A TRIPLE HOMICIDE, A BOOK PUBLISHER, and the FIRST AMENDMENT: How Will *Rice v. Paladin Enterprises, Inc.* Impact the Entertainment and Media Industries?

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I disapprove of what you say, but I will defend to the death your right to say it.[1] *He who helps the guilty shares the crime.*[2]

I. INTRODUCTON

In *Rice v. Paladin Enterprises, Inc.*,[3] the United States Court of Appeals, Fourth Circuit, was forced to reconcile these two maxims. The issue before the court was whether the First Amendment bars a wrongful death action, brought against the publisher of an instructional book, for aiding and abetting a convicted killer who relied upon the book in carrying out a triple homicide.[4] Judge Luttig, in a voluminous opinion which quoted the text of *Hit Man: A Technical Manual*

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1 Attributed to Voltaire (1694-1778).

2 Publilius Syrus, *Sententiae*, c.43 B.C.

3 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 1515 (1998).

4 *Id.* at 241.

For Independent Contractors[5] at length and drew significant parallels between the work and the commission of the murders, held that the First Amendment did not bar such an action.[6]

II. FACTS OF PALADIN

On March 3, 1993, James Perry murdered Mildred Horn, her eight-year-old son Trevor, and Janice Saunders, the boy's personal nurse. Mildred Horn's ex-husband, Lawrence Horn, hired Perry to carry out this execution. A two million-dollar trust in the boy's name existed at the time of the murders. Trevor had received this money in settlement of a prior accident that had rendered the boy paralyzed for life. Under the terms of the trust, Lawrence Horn was the sole beneficiary of this account in the event of the death of both Trevor and his mother.

The relatives and representatives of Mildred Horn, Trevor Horn and Janice Saunders brought a civil wrongful death action against Paladin Enterprises, Inc., the publisher of *Hit Man: A Technical Manual For Independent Contractors.* They claimed that "in soliciting, preparing for, and committing these murders, Perry meticulously followed countless of *Hit Man's* 130-pages of detailed factual instructions on how to murder and to become a professional killer."[7] The plaintiffs argued that Paladin's liability should be based on the publication of *Hit Man*[8] and the book's graphically detailed "killing instructions."[9] In the preface to his work, the author sets forth the objectives of *Hit Man* as follows:

[When] [y]ou've read all the suggested material, you [will have]

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[5] *Hit Man: A Technical Manual For Independent Contractors* was published by Paladin Enterprises, Inc., a/k/a. The Paladin Press.

[6] 128 F.3d at 242.

[7] Both parties stipulated that in January 1992, Perry ordered and received a copy of *Hit Man* and a second publication entitled *How To Make a Disposable Silencer*, Volume 2 from Paladin in response to a catalogue advertisement. After his arrest, a copy of *Hit Man* was found in Perry's apartment.

[8] Paladin Enterprises Inc. began publishing the work entitled *Hit Man: A Technical Manual For Independent Contractors*, in 1983. Between 1983 and the time this action was commenced approximately 13,000 copies had been sold nationally.

[9] The suit is a civil, state-law wrongful death action against the defendant. Plaintiffs allege that defendant aided and abetted Perry in the actual murders through its publication. 128 F.3d at 241.

honed your mind, body and reflexes into a precision piece of professional machinery. [You will have] assembled the necessary tools and learned to use them efficiently. Your knowledge of dealing death [will have] increased to the point where you have a choice of methods. Finally, you [will be] confident and competent enough to accept employment.[10]

Specifically, *Hit Man* advises its reader as to how to solicit employment, where to carry out the execution, which weapon to select for killing, the proper use of that weapon, how to dispose of a victim's body, and how much to charge.[11]

At trial,[12] in order to clarify the issue, or perhaps motivated by arrogance fueled by its faith in the First Amendment, Paladin "stipulated to a set of facts which establish[ed] as a matter of law that the publisher is civilly liable for aiding and abetting James Perry in his triple murder, unless the First Amendment absolutely bars the imposition of liability upon a publisher for assisting in the commission of criminal acts."[13] These stipulations were offered for the sole purpose of determining the defendant's motion for summary judgment. The defendant expressly reserved the right to contest its stipulations at any and all

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[10] *Id.* at 236.

[11] The specific instructions and advice contained throughout the text of *Hit Man's* 130-pages is specifically referenced by the court in its decision. 128 F.3d at 239–41.

[12] Rice v. Paladin Enters., Inc., 940 F.Supp. 836, 839 (D. Md. 1996).

[13] The full stipulations of the parties are quite extensive, therefore only the most relevant provisions of the Joint Statement of Facts follows:

4. Defendants concede, for purposes of this motion, and for no other purposes, that:

a.) defendants engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes; and

b.) in publishing, marketing, advertising and distributing *Hit Man* and *Silencers*, defendants intended and had knowledge that their publications would be used upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in their publications.

c.) The conditional factual concessions made in this paragraph relate only to the defendants state of mind, and do not preclude defendants from contending that defendants published words, in and of themselves, were neither directed at causing imminent unlawful action nor likely to produce such action, for purposes of the doctrine of *Brandenburg v. Ohio*.

subsequent proceedings.[14] Despite the unusual factual stipulations, which included that Paladin "intended to attract and assist criminals" who desired such information on how to commit crimes," intended and had knowledge" that the book would be used by readers to carry out the crime of murder for hire, and through the publication and sale of the book, "assisted Perry" in the actual murders,[15] the United States District Court for the District of Maryland granted the defendant-publisher's motion.[16]

The federal appellate court reversed the lower court's decision allowing this cause of action against Paladin to proceed to trial on the merits.[17] Specifically, Judge Luttig found that *Hit Man* was not entitled to the First Amendment's protection of speech that is merely abstract advocacy of unlawful action.[18] Therefore, the First Amendment was not a bar to the plaintiff's wrongful death action.

III. IMPOSING LIABILITY ON THE ENTERTAINMENT INDUSTRY

Seeking to impose civil liability upon producers and publishers in the entertainment industry is not a novel concept. Suits based on theories ranging from negligence and strict products liability filed against the publisher of the *Encyclopedia of Mushrooms*[19] to allegations that the three major television networks, through their programming, had caused a minor to become desensitized and addicted to violence,[20] have come before the judiciary. Wrongful death actions have been brought against Ozzy Osbourne and CBS Records,[21] as well as the manufacturers of the fantasy game "Dungeons & Dragons."[22] Sum-

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[14] The preamble to the Joint Stipulations of Fact expressly states, "these facts are offered only for the purposes of this motion and the parties specifically reserve the right to contest all statements which follow at any subsequent proceedings in this case."

[15] *See* 128 F. 3d at n2 (full text of stipulations between the parties).

[16] 940 F.Supp. 836, 839 (D. Md. 1996).

[17] 128 F.3d at 242.

[18] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[19] *See* Winter v. G.P. Putnam's Sons, 938 F.2d 1033 (9th Cir. July 21, 1991).

[20] *See* Zamora v. CBS, Inc., 480 F.Supp. 199 (D. Fla. 1979).

[21] *See* McCollum v. CBS, Inc., 202 Cal.App.3d 989 (Cal. Ct. App. 1988).

[22] *See* Watters v. TSR, Inc., 904 F.2d 378 (6th Cir. 1990).

mary judgment in favor of the defendant has been granted in a vast majority of these actions.[23] However, the courts have been divided on the underlying basis for granting summary judgment, or otherwise granting dismissal.[24] While some cases do so based on the First Amendment's protection of free speech, others do so because the plaintiff has failed to establish the necessary elements of a negligence action.

A. The First Amendment

Numerous cases have barred the imposition of liability solely on constitutional grounds, as the expression in question was found to be free speech protected by the First Amendment.[25] However, it is well established that the freedom of speech guaranteed by the First Amendment is not absolute. Certain classes of speech may be regulated or punished by the state without violating the principles established by the First Amendment.[26] Obscene speech,[27] defamation,[28] false or deceptive advertising,[29] and "fighting words"[30] are not immu-

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[23] For motions for summary judgment which have been granted at the Court of Appeals level: *see* Winter v. G.P. Putnams's Sons, 938 F.2d 1033 (9th Cir. 1991); Watters v. TSR Inc., 904 F.2d 378 (6th Cir., 1990); For motions for summary judgment granted at District Court level: *see* Waller v. Osbourne, 763 F.Supp. 1144 (M.D. Ga 1991). For state level decisions: *see* Bill v. Superior Court, 137 Cal. App.3d 1002 (Cal. Ct. App. 1982); Yabubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. App. Ct. 1989); De Filippo v. NBC, 446 A.2d 1036 (R.I. 1982).

[24] Numerous court decisions have refused to hold the defendant liable based on First Amendment grounds. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987); Waller v. Osbourne, 753 F.Supp. 1141 (M.D. Ga. 1991); Zamora v. CBS, Inc., 480 F.Supp. 199 (S.D. Fla. 1979); Bill v. Superior Court, 137 Cal.App.3d 989 (Cal. Ct. App. 1982); De Filippo v. NBC, 446 A.2d 1036 (R.I. 1982); Olivia N. v. NBC, 126 Cal.App.3d 488 (Cal. Ct. App. 1981). Some courts have declined to impose liability based upon a finding that the defendant breached no duty owed to plaintiff. *See* Winter v. G.P. Putnams's Sons, 938 F.2d 1033 (9th Cir. 1991); Watters v. TSR Inc., 904 F.2d 378 (6th Cir., 1990); Zamora v. CBS, Inc., 480 F.Supp. 199 (S.D. Fla. 1979).

[25] *See* Olivia N. v. NBC, 126 Cal.App.3d 488 (Cal. Ct. App. 1981); De Filippo v. NBC, 446 A.2d 1036 (R.I. 1982).

[26] McCollum v. CBS, Inc., 202 Cal.App.3d 989, 999, 1000 (Cal. Ct. App. 1988).

[27] Miller v. California, 413 U.S. 15, 23 (1973).

[28] Konigsberg v. State Bar, 366 U.S. 36, 49 n.10 (1961).

[29] Central Hudson Gas and Elec. Corp. v. Public Service Comm. 447 U.S. 557

nized under the guise of free speech. Finally, *Brandenburg v. Ohio* [31] established that speech which is directed to producing or inciting imminent lawless action, and which is likely to incite or produce such action,[32] is also beyond the scope of protection.

This last class of unprotected speech, incitement, as established by *Brandenburg*, is essential to the rationale of the court in *Paladin*. In *Brandenburg,* the conviction of a Ku Klux Klan leader was reversed by the Supreme Court of the United States on the grounds that the state statute, under which the defendant was convicted, was unconstitutional.[33] The Court held that a state could not punish mere abstract advocacy of lawlessness. Rather, "the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy 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.[34] The *Brandenburg* Court found that, although the defendant's remarks were derogatory of two particular minority groups, "the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[35]

The "incitement" standard was further developed in *Hess v. Indiana*.[36] In *Hess*, the defendant was arrested for shouting "We'll take the f*cking street later" as police were attempting to break up an anti-war demonstration.[37] In reaching its decision to uphold the speaker's First Amendment right to free speech, the Court focused on the immi-

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(1980).

[30] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[31] 395 U.S. 444 (1969).

[32] *Id* at 444, *cited in* Dennis v. United States, 341 U.S. 494, 507 (1951).

[33] In *Brandenburg* the Court held that the Ohio criminal syndicalism statute on its face and as applied punished mere advocacy as opposed to such advocacy which would lead to imminent lawless action.

[34] 395 U.S. 44 (*cited in* Dennis v. United States, 341 U.S. 494, 507 (1951))

[35] *Brandenburg cited in* Noto v. United States, 367 U.S. 290, 297, 298 (1961); *see* also Herndon v. Lawry, 301 U.S. 242 (1937).

[36] 414 U.S. 105 (1973).

[37] *Id.* at 105.

nence of the threat resulting from Hess' speech. The Court stated that the statement was not directed to any person or group and there was no evidence, nor could there be an inference from the language, that Hess' words were intended "to produce, and likely to produce, imminent disorder."[38]

Courts have applied the incitement exception with extreme care since the criteria underlying its application are vague.[39] Therefore the exception has proved to be a narrow one. In *McCollum v. CBS Inc.*,[40] Judge Closkey of the California Court of Appeal acknowledged that a survey of case law on the topic revealed that all claims that "fictional depictions in the film or electronic media" had incited unlawful conduct, and should therefore result in the imposition of tort liability, had been rejected on First Amendment grounds.[41]

B. Incitement And Entertainment Industry Defendants

In *Zamora*,[42] a minor and his parents filed an action for damages

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[38] *Id.* at 108, 109. Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it can not be said that he was advocating, in the normal sense, any action. And since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the state on the ground that they had a tendency to lead to violence.

[39] *See* De Filippo v. NBC, 446 A.2d 1036 (R.I. 1982).

[40] 202 Cal.App.3d. 989 (1988).

[41] *Id.* at 1002. [T]he claim that certain fictional depictions in the film or electronic media have incited unlawful conduct, and should result in the imposition of tort liability is by no means novel. However, all such claims have been rejected on First Amendment grounds. *See* Bill v. Superior Court, *supra* 137 Cal. App. 1002 (Plaintiff shot outside a theater showing a violent movie made by defendants which allegedly attracted violence-prone individuals who were likely to injure members of the general public at or near the theater); De Filippo v. NBC, 446 A.2d 1036 (R.I. 1982) (Plaintiffs' son died attempting to imitate a "hanging stunt" which he saw on television); Walt Disney Productions Inc. v. Shannon, 276 S.E.2d. 580 (Ga. 1981) (Plaintiff partially blinded when he attempted to reproduce some sound effects demonstrated on television by rotating a lead pellet around in an inflated balloon); Zamora v. CBS, Inc., 480 F.Supp. 199 (S.D. Fla. 1979) (Minor plaintiff had become so addicted to and desensitized by television violence that he developed a sociopathic personality and as a result shot and killed an 83-year-old neighbor).

[42] 480 F.Supp. at 199.

against American Broadcasting Company, Columbia Broadcasting System and National Broadcasting Company for causing the minor to become desensitized and addicted to violence, thereby inciting him to murder his neighbor. Dismissing the complaint with prejudice, the court based its holding, in part, on the failure of the complaint to establish that plaintiff was incited into murdering his neighbor by a particular call to action or by "any specific program of an inflammatory nature."[43]

In *Waller v. Osbourne*, [44] the parents of a teenage boy who had committed suicide after listening to the defendant's song "Suicide Solution" brought a wrongful death action against the song's creators. The court granted summary judgment to the defendants, musician Ozzy Osbourne, CBS Inc., and CBS Records[45] based solely on the protection of First Amendment interests.[46]

The plaintiffs argued that a subliminal message within the defendant's song incited their son to take his own life. In its opinion, the court stated that even though it had determined that the defendant's music did not contain any subliminal messages, the plaintiffs would be able to prevent the defendants from asserting First Amendment protection for their work if it could be demonstrated that "Suicide Solution" qualified as incitement.[47] After reviewing the lyrics in question, the court found that the defendant's music was not "directed toward any particular person or group of persons." Then, noting that no allegation had even been asserted that the teenage boy committed suicide immediately after listening to "Suicide Solution," the court stated: "there is no evidence that defendant's music was intended to produce

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[43] *Id.* at 204.

[44] Waller v. Osbourne, 763 F.Supp. 1144 (1991).

[45] The defendants named in *Waller* were Ozzy Osbourne, CBS Incorporated, CBS Records, Jet Records, Bob Daisley, Randy Rhoads, Essex Music International, Ltd., and Essex Music International, Incorporated.

[46] "In the final analysis, the court simply has no basis upon which to impose tort liability on the defendants when, as in this case, the alleged wrongful acts are based on the defendants' dissemination of protected speech. The court, therefore, finds as a matter of law that the defendants' First Amendment rights protect them from being held liable under plaintiffs' claims of negligence, nuisance, fraud, and invasion of privacy." *Id.* at 1152.

[47] *Id.* at 1150.

acts of suicide, and likely to cause imminent acts of suicide; nor could one rationally infer such a meaning from the lyrics."

In a similar, more recent case, a civil action was brought against rap artist, Tupac Shakur.[48] After stopping a vehicle based on a traffic infraction, Officer Bill Davidson was shot and killed by the vehicle's driver. The car was later established as stolen. At the criminal trial the driver of the vehicle, Ronald Howard, claimed that he had been listening to an audiocassette recording of Tupac Shakur's "2Pacalypse Now." In an effort to avoid the death penalty, Howard alleged that listening to "2Pacalypse Now" had caused him to shoot Officer Davidson. Howard was unable to convince the jury of this and was sentenced to die. The family of Officer Davidson filed a civil action against Shakur. Alleging that the music produced by the defendants "tends to incite imminent illegal conduct on the part of individuals like Howard" and therefore should not merit First Amendment protection, the family of Officer Davidson sought to hold defendants liable for causing his death.[49]

The court examined the incitement test in the following two prongs: (1) was the communication in question directed or intended toward the goal of producing imminent lawless conduct and (2) was the communication likely to produce such imminent illegal conduct?[50] The court was not convinced that Shakur's description of his work as being "revolutionary" met the standard required under the first prong of the stated incitement. Rather, at best, the intent behind Shakur's work may have been to cause violence at some time after the listener had heard and considered his underlying message.[51]

The court was also not persuaded that the illegal conduct that Shakur allegedly encouraged would imminently occur after an individual listened to the recording. "No rational person would or could believe otherwise nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action."[52]

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[48] Davidson v. Time Warner Inc., 1997 WL 405907, at *1 (S.D. Tex. 1997).

[49] *Id.*

[50] *Id.* at 20.

[51] *Id.*

[52] *Citing*, McCollum v. CBS, Inc., 202 Cal.App.3d 989, 999, 1000 (Cal. Ct. App. 1988).

The court noted that cases addressing similar issues have continually declined to find that a musical recording or television broadcast incited certain conduct merely because certain acts occurred after the speech.[53] Therefore, the mere broadcast of "2Pacalypse Now" was found not likely to incite or produce illegal or violent action. The court pointed to the fact that Howard was a gang member driving a stolen vehicle and shot Officer Davidson to avoid his capture as a more likely reason for the killing.[54]

The court also pointed out that claiming Shakur's music is directed to the "violent black gansta subculture," in general, is too large of a group to meet the requirements established under *Hess* that a communication must be directed to a person or group of persons in order to qualify as incitement. Surmising the evidence presented, the court stated that, at best, some weak-willed individuals may be influenced by "2Pacalypse Now." However, such evidence does not remove the speech from constitutional protection.

Finally, the court labeled the defendant's album both "disgusting and offensive." The album's tremendous commercial success is indicative of "society's aesthetic and moral decay."[55] Despite this, in keeping with the intent of the drafters of the Constitution,[56] the court refused to deny Shakur the protection of the First Amendment based upon the evidence presented by the plaintiffs.[57]

C The Elements Of A Negligence Action

Some court decisions have refused to hold media defendants liable, finding that the plaintiff has failed to establish a justiciable issue as to a necessary element of a negligence action, without ever reaching

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[53] *Id.* at 20. *See* Waller v. Osbourne, 763 F.Supp. 1144 (M.D. Ga 1991).

[54] *Id.* at 20.

[55] "2Pacalypse Now" is both disgusting and offensive. That the album has sold hundreds of thousands of copies is an indication of society's aesthetic and moral decay. However, the First Amendment become part of the Constitution because the Crown sought to suppress the Framers' own rebellious, sometime violent views. Thus, although the court cannot recommend "2Pacalypse Now" to anyone, it will not strip Shakur's free speech rights based on the evidence presented by the Davidsons," Davidson at 22.

[56] *Id.*

[57] *Id.*

a discussion of the First Amendment.[58] Other cases have cited both constitutional grounds and lack of necessary elements of negligence when declining to extend liability.[59] Although an overview of the case law in this area is helpful when examining the court's decision in *Paladin*, a drawn-out discussion is unnecessary due to the unusual factual stipulations of the defendant in *Paladin*. Pursuant to these stipulations the sole issue before the court was whether the First Amendment bars a wrongful death action brought against the publisher. A discussion of whether or not the publisher breached a duty of care owed to the plaintiff and examination of the necessary elements of a negligence action is therefore premature. However, at trial, the plaintiff will be forced to overcome the extensive case law that has consistently denied relief to plaintiffs seeking to impose liability on media defendants based on a negligence cause of action.

The United States Court of Appeals for the Ninth Circuit has declined to extend the duty to investigate the accuracy of the contents of a book to the book's publisher.[60] In *Winter v. G.P. Putnams's Sons*, two mushroom enthusiasts who had relied to their detriment on the information contained in the *Encyclopedia of Mushrooms* brought a negligence action. The plaintiffs had used the publisher's book in determining which wild mushrooms were safe to eat. However, after eating their harvest the plaintiffs became critically ill and eventually required liver transplants. In a decision affirming the lower court's grant of summary judgment in favor of the defendant, the Court of Appeals also declined to impose a duty to place warnings on the book. Judge Sneed wrote "[A] publisher would not know what warnings, if any, were required without engaging in a detailed analysis of the factual contents of the book. This would force the publisher to do exactly what we have said he has no duty to do—that is, independently inves-

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[58] *See* Winter v. G.P. Putnam's Sons, 938 F.2d 1033 (9th Cir. 1991); Watters v. TSR Inc., 904 F.2d 378 (6th Cir., 1990); Zamora v. CBS, Inc., 480 F.Supp. 199 (S.D. Fla. 1979); McCollum v. CBS, Inc., 202 Cal.App.3d 989 (Cal. Ct. App. 1988); Davidson v. Time Warner Inc., 25 Media L.Rep 1705 (S.D. Tex. 1997).

[59] *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987); Waller v. Osbourne, 763 F.Supp. 1144 (M.D. Ga 1991); Zamora v. CBS, Inc., 480 F.Supp. 199 (S.D. Fla. 1979); McCollum v. CBS, Inc., 202 Cal.App.3d 989 (Cal. Ct. App. 1988); Bill v. Superior Court, 137 Cal.App.3d 989 (Cal. Ct. App. 1982).

[60] Winter v. G.P. Putnams's Sons, 938 F.2d 1033 (9th Cir. 1991).

tigate the accuracy of the text."[61]

The court also rejected applying the theory of strict products liability to this matter. Distinguishing between the physical material and print which comprise a book as tangible and the ideas and expressions contained therein as intangible, the court stated that the law of products liability is focused on the former. The court was equally unwilling to apply the theory of products liability solely to "how to" books that are intended to be used as part of an activity that is inherently dangerous.[62] The court stated that such a limited application, as put forth by the plaintiff, would be illusory because ideas are often" intimately linked with proposed action, and it would be difficult to draw such a bright line [distinction]."[63]

In *Zamora*, it was the plaintiff s contention that defendants breached their duty" by failing to use ordinary care to prevent [a minor] from being impermissibly stimulated, incited and instigated to duplicate the atrocities he viewed on television.[64] The court, finding that no such obligation presently existed at law,[65] framed its inquiry as to "whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred."[66] The court held that the imposition of such an unrealistic and impractical duty would be contrary to public policy. Most publishers lack the financial resources to compensate an indeterminate class[67] who might be exposed to the media's product (i.e. newspaper, magazine, or television programming). Therefore the imposition of such a broad legal duty

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[61] *Id.* at 1037-38.

[62] *Id.* at 1033, 1035.

[63] Numerous courts have failed to expand the strict liability doctrine to cover words or pictures. *See* Watters v. TSR Inc., 904 F.2d 378, 381 (6th Cir., 1990); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987); Cardozo v. True, 342 So.2d 1053, 1056-57 (Fla. Dist. Ct. App. 1977); Beasock v. Dioguardi Enters., Inc., 494 N.Y.S.2d 974, 978 (Sup. Ct. 1985).

[64] Zamora v. CBS, Inc. 480 F.Supp. 199 (D. Fla. 1979).

[65] Specifically the court stated that it lacked the legal and institutional capacity to identify isolated depictions of violence, let alone the ability to set the standard for permissible and impermissible levels of media dissemination of items containing violence.

[66] *Id.* at 201, *cited in* PROSSER, LAW OF TORTS § 42 at 244-45 (4th Ed. 1971).

[67] *Id.* at 202, *cited in* DeBardelelben Marine Corp. v. United States, 451 F.2d 140, 148 (5th Cir. 1971).

upon the media would have a staggering adverse economic impact on the media industry. [68]

In *Watters v. TSR, Inc.*,[69] the plaintiff alleged that her son was driven to commit suicide by the parlor game "Dungeons & Dragons." Plaintiff sought to recover on the grounds that the defendant breached a duty of care in publishing and disseminating the game and that the defendant breached a duty to warn that the game could cause psychological harm in fragile-minded children.[70] Unwilling to impose liability on the game manufacturer, the court stated that both claims stretched the concepts of foreseeability and ordinary care to absurd and unmanageable proportions.[71] The court further supported its affirmation of summary judgment in favor of defendant by labeling the suicide of the plaintiff's son an intervening act, which the defendant could not have reasonably been expected to foresee.[72]

IV. RICE V. PALADIN ENTERPRISES, INC.

A. Rational of Paladin

Not a judicial opinion for the faint of heart, Judge Luttig recounted numerous of *Hit Man's* passages which were "selected by the court as representative, both in substance and presentation" of the book's instructions.[73] Among the deadly words of wisdom plucked from *Hit*

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[68] *Id., cited in* Yuhas v. Mudge, 322 A.2d. 825 (N.J. Super. Ct. 1974).

[69] Watters v. TSR, Inc., 904 F.2d 378 (6th Cir., 1990).

[70] Plaintiffs asserted that their son's death, a self-inflicted gunshot to the head, was a direct and proximate result of defendant's violation of a duty to warn and duty of care. *Id.* at 379.

[71] For example, that court noted that if Johnny's suicide was not foreseeable to his own mother, TSR could not and should be expected to foresee such an event. *Id.* at 381.

[72] "Courts have long been reluctant to recognize suicide as a proximate consequence of a defendant's wrongful act. Generally speaking, it has said, the act of suicide is viewed as 'an independent intervening act which the original tortfeasor could not have reasonably expected.'" *Id.* at 383. *See also* Scheffer v. Washington City V.M. & G.S.R.R,. 105 U.S. 249 (1882); Stasiof v. Chicago Hoist & Body Co., 50 Ill.App. 2d 115, 122 (App. Ct. 1964).

[73] Rice v. Paladin Enter. Inc., 128 F.3d 233 (4th Cir. 1997). These are but a small fraction of the total number of instructions that appear in the 130-page manual.

Man's passages were the following:

[If you decide to kill your victim with a knife,] [t]he knife . . . should have a six-inch blade with a serrated edge for making efficient, quiet kills. [If you decide to kill your victim with a small caliber weapon [y]ou will not want to be at point blank range to avoid having the victim's blood splatter you or your clothing. [When using explosives, remember] shrapnel doesn't always kill. [If committing arson] for covering a kill or creating an "accident", [d]on't ever use gasoline or other traceable materials to start your fire.[74]

The text of the opinion goes on to recite *Hit Man's* advice on disposing of a corpse which includes, among the alternatives, removing the head from the body and utilizing dynamite to eradicate the victim's teeth, properly utilizing concrete blocks to sink the body in water, and applying lye and lime when burying the body on land to speed up the natural decomposition.[75]

B. Drawing Parallels

Judge Luttig then, in great detail, points out the parallels between the book and the crime. The book advises that in soliciting and arranging your first contract killing "a personal acquaintance whom you trust" should be utilized. Perry offered his services to Lawrence Horn through a good friend of Perry's who also happened to be Horn's first cousin. As suggested by the book, Perry requested and received "all expense money up front." For his services Perry charged a fee in the appropriate price range as recommended in the book. Also as suggested by the book, Perry used a rented car with stolen out of state license plates as his means of travel; Perry gave a false license plate number to the receptionist at the motel where he was staying prior to the murder and Perry used a AR-7 rifle which had the serial number drilled out and was equipped with a homemade silencer. *Hit Man* advises that the victims should be shot at close range between three to six feet to ensure death but not at point blank range so as to avoid the

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The court has even felt it necessary to omit portions of these few illustrative passages in order to minimize the danger to the public from their repetition herein.

[74] *Id.* 236, 239.

[75] *Id.* at 238.

splattering of blood upon the shooter. Trevor, his mother and his nurse were shot from a distance of three feet. The book recommends shooting at the head, specifically the eyes. Three shots are optimal for a "quick and sure death." Two of the victims were shot approximately two or three times through the eyes. In an effort to conceal the contract killing and to disguise the incident as a burglary, Perry removed the spent rifle shells, removed credit cards from a victim's wallet and displaced some of the living room furniture. All of these directions are contained in *Hit Man*. Finally, Perry dismantled his weapon, altered its parts, and scattered it along the highway, pursuant to the book's suggestions.

C. Steeling to Action

In his opinion, Judge Luttig stressed that, under Brandenburg, the Supreme Court established protection for the mere abstract advocacy of violence not the "teaching of the technical methods of murder."[76] The court stated that with systematic and meticulous detail the book "instructs on the gruesome particulars of every possible aspect of murder for hire." Describing *Hit Man* as "methodically and comprehensively" preparing the reader to carry out the crime of murder, the court also stated that *Hit Man* did not even remotely resemble the advocacy protected under *Brandenburg* in either form or purpose.[77] The concrete instructions of *Hit Man* are not analogous to the "vague, rhetorical threats of politically or socially motivated violence that have historically been considered part and parcel of the impassioned criticism of laws, policies and government indispensable in a free society"[78] and therefore held to be protected speech. Rather, "as *Hit Man* instructs, it also steels its readers to the particular violence explicates,

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[76] *Id.* at 249-50. The court reversed the district court's decision stating that the lower court had misinterpreted the landmark case of *Brandenburg* which extended protection to abstract advocacy of lawlessness and the open criticism of government and its institutions. The court continued:

"As such, the murder instruction in *Hit Man* are, collectively, a text book example of the type of speech that the Supreme Court has quite purposely left unprotected, and the prosecution of which, criminally or civilly, has historically been thought subject to few, if any, First Amendment constraints."

[77] *Id.*

[78] *Id.* at 262.

instilling in them the resolve necessary to carry out the crimes it details, explains and glorifies."[79]

D. Additional Support

In further support of its holding, the *Paladin* court cited *Giboney v. Empire Storage & Ice Co.*[80] for the principle that speech or writing used as an integral part of conduct in violation of a valid statute is not subject to protection under the First Amendment.[81]

The court next compared the facts presented with those arising in *United States v. Barnett*,[82] which Judge Luttig found to be "indistinguishable in principle."[83] In *Barnett*, it was established that the defendant had sold a one-page document entitled "Synthesis of PCP/Angel Dust" to a second party, Hensley, through the U.S. Mail. This document contained printed instructions for the manufacturing of phencyclidine. Hensley was later arrested and pled guilty to charges of attempted manufacture of an illegal substance. Hensley was found in possession of a copy of defendant's printed instructions and was using them at the time of his arrest. The *Barnett* court held that although en-

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[79] *Id.* at 261.

[80] Giboney v. Empire Storage & Ice Co., 336 U.S 490 (1949).

[81] In *Giboney*, the plaintiff sought to enjoin the defendants from picketing plaintiff s plant. The defendants were members of a ice and coal handlers union. The union sought to prevent nonunion peddlers from buying ice from wholesale ice distributors. In an effort to accomplish this, the union obtained agreements from wholesalers stating that they agreed not to sell ice to nonunion peddlers. The plaintiff, Empire refused to sign this agreement. The union members thereafter picketed the Empire warehouse, seeking to compel the wholesaler to stop selling to nonunion peddlers. The Supreme Court, finding that the state could constitutionally enforce a statute prohibiting agreements which restrained trade, expressly rejected the contention that the First Amendment protects "speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Id.* at 498.

[82] U.S. v. Barnett, 667 F.2d 835 (9th Cir. 1982).

[83] The *Barnett* court held the "First Amendment does not provide [publishers] a defense as a matter of law" to charges of aiding and abetting a crime through the publication and distribution of materials on how to make illegal drugs. It is also important to note here that the court also found that no immunity attaches to a defendant merely because the "printed word" was utilized to encourage and counseling others in the commission of a crime. It was expressly held that the First Amendment does not as a matter of law provide a defense to such conduct. *Id.* at 843.

couraging and counseling another by providing specific information as to how to commit a complex crime does not alone constitute aiding and abetting, once the person so assisted or incited commits the crime which he is encouraged to perpetrate, his counselor is guilty of aiding and abetting.[84]

The *Paladin* court then cited numerous cases that had expressly relied upon the rationale underlying *Barnett* to convict individuals for aiding and abetting tax fraud at seminars held in protest of the tax laws.[85] "[T]he First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself."[86]

Finally, the *Paladin* court relied upon a recent Department of Justice Report (the "Report").[87] The Report was a result of a study focusing on the public availability of materials dealing with "how to make bombs, destructive devices, or weapons of mass destruction."[88] The Report acknowledged that the First Amendment would bar any effort to "indiscriminately" proscribe such material as bomb-making information. The imposition of punishment for advocating lawlessness

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[84] *Id.* at 841-42.

[85] *See* United States v. Freeman, 761 F.2d 549, 552-53 (9th Cir. 1985), *cert denied*, 476 U.S. 1120 (1986); United States v. Kelley, 769 F.2d 215 (4th Cir. 1985); United States v. Rowlee, 899 F.2d 1275 (2d Cir. 1990), *cert. denied*, 498 U.S. 828 (1990); United States v. Moss, 604 F.2d 569 (8th Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980); United States v. Buttorff, 572 F.2d 619, 623-24 (8th Cir 1978), *cert. denied*, 437 U.S. 906 (1978); United States v. Fleschner, 98 F.3d 155 (4th Cir. 1996), *cert. denied* Clarkson v. United States, 521 U.S. 1106 (1997).

[86] 761 F.2d 549, 552.

[87] DEPARTMENT OF JUSTICE, *Report on the Availability of Bomb-Making Information, the Extent to Which Its Dissemination is Controlled by Federal Law, and the Extent to Which Such Dissemination May Be Subject to Regulation Consistent with the First Amendment to the United States Constitution.* (April 1997).

[88] Congress, in the Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1297, required the Attorney General to conduct a study concerning, *inter alia*, the extent to which there is available public access to materials instructing on how to make bombs, destructive devices, or weapons of mass destruction; the application of then-existing federal laws to such materials; and the extent to which the First Amendment protects such materials and their private and commercial distribution. 128 F.3d at 246 n.3.

or for disseminating truthful information does not comport with the principles underlying freedom of speech. However, the Report continued, the punishment of speech which is an integral part of a transaction involving conduct which the government may legitimately proscribe is not subject or deserving of the same First Amendment concern.[89]

E. Analysis

An argument may be raised that the court in *Paladin* has created a potential black hole of liability for the entertainment industry. Certainly the great number of *amici curiae* which appeared before the court is some indication of the potential gravity of the court's decision.[90] Specifically, authors and publishers of books, magazines and other literary works which may be considered as falling into the "how to" genre or which are otherwise instructional in nature, may wish to consider the content of their publications more cautiously.

However, the decision, as the *Paladin* court properly acknowledges, must be limited to the specific facts of this case as presented to the court.[91] The exceptional nature of the defendant publisher's factual

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[89] "The government generally may not, except in rare circumstances, punish persons either for advocating lawless action or for disseminating truthful information—including information that would be dangerous if used—that such persons have obtained lawfully. However, the constitutional analysis is quite different where the government punishes speech that is an integral part of a transaction involving conduct the government otherwise is empowered to prohibit; such "speech acts—for instance, many cases of inchoate crimes such as aiding and abetting and conspiracy—may be proscribed without much, if any, concern about the First Amendment, since it is merely incidental that such 'conduct' takes the form of speech." 128 F.3d at 246 n.3 (*citing* DOJ Report at 2).

[90] *Amici curiae* included, *inter alia*, ABC Inc., America Online Inc., Association Of American [Publishers, The Baltimore Sun Company, E.W. Scripps Company, Magazine Publishers Of America Inc., The New York Times, The Washington Post, The Horror Writers Association, National Victims Center, and The Victims Right Action Committee.

[91] The court stated that the publisher had stipulated to a series of facts in "almost taunting defiance." The court continued that only a rare few would stand up and announce to the world that because an individual is a publisher, he has a unique and constitutional right to aid and abet murder. *See* Brief for Appellant at 20. Rice v. Paladin Enter. Inc., 128 F.3d 233 (4th Cir. 1997).

stipulations can not be overstated. Paragraph 4 of the Joint Statement of Facts stipulates,

a. [D]efendants engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes; and

b. in publishing, marketing, advertising and distributing *Hit Man* [. . .] defendants intended and had knowledge that their publications would be used, upon receipt, by criminals to plan and execute the crime of murder for hire, in the manner set forth in their publications.[92]

Under these extraordinary circumstances the court's holding is proper. In a decision that appeals to both one's common sense and sense of morality, the court properly reversed the district court.

At the trial of this lawsuit, the plaintiffs will not be afforded the luxury of bizarre stipulations.[93] Paladin expressly reserved the right to contest their stipulations at all subsequent proceedings. Therefore, the plaintiffs must establish again that *Hit Man* is unprotected by the First Amendment.

The facts of *Paladin* are distinguishable from those presented throughout the existing case law in this area. This is of significant importance when arguing that under the incitement test, *Hit Man* was "likely to produce" imminent illegal conduct. Prior case law has not extended liability for subject matter including lyrics, poetry, fantasy board games and accompanying published materials and other works fictional in nature.[94] *Hit Man's* 130-pages provide a painstaking step-by-step, all-inclusive, guide to assassination, ranging from soliciting a contract killing to managing your ego after you have carried out the hit. Certainly it would be reasonable to conclude that after reading the "Joy of Cooking," one interested in the field would be likely to engage in a culinary undertaking. A jury faced with the decision may conclude that *Hit Man*, with its detailed and comprehensive instructions, coupled with the author's alluring bravado in the hands of an individual who desired such information and who had already decided that he

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[92] *See* note 13 above (stipulations provided in the Joint Statements of Facts).

[93] *See* note 14 above (reservation of the right to contest all statements in future proceedings).

[94] *See* note 41 above.

was going to carry out a murder, *Hitman* would be likely to produce the criminal conduct.[95]

A more difficult task for the plaintiff may be establishing that the defendant intended to produce imminent lawless conduct, such as carried out by Perry. In their defense Paladin has suggested that *Hit Man* is merely a comic book "whose fantastical promotion of murder no one could take seriously."[96] Paladin can also argue that *Hit Man* was intended to serve legitimate purposes[97] such as informing law enforcement officials of techniques used by criminals to elude apprehension. Perhaps Paladin's sole purpose was to entertain the reader by providing intricate factual accounts of such a perverse subject in a manner which compels and entices the reader to become mentally immersed in a world void of law, order and morality, even if it is just for the moment.

Another hurdle in establishing the imminence of the illegal conduct may be the fact that *Hit Man* was first published in 1983 and approximately 13,000 copies of the book had been sold up until the date of this action[98] and it has not been asserted that *Hit Man* can be linked to any other acts similar to that of Perry's.

First Amendment considerations aside, this cause of action may not be sufficient to establish a claim of negligence against the pub-

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[95] "*Hit Man* does not merely detail how to commit murder and murder for hire; through powerful prose in the second person and imperative voice, it encourages its readers in their specific murder acts. [. . . .] And at every point where the would-be murderer might yield either to reason or to reservations, *Hit Man* emboldens the killer, confirming not only that he should proceed, but that he must proceed, if he is to establish his manhood." 128 F.3d at 252; "The book is so effectively written that its protagonist seems actually to be present at the planning, commission, and cover-up of the murders the book inspires." Id. at 252.

[96] *Id.* at 254

[97] Defendants suggest numerous legitimate purposes behind the work. Such purposes include maximizing its sales to the general public, and specifically targeting sales to authors who desire information for the purpose of writing books about crime and criminals; law enforcement officers and agencies who desire information concerning the means and methods of committing crimes; persons who otherwise enjoy reading about the commission of crimes and the means of carrying out such crime; and criminologists.

[98] *See* note 8 above.

lisher. The courts have been slow to impose a duty upon publishers.[99] In *Winters*, the court refused to find that a defendant publisher was required to investigate the accuracy of the contents of an encyclopedia that the defendant published. The court further refused to impose a duty to warn on the publisher, stating that this also would require the publisher to independently investigate the accuracy of the text of the work and the court would not impose such a duty by simply renaming it. Requiring that Paladin warn a potential reader of the so-called evils of *Hit Man* would likewise require Paladin to independently investigate the book's contents, a duty expressly rejected in *Winters*. If such a duty were to be imposed, would a publisher then be required to subjectively evaluate the works of Stephen King and determine whether or not a description of a murder is too graphic or too factually based and therefore gives rise to a duty to warn?

Paladin can also argue that Perry's actions were not reasonably foreseeable. Is it reasonably foreseeable that a 130-page publication would lead the average reader to commit the ultimate act of depravity, taking the life of another human being? Is it reasonable that a person, after reading an explicit description of a murder, would take affirmative action to solicit, arrange and carry out the cold-blooded execution of another party? It would seem that only those individuals who are predisposed to such actions by reason of mental defect would be inclined to such behavior. Case law shows that defendants have not been held accountable for the frailties of such a select minority of the defendant's audience.[100]

The most difficult element to establish of a negligence action would be that the defendant's publication proximately caused the harm involved. The voluntary and affirmative actions of Perry were intervening criminal acts that necessarily broke the causal link.[101]

Therefore, it must be stated that the holding of the Fourth Circuit is proper due to the narrowly tailored issue that was before the court. Due to the stipulations of the defendant, the court was asked to deter-

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[99] *See* note 23 above.

[100] Watters v. TSR Inc., 904 F.2d 378 (6th Cir., 1990). (Defendant violated no duty to warn that the game could cause psychological harm in fragile-minded children.)

[101] *See* note 52 above.

mine only whether or not the First Amendment barred a wrongful death action brought against the publisher of an instructional book for aiding and abetting a convicted killer who relied upon the book in carrying out a triple homicide. The court found that this form of speech qualified as incitement, an exception to the First Amendment, and therefore denied First Amendment protection to *Hit Man*. However, until subsequent cases further clarify this area, the entertainment and media industries are left to hope, as the *Paladin* court suggests, that *Paladin* will be narrowly construed and limited to its unusual facts. Although proper, the decision of the court in this matter may be misinterpreted, misconstrued or misapplied in future settings.

V. Byers v. Edmonson

No less than six months after the Fourth Circuit handed down its decision in *Paladin, Byers v. Edmondson*[102] was decided.

On March 8, 1995, Patsy Byers was shot and seriously injured during the armed robbery of a Louisiana convenience store. Byers brought a suit against the alleged shooter, Sarah Edmondson, and her boyfriend, Benjamin Darrus, who accompanied her. In later amendments to her petition the plaintiff added Warner Home Video, Inc., Warner Bros. Inc., Time Warner Entertainment Company, and Oliver Stone as defendants.[103] In a memorandum filed with the court, Byers asserted that Edmondson and Darrus:

1) repeatedly viewed the movie [Natural Born Killers] on videotape, sometimes under the influence of mind altering drugs; 2) desired to emulate the protagonists of the video by obtaining a gun and ammunition; and 3) began their own reenactment of the "Mickey and Mallory" story from the film, resulting in the murder of a Mississippi cotton gin owner and the brutal attempted murder of Patsy Byers.

The plaintiff sought to establish the defendants' liability on several theories. Byers' petition alleged that the defendants are liable for producing and distributing a film which "they knew, intended, were substantially certain, or should have known would cause or incite per-

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[102] 712 So.2d 681 (La. App. 1998), *cert. denied*, 119 S.Ct 1143 (1999).

[103] Additional defendants included Time Warner, Inc., Regency Enterprises Alcoer Films, JD Productions, Edmondson's parents and several insurance companies.

sons" such as Edmondson and Darrus to carry out criminal acts such as the shooting of Byers. Additionally, the petition alleged that the defendants negligently and/or recklessly failed to minimize the film's violent content and glorification of senseless violence. Finally, the petition asserts that the defendants negligently and/or recklessly failed to warn viewers of the "potential deleterious effects" upon teenage viewers caused by repeated viewing of *Natural Born Killers*.[104]

On September 25, 1996, the defendants filed a peremptory exception raising the objection of no cause of action.[105] Specifically, the defendants contended that they owed no duty to the plaintiff to ensure that viewers of *Natural Born Killers* would not imitate actions depicted in the fictional work. Additionally, they argued that the imposition would violate the First Amendment to the United States Constitution.[106]

The trial court's dismissal of the action in favor of the defendants[107] was reversed by the, Court of Appeals for the First Circuit. The Court of Appeal held that the defendants could potentially be found liable at trial "as a result of their misfeasance in that they produced and released a film containing violent imagery which was intended to cause its viewers to imitate the violent imagery."[108] The court further concluded, that because Byers' allegations were analogous to the stipulations agreed to by the defendant in *Paladin*, the First Amendment did not require that the action be dismissed prior to a trial on the merits.[109]

It is the author's opinion that the *Byers* court failed to recognize

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[104] *Id.* at 685.

[105] This exception is the Louisiana equivalent of a motion to dismiss for failure to state a cause of action.

[106] *Id.* at 684. In addition, the defendants brought to the court's attention that a similar claim had been filed in Georgia against the same defendants. That action was also based on a claim that a couple imitating the actions of "Mickey and Mallory", from the movie *Natural Born Killers*, had committed murder. This Georgia action however, was dismissed for failure to state a cause of action. *Id.* at 685.

[107] The trial court granted the peremptory exceptions raising the objection of no cause of action, finding that the law simply does not recognize a cause action such as that contained in and asserted by Byers' petition.

[108] *Id.* at 687.

[109] Weis and Neuhardt, Case Note, LDRC Libel Letter, (May 1998) at page 19.

the unique nature of the facts in *Paladin*. As discussed, Paladin's stipulations played a primary role in the reversal of the lower court's decision to grant summary judgment. The *Paladin* court expressly addressed the potential of an action based on a copy cat crime.[110] The *Paladin* court, seemingly aware of the potential for misinterpretation of its decision, warned that there will almost never be sufficient evidence from which a jury could reasonably conclude that a broadcaster, publisher or producer possessed the requisite intent to assist in the commission of criminal activities. Rather, such crime will result from a misuse of the information.

If *Byers* is indicative of the course of case law to follow, *Paladin*, although properly decided on its particular facts, may, in effect, lead to the redefinition of the duties and liabilities imposed upon the entertainment and media industries. Indeed, if future courts liberally construe *Paladin*, a Pandora's Box of liability for defendants in the entertainment industry may be opened.

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[110] "[I]n contrast to the case before us, in virtually every 'copy cat' case, there will be lacking in the speech itself any basis for a permissible inference that the 'speaker' intended to assist and facilitate the criminal conduct described or depicted. Of course, with few, if any, exceptions, the speech which gives rise to the copy cat crime will not directly and affirmatively promote the criminal conduct, even if, in some circumstances, it incidentally glamorizes and thereby indirectly promotes such conduct." Rice v. Paladin Enter. Inc., 128 F.3d at 266.