *Id.*

³⁷ See *id.* See also *Slender Man Documentary*, CREEPYPASTA, http://creepypasta.wikia.com/wiki/File:Slenderman_Documentary (last visited Oct. 29, 2017). The Slender Man Facebook Page states: "Some say I am evil, but all I ever wanted was [a] friend. I think that a few dozen casualties are to be expected during the quest for friendship." Slenderman, *About*, FACEBOOK, https://www.facebook.com/pg/dial0forslendy/about/?ref=page_internal (last visited Oct. 29, 2017).

³⁸ See *Slender Man Stabbings: Who is Slender Man?*, CBC NEWS (June 3, 2014, 11:43 AM) <http://www.cbc.ca/news/world/slender-man-stabbings-who-is-slender-man-1.2663012>.

³⁹ See Patrick Klepek, *A Brief History of Slender Man, The Internet's Boogeyman*, KOTAKU (MAR. 25, 2015, 2:00 PM),

contest to produce paranormal images.⁴⁰ The Slender Man story began with two images that were Photoshopped into one image, giving the illusion that he was real.⁴¹ Knudson then added text to the photos, alleging the text was quotes from witnesses who described the entity and stories of abduction:⁴² “Whether he absorbs, kills, or merely takes his victims to an undisclosed location or dimension is also unknown as there are never any bodies or evidence left behind in his wake to deduce a definite conclusion.”⁴³

The stories are rarely graphic, leaving it up to the reader’s imagination.⁴⁴ Knudson says that the character was inspired by the fictional writings of H.P. Lovecraft, Zack Parson and Stephen King.⁴⁵ He wanted to create a character that caused “unease and terror in [the] general population.”⁴⁶

Shortly after its creation, the Slender Man went viral.⁴⁷ The stories appeared in many different forums online and have been written by many different authors.⁴⁸ Along the way, the Slender Man character changed.⁴⁹ Slender Man now has

<http://www.kotaku.com.au/2015/03/a-brief-history-of-slender-man-the-internets-boogeyman>.

⁴⁰ See *Slender Man Stabbing: Who is Slender Man?*, *supra* note 38.

⁴¹ *Id.*

⁴² See Caitlin Dewey, *The Complete, Terrifying History of ‘Slender Man,’ the Internet Meme that Compelled Two 12-Year-Olds to Stab Their Friend*, WASHINGTON POST (Jun. 04, 2014), <http://www.washingtonpost.com/news/the-intersect/wp/2014/06/03/the-complete-terrifying-history-of-slender-man-the-internet-meme-that-compelled-two-12-year-olds-to-stab-their-friend/>.

⁴³ *The Slender Man*, *supra* note 34.

⁴⁴ Shira Chess, *Open-Sourcing Horror: The Slender Man, Marble Hornets, and Genre Negotiations*, 15 INFORMATION, COMMUNICATION & SOCIETY 3, 376 (2012).

⁴⁵ See DEWEY, *supra* note 24.

⁴⁶ Joanna Robinson, *American Horror Story and Slender Man*, VANITY FAIR (Jan. 28, 2016, 3:37 PM), <https://www.vanityfair.com/hollywood/2016/01/american-horror-story-slender-man>.

⁴⁷ See Klepek, *supra* note 39.

⁴⁸ See Chess, *supra* note 44 at 385.

⁴⁹ See *The Slender Man*, *supra* note 34. There is Slender Man Youtube channel that has close to 400,000 followers and over 70 million views. Laura Stamper, *The Origins of Slender Man, the Meme*

tentacles coming from his back and the ability to stretch his torso, arms and legs.⁵⁰ He is only seen at night, when he peers into open windows and steps out into secluded roads appearing before lone motorists.⁵¹ It is said that his featureless face may appear different to people, depending on their fears.⁵² He puts his victims in a hypnotized state, making them unable to stop themselves from going to the Slender Man.⁵³

Another *Something Awful*-user created a backstory for Slender Man claiming that a German Folklore story called “Der Grossman” was an early reference to the Slender Man.⁵⁴ A different user on *Something Awful* posted a video and alleged the video was footage from a film school project that captured the entity.⁵⁵ The Slender Man meme has also been adapted into a video game,⁵⁶ an app,⁵⁷ and several small-budget films.⁵⁸

Some claim that investigating the Slender Man will draw his attention.⁵⁹ He will interfere with video and audio signals.⁶⁰ It is also reported that when he is near, people often feel “Slender Man Sickness,” with symptoms including nose bleeds, nightmares, delusion, and paranoia.⁶¹ Some of the stories claim

that Allegedly Drove 12-Year-Olds to Kill, TIME (June 3, 2014), <http://time.com/2817725/slender-man-killing>.

⁵⁰ See *The Slender Man*, *supra* note 34.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Shira Chess, *Open-Sourcing Horror: The Slender Man, Marble Hornets, and Genre Negotiations*, 15 J. INFO., COMM. & SOC. 374, 380–81 (2012).

⁵⁶ See, e.g., SLENDER: THE EIGHT PAGES (2012), download available at <http://slender.en.softonic.com> (last accessed Oct. 28, 2017).

⁵⁷ See SLENDER-MAN (iOS) (2014), download available at <https://itunes.apple.com/us/app/slender-man/id562558324?mt=8> (last accessed Oct. 28, 2017).

⁵⁸ See, e.g., Super Movie Bros. Production, *Slender Man - The Movie*, YOUTUBE (Feb. 20, 2013), <https://www.youtube.com/watch?v=N5ppqrCIIUQ>.

⁵⁹ See Chess, *supra* note 44, at 384.

⁶⁰ *Id.*

⁶¹ See Stampler, *supra* note 49.

that he drives young people to become violently insane, while other stories claim that he seduces people to act on his behalf.⁶²

B. THE SLENDER MAN PROXIES

The two Wisconsin girls claimed that it was the Slender Man who inspired them to lure their friend into the woods and to stab her repeatedly.⁶³ The girls learned about the Slender Man from the wiki-site *Creepy Pasta*.⁶⁴ One of the girls claimed that the Slender Man came to her in a dream and that he watched her.⁶⁵ They also claimed that Slender Man teleported and read their minds.⁶⁶

The girls ultimately wanted to prove themselves to the Slender Man by killing their classmate.⁶⁷ In completing the act, the two girls could, in their minds, become proxies of the Slender Man.⁶⁸ After the murder, they could run away with the Slender Man and live with him in his forest mansion in Nicolet National Forest.⁶⁹ One of girls told the police that “[m]any

⁶² See Dustin Rowles, *Who the Hell is Slender Man?*, PAJIBA (Sept. 28, 2016), http://www.pajiba.com/mindhole_blowers/who-the-hell-is-slender-man.php.

⁶³ Stephanie Slifer, *Could a Fictional Internet Character Drive Kids to Kill?*, CBS NEWS (June 3, 2014), <http://www.cbsnews.com/news/could-a-mythological-creature-drive-kids-to-kill>.

⁶⁴ *Id.*

⁶⁵ *Id.* She also claimed to speak to Lord Voldemort from *Harry Potter* and to the Teenage Mutant Ninja Turtles. Elliott C. McLaughlin, *Girl Charged in Slenderman Stabbing Deemed Incompetent*, CNN (Aug. 1, 2014), <http://www.cnn.com/2014/08/01/justice/wisconsin-stabbing-slenderman-defendant>.

⁶⁶ Ellen Gabler, *Charges Detail Waukesha Pre-Teens' Attempt to Kill Classmate*, MILWAUKEE-WISCONSIN JOURNAL SENTINEL (June 2, 2014), <http://www.jsonline.com/news/crime/waukesha-police-2-12-year-old-girls-plotted-for-months-to-kill-friend-b99282655z1-261534171.html>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* The girls' plan was to walk to his mansion after they killed the classmate. *Id.*

people do not believe Slender Man is real . . . [we] wanted to prove the skeptics wrong.”⁷⁰

Once the story of the Wisconsin girls was published, others came forward with stories of Slender Man inspired violence. A woman in Hamilton, Ohio claimed that her thirteen-year-old daughter attacked her with a knife.⁷¹ The mother claimed that her daughter had written Slender Man fan fiction and it motivated the attack.⁷² In Port Richey, Florida, a fourteen-year-old girl set fire to her house while her mother and nine-year-old brother slept inside.⁷³ She too had read Slender Man stories online and the police believed that it was a motivating factor.⁷⁴ Prosecutors charged her with two counts of attempted murder.⁷⁵

C. FEAR THE MEMES?

Critics fear that virtual worlds will isolate people who want to escape from the real world that they find undesirable.⁷⁶

⁷⁰ Caitlin Dewey, *The Complete History of ‘Slender Man,’ the Meme that Compelled Two Girls to Stab a Friend*, WASHINGTON POST (July 27, 2016), <http://www.washingtonpost.com/news/the-intersect/wp/2014/06/03/the-complete-terrifying-history-of-slender-man-the-internet-meme-that-compelled-two-12-year-olds-to-stab-their-friend/>.

⁷¹ Rheana Murray, *Slender Man Now Linked to 3 Violent Acts*, ABC NEWS (June 9, 2014), <http://abcnews.go.com/US/slender-man-now-linked-violent-acts/story?id=24058562>. This story also mentioned a Las Vegas man who had murdered his wife and two police officers before taking his own life. The man’s neighbors claimed that he dressed as the Slender Man, but it is not known if it was just a Halloween costume. *Id.*

⁷² See Isha Aran, *Teenage Girl Stabs Mother in Another Slender Man Attack* JEZEBEL (June 8, 2014), <https://jezebel.com/teenage-daughter-stabs-mother-in-another-slender-man-in-1587818811>.

⁷³ Caitlin Keating, *Florida Girl, 14, Sets Fire to Her House in Another Slender Man Inspired Crime: Police*, PEOPLE (Sept. 6, 2014), <http://www.people.com/article/slender-man-inspires-more-crime>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See Monica Kim, *The Good and Bad of Escaping to Virtual Reality*, THE ATLANTIC (Feb. 18, 2015), <http://www.theatlantic.com/health/archive/2015/02/the-good-and-the-bad-of-escaping-to-virtual-reality/385134>.

Users will be addicted to a virtual world that offers a better life.⁷⁷ It is foreseeable that this will affect adolescents more significantly because they often struggle with this transitional phase in life.⁷⁸ Another concern is that the virtual world disconnects us from human interaction, which not only hurts the development of social skills but also the ability to recognize social cues and have empathy.⁷⁹

Of course, the Slender Man meme uses fairly basic technology.⁸⁰ Though it appears on digital sites, it is still mostly text, photoshopped jpegs, and amateur movies using old Hollywood tricks.⁸¹ Yet, it still has created a fascination among young adolescents.⁸² But, legitimate concerns exist that virtual reality will have even greater effects on users' thoughts, beliefs, and behavior.⁸³ In the near future, technology will be more

⁷⁷ *Id.* One World of Warcraft player, who played 60 hours a week, stated that “living inside [the game] seemed preferable to the drudgery of everyday life.” *Id.*

⁷⁸ *Cf.* David Freeman, *Violent Video Games May Curb Bullying in Vulnerable Children, Study Suggests*, HUFFINGTON POST (Aug. 28, 2013, 8:13 AM), http://www.huffingtonpost.com/2013/08/28/violent-video-games-bullying-children-study_n_3823490.html; Karen Frenkel, *Therapists Use Virtual Worlds to Address Real Problems*, SCIENTIFIC AMERICAN (Apr. 3, 2009), <http://www.scientificamerican.com/article/therapists-use-virtual-worlds>.

⁷⁹ *See generally* Katherine Bindley, *When Children Text All Day, What Happens to Their Social Skills?*, HUFFINGTON POST (Dec. 9, 2011, 1:22 PM), available at http://www.huffingtonpost.com/2011/12/09/children-texting-technology-social-skills_n_1137570.html; These are also the traits that are often used to diagnose sociopathy in young people. *Antisocial Personality Disorder*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/antisocial-personality-disorder/basics/symptoms/con-20027920> (last accessed Oct. 28, 2017).

⁸⁰ *See* CREEPYPASTA WIKI, *supra* note 34.

⁸¹ *See id.*

⁸² *See supra* Part II.C.

⁸³ *See generally* Robin Burks, *How Does Virtual Reality Affect the Brain? The Answer May Surprise You*, TECH TIMES (Nov. 25, 2014, 4:04 PM), <http://www.techtimes.com/articles/20927/20141125/how-does-virtual-reality-affect-the-brain-the-answer-may-surprise-you.htm>. The arguments will be similar to those made by critics of video games. *See e.g.*, Rick Nauert, *Negative Effects of Violent Video Games May*

immersive as virtual reality becomes commercially available.⁸⁴ Companies have recently developed holograms that are incredibly life-like.⁸⁵ Oculus Rift (a Facebook subsidiary),⁸⁶ Microsoft, Samsung, HTC, and SONY⁸⁷ have all recently announced that their wearable virtual reality technology will be coming to mass markets soon.⁸⁸

If this technology becomes readily available, then memes like the Slender Man may virtually come to life. In the future, it may be difficult to discern what is real and what is fantasy. It is foreseeable that younger, less-developed (or damaged) psyches will be more susceptible to the messages in the product.⁸⁹ If adults can leave a movie theater after seeing *Avatar* with feelings of depression and thoughts of suicide because they had to leave the world of Pandora,⁹⁰ it is foreseeable that teenagers will experience similar feelings that they may have difficulty managing.⁹¹

Build Over Time, PSYCHCENTRAL (Dec. 11, 2012), <http://psychcentral.com/news/2012/12/11/negative-effects-of-violent-video-games-may-build-over-time/48918.html>.

⁸⁴ Marco della Cava, *Facebook's Oculus Rift demo hints at VR's future*, USA TODAY (Mar. 26, 2015), <http://www.usatoday.com/story/tech/columnist/2015/03/25/facebook-f8-san-francisco-oculus-rift-demo-future-of-vr/70434214>.

⁸⁵ A company called Image Metrics have created a photo-realistic hologram called "Emily." See *The Emily Project*, IMAGE METRICS, <http://image-metrics.com/company/#about> (last accessed Oct. 28, 2017).

⁸⁶ See Marco della Cava, *supra* note 84.

⁸⁷ See Nathan Olivarez-Giles, *Sizing up Virtual-Reality Headsets: Sony's Morpheus and HTC's Vive*, WALL ST. J. (Mar. 6, 2015, 6:50 PM), <http://blogs.wsj.com/personal-technology/2015/03/06/sizing-up-virtual-reality-headsets-sonys-morpheus-and-hrcs-vive> (stating that Google may be next to enter the market).

⁸⁸ *Id.*

⁸⁹ See *infra* Part III.

⁹⁰ Jo Piazza, *Audience Experience 'Avatar' Blues*, CNN (Jan. 11, 2010, 8:06 AM), <http://www.cnn.com/2010/SHOWBIZ/Movies/01/11/avatar.movie.blues/>.

⁹¹ See generally Steven Tweedie, *Tech Tuesday: The Very Real Dangers of Virtual Reality*, THE MICHIGAN DAILY (Mar. 11, 2014, 7:44 PM),

For example, one study of soldiers affected by post-traumatic stress disorder (PTSD) used the software titled *Virtual Iraq*.⁹² This software had the positive outcome of allowing the soldiers to mitigate the effects of PTSD by ‘reliving’ the war.⁹³ But, actors who used the software to prepare for roles in a war movie started to show early signs of PTSD as if they were in an actual war.⁹⁴ This demonstrates it is possible for situations in interactive virtual media to cause harmful impacts on a person’s mental health, particularly when they are unfamiliar with the situation in the real world.

II. THE REJECTION OF PRODUCTS LIABILITY FOR MEDIA INDUSTRIES

As of August 2017, one of the young Wisconsin girls involved in the “Slender Man inspired” stabbing pled guilty to attempted second-degree homicide with a deadly weapon.⁹⁵ The other young girl pled “not guilty by reason of mental disease” and is set to face trial in September 2017 to determine whether she can claim a defense of mental illness.⁹⁶ Because the teenagers lured their victim into the woods to fulfill their delusions of becoming the Slender Man’s proxies, some have called for the creators of the meme to claim some responsibility.⁹⁷ But, it is hard to imagine that any case will ever

<https://web.archive.org/web/20140315053919/http://michigandaily.com/blog/filter/tech-tuesday-very-real-dangers-virtual-reality>.

⁹² David Zax, “*Virtual Iraq*” *Helps Soldiers Overcome PTSD*, FAST COMPANY (Feb. 17, 2011), <https://www.fastcompany.com/1728656/virtual-iraq-helps-soldiers-overcome-ptsd>.

⁹³ *Id.*

⁹⁴ See Sue Halpern, *Virtual Iraq: Using Simulation to Treat a New Generation of Traumatized Veterans*, NEW YORKER (May 19, 2008), <https://www.newyorker.com/magazine/2008/05/19/virtual-iraq>.

⁹⁵ Katie Reilly, *Wisconsin Teen Pleads Guilty to Stabbing Attack Inspired by ‘Slender Man,’* TIME (Aug. 21, 2017), <http://time.com/4910238/wisconsin-slender-man-attack-guilty-plea-anissa-weier/>.

⁹⁶ *Id.*

⁹⁷ See e.g. Evan McMurry, *Fox’s Ablow Demands Warnings on Facebook, Slender Man: ‘Where is the Surgeon General?’*, MEDIAITE (June 10, 2015, 9:21 AM), <http://www.mediaite.com/tv/foxs->

be successful against the creators of the meme.⁹⁸ First, the Slender Man story has taken on a life of its own with many hands playing a role in the creation of the myth, making it difficult to isolate one or two defendants.⁹⁹ Moreover, the torts available to a plaintiff in such a case are significantly in favor of the defendant.¹⁰⁰ This section outlines two torts—negligence and incitement—that plaintiffs have used, most often unsuccessfully, against defendants when claiming their injury was inspired by the media.¹⁰¹

A. NEGLIGENCE

Negligence is a failure to take reasonable care which results in an injury to another.¹⁰² Negligence lies between intentional torts, which require proof of a plaintiff's intent, and strict liability, which does not concern the actions of the

ablow-demands-warnings-on-facebook-slender-man-where-is-the-surgeon-general/.

⁹⁸ Clay Calvert, *Slender Man Meets the First Amendment: Why Suing the Character's Creator Won't Work*, HUFFINGTON POST (June 9, 2014, 1:00 PM), http://www.huffingtonpost.com/clay-calvert/slender-man-meets-the-fir_b_5470902.html.

⁹⁹ See *supra* Part II.

¹⁰⁰ See *infra* Part III. A-B.

¹⁰¹ Other torts have been used against the media: (1) failure to adequately warn consumers (see *DeFilippo v. Nat'l Broad. Co., Inc.*, 446 A.2d 1036 (R.I. 1982); *Bill v. Super. Ct. of San Francisco*, 187 Cal. Rptr. 625 (1982); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989); *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798 (W.D. Ky. 2000); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002); *Watters v. TSR, Inc.*, 904 F.2d 378 (1990); *Wilson v. Midway Games, Inc.*, 198 F. Supp.2d 167 (D. Conn. 2002); (2) products liability (see *DeFilippo*, 446 A.2d 1036; *James*, 90 F. Supp. 2d 798; *Sanders*, 188 F. Supp. 2d 1264; *Davidson v. Time Warner, Inc.*, 25 Media L. Rep. 1705 (1997); *Herceg*, 814 F.2d 1017; *Wilson*, 198 F. Supp. 2d 167); (3) failure to provide adequate, on-site protection for moviegoers (see *Bill*, 187 Cal. Rptr. 625; *Yakubowicz*, 536 N.E.2d 1067); (4) RICO (see *James*, 90 F. Supp. 2d 798; *Sanders*, 188 F. Supp. 2d 1264); (5) unfair trade practices (see *Wilson*, 198 F. Supp. 2d 167); and a (6) Pied Piper theory (see *Walt Disney Prods., Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981)).

¹⁰² See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (AM. LAW. INST. 2010).

defendant, only the injury to the plaintiff.¹⁰³ Basic negligence does not require intent, but does require that defendant's action include risk of injury that is so "sufficiently great to lead a reasonable man in [the actor's] position to anticipate [such injuries], and to guard against them."¹⁰⁴ Juries determine what is reasonable depending on the context and community norms, meaning the outcome of negligence claims can vary greatly depending on the jury and jurisdiction.¹⁰⁵

To prevail in a negligence claim, a plaintiff must show that: (1) the harm to the plaintiff was foreseeable; (2) the defendant had a duty to act reasonably in such circumstances, but the defendant breached that duty; and (3) the breach was the proximate cause of the plaintiff's injuries.¹⁰⁶ The question of duty is a matter-of-law with policy considerations asking whether the plaintiff is owed protection.¹⁰⁷ However, companies that put products into the stream of commerce always owe a duty to their consumers that the product will be reasonably safe.¹⁰⁸

In cases involving a third party's criminal action, courts usually consider the third party's act to be a superseding event

¹⁰³ *Id.*

¹⁰⁴ WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 148 (West 3d ed. 1964).

¹⁰⁵ April M. Perry, *Guilt by Saturation: Media Liability for Third-Party Violence and the Availability Heuristic*, 97 Nw. U. L. Rev. 1045, 1049 (2003) (arguing that the trier of facts determines the elements of negligence).

¹⁰⁶ Prosser listed the elements of a negligence cause of action to include:

(1) [a] duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks; (2) [a] failure on his part to conform to the standard required; (3) [a] reasonably close causal connection between the conduct and the resulting injury, [and] (4) [a]ctual loss or damage resulting to the interests of another.

See Prosser, *supra* note 104, at 146.

¹⁰⁷ See W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS 357-59 (4TH ED. 1984).

¹⁰⁸ See *First Nat'l Bank of Mobile v. Cessna Aircraft Co.*, 365 So. 2d 966, 968 (Ala. 1978).

breaking the chain of causation.¹⁰⁹ However, there is an exception when a defendant provides a significant “opportunity for criminal misconduct.”¹¹⁰ Thus, a defendant must guard against reasonable risks, if it is foreseeable that the third party will injure a person with the product.¹¹¹

Foreseeability is an important element in negligence law.¹¹² Foreseeability is often used as a “shorthand for negligence.”¹¹³ Foreseeability is a matter-of-fact and is left for juries to decide, thus there is no bright-line rule for what constitutes foreseeability.¹¹⁴ But, when a jury determines that the plaintiff’s injuries were foreseeable, it often establishes duty, proximate cause, and even the extension of the liability to a third party’s actions.¹¹⁵ Without a finding of foreseeability, it is likely a plaintiff cannot meet the other three factors and a court will dismiss the case.¹¹⁶

Most often foreseeability is equated to duty. Courts reason that “the morality of an action depends on its foreseeable consequences.”¹¹⁷ Thus, foreseeability creates a duty that may be independent of the relationship between the parties.¹¹⁸ Essentially, if the defendant could foresee an injury, then he or she has a duty to protect against it.¹¹⁹

¹⁰⁹ See PROSSER, *supra* note 104, at 177.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 179.

¹¹² Perry, *supra* note 105 (arguing that negligence claims hinge on foreseeability).

¹¹³ *Id.* at 1050. “In other words, negligence doctrine becomes circular and illogical when only one criterion must be satisfied to prove all elements of negligence.” *Id.* at 1052.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1049–50.

¹¹⁶ *Id.* at 1050–52. Foreseeability “so completely lacks all clarity and precision that it amounts to nothing more than a convenient formula for disposing of the case—usually by leaving it to the jury.” See PROSSER & KEETON, *supra* note 107, at 297.

¹¹⁷ William H. Hardie, Jr., *Foreseeability: A Murky Crystal Ball for Predicting Liability*, 23 CUMB. L. REV. 349, 349 (1993).

¹¹⁸ *Id.*

¹¹⁹ Because of its unclear definition, some commentators believe that “foreseeability is wholly unsuitable as a test for any element of liability or defense submitted to a jury.” *Id.* at 398-99.

B. MEDIA NEGLIGENCE CASES

When deciding negligence cases, courts often consider policy implications.¹²⁰ These include preventing future harm and the consequence to the community if exercising due care is imposed.¹²¹ In cases of media defendants, the policy concern is the First Amendment and avoiding the chilling of free speech.¹²² First Amendment protections reduce the duty requirement of media companies, so they are held to a lesser standard compared to other industries that put products into the stream of commerce.¹²³ Causation is also difficult to prove against a media company as courts are reluctant to accept social science evidence of correlation as a substitute for causation.¹²⁴

I. NEGLIGENCE & ENTERTAINMENT: MEDIA WINS

In *Zamora v. CBS*, a family sued three television networks claiming the networks caused their son to become addicted to violent television, which caused him to kill his elderly neighbor.¹²⁵ The court refused to find that the networks had a duty to refrain from airing violent programming.¹²⁶ The

¹²⁰ Prosser & Keeton, *supra* note 107, at 357–58.

¹²¹ *Id.* at 359.

¹²² See *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (applying constitutional protection in case between two non-state actors).

¹²³ See generally William Li, *Unbaking the Adolescent Cake: The Constitutional Implications of Imposing Tort Liability on Publishers of Violent Video Games*, 45 ARIZ. L. REV. 467 (2003) (detailing several different media cases in which courts have found no liability distributors of entertainment products).

¹²⁴ See *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 800 (2011). *Brown* was the first time that the Court used the phrase ‘direct causal link’ in a free speech case. Clay Calvert & Matthew D. Bunker, *Examining the Immediate Impact of Brown's Proof-of-Causation Doctrine on Free Speech and Its Compatibility with the Marketplace Theory*, 35 HASTINGS COMM. & ENT L.J. 391, 392 (2013).

¹²⁵ *Zamora v. CBS*, 480 F. Supp. 199, 200 (1979).

¹²⁶ *Id.* at 202–03.

court held that the First Amendment protected the broadcasters from such censorship.¹²⁷

In *James v. Meow Media*,¹²⁸ the family of the victims of a school shooting sued the producers of the *Basketball Diaries* for negligence after a high school student was allegedly inspired by the movie to commit a school shooting.¹²⁹ The court ruled that this single event was too idiosyncratic for it to be foreseeable:

We find that it is simply too far a leap from shooting characters on a video screen (an activity undertaken by millions) to shooting people in a classroom (an activity undertaken by a handful, at most) for [the assailant's] actions to have been reasonably foreseeable to the manufacturers of the media that [the assailant] played and viewed.¹³⁰

Moreover, the court was reluctant to attach tort liability to any speech protected by the First Amendment.¹³¹ Additionally, the court stated that the plaintiff could not show proximate causation as the assailant's acts were an intervening, superseding act that broke the chain of causation.¹³²

In *Watters v. TSR, Inc.*, a mother brought a wrongful death suit against the producers of *Dungeons & Dragons*, claiming that the board game caused her son to commit suicide.¹³³ The mother claimed that the game could “dominate his mind” and cause “psychological harm in fragile-minded children.”¹³⁴ She claimed that her son had succumbed to this and

¹²⁷ *Id.* at 203–07.

¹²⁸ *James v. Meow Media*, 300 F.3d 683 (6th Cir. 2002) (family of murdered child sued creators of entertainment product for negligence and strict liability).

¹²⁹ The plaintiffs also sued a video games producer and internet service provider. *Id.*

¹³⁰ *Id.* at 693.

¹³¹ *Id.* 695–99.

¹³² *Id.* at 699–700 (“Generally, a third party's criminal action that directly causes all of the damages will break the chain of causation.”).

¹³³ *Watters v. TSR, Inc.*, 904 F.2d 378, 379 (6th Cir. 1990).

¹³⁴ *Id.* at 379–80 (The court stated that the game is not violent and often used by schools for learning exercises).

lost “touch with reality,” and “lost control of his own independent will and was driven to self-destruction.”¹³⁵

The court held that the manufacturer was not negligent.¹³⁶ First, the manufacturer could not be expected to ascertain the mental health of every user before it sells its product.¹³⁷ Second, the suicide was not a foreseeable result of the entertainment fantasy game.¹³⁸ Finally, the child’s suicide was an intervening action breaking the chain of causation.¹³⁹

In *Davidson v. Time Warner*,¹⁴⁰ the family of a murdered police officer sued artist Tupac Shakur and his record label.¹⁴¹ The family alleged that the assailant had listened to Tupac Shakur’s album *2Pacalypse Now* and it had caused him to murder the officer.¹⁴² The court held that the record company and artist were not negligent.¹⁴³ The court stated that no state negligence cases had placed “a duty upon a publisher to refrain from distributing a published work.”¹⁴⁴ The court also held that their artistic expression received the highest protection and to punish publication on the rare chance that it inspires a crime would chill free speech.¹⁴⁵

2. NEGLIGENCE & COMMERCIAL SPEECH: MEDIA LOSES

In *Weirum v. RKO General, Inc.*,¹⁴⁶ a radio station offered a cash prize to the first listener who could spot the station’s disc jockey wandering through Los Angeles.¹⁴⁷ During

¹³⁵ *Id.* at 380.

¹³⁶ *Id.* at 384.

¹³⁷ *Id.* at 381.

¹³⁸ *Id.* at 381–82 (“But if [the child’s] suicide was not foreseeable to his own mother, there is no reason to suppose that it was foreseeable to defendant.”).

¹³⁹ *Id.* at 383–384.

¹⁴⁰ *Davidson v. Time Warner*, No. Civ.A. V–94–006, 1997 WL 405907 (S.D. Tex. Mar. 31, 1997).

¹⁴¹ *Id.* at *2.

¹⁴² *Id.* A jury did not believe the criminal defendant, Howard, and sentenced him to death.

¹⁴³ *Id.* at *10.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at *12.

¹⁴⁶ *Weirum v. RKO General*, 539 P.2d 36 (Cal. 1975).

¹⁴⁷ *Id.* at 38.

the promotion, a man was killed when his car was forced off the road by a young driver who was searching for the disc jockey.¹⁴⁸ The family of the decedent sued the driver and radio station for wrongful death and was awarded \$300,000.¹⁴⁹ The radio station appealed claiming that the extension of duty would open them up to unwarranted liability.¹⁵⁰ The California Supreme Court disagreed, holding that this particular promotion created unnecessary and foreseeable risk for which the station was liable.¹⁵¹

In *Norwood v. Soldier of Fortune Magazine*,¹⁵² the plaintiff sued a magazine after he suffered injuries from a hitman hired through the magazine's advertisement.¹⁵³ The magazine filed for summary judgment, claiming First Amendment protection, but the motion was denied.¹⁵⁴ The court held that "[r]easonable jurors might conclude that a reasonable person shouldn't be especially surprised when he learns that the gun that had been hired through his advertisement was used to do one of the things that guns often do and are designed to do—hurt people."¹⁵⁵ The parties settled for an undisclosed sum before the start of the trial.¹⁵⁶

¹⁴⁸ *Id.* at 37.

¹⁴⁹ *Id.* at 39.

¹⁵⁰ *Id.* at 40–41.

¹⁵¹ *Id.* at 41. The court held that First Amendment does not bar against "civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent." *Id.* at 40.

¹⁵² *Norwood v. Soldier of Fortune Magazine*, 651 F.Supp. 1397 (W.D. Ark. 1987).

¹⁵³ 651 F. Supp. 1397, 1397–98 (W.D. Ark. 1987). The advertisements were in a 1985 issue of *Soldier of Fortune* magazine. *Id.* at 1398. The first advertisement read: "GUN FOR HIRE: 37 year-old—professional mercenary desires jobs. Vietnam Veteran. Discreet and very private. Bodyguard, courier, and other special skills. All jobs considered. Phone (615) 891-3306 (I-03)." *Id.* The second advertisement read: "GUN FOR HIRE: NAM sniper instructor. SWAT. Pistol, rifle, security specialist, body guard, courier plus. All jobs considered. Privacy guaranteed. Mike (214) 756-5941 (101)." *Id.*

¹⁵⁴ *Id.* at 1398, 1403.

¹⁵⁵ *Id.* at 1402.

¹⁵⁶ See Debbie Lee, 'Gun for Hire' Advertisement That Backfired and Hit the Publisher in the Pocketbook, 8 LOY. ENT. L.J. 439, 439 n.2 (1988) (detailing out of court settlement).

Eimann v. Soldier of Fortune Magazine was another case involving an advertisement for a hitman in *Soldier of Fortune* magazine.¹⁵⁷ This time a man hired a hitman to kill his estranged wife.¹⁵⁸ The family of the victim sued the magazine for wrongful death and sought over \$100 million in damages.¹⁵⁹ *Soldier of Fortune* magazine sought summary judgment, but the court denied it.¹⁶⁰ The case went to trial and a jury determined the magazine should pay \$9.4 million to the plaintiffs.¹⁶¹ However, on appeal the Fifth Circuit reversed the award stating the advertisement was too ambiguously worded to hold the magazine liable.¹⁶²

In *Rice v. Paladin Enterprise*, the family of three murder victims sued the publisher of a “hit man” instructional book for wrongful death.¹⁶³ A contract killer had followed the book’s instruction in the brutal murder of three people.¹⁶⁴ The publishers argued that the First Amendment barred them from liability.¹⁶⁵ The Fourth Circuit disagreed and held that that “the First Amendment does not pose a bar to a finding that Paladin is civilly liable as an aider and abettor of Perry's triple contract murder” and remanded the case.¹⁶⁶

¹⁵⁷ 880 F.2d 830, 831 (5th Cir. 1989).

¹⁵⁸ The hitman was paid \$10,000. *Id.*

¹⁵⁹ *See Eimann v. Soldier of Fortune*, 680 F. Supp. 863, 864 (S.D. Tex. 1988).

¹⁶⁰ *Id.*

¹⁶¹ *Eimann*, 880 F.2d at 831.

¹⁶² *Id.* at 838.

¹⁶³ 128 F.3d 233, 233 (4th Cir. 1997). The book was titled *Hit Man: A Technical Manual for Independent Contractors*. *Id.* at 239.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 241.

¹⁶⁶ *Id.* at 243. The case was settled out of court with the publishers paying several million dollars and destroying all the remaining copies. *See Andrianna D. Kastanek, From Hit Man to A Military Takeover of New York City: The Evolving Effects of Rice v. Paladin Enterprises on Internet Censorship*, 99 NW. U. L. REV. 383, 397 n.113 (2004).

a. Media Incitement

Incitement is another tort that is sometimes used by plaintiffs against a media defendant.¹⁶⁷ Incitement is a category of speech that is not covered by the First Amendment.¹⁶⁸ To prove incitement, a plaintiff must show that: (1) the speech was directed at producing imminent lawless action; and (2) the speech was likely to produce lawless action.¹⁶⁹ Whether a product has caused incitement is a matter of law.¹⁷⁰ The difficulty in suing the media for incitement is that entertainment products are merely meant to entertain, not incite action,¹⁷¹ and as with negligence, causation is difficult to prove.¹⁷²

In *McCullum v. CBS, Inc.*, the family of a man that committed suicide sued the music artist Ozzy Osborne and his record label for negligence and incitement.¹⁷³ At the time of the suicide, the man was listening to Osborne's music including the song "Suicide Solution" which generally promoted the act.¹⁷⁴ The court applied the incitement test and found that Osbourne's music was not "a command to an immediate suicidal act," and instead the song merely created a depressing mood by exploring

¹⁶⁷ See, e.g., *Byers v. Edmonson*, 826 So. 2d 551, 553 (La. Ct. App. 2002).

¹⁶⁸ *Byers v. Edmonson*, 826 So. 2d 551, 555; *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

¹⁶⁹ *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193; *See Hess v. Indiana*, 414 U.S. 105, 108 (1973). As with negligence, incitement has an element of causation which is similarly difficult to prove. *See also supra* Part III.A.

¹⁷⁰ *Byers*, 826 So. 2d at 555.

¹⁷¹ *See McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 194 (Cal. Ct. App. 1988) ("No rational person would or could believe otherwise nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action."). Incitement also requires proximity which mass media products do not provide. *See id.* at 197.

¹⁷² *See supra* Part III.A.

¹⁷³ *McCullum*, 249 Cal. Rptr. at 191.

¹⁷⁴ *Id.* at 190.

the darker side of humanity.¹⁷⁵ Thus, the defendants were not liable for incitement.¹⁷⁶

In *Byers v. Edmondson*, a couple went on a drug-induced killing spree inspired by the movie *Natural Born Killers*.¹⁷⁷ Byers was one of the victims who survived, but sustained several injuries leaving her a paraplegic.¹⁷⁸ She sued the distributors, Warner Bros., and the director, Oliver Stone, for incitement.¹⁷⁹ The court stated that the incitement test was not the equivalent of an artistic critique of the movie, it was an application of a legal test.¹⁸⁰ In applying the test, the court found that the producers were not liable for incitement.¹⁸¹ First, the movie does more than glorify violence as it critiques our society's obsession with it.¹⁸² Second, the movie is fantasy and does not have a call to action to commit crimes.¹⁸³

¹⁷⁵ *Id.* at 193–94.

¹⁷⁶ *Id.* at 195. The court also found that the defendants were not liable for negligence as the descendant's suicide was not foreseeable. *Id.* at 196.

¹⁷⁷ *Byers v. Edmonson*, 826 So. 2d 551, 553 n.2 (La. Ct. App. 2002).

¹⁷⁸ *Id.* Another victim had died. *Id.*

¹⁷⁹ *Id.* at 554. She also claimed that the movie was obscene. *Id.* at 555.

¹⁸⁰ *Id.* at 556.

¹⁸¹ *Id.*

¹⁸² *Id.* (“Although we acknowledge that such a portrayal of violence can be viewed as a glorification and glamorization of such actions, such a portrayal does not rise to the level of incitement, such that it removes the film from First Amendment protection.”).

¹⁸³ *Id.* See also *Olivia N. v. Nat'l Broad. Co.*, 126 Cal. App. 3d 488 (1981) (holding that victim could not sue television broadcaster for airing movie which inspired sexual assault because the movie did not contain a call to action); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (1989) (holding that producers of *The Warriors* were not liable for wrongful death or incitement in the shooting death caused outside of the theatre).

III. HOW VIRTUAL REALITY MAY REVIVE PRODUCTS LIABILITY

Over the last thirty years, many commentators have written about tort liability as it applies to violent video games.¹⁸⁴ Commentators have suggested many different approaches to increase liability for producers, including: lowering scrutiny of regulations of children and media,¹⁸⁵ creating a duty of media companies for their consumers,¹⁸⁶ using social science research as evidence of foreseeability and causation in tort cases,¹⁸⁷ and relaxing or disposing of the incitement test as it pertains to younger audiences.¹⁸⁸

Lower courts never adopted these proposals when it came to regulating violent video games.¹⁸⁹ In *Brown v. Entertainment Merchants Ass'n*, the United States Supreme Court stated that video games are protected speech.¹⁹⁰ But, the

¹⁸⁴ See, e.g., Amanda Harmon Cooley, *They Fought the Law and the Law (Rightfully Won): The Unsuccessful Battle to Impose Tort Liability Upon Media Defendants for Violent Acts of Mimicry Committed by Teenage Viewers*, 5 TEX. REV. ENT. & SPORTS L. 203 (2004) (arguing that First Amendment should protect against tort claims); Juliet Dee, *Basketball Diaries, Natural Born Killers and School Shootings: Should There be Limits on Speech which Triggers Copycat Violence?*, 77 DENV. U. L. REV. 713 (2000) (arguing that society should employ legislative measures to curtail violence in media); S. Elizabeth Wilborn Malloy, *Taming Terrorists But Not "Natural Born Killers"*, 27 N. KY. L. REV. 81 (2000) (arguing that violent entertainment that does not instruct the viewer on illegal behavior should enjoy First Amendment protection).

¹⁸⁵ See, e.g., Juliet Dee, *Basketball Diaries, Natural Born Killers, and School Shootings: Should There Be Limits on Speech Which Triggers Copycat Violence?*, 77 DENV. U. L. REV. 713 (2000).

¹⁸⁶ See, e.g., *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003).

¹⁸⁷ See, e.g., Jonathan Seiden, *Scream-ing for a Solution: Regulating Hollywood Violence; An Analysis of Legal and Legislative Remedies*, 3 U. PA. J. CONST. L. 1010 (2001); *cf.* *Brown v. Entm't Merchants Assoc.*, 131 S. Ct. 2729 (2011).

¹⁸⁸ See, e.g., David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1 (1994).

¹⁸⁹ See *id.* at 32–33.

¹⁹⁰ See *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011).

video game industry had existed for forty years before the Court spoke on the matter, during which time others had debated the effects of the games and whether video games deserved less protection than other entertainment products.¹⁹¹ With the number of Slender Man inspired crimes combined with the emergence of commercially available virtual reality technology, there may soon be another call for legislative action and judicial activism to curtail this “new” media violence.¹⁹² The following section outlines how negligence and incitement law may be reinterpreted to support liability for virtual reality entertainment that inspires crimes.

A. NEGLIGENCE AND VIRTUAL REALITY

I. DUTY OF CARE: LESS PROTECTION FOR PRODUCTS THAT PURPOSELY APPEAR REAL

When bringing a negligence case against the media, one of the difficulties for a plaintiff is that entertainment media does not have the same duty of care to their customers as other industries.¹⁹³ Courts are concerned that placing such requirements on entertainment producers may chill constitutionally protected speech.¹⁹⁴ But, in cases where the

¹⁹¹ Home video games consoles have been around since the 1970s, starting with Atari. But the first wave of cases against video manufacturers did not come until late-1990s as games became more violent and realistic. *See, e.g.,* James v. Meow Media, Inc., 90 F. Supp. 2d 798 (W.D. Ky. 2000), *aff'd*, 300 F.3d 683 (6th Cir. 2002); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002).

¹⁹² The introduction of new media technology often brings about a social panic over its presumed effects. *See generally* SIAN NICHOLAS & TOM O'MALLEY, MORAL PANICS, SOCIAL FEARS, AND THE MEDIA: HISTORICAL PERSPECTIVES (2013) (case studies examining moral panics that coincided with the introduction of new media); *See generally* Vaughan Bell, *Don't Touch that Dial! A History of Media Technology Scares, from the Printing Press to Facebook*, SLATE (Feb. 15, 2010, 7:00 AM), http://www.slate.com/articles/health_and_science/science/2010/02/dont_touch_that_dial.html.

¹⁹³ *See supra* Part III.A.

¹⁹⁴ *See* Davidson v. Time Warner, Inc., No. Civ.A. V-94-006, 1997 WL 405907 at *12 (S.D. Tex. Mar. 311, 1997).

speech was found to be more informational than entertainment, courts have required more duty of care on media companies.¹⁹⁵

Internet memes are more like cultural folklore and may appear more “real” than other media entertainment.¹⁹⁶ Memes like the Slender Man are more like a collective story than the work of a single author:¹⁹⁷ the story changes as each new author adds to it.¹⁹⁸ The story is also individualized to fit the fears and anxieties of its audience.¹⁹⁹

Moreover, unlike television or movies, the internet offers a reality if one chooses to believe it.²⁰⁰ Television and movies are commercial products that clearly state who wrote, acted in, and produced the product. In the last decade, Hollywood has tried to combat this by suspending our disbelief with the “found footage” genre, including the *Blair Witch Project* and the *Paranormal Activity* movie franchises, and the *Ghost Hunters* TV series.²⁰¹ However, with mass-commercial media, it is impossible to escape the fact that it is a product.

¹⁹⁵ See *supra* Sections III.B.1–2.

¹⁹⁶ Scholar Shira Chess refers to texts like movies and television as ‘fakelore’ which originate as commercial products. Shira Chess, *Open-Sourcing Horror: The Slender Man, Marble Hornets, and Genre Negotiations*, 15 J. INFO., COMM. & SOC. 374, 374–83 (2012).

¹⁹⁷ Though the creator of the Slender Man is known, as the story progresses, the origins are often lost on the consumer who is not actively seeking it out. See generally Dana Keller, *Digital Folklore: Marble Hornets, The Slender Man, and the Emergence of Folk Horror in Online Communities* (Dec. 2013) (unpublished B.A. thesis, University of British Columbia) (on file with the University of British Columbia, Vancouver Library).

¹⁹⁸ See *id.* at 3–5.

¹⁹⁹ See Chess, *supra* note 198, at 380.

²⁰⁰ Farhad Manjoo, *How the Internet Is Loosening Our Grip on the Truth*, N.Y. TIMES (Nov. 2, 2016), https://www.nytimes.com/2016/11/03/technology/how-the-internet-is-loosening-our-grip-on-the-truth.html?_r=0.

²⁰¹ See Matilda Battersby, ‘Based on a True Story’ It’s the Most Overused Tagline in Cinema at the Moment, but Can We Really Believe It?, THE INDEPENDENT: CULTURE (U.K.) (Oct. 19, 2012, 11:00 PM), <http://www.independent.co.uk/arts-entertainment/films/features/based-on-a-true-story-its-the-most-overused-tagline-in-cinema-at-the-moment-but-can-we-really-believe-it-8216817.html>. “There is little legal need to curtail creative use of the truth so long as you are not offending anyone.” *Id.*

However, internet sites can hide themselves from commercialism and appearing over-produced (often this is out of necessity caused by lack of funding).²⁰² This can give the product more ethos, and maybe more power, especially among susceptible persons who want to believe.²⁰³ Add to this the evolving technology of virtual reality, and it may become even more difficult to ascertain what is real and what is make believe.²⁰⁴

If memes can use virtual reality technology to appear real and are presented as real, then it can be argued that they should have less speech protection. In First Amendment jurisprudence, opinion speech is given more protection than factual speech.²⁰⁵ For example, opinion is a defense in libel law.²⁰⁶ Hard news stories will receive more scrutiny than editorial pieces.²⁰⁷ Political speech receives the highest order of

²⁰² See, e.g., *Official Slender Man Site*, CREEPY PASTA WIKI (Feb. 19, 2017), http://creepypasta.wikia.com/wiki/The_Slender_Man.

²⁰³ Adolescents are the highest risk age groups for the development of Internet addiction. See Soo Kyung Park et al., *Prevalence of Internet Addiction and Correlations with Family Factors Among South Korean Adolescents*, 43 *ADOLESCENT* 895, 895–909 (2008).

²⁰⁴ See, e.g., *supra* note 84 and accompanying text; see also Seth Millstein, *Is Slender Man Real? A Fascinating Deep Dive in Meme's Message Boards*, *BUSTLE* (June 12, 2014), <http://www.bustle.com/articles/27971-is-slender-man-real-a-fascinating-deep-dive-in-memes-message-boards>. “In fact, a contingent of the paranormal community believes this creature actually exists[.]” Aaron Sagers, *Slender Man is Real: From Cultural Conversation to Paranormal Topic*, *HUFFINGTON POST* (Aug. 14, 2014), http://www.huffingtonpost.com/aaron-sagers/slender-man-is-real-from-_b_5481349.html.

²⁰⁵ See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980) (holding that purely commercial speech will receive intermediate scrutiny). Commercial speech that is deceptive will not be protected. *Id.*

²⁰⁶ See generally *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 7 (1990) (“[S]tatement[s] of opinion relating to matters of public concern which do[] not contain a provably false factual connotation will receive full constitutional protection.”).

²⁰⁷ See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (protecting advertorial from libel award).

protection, partly because it is mostly opinion.²⁰⁸ However, more fact-based speech, like commercial speech, receives less protection.²⁰⁹

Similarly, one could argue that entertainment products that appear to be real should receive less protection.²¹⁰ If there is no attribution, disclaimer, or age filter, then the speech is trying to present itself as a statement of fact, which receives less protection.²¹¹

2. PROXIMATE CAUSE: MORE POWERFUL, ADVERSE EFFECTS?

The next element in a negligence case is proximate cause.²¹² Proximate cause is difficult for plaintiffs in media cases to show because: (1) the intervening action of the assailant breaks the chain of causation; and (2) when it comes to media effects, social science can only support correlation, not causation.²¹³ During the debate on whether to regulate video game violence, one of the main arguments against regulation was the lack of strong evidence of effects.²¹⁴ Similarly, the effects of virtual worlds are still unknown, with an even smaller body of research than courts and legislatures had with video games.²¹⁵

²⁰⁸ *Id.*

²⁰⁹ *See Central Hudson*, 447 U.S. at 563.

²¹⁰ *See generally* Laura Tate Kagel, Note, *Balancing The First Amendment And Child Protection Goals In Legal Approaches To Restricting Children's Access To Violent Video Games: A Comparison Of Germany And The United States*, 34 GA. J. INT'L & COMP. L. 743, 769–74 (2006); *supra* note 188 and accompanying text.

²¹¹ *See Central Hudson*, 447 U.S. at 563. Creepy Pasta posted disclaimers after the Wisconsin crimes occurred. Scott Neuman, *Website Linked to Stabbing of 12-Year-Old Posts Disclaimer*, NPR (June 3, 2014, 8:49 PM), <http://www.npr.org/blogs/thetwo-way/2014/06/03/318615699/website-linked-to-stabbing-of-12-year-old-posts-disclaimer>.

²¹² *See supra* Part III.A.

²¹³ *Id.*

²¹⁴ *See e.g.*, *Brown v. Entm't Merchs. Assoc.*, 564 U.S. 786, 800 (2011) (requiring a direct causal link in order to support content-based regulation).

²¹⁵ *See generally* Robin Burks, *How Does Virtual Reality Affect the Brain? The Answer May Surprise You*, TECH TIMES (Nov. 25, 2014), <http://www.techtimes.com/articles/20927/20141125/how-does-virtual-reality-affect-the-brain-the-answer-may-surprise-you.htm>. The arguments will be similar to those made by critics of video games. *See*

Unfortunately, when there is a lack of empirical evidence, anecdotes tend to fill the vacuum.²¹⁶

A few critics have argued that immersive virtual worlds may have stronger effects than traditional video games.²¹⁷ One argument is that minors are more affected because of a less developed sense of the fantasy-reality dichotomy.²¹⁸ One study found that 23% of users experienced mood modifications while in the virtual world,²¹⁹ and 15% of virtual world users experienced withdrawal when they were no longer immersed in it.²²⁰ Furthermore, 28% of the subjects used the virtual world even if they did not enjoy it.²²¹ Additionally, 58% of men and 80% of women reported dreaming about themselves living in the virtual world.²²² Another study found that 30% of heavy users of

e.g., Rick Nauert, *Negative effects of Violent Video Games May Build Over Time*, PSYCHCENTRAL (Dec. 11, 2012), <http://psychcentral.com/news/2012/12/11/negative-effects-of-violent-video-games-may-build-over-time/48918.html>.

²¹⁶ It is an “often reported finding that the normatively weaker, but more vivid anecdotal evidence is more convincing than the normatively stronger, but less vivid statistical evidence[.]” Hans Hoeken, *Anecdotal, Statistical and Causal Evidence: Their Perceived and Actual Persuasiveness*, 15 ARGUMENTATION 425, 428 (2001).

²¹⁷ See Monica Kim, *The Good and Bad of Escaping to Virtual Reality*, THE ATLANTIC (Feb. 18, 2015), <http://www.theatlantic.com/health/archive/2015/02/the-good-and-the-bad-of-escaping-to-virtual-reality/385134>.

²¹⁸ Nachshon Goltz, *ESRB Warning: Use of Virtual Worlds by Children May Result in Addiction and Blurring of Borders - the Advisable Regulations in Light of Foreseeable Damages*, 11 U. PITT. J. TECH. L. POL'Y 2, 13 (2010). “Six professional organizations in the health field found a connection between video games and behavior in minors: stating that more than 1000 studies point overwhelmingly to a causal connection between media violence and aggressive behavior in some children.” *Id.*

²¹⁹ *Id.*

²²⁰ NICK YEE, ARIADNE - UNDERSTANDING MMORPG ADDICTION 4 (Oct. 2002), <http://www.nickyee.com/hub/addiction/addiction.pdf>.

²²¹ See *id.* at 5.

²²² NICHOLAS YEE, THE NORRATHIAN SCROLLS: A STUDY OF EVERQUEST 63 (2001), <http://www.nickyee.com/report.pdf>.

Second Life reported that the virtual world offers them a better quality of life than the real world.²²³

New evidence of powerful effects of immersive media would change the debate on causation. This could be in the form of social science showing a stronger correlation between violence and virtual reality than the evidence linking violence and contemporary video games.²²⁴ Another development could be research from the “hard” sciences such as neuroscience, which could show stronger neurological effects of virtual reality immersion, as compared to contemporary media.²²⁵ This type of evidence could be more acceptable to courts when establishing proximate cause.²²⁶

3. FORESEEABILITY: EXCEPTIONS PROVE THE RULE

The final and arguably most determinative element in a negligence case is foreseeability.²²⁷ When plaintiffs sue media companies for media inspired violence, courts usually hold that a single incident is too idiosyncratic for a media company to be held liable for the injury caused by another.²²⁸ But,

²²³ Heavy users are those who use Second Life 30 or more hours a week. JELLE ATTEMA & DAVID DE NOOD, *SECOND LIFE: THE SECOND LIFE OF VIRTUAL REALITY 3* (2006) https://ecp.nl/sites/default/files/EPN_report_-_The_Second_Life_of_Virtual_Reality_-_2006_October.pdf.

²²⁴ See Kim, *supra* note 219.

²²⁵ See Burks, *supra* note 217. See generally Susan Greenfield, *Modern Technology is Changing the Way Our Brains Work, Says Neuroscientist*, THE DAILY MAIL, <http://www.dailymail.co.uk/sciencetech/article-565207/Modern-technology-changing-way-brains-work-says-neuroscientist.html> (last visited Oct. 26, 2017).

²²⁶ See Francis X. Shen, *The Law and Neuroscience Bibliography: Navigating the Emerging Field of Neurolaw*, 38 INT'L J. LEGAL INFO. 352, 352 (2010). “In the past five years, we have witnessed extraordinary growth in the amount of legal scholarship, legal practice, and public policy at the intersection of law and neuroscience.” *Id.*

²²⁷ See April M. Perry, *Guilt by Saturation: Media Liability for Third-Party Violence and the Availability Heuristic*, 97 Nw. U. L. Rev. 1045, 1048–50 (2003) (arguing that negligence claims hinge on foreseeability).

²²⁸ See *id.* at 1064–65, 1073.

foreseeability is subjective.²²⁹ Often it is a matter of familiarity—what was once unforeseeable becomes foreseeable once several similar incidents occur.²³⁰

The “availability heuristic” is a concept from psychology that states that when attention is focused on an odd or novel event, it makes it seem more common.²³¹ The news media often focuses on acts of random violence because it attracts more viewers compared to commonly occurring events.²³² This effect may be problematic to entertainment creators, as it may decrease the amount of evidence that a plaintiff needs to prove foreseeability in a negligence case.²³³

The nonstop coverage of random violence may give unsubstantiated power to the media texts that are said to inspire

²²⁹ *See id.* at 1052.

²³⁰ This is common in products liability. A certain malfunction is found and the company will recall the product. They are often not held liable for certain malfunctions if they were not foreseeable. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 684–85 (Hornbook Series Student eds., 5th ed. 1984). But, if later versions of the product have such malfunctions, then it is foreseeable and the company can be held liable. *Id.* The webmaster for Creepy Pasta claimed that he was concerned for the overall obsession of fan girls:

I’ve tried to contact writers who sent in things that troubled me – particularly teens who were clearly writing out their own unhealthy, violent revenge fantasies – and tried to direct them to websites or hotlines where they could find someone to talk to if they were having trouble. For the sake of both my own sanity and that of my readers, I have policies about flat-out rejecting things that I believed glorified abuse or suicide.

Statement on the Wisconsin Stabbing, CREEPY PASTA (June 3, 2014), <http://www.creepypasta.com/statement-wisconsin-stabbing/>.

²³¹ *See generally* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 207–09 (1973).

²³² During the Aurora Movie Theatre Shooting coverage, CNN News saw a 125% spike in viewership. *See* John Nolte, *MSNBC Lost Viewers as Colorado Shooting News Broke*, BREITBART (July 24, 2012), <http://www.breitbart.com/big-journalism/2012/07/24/msnbc-lost-viewers-batman-shooting/>.

²³³ *See* Perry, *supra* note 229 at 1065, 1068.

it.²³⁴ In our digital world, we are inundated with constant information, so events like mass shootings seem more commonplace.²³⁵ The news coverage arouses public fear that a killer could strike at any moment in any place.²³⁶ But it is only the amount of attention and available information that has increased, not the chances of an attack happening.²³⁷ For example, media attention has created a false sense that mass shootings are a new phenomenon—but school shootings in the United States were first reported in the 1800s.²³⁸ The Sandy Hook tragedy seemed like a unique occurrence, but a similar incident had occurred 23 years earlier in Stockton, California.²³⁹

Naturally, when tragedies occur, people search for an answer, often in a form of a scapegoat. The answer all too often is found in a “new” media.²⁴⁰ This fear is especially strong for those who do not use the “new” medium and are unfamiliar with it.²⁴¹ This is usually an older population, which is also the population more likely to vote, serve in public office, and serve on juries.²⁴²

a. Incitement and Immersive Media

In an incitement case against the media, the plaintiff must prove that the speech was directed at producing imminent lawless action and that the speech was likely to cause lawless

²³⁴ See *id.* at 1065. After the tragedy at Columbine, “seventy-eight percent of the respondents stated that ‘violence in the media deserved ‘some’ or ‘a lot’ of the blame for the recent mass shootings.’” *Id.* at 1066.

²³⁵ *Id.* at 1063.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Jack Schneider, *Long History of US School Shooting Means Obama is Right, NRA is Wrong*, THE CHRISTIAN SCIENCE MONITOR (Jan. 16, 2013), <http://www.csmonitor.com/Commentary/Opinion/2013/0116/Long-history-of-US-school-shootings-means-Obama-is-right-NRA-is-wrong>.

²³⁹ *Id.*

²⁴⁰ See *supra* Part I.

²⁴¹ See *supra* Part I.

²⁴² See *supra* Part I.

action.²⁴³ Most incitement cases brought against the media have been dismissed because there is no call to action, as these texts are merely meant to entertain.²⁴⁴ However, in *Byers*, the court did say that entertainment that glorifies violence may rise to a call to action.²⁴⁵ But in the case of movies, there is also a story-telling value.²⁴⁶ More immersive entertainment may not have that context—it may be merely a call to action, such as instruction to kill in order to become a proxy of the character.²⁴⁷

Another factor in incitement cases is the requirement of proximity.²⁴⁸ Courts are reluctant to hold that a producer’s speech, put in a movie or television show and consumed in a distant place and time, is geographically or temporally proximate enough to inspire a crime.²⁴⁹ But, virtual reality may create a universe where the character is no longer a two-dimensional graphic on a screen; instead the image will now appear to be real and in person.²⁵⁰ Add to that a social media presence in games, and that games can now be interactive and controlled by a person calling for such action.²⁵¹ In these cases, the factors may be more akin to the hitman manual in *Rice* and proximity may be established.²⁵² As the *McCollum* and *Davidson* cases suggest, publications that “clearly condone recipients of their message [to

²⁴³ See *Hess v. Indiana*, 414 U.S. 105, 108-109 (1973). As with negligence, incitement has an element of causation which similarly difficult to prove. See *supra* Part III.A.

²⁴⁴ See *supra* Part III.C.

²⁴⁵ See *Byers v. Edmondson*, 826 So. 2d 551 (La. Ct. App. 2002).

²⁴⁶ *Id.* at 556.

²⁴⁷ Slender Man meme did speak of children becoming proxies, though it is a tenuous to describe that as a call to action. See *supra* Part II.A.

²⁴⁸ See *supra* Part III.C.

²⁴⁹ See *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 1007–08 (1988) (holding recorded song promoting suicide was not proximate cause of death).

²⁵⁰ See *supra* notes 73–76 and accompanying texts.

²⁵¹ See generally F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293, 294–99 (2004–2005).

²⁵² *Rice v. Paladin Enters., Inc.* 128 F.3d 233, 239–43 (4th Cir. 1997) (holding that First Amendment does not bar incitement claim against publisher).

engage in violence], and perhaps only those that go so far as to exhort violence, will run the risk of liability.”²⁵³

CONCLUSION

It is unlikely that the creators of the Slender Man will ever face liability for harms motivated by the character. The case law makes it difficult to win against entertainment producers on negligence or incitement claims. As the Fifth Circuit said in *Herceg v. Hustler Magazine*: “the constitutional protection accorded to the freedom of speech and of the press is not based on the naïve belief that speech can do no harm, but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.”²⁵⁴

Today, the benefits of ideas produced by entertainment products, even with their glorification of violence and fascination with the macabre, outweighs the harm of violence they may inspire. But, if more crimes are inspired by new media platforms, then things may change. More cases may be filed and more courts may be willing to hold media entertainment producers liable. Moreover, in the near future, when entertainment becomes even more immersive, more blame may be placed on the producers—especially if there is a fear of effects or more precise science showing powerful effects. If this happens, entertainment producers should expect courts to hold them to the same duty as companies in other markets.

²⁵³ L. Lin Wood & Corey Fleming Hirokawa, *Shot by the Messenger: Rethinking Media Liability for Violence Induced by Extremely Violent Publications and Broadcasts*, 27 N. KY. L. REV. 47, 64 (2000).

²⁵⁴ *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019 (5th Cir. 1987).