


## Big Tobacco and Hollywood: Kicking the Habit of Product Placement and On-Screen Smoking

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# COMMENTS

## BIG TOBACCO AND HOLLYWOOD: KICKING THE HABIT OF PRODUCT PLACEMENT AND ON-SCREEN SMOKING

BY MATTHEW S. FUCHS\*

“[F]ilm is better than any commercial that has been run on television or any magazine, *because the audience is totally unaware of any sponsor involvement . . .*”<sup>1</sup>

“Man is by nature an imitative animal.”<sup>2</sup>

### I. INTRODUCTION

In 1964, the Surgeon General’s Advisory Committee on Smoking and Health concluded that cigarette smoking is a significant health hazard.<sup>3</sup> The Committee recommended “remedial action.”<sup>4</sup> However, by all accounts, tobacco use today remains the most deadly of the preventable causes of illnesses in this country.<sup>5</sup> Statistics indicate that more than twelve million Americans have died

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1. C. Mekemson & S.A. Glantz, *How the Tobacco Industry Built its Relationship with Hollywood*, 11 *Tobacco Control* i81, i82 (2002) (emphasis in original) (quoting Robert Richards, president of Productions Inc., a movie and television production company, in a letter dated August 25, 1972, to William Smith, president of R.J. Reynolds), [http://tc.bmjournals.com/cgi/reprint/11/suppl\\_1/i81.pdf](http://tc.bmjournals.com/cgi/reprint/11/suppl_1/i81.pdf) (last visited July 5, 2005).

2. HENRY JAMES FOREMAN, *OUR MOVIES MADE CHILDREN* 147 (1933).

3. See MARTHA A. DERTHICK, *UP IN SMOKE* 10 (2002) (discussing the results of the 1964 report of the U.S. Surgeon General’s Advisory Committee on Smoking and Health); RICHARD KLUGER, *ASHES TO ASHES: AMERICA’S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* 242-62 (1996).

4. DERTHICK *supra* note 3 at 11.

5. See, e.g., Peter H. Rhee et al., *Children and Tobacco: The FDA’s Final Rule*, 55 *AM. FAM. PHYSICIAN* 1441, 1442 (1997) (discussing that the number of deaths from tobacco use are more “than the combined total of deaths from acquired immunodeficiency syndrome, vehicular accidents, alcohol, homicides, illegal drugs, suicides and fires, all of which are considered preventable causes of premature death”); *THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL, EXEC. SUMM.*, *NAT’L CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION* 7, 14 (2004) [hereinafter *SURGEON GENERAL 2004*], [http://www.cdc.gov/tobacco/sgr/sgr\\_2004/pdf/executive\\_summary.pdf](http://www.cdc.gov/tobacco/sgr/sgr_2004/pdf/executive_summary.pdf) (last visited July 5, 2005).

from smoking since 1967.<sup>6</sup> Currently, smoking alone kills an estimated 440,000 Americans each year.<sup>7</sup> Furthermore, the economic toll for treating smoking-related diseases and conditions exceeds \$157 billion each year – \$75 billion in direct medical costs and \$82 billion in lost productivity.<sup>8</sup>

The smoking epidemic persists in part because smoking rates among teenagers remain high.<sup>9</sup> In 2003, 24.4% of high school seniors smoked regularly.<sup>10</sup> Moreover, according to the U.S. Centers for Disease Control and Prevention, more than 53% of all adult smokers became addicted before age eighteen, and 82% tried their first cigarette before age eighteen.<sup>11</sup> In an attempt to reduce teen smoking, researchers have tried to determine which influences most impact adolescent decisions to use tobacco. As expected, researchers have found that behaviors and attitudes of family and friends are major influences.<sup>12</sup>

However, researchers have also discovered that watching Hollywood actors light up in movies significantly affects adolescent smoking behavior. The most convincing studies have been conducted by Madeline Dalton of Dartmouth University.<sup>13</sup> After controlling for all other factors known to influence smoking, Dr. Dalton found a three-fold increase in smoking initiation among children ages 10-14 who viewed the greatest number of smoking depictions in movies.<sup>14</sup> Accordingly, her studies suggest that a decline in youth exposure to smoking in movies could significantly reduce teen smoking.<sup>15</sup>

Projected nationally, the study's results mean that youth-rated movies showing tobacco use now recruit 360,000 new adolescent smokers annually – roughly half of all new smokers.<sup>16</sup> Of the adolescents recruited to smoke by Hollywood each year, many will eventually die from tobacco-related diseases.<sup>17</sup>

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6. *The Low-Tar Myth*, CBSNEWS.COM (Feb. 20, 2001).

7. SURGEON GENERAL 2004, *supra* note 5.

8. *Id.* at 13.

9. *See id.* at 14 (noting that the rate of decline among youth smokers is “slowing appreciably”).

10. *Id.*

11. CTRS. FOR DISEASE CONTROL AND PREVENTION (CDC), HEALTHY PEOPLE 2010, TOBACCO USE, 27-4 (Nov. 2000), <http://www.healthypeople.gov/Document/pdf/Volume2/27Tobacco.pdf> (last visited July 5, 2005).

12. *See* Erica H. van Roosmalen & Susan A. McDaniel, *Peer Group Influence as a Factor in Smoking Behavior of Adolescents*, 24 ADOLESCENCE 801, 802 (1989) (citing more than a dozen past studies to support the statement that “[p]revious research on smoking behavior of adolescents acknowledges this strong correlation between smoking and peer pressure”).

13. *See generally*, Madeline A. Dalton et al., *Effect of Viewing Smoking in Movies on Adolescent Smoking Initiation: A Cohort Study*, 362 THE LANCET 281, 281-85 (2003). This 2003 research is the first longitudinal study of the correlation between watching movie smoking, and adolescent smoking. Previous cross-sectional and experimental studies failed to establish a temporal relation. *Id.* at 281.

14. *Id.* at 284.

15. *Id.*

16. Christopher Heredia, *UCSF Study Ignites Drive to Stop Smoking in Kids' Movies*, SAN FRAN. CHRON., April 2, 2004, at F-1, <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/04/02/>

Long suspecting that smoking in movies had this influence on teens,<sup>18</sup> public officials took steps in the 1990s to limit cigarette appearances on screen. For example, officials pressured Big Tobacco<sup>19</sup> into a series of restrictions on paid product placements.<sup>20</sup> Paid product placement occurs when a tobacco company pays a Hollywood studio, in some cases rather handsomely,<sup>21</sup> to use the company's tobacco products in a film.<sup>22</sup> In light of restrictions on paid product placement, one would expect big screen smoking scenes to be on the decline.

Nevertheless, the past few years have witnessed anything but such a decline. Although smoking in movies dropped from 10.7 incidents per hour in 1950 to 4.9 in 1980-1982, this downward trend actually reversed itself in the 1990s.<sup>23</sup> Indeed, in 2002 the rate had increased to 10.9 incidents per hour.<sup>24</sup> Even more disturbingly, these smoking scenes commonly occur in movies targeting teenagers. A University of California study found that 80% of PG-13 rated movies produced from 1998-2002 included smoking.<sup>25</sup> G-rated movies included smoking approximately 50% of the time.<sup>26</sup> Adding to the problem is that teens see movies more often than any other age group,<sup>27</sup> and thus they are bombarded most heavily

WBGVN5TBP51.DTL (last visited July 5, 2005).

17. SURGEON GENERAL 2004, *supra* note 5.

18. Long before Dalton's studies, researchers established that social behavior is controlled to a great extent by "strategies" or "scripts" that people store in memory and use as behavioral guides when they confront particular situations. See, e.g., Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where to Go From Here*, 267 JAMA 3059, 3060 (1992).

19. For the purposes of this paper, "Big Tobacco" refers to the top U.S. tobacco firms: Phillip Morris, Brown & Williamson, Lorillard, R.J. Reynolds, and British American Tobacco.

20. For example, through congressional and FTC pressure, the government pressured Big Tobacco into agreeing to a voluntary ban on all paid product placement in movies. See *infra* note 35 and accompanying text. In 1998, the attorneys general included in its Master Settlement Agreement (MSA) a provision banning product placement. See *infra* notes 38-47 and accompanying text (discussing the MSA in detail).

21. See, e.g., Siva K. Balasubramanian, *Beyond Advertising and Publicity: Hybrid Messages and Public Policy Issues*, 23 J. ADVERTISING, 29, 33 (1994) (noting that product placement has grown into a multi-million dollar business with placement packages costing upwards of \$500,000 per movie).

22. Steven L. Snyder, *Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?*, 1992 U. ILL. L. REV. 301, 301 (1992).

23. Stanton A. Glantz, et al., *Back to the Future: Smoking in Movies in 2002 Compared with 1950s Levels*, 94 AM. J. PUB. HEALTH 261, 261-62 (2004) (discussing a study which concluded that smoking in movies during the 1990s returned to levels observed in 1950).

24. *Id.* at 262.

25. Heredia, *supra* note 16 (citing the UC San Francisco study).

26. *Id.*

27. PIERRE BOUVARD ET AL., ARBITRON, THE ARBITRON CINEMA ADVERTISING STUDY 11 (2003) [hereinafter ARBITRON CINEMA], <http://www.natoonline.org/Cinema%20Advertising%20Study.pdf> (last visited July 5, 2005).

by tobacco scenes.<sup>28</sup> Perhaps as a result, teens recall and recognize tobacco products featured in movies at a far greater rate than other age demographics.<sup>29</sup>

The increase in big screen smoking makes it likely that teen smoking will persist. Furthermore, it suggests the possibility that Big Tobacco product placement continues, though no one is sure. In fact, commentators are left with a mystery saga, perhaps fit for the silver screen. The Justice Department (DOJ) and Federal Trade Commission (FTC) are the gritty, no-nonsense detectives. Both the DOJ and FTC have expressed an interest in investigating the suspected villains, Hollywood and Big Tobacco, to determine who is responsible for continued on-screen smoking.

This Comment does not solve this mystery, but in Section II, I examine steps that the DOJ and FTC should take to find out if Big Tobacco product placement persists. Then, in Section III, this Comment considers the feasibility of a solution that does not require the involvement of Big Tobacco. Rather, I look at possible strategies for convincing and, if necessary, forcing Hollywood to take action to neutralize the effect of smoking in movies. Finally, this article concludes that the best strategy is to pressure Hollywood to show antismoking Public Service Announcements (PSAs). Theaters would show these PSAs prior to movies involving smoking.

## SECTION II: CLOSE SCRUTINY OF BIG TOBACCO

Big Tobacco has a long history of deceiving public health advocates, state officials, consumers, and the general public. This history of deception, combined with the fact that movie screen smoking persists, demands close scrutiny of Big Tobacco's claims of discontinued paid product placement. Accordingly, the DOJ and FTC should seriously consider investigating whether paid product placement indeed continues.

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28. See JONATHAN R. POLANSKY & STANTON A. GLANTZ, CTR. FOR TOBACCO CONTROL RESEARCH AND EDUC., UNIV. OF CAL., SAN FRAN., FIRST-RUN SMOKING PRESENTATIONS IN U.S. MOVIES 1999-2003, 9-10 (2004) (finding that adolescents see incidents of smoking in movie theaters 75 percent more than younger children and 20 percent more than young adults), <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1047&context=ctere> (last visited July 5, 2005).

29. See ASSOC.'D FILM PROMOTIONS, RECALL AND RECOGNITION OF COMMERCIAL PRODUCTS IN MOTION PICTURES (Sept. 1 1981) (recall and recognition study performed by Associated Film Promotions for Brown & Williamson Tobacco Company, which compared the ability to recall and recognized different products among different age groups and found persons under 18 recall and recognize tobacco products more frequently than those aged 18-35 and 56 and over), <http://legacy.library.ucsf.edu/cgi/getdoc?tid=hgo30f00&fmt=pdf&ref=results> (last visited July 5, 2005).

*A. Big Tobacco's History of Deception Has Continued, Despite Laws and Agreements that Forbid Big Tobacco Product Placement.*

Perhaps more than any other American industry, Big Tobacco's word is tainted by a tradition of covert action. This tradition has been evident in the realms of science, politics, and elsewhere.<sup>30</sup> For example, Big Tobacco claimed for years that active and passive smoking did not cause disease, despite internal documents showing this claim to be a farce.<sup>31</sup> Big Tobacco has also been excoriated for refusing to acknowledge the addictive nature of nicotine despite company records to the contrary, and notwithstanding the industry's adjustments of nicotine to optimize nicotine delivery to smokers.<sup>32</sup>

This tradition of artifice is also evident in Big Tobacco's relationship with Hollywood. Indeed, evidence abounds that Big Tobacco continued product placements in movies, even after the passage of laws and agreements that condemned this practice. For instance, in 1989 the Subcommittee on Transportation and Hazardous Materials of the U.S. House Committee on Energy and Commerce waged an investigation of Big Tobacco's practice of product placements.<sup>33</sup> This investigation, spearheaded by Ohio Representative Thomas Luken, created a public outcry against tobacco product placement.<sup>34</sup> To mitigate the developing public relations nightmare, in 1990 the Tobacco Institute announced a voluntary ban on all paid product placement in movies.<sup>35</sup>

After this voluntary ban, in the 1990s the industry stopped mentioning product placement in internal documents. However, some circumstantial evidence survived this era of increased secrecy to indicate that, incredibly, Big Tobacco's practice of product placement persevered. In a 1998 study, interviews of Hollywood directors, writers, actors, studio executives, and others indicated that they "thought [product placement] occurred," although none claimed to know of

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30. Mekemson & Glantz, *supra* note 1 at i89.

31. See DERTHICK, *supra* note 3 at 35-41 (describing how, throughout the 1970s, Big Tobacco lawyers suppressed evidence produced by company scientists proving that smoking was hazardous).

32. See Alix M. Freedman & Suein L. Hwang, *Three Ex-Employees Say Phillip Morris Deliberately Controlled Nicotine Levels*, WALL ST. J., Mar. 19, 1996, at B1 (citing three ex-Phillip Morris executives as saying that Phillip Morris "not only believes it is in the nicotine-delivery business, but deliberately controls nicotine levels in its cigarette brands").

33. TOBACCO INSTITUTE, PUBLIC AFFAIRS MANAGEMENT PROGRESS AND EXPENSE REPORT FOR SEPT., 1989 16 (detailing hearings on the "Protect Our Children from Cigarette Advertising Act of 1989," H.R. 1250, 101st Cong., 1989), [http://tobaccodocuments.org/bliley\\_ti/20126.html?start\\_page=11](http://tobaccodocuments.org/bliley_ti/20126.html?start_page=11) (last visited July 5, 2005).

34. *Id.*

35. See Robert Adler, *Here's Smoking at You Kid: Has Tobacco Product Placement in Movies Really Stopped?*, 60 MONT. L. REV. 243, 255 (1999) (citing Press Release, The Tobacco Institute, Major New Initiatives To Discourage Youth Smoking Announced, (Dec. 11 1990), <http://www.library.ucsf.edu/tobacco/calminnesota/html/3930/001/otherpages/allpages.html> (last visited July 5, 2005), which announced the voluntary ban, while at the same time insisting that "cigarette advertising has no significant effect on the prevalence of smoking by young people").

any specific placements.<sup>36</sup> In addition, as noted earlier, the substantial increase in the appearance of cigarette brand names in movies throughout the 1990s comprised further evidence that product placement continued.<sup>37</sup>

Reacting to this circumstantial evidence, the states' attorneys general sought to legally reinforce the 1990 voluntary ban.<sup>38</sup> To do so, they included in the 1998 Master Settlement Agreement (MSA) with Big Tobacco the following language in Section III:

No Participating Manufacturer may . . . make or cause to be made, any payment or other consideration to any other person or entity to use, display, make reference to or use as a prop any Tobacco Product, Tobacco Product package, advertisement for a Tobacco Product, or any other item bearing a Brand Name in any motion picture . . . .<sup>39</sup>

Accordingly, the MSA provides an enforcement mechanism for a wide range of product placement activity. For instance, Section III of the MSA condemns product placement whether it occurs by cash payments or simply by making tobacco products available.<sup>40</sup> Section III is critical in this respect because, according to industry insiders, Hollywood generally has not paid money for tobacco product placements since the 1990 voluntary ban.<sup>41</sup> Rather, Big Tobacco

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36. David L. Shields et al., *Hollywood on Tobacco: How the Entertainment Industry Understands Tobacco Portrayal*, 8 TOBACCO CONTROL 378, 379-80 (1999) (discussing a study in which the interviewees were "drawn from the California-based entertainment industry"), <http://tc.bmjournals.com/cgi/reprint/8/4/378> (last visited July 5, 2005). See also ACTION ON SMOKING AND HEALTH (ASH), EVERYTHING FOR EVERYBODY CONCERNED ABOUT SMOKING AND NONSMOKERS' RIGHTS, (May 12, 1998) [hereinafter ASH Report] (discussing evidence that product placement by the tobacco industry continued long after its supposed demise in 1990), at <http://no-smoking.org/may98/05-12-98-1.html> (last visited July 5, 2005).

37. See, e.g., James D. Sargent et al., *Brand Appearances in Contemporary Cinema Films and Contribution to Global Marketing of Cigarettes*, 357 LANCET 29, 29-31 (2001) (noting brand exposure through actor use increased from 1% before the industry's voluntary restriction on product placement to 11% afterward).

38. Mekemson & Glantz, *supra* note 1 at i89.

39. NAT'L ASS'N OF ATTORNEYS GENERAL, MULTISTATE SETTLEMENT WITH THE TOBACCO INDUSTRY, MASTER SETTLEMENT AGREEMENT 15 (1998) [hereinafter, MSA], <http://www.library.ucsf.edu/tobacco/litigation/msa.pdf> (last visited July 5, 2005)

40. E-mail from Marlene Trestman, Special Assistant to the Attorney General of Maryland, to Matthew Fuchs (Dec. 9, 2004, 12:04:21 EST) (on file with Journal of Health Care Law & Policy). "[I]f anyone has evidence that a participating manufacturer (i.e., a signatory to the MSA) has given cigarettes, or anything else of value (food, apartment, car, movie equipment, \$\$) to anyone involved in the making of a movie (propmaster, actor, director, crew) or has caused them to be given to anyone in the making of a movie such as by hiring an intermediary, the MSA offers an enforcement mechanism." *Id.*

41. Adler, *supra* note 35, at 266 (citing Telephone interview with Dean Ayers, President of Entertainment Resources Marketing Association (the product placement industry's trade association) (Apr. 27, 1998) (stating that 80-90 percent of product placement in movies is unpaid)).

usually gives Hollywood free samples of the product in return for placements in films.<sup>42</sup> Pursuant to Section III, these samples are forbidden.

Moreover, Section III states that Big Tobacco may not “cause [product placement] to be made.”<sup>43</sup> Thus, Big Tobacco has agreed not to use any third party intermediary to make product placements.<sup>44</sup> This aspect is important because Big Tobacco has a history of using intermediaries to further pro-tobacco agendas. For instance, it directed third parties to generate controversy about evidence that active and passive smoking cause disease,<sup>45</sup> and to organize opposition to tobacco control measures.<sup>46</sup> Through Section III, the attorneys general squarely addressed Big Tobacco’s propensity to use intermediaries to promote tobacco use in films.

In fact, the attorneys general have interpreted the text of Section III even more broadly. Beyond prohibiting the use of third parties, the attorneys general have argued that Section III requires Big Tobacco to take any “commercially reasonable” step to prevent the unauthorized use of brands in films.<sup>47</sup> Thus, even if Big Tobacco has no relation to the third party, it has an affirmative obligation to police the use of the brand-name.<sup>48</sup>

Due to the breadth of Section III, one would expect the MSA to deter Big Tobacco from engaging in product placement. In fact, discovery of the continued practice will result in significant civil penalties.<sup>49</sup> Nevertheless, since the Agreement’s inception, the on-screen appearance of tobacco products in movies has only increased.<sup>50</sup>

*B. Recommendation: Department of Justice and Federal Trade Commission  
Investigation, and MSA Section III Enforcement*

The history of covert action and the mysterious increase in tobacco appearances in movies warrant DOJ and FTC investigation to determine if Big Tobacco is complying with applicable laws and agreements. If the DOJ and FTC

42. *Id.*

43. MSA, *supra* note 39, § III(e).

44. E-mail from Marlene Trestman, *supra* note 40.

45. STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* 40-44 (1996).

46. See J. Mark Ahern, Press Query, Brown & Williamson, July 22, 1983, <http://legacy.library.ucsf.edu/cgi/getdoc?tid=vfh13f00&fmt=pdf&ref=results> (last visited July 5, 2005) (documenting Brown & Williamson’s use of the press as an intermediary to deflect assertions that it had violated rules governing tobacco advertisements in G-rated films).

47. Vanessa O’Connell, *Tobacco Makers Want Cigarettes Cut From Films*, WALL ST. J., June 14, 2004, at B, available at 2004 WLNR 7324583. State authorities in California have recently informed Big Tobacco that it is obliged under the MSA to police any use of its brands in films. *Id.* Indeed, in early 2004, at the urging of California’s attorney general, R.J. Reynolds asked Sony Pictures to edit its products out of the movie “Mona Lisa Smile.” *Id.*

48. *Id.*

49. See MSA, *supra* note 39, § VII, Enforcement.

50. See *supra* notes 23-24 and accompanying text.



discover that product placement is indeed ongoing, Section III of the MSA requires an injunction and substantial civil penalties. However, as explained in section C of this Comment, even if DOJ and FTC action triggers the end of product placement, the problem of smoking in movies might continue. Therefore, this section will explore strategies to pressure Hollywood to reduce the impact of smoking in movies.

### *1. DOJ and FTC Investigation*

According to Action on Smoking and Health (ASH), an anti-smoking non-governmental organization, in 1997 the Justice Department agreed to “thoroughly review” whether the increase in tobacco product appearances was caused by product placement.<sup>51</sup> However, as of publication of this article, the results of this investigation, if it has even occurred, are unknown.

What makes the DOJ’s inaction particularly frustrating is how little energy is required for the DOJ to get the ball rolling. In fact, the DOJ could simply write letters to the major tobacco companies and Hollywood studios, asking them to respond in writing, and under the penalties for lying in an official investigation, whether they or any of their agents coordinated or know of tobacco product placements.<sup>52</sup> Responses to these simple letters could then be reviewed to establish if any further inquiries are appropriate.<sup>53</sup>

The FTC has been comparatively active in investigating product placement. It requires Big Tobacco to file annual “special reports” on sales and advertising expenditures, including product placements in movies.<sup>54</sup> Specifically, the FTC requires Big Tobacco to reveal all payments or other consideration supplied to those engaged in product placement.<sup>55</sup>

Although promising, these requirements need buttressing. The FTC’s annual investigative orders include language that is too vague, thus permitting Big Tobacco to interpret the orders narrowly. For instance, the FTC only asks Big Tobacco about payments or other consideration to those “engaged in the business of product placement.”<sup>56</sup> Big Tobacco can interpret these murky orders to require only responses concerning firms that specialize in product placement. Other third parties used by Big Tobacco to place products, such as public relations companies,

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51. ASH, Justice to Investigate “Hidden Cigarette Ads” in Movies, at <http://ash.org/investigation.html> (last visited July 5, 2005).

52. ASH report, *supra* note 36.

53. *Id.*

54. See Adler, *supra* note 35 at 266-67 (referencing Federal Trade Commission, Order to File Special Report, July 28, 1995 (copy on file with author)) (discussing the 1995 order expanding the questions to be asked of tobacco companies).

55. See *id.* at n.131 (providing two sample questions from the FTC 1995 order).

56. *Id.* at 267.

may not be viewed as “in the business” of placement. As a result, the FTC’s orders do not scrutinize all use of third party product placement by Big Tobacco.

The FTC must iron out these ambiguities; it should specify that the FTC orders seek information about all third parties, not just those that specialize in product placement. Such orders make sense considering that use of all third parties is prohibited by the MSA. In fact, the FTC should interrogate Big Tobacco about all activities that would violate the MSA, as well as actions that Big Tobacco is required to take to prevent MSA infractions. Likewise, it would be insufficient for the DOJ only to attempt to locate direct cash payments by Big Tobacco; the DOJ must also investigate free samples and placement that occurs via third parties.

## 2. MSA Section III Enforcement

If the FTC and the DOJ discover that product placement is indeed ongoing, any settling state could bring an action against Big Tobacco in that state’s court for violating the MSA.<sup>57</sup> If the court finds that a good-faith dispute exists as to the meaning of the terms of the Agreement, the court might enter a declaratory order,<sup>58</sup> or a declaration construing terms in the Agreement.<sup>59</sup>

The court will find no good-faith dispute over the meaning of the MSA Section III provision if the government uncovers evidence that Big Tobacco has placed products directly, without using a third party. In that case, violation of the MSA’s terms is unmistakable. In other contexts, though, courts might find a good-faith dispute. For example, the FTC or DOJ might discover that Big Tobacco failed to discourage a third party from placing products. As mentioned, the attorneys general have interpreted Section III to require Big Tobacco to take all commercially reasonable steps to stop third party placement, even when Big Tobacco did not request the third party to place their tobacco products. However, the text of the provision is ambiguous on this point. Consequently, it is questionable whether a state judge would grant an injunction.

On the other hand, Big Tobacco recently has taken steps to prevent Hollywood from using brand-name products,<sup>60</sup> suggesting that even Big Tobacco considers Section III to compel policing the use of tobacco products.<sup>61</sup> If the court determines that Big Tobacco has indeed breached the MSA, the state may request

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57. See MSA, *supra* note 39, § VII. The state could only bring such an action in a court to which the Agreement was “presented for approval and/or entry as to that Settling State.” *Id.* § II(p).

58. *Id.* § VII(c)(5).

59. *Id.* § VII(c)(1).

60. See *supra* note 47.

61. However, R.J. Reynolds’s motivation for asking Sony Pictures to edit its products out of “Mona Lisa Smile” is unknown. Rather than representing a concession that Section III requires Big Tobacco to police all use of brand-names in movies, RJR’s request might simply have been a public relations ploy.

an injunction.<sup>62</sup> As discussed above, the court also might impose substantial civil penalties on the manufacturer.<sup>63</sup>

*C. Eradicating Product Placement Does Not Necessarily Solve the Problem of Smoking in Movies.*

The DOJ and FTC should adequately investigate the possibility of continued product placement by Big Tobacco, and if violations are revealed, states should bring claims under the MSA. However, as suggested by the above analysis, such investigation and subsequent state claims do not necessarily solve the problem of smoking in movies. For example, even if the DOJ and FTC discover that Big Tobacco product placement continues, and consequent government action prevents Big Tobacco from continuing to place products, problems still might persist. Such action only prevents Big Tobacco companies from placing products bearing their brand-names.<sup>64</sup> This solution would be insufficient because most on-screen tobacco appearances are “generic,” or lacking a brand-name.<sup>65</sup> Just like watching actors use brand-name products, watching on-screen use of generic tobacco products stimulates greater interest in cigarettes.<sup>66</sup>

Moreover, even if MSA enforcement ends Big Tobacco product placement, nothing impedes Hollywood’s continued use of brand-name tobacco, independent of Big Tobacco involvement. Similarly, even if the FTC and the DOJ investigation uncovers no foul play by Big Tobacco, tobacco scenes might continue, thus forcing the conclusion that Hollywood is the true villain behind smoking in movies.<sup>67</sup> In fact, regardless of Big Tobacco involvement, Hollywood ultimately controls movie content. Consequently, consumer and governmental health advocates must pressure Hollywood to rethink policies on smoking in movies. The next section focuses on strategies that bypass Big Tobacco altogether, instead directly pressuring Hollywood to lower the rate of on-screen smoking.

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62. MSA, *supra* note 39, § VII(c)(4).

63. Adler, *supra* note 35, at 265 (“if the tobacco industry violates the terms of the agreement, the defendants presumably face substantial civil penalties”). See also MSA, *supra* note 39, § II(n) (defining “claims” to include civil penalties).

64. The MSA, for example, does not cover product placement for generic smoking. See Adler, *supra* note 35, at 267-68.

65. See O’Connell, *supra* note 47 (noting that of movies released from 1999 to 2003 that included tobacco scenes, most was generic).

66. See *id.* See also Theresa F. Stockwell & Stanton A. Glantz, *Tobacco Use is Increasing in Popular Films*, 6 TOBACCO CONTROL 282 (1997). These authors note that, through perhaps the Tobacco Institute, Big Tobacco might pay Hollywood even just to use generic tobacco products. Although generic smoking would not favor one brand over another, if it stimulated greater interest in smoking, it would trigger increased sales for the entire industry. *Id.*

67. In fact, the DOJ and FTC investigations of product placement should focus not only on Big Tobacco, but also Hollywood. This point is explored in more detail at the end of Section III(A) of this Comment.

SECTION III: STRATEGIES TO PRESSURE HOLLYWOOD TO REDUCE THE IMPACT OF SMOKING IN MOVIES, WITHOUT INVOLVING BIG TOBACCO

Smoking first became prevalent on American movie screens in the 1950s.<sup>68</sup> At this time, Hollywood was prohibited by moral and governmental regulations from showing sex scenes.<sup>69</sup> As a result, directors searched for a substitute for sexual gratuity which could appeal to viewer's prurient interests, but could do so in an indirect and socially acceptable way.<sup>70</sup> In cigarette smoking, they found their answer.<sup>71</sup> Smoking communicated a sexual energy between two actors, a tangible force that gripped and enticed audiences.<sup>72</sup> But Hollywood soon discovered that this was just the tip of the iceberg. Smoking also portrayed to audiences a sense of sophistication and rebellion, two qualities particularly attractive to Hollywood's most cherished demographic: teenagers.<sup>73</sup> In fact, Hollywood's desire to continue attracting teenagers is the primary reason that, today, Hollywood is reluctant to take steps to mitigate the impact of on-screen smoking.

In recent years, three different groups have signaled an interest in institutionalizing measures to remedy the impact of smoking in movies. First, government leaders have applied pressure on Hollywood, and even have suggested that if Hollywood does not act, Congress would usurp Hollywood's control over editing content. Second, consumer groups have indicated their desire for an end to smoking in movies; these groups have the most potential to curtail smoking in movies. In fact, consumer groups have a series of viable causes of action against Hollywood. For example, consumers can bring an Article 78 suit asserting that the Motion Pictures Association of America (MPAA),<sup>74</sup> Hollywood's rating body, rates on an arbitrary and capricious basis. Pursuant to such an action, consumers should demand that the MPAA improve its rating system by applying an R rating to all movies with smoking scenes. Another viable action is a tort suit. In addition, groups have at their disposal the shareholder's resolution against Hollywood studios. The tort suit and shareholder resolution can be used either to compel Hollywood to apply an R rating, or to show Public Service Announcements (PSAs). These PSAs would propound anti-smoking messages,

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68. See Chris Hastings, *Hollywood Faces Fury as Smoking on Screen Returns to 1950s Levels*, TELEGRAPH (London), July 3, 2004; see also *Smoking Becoming Part of Hollywood Nostalgia*, CHI. TRIB., June 22, 1997, available at 1997 WL 3561134.

69. *Smoking Becoming Part of Hollywood Nostalgia*, *supra* note 68.

70. See Hastings, *supra* note 68.

71. See *id.* ("Many stars of the 1940s and 1950s regarded the cigarette as adding to their sexual allure.").

72. See *id.*

73. *Id.* Adolescents comprise Hollywood's most cherished demographic because, as noted earlier, they see more movies than any other age demographic. See ARBITRON CINEMA, *supra* note 27.

74. The Motion Picture Association of America (MPAA) is a not-for-profit corporation and its members are producers and distributors of motion pictures and television programs. *Miramax Films Corp. v. MPAA, Inc.* 560 N.Y.S.2d 730, 732 (1990).

and would be shown prior to the screening of movies with tobacco scenes. This paper takes the position that both methods would be effective, but PSAs are more effective and feasible and therefore the better remedy.

Finally, Hollywood itself has expressed an interest in reducing on-screen smoking. On the other hand, Hollywood has long resisted efforts to change the MPAA rating system or to compel PSAs.<sup>75</sup> MPAA President Jack Valenti has served as Hollywood's mouthpiece in enunciating this resistance.<sup>76</sup> Again, because they are more effective and feasible than an alteration of the rating system, PSAs are the more effective strategy to circumvent Hollywood resistance.

### *A. Government Leaders*

Over the past year, Senators from both U.S. political parties and attorneys general from twenty-seven states have insisted that Hollywood do something to prevent children from becoming tobacco-addicted adults.<sup>77</sup> These health-minded officials have met with studio heads, the Director's Guild of America (DGA), the MPAA, and others.<sup>78</sup> Most recently, in May, 2004, the Senate Commerce Committee held a hearing to discuss the problem with the MPAA, among others.<sup>79</sup> At this hearing, Senator John Ensign stated that he prefers voluntary efforts over legislation.<sup>80</sup> However, Senator Ensign sounded a warning to Hollywood: if it does not pursue voluntary efforts, the U.S. Congress will act.<sup>81</sup>

Unfortunately, Congress and the attorneys general have little legal pull to affect the content of Hollywood films. In fact, the government's recent pressure bears striking resemblance to two key moments in the history of attempted Hollywood censorship. Both moments demonstrate the government's relative impotence to force Hollywood to alter the content of films. In fact, throughout the

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75. James Bates & Amy Wallace, *Pressure's on Again to Edit Film Rating System*, L.A. TIMES, Sept. 27, 2000, at A1.

76. *Id.*

77. David McAlary, *U.S. Lawmakers Warn Hollywood to Reduce Smoking in Movies*, VOANEWS.COM, May 13, 2004, <http://voanews.com/english/Archive/a-2004-05-13-15-1.cfm?textmode=0> (last visited July 5, 2005).

78. See, e.g., Ted Elrick, *Smoking in the Movies: The DGA Responds to the Controversy*, DGA MAGAZINE (July 2004) [hereinafter *DGA Responds*] (noting that in December, 2003, DGA met with Senators John Ensign (D-NV) and the attorneys general of Maryland, Connecticut, Utah and Vermont and representatives from the attorney general offices of California and Maine), [http://www.dga.org/news/v29\\_2/craft\\_smkg\\_704.php3](http://www.dga.org/news/v29_2/craft_smkg_704.php3) (last visited July 5, 2005); Press Release, Maryland Attorney General, Curran to Testify to Senate on Impact of Smoking in Movies on Children, (May 10, 2004) [hereinafter *Curran Media Release*] (writing that AG Curran has met with Valenti, the National Association of Theaters (NATO), and production executives from seven major studios), <http://www.oag.state.md.us/Press/2004/051004.htm> (last visited July 5, 2005).

79. See McAlary, *supra* note 77.

80. *Id.*

81. *Id.*

twentieth century, the government's role in creating change in Hollywood has taken a backseat to the more effective role played by consumer advocates.

The first example of attempted censorship is the government's effort to influence content in the late 1920s and early 1930s. In 1927, the Hays Office issued the Hays Code: "Don'ts and Be Carefuls."<sup>82</sup> Designed to quiet frequent complaints about movie-content, the Hays Code included eleven forbidden subjects and twenty-five topics on which producers were required to exercise caution.<sup>83</sup> Despite the Code, at the onset of the Depression, movie producers still operated under lax, voluntary self-regulation.<sup>84</sup> Then, in 1933, the U.S. Senate initiated an investigation of the movie industry.<sup>85</sup> Although Hollywood stated its interest in upholding the Code, it once again stymied government requests by refusing to make these standards mandatory.<sup>86</sup> Hollywood's behavior reflected its sense that Congress was powerless to enforce significant content restrictions.

However, the Code was ultimately enforced, not because of the Senate, but because consumers dictated change. Where Senate intervention failed, the organization of a boycott by the Catholic Church succeeded.<sup>87</sup> In October, 1933, pursuant to the direction of a papal emissary in New York,<sup>88</sup> an estimated eight million Catholics signed a pledge to boycott any films declared objectionable by the church hierarchy.<sup>89</sup>

The boycott never happened. Instead, the industry immediately capitulated, adopting a new system whereby films required a certificate of approval prior to release.<sup>90</sup> Moreover, rather than face the boycott, Hollywood agreed to give the Hays Office a significant role in reviewing films prior to release.<sup>91</sup> On the local level, a slew of state and municipal legislatures passed laws that regulated movies even more strictly than the Hays Code.<sup>92</sup> This example demonstrates that

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82. RUTH A. INGLIS, *FREEDOM OF THE MOVIES: A REPORT ON SELF-REGULATION FROM THE COMMISSION ON FREEDOM OF THE PRESS* 114-16 (1947). Will Hays was president of the Motion Picture Producers and Distributors of America, the predecessor of the MPAA. *Id.* at 113.

83. *Id.* For instance, open mouth kissing was prohibited; a man and woman in bed, whether married or not had to keep one leg on the floor; verbal profanity was not allowed; bad guys did not escape justice. *Id.*

84. *Id.* at 83-84.

85. *Id.* at 119.

86. *Id.*

87. *Id.*, at 120-21.

88. Margarette A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 784 (citing N.Y. TIMES, Oct. 2, 1933, quoted in Richard Corliss, *The Legion of Decency*, 4 FILM COMMENT 26 (1968)).

89. Inglis, *supra* note 82, at 123.

90. *Id.* at 125.

91. *Id.*

92. *Id.* at 142.

consumer-led movements may offer greater potential than government action to trigger change in Hollywood.

The second example shows that when consumers and the government exhort Hollywood in two opposite directions, Hollywood caters to consumer pressure. In the late 1960s, with the commencement of the post-modern era, consumers demanded more risqué subject matter.<sup>93</sup> At the same time, the government sought to conventionalize movie content through the Hays Code and restrictive local laws. Shunning these laws, Hollywood listened to the consumers, offering more salacious content.<sup>94</sup> Accordingly, in 1968, Metro-Goldwyn-Meyer (MGM) released Michelangelo Antonioni's "Blow-Up."<sup>95</sup> It was the first time nudity was seen on American movie screens.<sup>96</sup> Once again, consumer-led pressure had forced Hollywood to modify movie content.

To protect this movie and others like it, studios challenged government content restrictions in the courts. Unfortunately for the Hays Code and local laws, the Supreme Court was highly receptive to First Amendment arguments. What ensued was the wholesale judicial annihilation of these restrictions,<sup>97</sup> both as applied to movies and other artistic expression. For example, in *Interstate Circuit v. City of Dallas*,<sup>98</sup> Dallas had formed a Motion Picture Classification Board, which prohibited theaters from showing minors any film that was likely to incite or encourage minors to engage in crime, sexual promiscuity, or other delinquent behavior.<sup>99</sup> Writing for the Court, Justice Marshall struck down the law as unconstitutionally vague.<sup>100</sup> Justice Marshall stressed that the scheme was state action and as such must be "narrowly drawn," with "reasonable and definite

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93. See generally Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1364 (1990) ("Post-modernism not only rejected the Modernist demand that art be 'serious,' it rejected the idea that art must have any traditional 'value' at all."). The movie industry was also pressured by the advent of television, a competitor that offered a similar service without the hassle of leaving home. Richard M. Mosk, *Motion Picture Ratings in the United States*, 15 CARDOZO ARTS & ENT. L.J. 135, 136 (1997).

94. Mosk, *supra* note 93, at 136.

95. Jacob Septimus, *The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation*, 21 COLUM.-VLA J.L. & ARTS 69, 72 (1996).

96. *Id.*

97. The Court held the following film licensing standards to be unconstitutionally vague:

'[O]f such character as to be prejudicial to the best interests of the people of said City;' 'moral, educational or amusing and harmless;' 'immoral,' and 'tend to corrupt morals;' 'approve such films . . . [as] are moral and proper;' '. . . disapprove such as are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals.'

*Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 683 (1968) (citations omitted). This footnote provides only a sampling of such cases. For a more exhaustive account, see the opinion in *Interstate Circuit, Inc.*, 390 U.S. 676.

98. 390 U.S. 676 (1968).

99. *Id.* at 681.

100. *Id.* at 682.

standards.”<sup>101</sup> Just as the Senate’s efforts in the 1930s to rein in Hollywood content fell short, *City of Dallas* ensured that efforts by state and municipal legislatures also stumbled.

The two historical examples given above are instructive for health advocates wishing to implement either PSAs or an R rating for movies with tobacco scenes. Above all, the examples demonstrate that congressional and state attorney general posturing is no substitute for direct consumer pressure. Such consumer pressure, unlike a congressional hearing alone, has the potential to manifest itself in diminished returns at the box office and costly private lawsuits against Hollywood.<sup>102</sup> These are the threats that capture Hollywood’s attention, and could force Hollywood to remove smoking scenes, or implement an R rating or PSA requirement. Consequently, government leaders should envision their role, at least in significant part, as organizing and channeling direct consumer pressure. For example, Congress can suggest to consumers effective strategies for applying direct pressure on Hollywood.<sup>103</sup>

This is not to say that direct pressure by government leaders is valueless. Attorney general and Senate participation in meetings, hearings, and investigations are vital to produce information. For example, DOJ and FTC investigation of product placement should focus not just on Big Tobacco, but on Hollywood involvement as well. Although the government probably cannot punish Hollywood for product placement, investigations can uncover and spotlight Hollywood complicity. Government officials should then publicly condemn Hollywood’s involvement.<sup>104</sup> Such disclosure and condemnation may embarrass Hollywood, as well as anger Hollywood’s traditional audience groups.<sup>105</sup>

101. *Id.* at 690. Marshall added: “Of course . . . ‘[i]t does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places’ . . . [however] restrictions imposed cannot be so vague as to set ‘the censor . . . adrift upon a boundless sea . . .’” *Id.* at 684 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502, 504 (1952)).

102. See *infra* notes 109-199 and accompanying text (examining a series of legal actions against Hollywood).

103. For an example of effective consumer strategies, see Press Release, Interfaith Center on Corporate Responsibility (ICCR), Religious Shareholders Challenge Media Giants’ Promotion of Smoking in Youth-Rated Movies (Nov. 10, 2003) [hereinafter ICCR Press Release], <http://www.smokefreemovies.ucsf.edu/pdf/ShareholderPress10-10-03.pdf> (last visited July 5, 2005).

104. See Clifford Rothman, *Smoke Screen: Hollywood Taking Heat for All the Lighting Up in Films*, USA TODAY, Aug. 25, 1997, (detailing various criticism by the Clinton Administration of Hollywood for tobacco scenes, including a rebuke by Hillary Rodham Clinton for “the mixed message our children are receiving regarding the use of tobacco products.”), available at 1997 WLNR 3051652.

105. See Adler, *supra* note 35 at 272.



Moreover, recent changes in the political and cultural landscape<sup>106</sup> may foster greater potential for government leaders to pressure Hollywood to alter film content to promote morality and even religiosity. The evolution of this new playing field was evidenced by the recent efforts of Senator Ensign, Maryland Attorney General Joseph Curran, and others.<sup>107</sup> Although these efforts have yet to bear fruit, increased government involvement and pressure signal growing confidence that the current landscape is ripe for government-led change.<sup>108</sup>

### *B. Direct Consumer Action*

Consumer action has proven to be more effective than the government's attempts to alter Hollywood movie content. In fact, the current socio-political climate is ripe for broad consumer-based actions to force Hollywood to minimize the impact of on-screen smoking.<sup>109</sup> America is still recovering from the Columbine, Colorado school shootings, and across the country parents may be especially receptive to movements calling for greater protection of their children.<sup>110</sup> Therefore, it is useful to consider the methods consumers should use to reduce the effect of on-screen smoking. Some primary vehicles for direct

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106. The Bush Administration has strived to cultivate an image of piety and decorum by taking conservative positions on social issues. For example, soon after taking office, Attorney General John Ashcroft, a man deeply conservative in his religious and political views, removed a Sprit of Justice statue from the Department of Justice's Great Hall because the art deco rendering portrayed a rather buxom woman with one breast exposed. George McEvoy, '*Spirit of Justice*' Under Ashcroft a Mirage, PALM BEACH POST, Nov. 13, 2004, at 13A.

107. See, e.g., Curran Media Release, *supra* note 78 (describing Curran's extensive efforts to address the on-screen tobacco problem).

108. Although government is unlikely to pass laws that infringe on the First Amendment, it might very well take other action to indirectly impact Hollywood content. For example, the government could establish its own rating system, which would coexist with the MPAA system. Presumably, government ratings would better address parental concerns about content, and consequently parents might give greater regard to these ratings than the MPAA's. However, government ratings would be after-the-fact; a rating could only be assigned after the movie's release. Moreover, the government could not use these ratings to restrict a child's access to certain movies.

109. See *supra* notes 105-07 and accompanying text (reviewing changes in political climate).

110. See, e.g., President William Jefferson Clinton, Remarks to NATO, Washington, D.C. (June 8, 1999) ("[T]he tragedy at Columbine High School seared itself into our national consciousness. Ever since that day, our country has been moving steadily away from a culture of youth violence, toward creating the kind of future we want for our children. People from all walks of life are coming together in a national grass-roots campaign to prevent youth violence, to give our children the childhoods they deserve."), <http://clinton4.nara.gov/WH/New/html/19990608a.html> (last visited July 5, 2005). See also Jonathan Seiden, *Scream-ing for a Solution: Regulating Hollywood Violence: An Analysis of Legal and Legislative Remedies*, 3 U. PA. J. CONST. L. 1010, 1011 ("In the aftermath of the school shootings at Columbine High School in Littleton, Colorado, Hollywood has come under vigorous attack and criticism for violent images depicted in movies and television."). Prior to the Columbine incident, one of the murderers reportedly studied "Natural Born Killers" (1994), "in which two crazy kids cut a carnage swath through the Southwest." *Id.*

consumer action are boycotts, as threatened by the Catholic Church in the 1930s, letter-writing campaigns, and private lawsuits.

Specific strategies for organizing boycotts and letter writing campaigns are beyond the scope of this paper. However, this section examines the possibility of private legal action by consumers. In *Ginsberg v. State of New York*,<sup>111</sup> a companion case to *City of Dallas*, Justice Brennan laid the groundwork for private suits by parents challenging Hollywood content. Justice Brennan explained that, “constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”<sup>112</sup> He concluded that parents are “entitled to the support of laws designed to aid discharge of that responsibility.”<sup>113</sup> *Ginsberg* suggests that when any actor such as Hollywood undermines society’s efforts to assist parents, parents derive a legal cause of action against that actor.<sup>114</sup>

Although Justice Brennan did not attempt to clarify specifically how parents might enforce their rights, more recent cases have provided some clarification. For example, private citizens could sue Hollywood for devising an inadequate ratings system, which offers no warning to parents when films contain dangerously influential tobacco scenes. This section describes three causes of action against Hollywood: the Article 78 arbitrary and capricious suit, the tort action, and the shareholder resolution and suit.

### *1. Article 78*

Article 78 is a New York statutory prohibition against arbitrary and capricious conduct.<sup>115</sup> While Article 78 is a procedure more commonly applied to review challenges to public administrative agency decisions, it is also available to review the determinations of private, non-governmental organizations.<sup>116</sup> This statute applies because the MPAA is a private organization, incorporated in New

111. 390 U.S. 629 (1968).

112. *Id.* at 639. “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Id.* (quoting *Prince v. Commonwealth of Massachusetts*, 64 S.Ct. 438, 442 (1944)).

113. *Id.*

114. *See id.*

115. N.Y. C.P.L.R. 7800 et seq. (McKinney 1994 & Supp. 2005). *Miramax Films Corp. v. MPAA, Inc.*, 560 N.Y.S.2d 730, 731 (N.Y. Sup. Ct. 1990). An Article 78 proceeding addresses the question of: “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . .” N.Y. C.P.L.R. 7803(3).

116. *See, e.g.*, *Levandusky v. One Fifth Ave. Apartment Corp.*, 553 N.E.2d 1317, 1317 (N.Y. 1990) (corporate co-op board action); *Susan M. v. New York Law School*, 556 N.E.2d 1104, 1104 (N.Y. 1994) (article 78 proceeding seeking a judgment directing respondent to reinstate her, petitioner alleged that her private law school’s decision to dismiss her was arbitrary and capricious and that her poor performance in her fourth semester was directly attributable to the irrational testing and grading procedures of three of her four).

York.<sup>117</sup> To provide necessary backdrop to Article 78 suits against the MPAA, this section begins by reviewing the forces that led to the creation of the MPAA. Next, the section discusses *Miramax Films Corp. v. MPAA, Inc.*,<sup>118</sup> in which a New York court, reviewing an Article 78 challenge, strongly criticized the MPAA system. *Miramax* is readily applicable to actions against the MPAA for failing to warn parents about on-screen tobacco scenes. The section then considers and contests Jack Valenti's likely response to such an Article 78 action.

*a. Creation of the MPAA and Brief Review of the Modern System*

The impetus for the MPAA was lack of a sufficiently effective mechanism for regulating movie content. In *City of Dallas*, the Court had established that the First Amendment prohibited the state from meaningful regulation of movies.<sup>119</sup> Additionally, in other cases the Court strongly suggested that the government's censorship powers were insufficient to protect the rights of parents to control what their children would and would not see.<sup>120</sup> The state could only prevent children from seeing obscenity, leaving them exposed to films depicting violence, foul language, and promiscuity.<sup>121</sup>

Jack Valenti read these opinions and had the unmistakable sense that the Justices were speaking directly to him.<sup>122</sup> The Court's emphasis on the obligations and authority of parents suggested that greater policing of expression, however necessary, was more than the state could constitutionally require.<sup>123</sup> To Valenti, implicit in the Court's emphasis was the expectation that some private entity would fill the gap between what the state could censor, only obscenity, and what parents wanted to be censored, such as violence and sexual promiscuity.<sup>124</sup> Hollywood

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117. *Miramax*, 560 N.Y.S.2d at 732.

118. 560 N.Y.S.2d 730 (N.Y. Sup. Ct. 1990).

119. 390 U.S. 676 (1968).

120. See *supra* notes 111-14, and accompanying text (discussing Ginsberg).

121. *Ginsberg v. State of New York*, 390 U.S. 629 (1968).

122. See Peter Bart, *Q&A with the Film Industry's Champion*, DAILY VARIETY, Apr. 27, 1995, at 16. Valenti:

[T]he Supreme Court said, 'The Dallas Censorship Board as it is now constituted is now unconstitutional.' And they suggested how they might make it constitutional. But it also said something that had a seminal ring to it, and it rang like a twanging wire through the whole fabric of viewing movies: They said children could be barred from seeing movies but no one could bar adults from seeing movies.

*Id.* That Valenti would make such a keen observation is not surprising; he established a reputation as a shrewd tactician as a member of the Johnson Administration. *Id.*

123. See *id.*

124. See *id.*

and Valenti saw a golden opportunity to wrest control over content decisions from the state.<sup>125</sup>

Valenti took action. He walked a tightrope between two sets of consumers: on the one hand, parents who expected chastity from movies shown to their children, and on the other hand, post-modernists who craved a more controversial fare. The result of this tightrope walk has served as the basis for the modern MPAA system.<sup>126</sup>

Under this system, a PG-13 rating indicates that the content of the film is suitable for any child over the age of thirteen.<sup>127</sup> In contrast, an R rating restricts children under the age of seventeen from watching the movie in any theater if unaccompanied by a parent or adult guardian.<sup>128</sup> A film receives an R based upon, “among other things, a film’s use of language, theme, violence, sex or its portrayal of drug use.”<sup>129</sup> The MPAA currently does not consider on-screen tobacco use to warrant an R, a PG-13, or a PG rating.<sup>130</sup> An Article 78 action could challenge the MPAA’s failure to supply an R rating for smoking in movies as arbitrary and capricious.

*b. Miramax*

Despite Valenti’s initial efforts to cater to parents’ concerns, critics have increasingly railed against the current MPAA system as vague and inadequate.<sup>131</sup> In *Miramax*, a New York court agreed with these critics. There, petitioner *Miramax*, an independent film company, asserted that the MPAA abused its discretion by operating an arbitrary and capricious rating system.<sup>132</sup> It specifically claimed that the MPAA’s X rating was vague and undefined, and therefore an X for Miramax’s “Tie Me Up! Tie Me Down!” ran afoul of New York’s Article 78.<sup>133</sup>

Although the court held that the Miramax movie was clearly unsuitable for those under age eighteen, and therefore warranted an X, it issued a scathing

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125. *See id.*

126. *Id.*

127. *Id.*

128. THE CLASSIFICATION AND RATING ADMIN., REASONS FOR MOVIE RATINGS, <http://www.filmratings.com/questions.htm>. (last visited July 5, 2005).

129. *Id.*

130. *See id.*

131. *See* FED. TRADE COMM’N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES 10 (2000) [hereinafter FTC: MARKETING VIOLENCE] (noting that the system has been criticized over the years).

132. *Miramax Films Corp. v. MPAA, Inc.*, 560 N.Y.S.2d 730, 731 (1990).

133. *Id.*

critique of the MPAA system.<sup>134</sup> It observed that the MPAA's purported purpose, to help parents decide which movies are appropriate for their children, was a myth.<sup>135</sup> Instead, "the standard [applied by the MPAA] is a marketing standard, a tool to aid in promoting films."<sup>136</sup> The court noted with consternation that the MPAA's initial Rating Board and the Ratings Appeals Board members have "no special qualifications."<sup>137</sup> In fact, to qualify for Board membership, the MPAA only requires parenthood experience, a passion for cinema, and "intelligent maturity of judgment."<sup>138</sup>

The court concluded that the MPAA was abusing its discretion; the rating system was so flawed that an adequately presented case could render the MPAA liable under Article 78.<sup>139</sup>

[T]he MPAA should strongly consider some changes in its methods of operations to properly perform its stated mission. Unless such concerns are meaningfully dealt with, the MPAA may find its rating system subject to viable legal challenge by those groups adversely affected herein, including organizations charged with the responsibility of protecting children.<sup>140</sup>

This precedent may very well provide consumers with a cause of action against the MPAA to apply an R rating to films with tobacco scenes. As noted, the MPAA formulates its guidelines and applies ratings without the assistance of any professional opinion. This haphazard system makes no effort to address the possibility that parents desire an R rating for on-screen smoking. Without endeavoring to address this possibility, the MPAA has left itself vulnerable to an Article 78 challenge.

In response to such an assertion, Valenti would counter that the MPAA's rating system is not arbitrary or capricious. He would most likely cite parental surveys that show a high rate of familiarity and satisfaction with the MPAA

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134. *Id.* at 735.

135. *See id.* ("What is offensive is the unprofessional standard itself. . .").

136. *Id.*

137. *Id.* at 733.

138. *Id.* (quoting VALENTI, MPAA, VOLUNTARY MOVIE RATING SYSTEM 5 (1987)).

139. *Id.* at 736.

140. *Id.* Although *Miramax* only specified that organizations protecting the interests of children were situated to bring Article 78 claims, additional parties may have standing. *Id.* For instance, parents of children that "[are] or will be affected" by the MPAA's arbitrary and capricious rating system may also bring an Article 78 claim. *Sun-Brite Car Wash, Inc. v. Bd. of Zoning and Appeals*, 515 N.Y.S.2d 418, 422 (1987). The court explained that in Article 78 cases, "proof of special damage or in-fact injury is not required in every instance to establish that the [plaintiff's interests are] adversely affected." *Id.* *See also* *Caso v. N.Y. State Public High School Athletic Ass'n., Inc.*, 434 N.Y.S.2d 60, 62 (1980) (allowing a parent to sue on behalf of his son when the Athletic Association determined his son ineligible to participate in high school gymnastics). If standing would be conferred to an organization charged with the responsibility of caring for children, certainly parents should also have standing, since they too care for their children.

system. Whenever Valenti makes a public appearance, he mentions that 90% of parents are familiar with the rating system, and 75% find it “useful.”<sup>141</sup> Consequently, Valenti concludes, the MPAA fulfills its mission to assist parents with their parental responsibilities.<sup>142</sup>

However, Valenti’s assertion that a 75% satisfaction rate is “high” is certainly contestable. Furthermore, Valenti neglects to mention that the same surveys show that 50% of parents say that the MPAA does a “fair or poor” job of informing them about certain content, such as violence.<sup>143</sup> Presumably, the survey does not even inquire about smoking. And perhaps most importantly, even if some parents do not consider smoking in movies problematic for their children, the reason for this may simply be that they are unaware of the correlation between viewing on-screen smoking and developing a smoking habit. If, as the *Miramax* court recommends, the MPAA used the opinion of professionals when formulating guidelines, it could issue ratings based upon what all parents, were they informed, would want for their children. As the court in *Miramax* notes, because the MPAA shuns these professional opinions, the system is “capricious.”<sup>144</sup>

## 2. Tort Action

The second possible private action asserts a breach of duty. For this action, private plaintiffs might be able to sue Hollywood under state tort law. To establish a cause of action in negligence a plaintiff must generally prove the existence of four elements: a duty owed to him (or to a class of which he is a part) by the defendant, a breach of that duty, a legally cognizable causal relationship between the breach of duty and the injuries suffered (“causation”), and injuries.<sup>145</sup> If a child sees movies with tobacco use because the MPAA negligently failed to restrict access with an R rating, or if a child sees on-screen smoking without first being shown a PSA, and the child incurs the injury of a nicotine addiction, the parents could argue that Hollywood failed to exercise duties to the parents.

Precedent supports a tort action. An example is *Abrams v. City of Rockville*.<sup>146</sup> In *Abrams*, the City of Rockville, through its Department of Recreation and Parks, operated an after-school activities program for elementary school children of working parents.<sup>147</sup> In May, 1988, program employees showed

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141. FTC: MARKETING VIOLENCE, *supra* note 131, at 10. See also Bart, *supra* note 122 (noting that Valenti is most proud of the ratings system he helped to create).

142. See FTC: MARKETING VIOLENCE, *supra* note 131 (noting that the MPAA does not require explanations of its ratings system in advertisements).

143. *Id.* at 10-11.

144. *Miramax Films Corp. v. MPAA, Inc.*, 560 N.Y.S.2d 730, 736 (1990).

145. See, e.g., *Jacques v. First Nat'l Bank of Maryland*, 515 A.2d 756, 758 (Md. 1986).

146. 596 A.2d 116 (Md. App. 1991).

147. *Id.* at 117.

the PG-rated movie “Poltergeist.”<sup>148</sup> Afterwards, seven-year old Andrea Abrams suffered great anxiety and psychological stress, manifested by sleeplessness and nightmares.<sup>149</sup> Her parents alleged tort liability against the city.<sup>150</sup>

The court agreed.<sup>151</sup> It held that the defendant’s duty was “implicit from the very nature<sup>152</sup> of the program they were operating.”<sup>153</sup> The city breached this duty because it showed to a child a movie that was “unsuitable” for her.<sup>154</sup> Indeed, the movie was PG, suggesting “parental guidance,” yet the defendant showed the girl the movie while her parents were absent.<sup>155</sup> Moreover, the court found that if the plaintiffs were to prove all the alleged facts, the harm was “at least foreseeable, if not likely.”<sup>156</sup> As a result, it was “clear” that the plaintiff had sufficiently alleged all four elements of tort negligence.<sup>157</sup>

*Delgado v. American Multi-Cinema, Inc.*<sup>158</sup> also provides guidance. There, a theater permitted a child unaccompanied by an adult to enter an R-rated movie.<sup>159</sup> The thirteen-year-old became excited during the movie’s violent scenes and told his friends that he wanted to shoot someone.<sup>160</sup> Immediately after the movie, the boy shot and killed the plaintiff parents’ son, one and one-half blocks from the theater.<sup>161</sup> The parents filed a tort suit, alleging that by admitting the boy to an R movie, the theater and the MPAA had breached their duty of care to society at large.<sup>162</sup>

The court ruled against the parents, reasoning that the purpose of the rating system was not to protect society at large.<sup>163</sup> However, the court added that the

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148. *Id.* at 118.

149. *Id.*

150. *Id.*

151. *Id.* at 122.

152. Hollywood defendants might attempt to distinguish *Abrams* by arguing that in that case, the court only found a duty was owed based upon the unique nature of the defendant’s public after-school program. For more discussion on this point, see first full paragraph of Section III.C.

153. *Abrams v. City of Rockville*, 596 A.2d 116, 122 (Md. App. 1991).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. 84 Cal.2d 838 (1999).

159. *Id.* at 839-40.

160. *Id.* at 839.

161. *Id.*

162. *Id.* at 840.

163. *Id.* at 841 (citing *Miramax Films Corp. v. MPAA*, 560 N.Y.S.2d 730, 732 (1990)). Had the murderer’s parents been sued, they could have impleaded the MPAA. See Joseph W. Glannon, *Liability of Multiple Tortfeasors in Massachusetts: The Related Doctrines of Joint and Several Liability, Comparative Negligence and Contribution*, 85 MASS. L. REV. 50, 70-71 (2000) (explaining that a defendant who impleads a third-party defendant for contribution will bear the burden to establish that the impleaded party is “jointly liable in tort” for the plaintiff’s injury). Even so, this point probably does not apply in the context of on-screen smoking actions. The only conceivable scenario is that a

MPAA and the theater did owe a duty to the parents of children admitted to movies.<sup>164</sup> Specifically, this duty is to help parents exercise control over the movies their children see.<sup>165</sup> “[T]he movie-rating system’s duty flows to parents.”<sup>166</sup> Accordingly, the appellate court held that, although the MPAA and the theater did not owe a duty of care to the parents of the slain boy, it did owe such a duty to parents to prevent a child from seeing a movie unsuitable for that child.<sup>167</sup>

When combined, *Abrams* and *Delgado* may support a cause of action against the MPAA for showing on-screen smoking to children, and thereby making a nicotine habit much more likely. For brevity, I will refer to a plaintiff bringing such an action as Plaintiff X. Like *Abrams*, Plaintiff X can demonstrate significant injury: nicotine addiction.<sup>168</sup> Experts project that nicotine addiction leads to a tobacco-related death for one out of three new smokers.<sup>169</sup>

Further, Plaintiff X can establish a duty. The MPAA owes parents a duty not to allow children unaccompanied by parents to see movies that are “unsuitable” for them. The MPAA owes this duty because it is responsible for devising the rating system that controls which movies children are permitted to see without a parent. Indeed, in both *Delgado* and *Abrams*, the courts held that the duty was owed by the entity responsible for deciding whether to show the movie to children.<sup>170</sup> Hollywood defendants might attempt to distinguish *Abrams* by

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victim of second-hand smoke could sue someone who developed a nicotine habit by watching on-screen smoking, and then the defendant could try to implead the MPAA.

164. *Delgado v. American Multi-Cinema, Inc.*, 85 Cal.2d 838, 840 (1999).

165. *Id.*

166. *Id.* at 841. The court explained the source of this duty: “[C]reation of a legal duty is fundamentally a policy determination: ‘The existence of a legal duty is a question of law which is simply an expression of the sum total of the policy considerations that lead a court to conclude that a particular plaintiff is entitled to protection . . . .’” *Id.* at 840. (citing *Jacoves v. United Merchandising Corp.*, 11 Cal.2d 468 (1992)).

167. *Id.* at 840-41.

168. Any lesser injury than nicotine addiction would unlikely suffice. For example, simply seeing on-screen smoking would probably not constitute a tort injury. Such an experience only increases the likelihood of the injury, or nicotine addiction; it is not the injury itself. *See, e.g., Jacques v. First Nat’l Bank of Maryland*, 515 A.2d 756 (1986). In the same vein, smoking once or twice probably does not constitute an injury as defined under state tort law because, once again, this only increases the likelihood of addiction. *Id.*

169. *See* CDC, DHHS, PROJECTED SMOKING RELATED DEATHS AMONG YOUTH - UNITED STATES, 45 Morbidity and Mortality Weekly Report (MMWR) 971 (Nov. 8, 1996) (finding that between ten and thirty-seven percent of young smokers’ deaths will be attributable to their early smoking habits), <http://www.cdc.gov/mmwr/preview/mmwrhtml/00044348.htm> (last visited July 5, 2005). One difficulty, though, will be establishing that the child has in fact developed a nicotine addiction. To establish addiction, a plaintiff might introduce evidence of purchasing nicotine cessation devices over a prolonged period of time. In addition, if the plaintiff has sought professional assistance to quit smoking, these professionals could testify as to the plaintiff’s addiction.

170. *Delgado v. American Multi-Cinema, Inc.*, 85 Cal.2d 838 (1999); *Abrams v. City of Rockville*, 596 A.2d 116 (Md. App. 1991).



arguing that, in that case, the court only found a duty was owed because of the unique nature of the defendant's public after-school program. However, *Delgado* involved a private defendant, and in that case the court also found the MPAA owed a duty.<sup>171</sup> Like *Delgado*, Plaintiff X can establish that the MPAA owed a duty to the parents simply by alleging that the child went to the theater to watch a movie.

The breach of duty in *Abrams* is also apposite to Plaintiff X's case. In *Abrams*, the City showed a movie unsuitable for a child when her parents were not there. Similarly, Plaintiff X can argue that the MPAA, by devising a flawed rating system, decided to show the child on-screen smoking, which is generally unsuitable for children unaccompanied by a parent. To support this point, Plaintiff X can rely on Dalton's studies,<sup>172</sup> which establish a correlation between the MPAA's decision to show on-screen smoking to children, and extreme harm to children.<sup>173</sup> Movies that may significantly harm children certainly seem unsuitable for them, especially in the absence of their parents.<sup>174</sup> Therefore, the MPAA has breached its duty to Plaintiff X.

The most difficult element for Plaintiff X to establish will be causation. However, as mentioned, studies by Dalton and others demonstrate that children who watch the most big-screen movies are three times more likely to start smoking.<sup>175</sup> Arguably,<sup>176</sup> Plaintiff X has as good a case for causation as *Abrams*, who produced no such research for the effects of scary movies. The case for causation would be more compelling if Plaintiff X could show the absence of other factors that cause children to start smoking, such as peer pressure. Such an absence will be very difficult to establish. Nonetheless, as statistical analysis of causation is refined, the ability of plaintiffs to mount a successful tort action may improve.

For brevity, this section only has involved challenges to showing R-rated movies to children. However, parents could also sue Hollywood for negligently failing to show PSAs prior to movies containing smoking scenes. Indeed, parents could assert that in choosing to omit PSAs, Hollywood breaches its duty to parents by failing to take steps to neutralize movie content harmful to their children. Again, however, proving causation is an onerous task.

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171. *Delgado*, 85 Cal.2d at 840-41.

172. See Dalton, *supra* note 13.

173. *Id.*

174. Further, Plaintiff X can use the language of *Miramax* as precedent for the MPAA's general negligence in determining suitable content. *Miramax Films Corp. v. MPAA*, 560 N.Y.S.2d 730, 735-36 (1990).

175. See Dalton, *supra* note 13, at 284.

176. Although Dalton's studies show a correlation, causation is far from clear. See O'Connell, *supra* note 47 (Valenti, for example, has rejected Dalton's findings, saying that human behavior is far too complex for researchers to be able to isolate movies as the basis for an adolescent's smoking habit). In fact, even Dalton's finding of a correlation is currently the subject of heated debate.

### 3. Shareholder Resolution

In addition to the Article 78 and state tort law actions, consumers have at least one other action against Hollywood at their disposal: the anti-smoking shareholder resolution to change corporate Hollywood's policies. In shareholder resolutions, shareholders demand that management investigate a specific corporate policy and reconsider this policy at the following annual board meeting.<sup>177</sup> These resolutions communicate to the board of directors that the shareholders are dissatisfied with corporate policies. Resolutions by religious shareholders have succeeded in changing policies at Phillip Morris (Atria), McDonald's, International Flavors and Fragrances, Kimberly-Clark, Knight-Ridder, 3M, RJR Nabisco, Eastman Kodak and Wendy's.<sup>178</sup>

Shareholder resolutions arise because occasionally corporate boards of directors do not operate in the interests of their shareholders. In gigantic businesses, such as prominent Hollywood studios and their parent corporations, no one shareholder or shareholding group possesses enough shares to exercise control of the corporation through the election of a majority of the board of directors.<sup>179</sup> Consequently, "[t]he board of directors, theoretically composed of representatives of various shareholding groups, is instead peopled by individuals selected by management."<sup>180</sup> This phenomenon has been described as the "captured board" syndrome.<sup>181</sup> When the captured board commits some breach of duty that directly injures the corporation's shareholders, shareholders often feel compelled to issue a resolution.<sup>182</sup>

Institutional shareholders, or entities with large amounts to invest,<sup>183</sup> are particularly well-suited to bring resolutions.<sup>184</sup> Typically, they are the largest shareholders in a given corporation.<sup>185</sup> It is true that senior executives at these

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177. Nolo, Corporate Resolution Definition, at <http://www.nolo.com/definition.cfm/Term/8F2A917D-B43F-4D96-84097038DA2A9FA4/alpha/C/> (last visited July 5, 2005).

178. ICCR Press Release, *supra* note 103.

179. Charles M. Elson, *The Duty of Care, Compensation, and Stock Ownership*, 63 U. CIN. L. REV. 649, 656 (1995).

180. *Id.*

181. *Id.* at 657.

182. Reinier Kraakman et al., *When Are Shareholder Suits in Shareholder Interests?* 82 GEO. L.J. 1733, 1733-34 (1994).

183. *See id.* Institutional investors are covered by fewer protective regulations because it is assumed that they are more knowledgeable and better able to protect themselves. These investors account for a majority of overall trading volume. *See id.* *See also* InvestorWords.com, Volume, at <http://www.investorwords.com/5258/institutionalinvestor.html> (last visited July 5, 2005).

184. E-mail from Jono Polansky, Director, OnBeyond, to Matthew Fuchs (Dec. 9, 2004, 15:05:43 EST) (copy on file with the Journal of Health Care Law & Policy) ("[M]anagement may and frequently does make contact with the [resolution] filers to test their resolve and sophistication and to try to get the resolution withdrawn").

185. InvestorWords.com, Institutional Investor, at [http://www.investorwords.com/2504/institutional\\_investor.html](http://www.investorwords.com/2504/institutional_investor.html) (last visited July 5, 2005).

corporations also hold large numbers of shares.<sup>186</sup> However, the shareholder resolution should not be viewed as a contest between filers and executives to see who has the most shares.<sup>187</sup> Institutional shareholders concede that they do not have the power to dictate new policies to management.<sup>188</sup> Nevertheless, resolutions are potentially effective because they pressure a board to seriously contemplate the institutional shareholder's position.<sup>189</sup>

Indeed, because of their size, institutional shareholders have the resources and sophistication to effectively argue that the positions they advocate makes good business sense.<sup>190</sup> As one NGO advises, "A prudent investor should engage management to look into the matter and control any potential risks."<sup>191</sup> As evidenced by recent successes in other contexts,<sup>192</sup> institutional shareholders frequently convince management that a policy indeed constitutes a potential risk. The institutional shareholder can argue that by continuing to display tobacco scenes, corporations involved in making movies leave themselves vulnerable to legal prosecution.<sup>193</sup> Thus, the resolution is an effective vehicle for consumers to persuade Hollywood to make changes.<sup>194</sup>

On November 10, 2003, an institutional investor called the Interfaith Center on Corporate Responsibility (ICCR)<sup>195</sup> filed the first of four duplicate sets of shareholder resolutions with parent corporations of Hollywood studios.<sup>196</sup> The

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186. *Id.*

187. E-mail from Jono Polansky, *supra* note 184.

188. *Id.*

189. "Showings of five percent or more in favor of 'social responsibility' resolutions are frequently considered successful; with millions of shares outstanding, management takes that kind of number seriously and will usually enter into policy discussions aimed at resolving the problem." *Id.*

190. *Id.*

191. SMOKING AND MOVIES SHAREHOLDER OUTREACH NETWORK, FREQUENT QUESTIONS [hereinafter SHAREHOLDER FREQUENT QUESTIONS], at <http://www.proxyinformation.com/sfm/questions.htm>. (last visited July 5, 2005). Indeed, one of the Interfaith Center on Corporate Responsibility's resolutions warns that, "As public awareness and research evidence grows, this corporation's continued, knowing inclusion of smoking in youth-rated films increases its exposure to consumer opprobrium and to potential liability." Smokefree Movies: 2004 – General Electric Company (NBC), at [http://www.iccr.org/shareholder/proxy\\_book04/MEMBER%20ISSUES/TEENTOBAC\\_TIMEWARNERAO\\_L\\_Gene\\_3578.HTM](http://www.iccr.org/shareholder/proxy_book04/MEMBER%20ISSUES/TEENTOBAC_TIMEWARNERAO_L_Gene_3578.HTM) (last visited July 5, 2005).

192. ICCR Press Release, *supra* note 103, and accompanying text.

193. See SHAREHOLDER FREQUENT QUESTIONS, *supra* note 191.

194. See *id.*

195. ICCR is a coalition of 275 Protestant Catholic and Jewish institutional investors with more than \$100 billion in equities. Desiring to balance social and fiscal responsibility in their investing, these institutions work together to challenge companies on environmental practices and other social issues of concern. One of these is tobacco. ICCR's prioritization of this issue is also valuable because ICCR is geared towards mobilizing consumer pressure. ICCR members sponsor actions such as prayer vigils, letter writing campaigns and consumer boycotts. INTERFAITH CENTER ON CORPORATE RESPONSIBILITY (ICCR), ABOUT ICCR, at <http://www.iccr.org/about/> (last visited July 5, 2005).

196. ICCR Press Release, *supra* note 103. The Disney resolutions were filed November 10, 2003. The GE resolutions were filed in November, 2004, and the Time Warner and Viacom resolutions were

resolutions are against General Electric (Universal), Time Warner (Warner Bros.), Viacom (Paramount), and Walt Disney.<sup>197</sup> ICCR called on these parent corporations to investigate each studio's use of tobacco in movies aimed at young audiences.<sup>198</sup> Specifically, ICCR requested that studios take a series of remedial measures, including an R rating for movies with smoking and PSAs. Although the success of these resolutions is still pending,<sup>199</sup> such actions are promising.

In sum, parents and health advocates have a series of legal mechanisms at their disposal to pressure Hollywood to minimize the impact of big-screen tobacco. Although none of these mechanisms will create sure-fire, open and shut cases, they all make changes in Hollywood possible. Even if plaintiffs fall short in convincing courts of liability, Hollywood still pays a financial burden for having to contest these actions. Further, suits and resolutions help publicize the problem of on-screen smoking, which increases pressure on Hollywood to make substantive policy changes.

### C. Hollywood

Hollywood, of course, has the most power to achieve improvements. On other public health issues, Hollywood has waged aggressive, highly publicized campaigns for pro-health reforms.<sup>200</sup> However, without sufficient external pressure, it is unlikely that Hollywood will act to minimize the impact of on-screen smoking. Although pushed by health advocates and consumers to implement an R rating or PSA system, in public statements of its position, Hollywood makes clear

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filed in December, 2004. E-mail from Conrad MacKerron, Director of Corporate Social Responsibility Program, ICCR, to Matthew Fuchs (Nov. 17, 2004) (on file with the Journal of Health Care Law & Policy).

197. ICCR Press Release, *supra* note 103.

198. *Id.*

199. See E-mail from Conrad MacKerron, *supra* note 196.

200. See, e.g., Amy Pyle, *Hollywood Backs California Cigarette Tax Increase*, L.A. TIMES, Oct. 1, 1998, <http://www.no-smoking.org/oct98/10-01-98-2.html> (last visited July 5, 2005). In 1998, Hollywood director Rob Reiner testified at a state legislature hearing, in favor of a 50-cent tax on cigarette packs. *Id.* Reiner also campaigned for the bill by convincing director Steven Spielberg and actor Robin Williams to join the crusade. *Id.* Although Reiner and a few others have recently said they would try to eliminate "gratuitous" smoking from their films, they seem considerably less energized to wage a public health campaign that countervails self-interests. *Id.* See also DGA Responds, *supra* note 78. In addition, prominent members of Hollywood have vociferously advocated animal rights, human rights, and the environment. Press Release, Artist Film Festival, Film Gala at Hollywood Egyptian Theater Unites Rare Art and Activists to Wake Up World (Apr. 27, 2004), <http://www.prweb.com/releases/2004/4/prwebxml121835.php> (last visited July 5, 2005). Hollywood is also well-known for trumpeting support for liberal political candidates. See Anne-Marie O'Connor & Ronald Brownstein, *America Coming Together: Hollywood Political Event Stirs Up Storm*, L.A. TIMES, Dec. 3, 2003 (reporting on a gathering for deep-pocketed Hollywood liberals to discuss a strategy for electing a Democratic president in 2004), <http://www.commondreams.org/headlines03/1203-09.htm> (last visited July 5, 2005).

that it would prefer neither. Hollywood is reluctant for two primary reasons: economic concerns, and concerns about diminished creative freedoms.

### *1. Reluctance Stemming from Economic Implications*

Hollywood's reluctance might best be explained by pure economics. Like any industry, Hollywood operates according to financial incentives. Moreover, the industry is currently in the midst of an economic slump, and is therefore especially sensitive to any economic threats.<sup>201</sup> Hollywood believes that an R rating for depiction of smoking would be an extra economic burden that it cannot tolerate.

Indeed, Hollywood predicts that such a change would subject it to an economic "catch-22."<sup>202</sup> On the one hand, Hollywood could respond to this new rating requirement by removing cigarettes from movies, thereby avoiding an R rating.<sup>203</sup> At least in theory, Hollywood would then capture its prized demographic, teenagers, who would still be able to see the film without an adult.<sup>204</sup> However, Hollywood's concern is that, were it to extract cigarettes, it would at the same time eliminate the forbidden fruit that entices teens to theaters.<sup>205</sup> Indeed, PG-13 movies attract teens so effectively precisely because they include risqué subject matter, such as tobacco use.<sup>206</sup>

Director Steven Spielberg explains:

[I]t's better to get a PG-13 than a PG for certain movies. Sometimes PG, unless it's for an animated movie, it turns a lot of young people off. They think it's going to be too below their radar and they tend to want to say, 'Well, PG-13 might have a little bit of hot sauce on it.'<sup>207</sup>

Without the promise of "hot sauce," Hollywood worries that unenthused teens will stay away from theaters.

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201. NAT'L ASS'N OF THEATRE OWNERS (NATO), RESPONSE OF NATO TO THE REPORT AND RECOMMENDATIONS OF THE FEDERAL TRADE COMMISSION 2 (Nov. 2, 2000) [hereinafter NATO RESPONSE] ("For any observer who has read the business page lately, they are aware that the motion picture exhibition industry faces very tough economic times. Better ratings policies won't mean a thing to a theatre that closes its doors to the public."), [http://www.natoonline.org/NATO\\_FTC\\_Response.pdf](http://www.natoonline.org/NATO_FTC_Response.pdf) (last visited July 5, 2005).

202. See *Miramax Films Corp. v. MPAA*, 560 N.Y.S.2d 730, 732 (1990) ("[T]he tremendous impact of [MPAA] ratings to the economic viability of a film is undisputed.").

203. It seems likely that Hollywood would react to the R rating requirement by extracting tobacco scenes. In fact, Hollywood currently edits out violence from movies so that these movies will receive the PG-13 rating. STANTON GLANTZ, SMOKE FREE MOVIES, THE SOLUTION: RATE SMOKING MOVIES R, [http://www.smokefreemovies.ucsf.edu/solution/r\\_rating.html](http://www.smokefreemovies.ucsf.edu/solution/r_rating.html) (last visited July 5, 2005).

204. *Id.*

205. See Mckemson & Glantz, *supra* note 1, at 6 (explaining how Hollywood has used smoking as a "forbidden fruit" to attract viewers).

206. Bates & Wallace, *supra* note 75.

207. Anthony Breznican, *PG-13 at 20: How Gremlins and Indiana Jones remade Hollywood*, ENTERTAINMENT TODAY, Aug. 27, 2004, [http://www.ent-today.com/features/aug04/f082704\\_pg13.htm](http://www.ent-today.com/features/aug04/f082704_pg13.htm) (last visited July 5, 2005).

Moreover, in Hollywood's opinion, the only other option would be even more financially problematic. This other option is for Hollywood to keep tobacco scenes and therefore apply an R. Then, teens would be forbidden from paying to see these movies. Along these lines, Dade Hayes, a writer for *Daily Variety*, a Hollywood trade publication, argues, "It's too punitive to say that just because tobacco is present, you have an automatic R, because an R rating really can be a commercial handicap."<sup>208</sup>

However, such arguments grounded in economics are ultimately unconvincing. By focusing only on economics, Hollywood ignores its social responsibility to help the government and parents to protect children.<sup>209</sup> Moreover, Hollywood is incorrect in its belief that an R rating for smoking will necessarily dent its profit margin. Indeed, if Hollywood removes tobacco from PG-13 movies, plenty of other flavors of "hot sauce" still remain available to entice teens to the ticket booth.<sup>210</sup> Of course, it is far from ideal for Hollywood to glamorize driving fast or eating junk food.<sup>211</sup> However, the depiction of either of these vices is preferable to smoking, the most deadly of the preventable causes of illness America.<sup>212</sup> Consequently, Hollywood does not need tobacco to lure the teen demographic, and thus its economics argument falls short.

## 2. Reluctance Because of Creative Freedom Implications

Another reason for Hollywood's aversion to an R rating or PSA is that it worries that First Amendment rights are at stake. Although a voluntary R rating for smoking would not constitute an actionable First Amendment problem, as the government is not the censor, adoption of such a rating system would force directors to increase censorship. The Directors Guild harps on this theme, to the exclusion of any other substantive reason for rejecting change, such as economic concerns.<sup>213</sup> In fact, in public statements on this issue, Hollywood rarely speaks in

208. *All Things Considered, Analysis: Anti-Tobacco Activists Pressure Movie Industry to Assign R Rating to Movies with Scenes of Smoking* (Nat'l Pub. Radio broadcast, Dec. 5, 2003), <http://www.npr.org/templates/story/story.php?storyId=1534487> (last visited July 5, 2005).

209. See, e.g., Brian Witte, *Attorneys General Push Hollywood to Cut Down on Smoking in Movies*, ASSOC. PRESS, Dec. 17, 2003 (paraphrasing Utah Attorney General Mark Shurtleff as saying that Hollywood directors must try to find a balance between creative free speech and social responsibility), <http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2003/12/17/state2101EST0146.DTL> (last visited July 5, 2005). At times, Hollywood acknowledges its social responsibility. In fact, the DGA has formed a "Social Responsibility" Task Force. DGA Responds, *supra* note 78.

210. See DGA Responds, *supra* note 78 (noting that Hollywood depicts other controversial behavior besides smoking).

211. *Id.*

212. SURGEON GENERAL 2004, *supra* note 5, at 1. In other words, health advocates prefer a movie with only fast car driving and junk food, rather than a movie with these two types of scenes on top of smoking scenes.

213. See *supra* notes 201-212 and accompanying text.

economic terms.<sup>214</sup> It instead explains its reluctance by citing its passion for First Amendment rights and uninhibited creativity.<sup>215</sup> This public stance probably reflects Hollywood's sense that the economics argument makes Hollywood appear greedy, whereas the First Amendment argument evokes Hollywood's virtuosity.<sup>216</sup>

In 1997, then-DGA president Jack Shea spoke before the California State Senate Committee on the Judiciary and said, "The DGA strongly believes that any legislative measure that infringes upon a director's right to make [choices on the depiction of smoking] is a violation of our freedom of expression protections in the United States Constitution."<sup>217</sup>

This commitment to protect its First Amendment rights was most recently expressed in a July 2004 statement by DGA of Hollywood's position on smoking in movies.<sup>218</sup> First and foremost, DGA opposed "any efforts at . . . interference with the creative process."<sup>219</sup> It clarified that, "[h]aving characters smoke is a creative decision to be exercised by each individual director."<sup>220</sup> DGA then explained the reasons why directors often decide that their characters should smoke: "[s]moking, like most personal traits, can be important to defining and understanding a character's behavior and motives and is often necessary in regard to establishing historical accuracy and 'life as it is.'"<sup>221</sup>

With respect to the imposition of an R rating, Hollywood's First Amendment argument is, at least on some levels, compelling for consumers. It is the kind of rhetoric that can deflect consumer pressure to make changes, by striking a patriotic chord with Hollywood's consumer-base.<sup>222</sup> Indeed, as perhaps most influentially articulated in Justice Holmes' dissent in *Abrams v. United*

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214. See, e.g. DGA Responds, *supra* note 78 (speaking comprehensively about First Amendment rights throughout the article, but omitting any mention of the economic impact of the R rating and PSA).

215. *Id.*

216. See *id.* In the late 1980s, Phillip Morris hired The Dolphin Group, a public relations firm whose main goal was to conceal the economic interests of Big Tobacco and Hollywood behind the rallying cry of protecting creative freedom. "[Dolphin] is looking for directors, producers, film commission representatives, etc., to express opposition to the censorship a bill like [Senator] Luken's would impose on the creative ability of the motion picture industry." Letter from Frank Devaney, Senior Vice President, Corporate Division, Rogers & Cowan, Inc., to W. Andrew Copenhagen, Womble, Carlyle, Sandridge & Rice (June 23, 1989), [http://tjrtdocs.com/tjrtdocs/image\\_downloader.wmt?MODE=PDF&SEARCH=0&ROW=1&DOC\\_RANGE=515687482+-7482&CAMEFROM=1&tab=search](http://tjrtdocs.com/tjrtdocs/image_downloader.wmt?MODE=PDF&SEARCH=0&ROW=1&DOC_RANGE=515687482+-7482&CAMEFROM=1&tab=search) (last visited July 11, 2005).

217. DGA Responds, *supra* note 78.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

*States*,<sup>223</sup> the extensive protections granted to speech in America separate this country from other democracies.<sup>224</sup> Moreover, the argument is constitutionally inscrutable; Congress lacks the power to restrict a child's access based on tobacco scenes.<sup>225</sup>

However, with regard to calls for PSA implementation, Hollywood's First Amendment argument is simply off-topic. A pre-movie, anti-tobacco PSA has no effect on the First Amendment rights of filmmakers.<sup>226</sup> Indeed, following the PSA, the movie would proceed precisely as the film's creators envisioned it.<sup>227</sup> Theaters are especially hard-pressed to reject PSAs in light of the fact that theaters now show commercial ads before movies.

Moreover, the PSA has the potential to effectively reduce the impact of on-screen smoking. Recent research has found that these antismoking ads can inoculate youth to depictions of smoking in films.<sup>228</sup> Indeed, showing just one antismoking ad immediately before a film in which cigarettes play a role makes teens immune to images that glamorize smoking.<sup>229</sup> Researchers showed a thirty-second anti-smoking PSA to teens before screenings of the popular PG-13 movie "Reality Bites," in which Winona Ryder and Ethan Hawke light up in twelve out of forty scenes.<sup>230</sup> A control group watched the movie without seeing the PSA. Those who saw the anti-smoking ad emerged from the film with negative views about smoking, while the others expressed positive attitudes.<sup>231</sup>

Another advantage of the PSA is that, unlike in the case of an R rating, the PSA approach does not raise enforcement problems.<sup>232</sup> If PSAs are run before all movies with smoking, then even teens who sneak into R rated movies will still be impacted by the PSA. Consequently, the effect of on-screen smoking is neutralized. Equally important, Hollywood could put PSAs at the beginning of

223. 250 U.S. 616 (1919). In this dissent, Holmes embraced John Stuart Mill's marketplace of ideas doctrine, which emphasizes the importance of protecting even false speech. See *id.* at 626-28 (Holmes, J., dissenting); see also JOHN STUART MILL, ON LIBERTY (1974).

224. See Abrams, 250 U.S. 630 (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."); see also *R v. Keegstra*, [1996] W.C.B.J. 654653, where Canadian Supreme Court Justice Dickson offered a comparatively narrow version of the marketplace of ideas.

225. See *supra* notes 97-101 and accompanying text.

226. SMOKE FREE MOVIES, THE SOLUTION: REQUIRE ANTI-TOBACCO ADS ("Since the anti-smoking advertisement would precede the film, it does not impose any restrictions on the creativity or artistic freedom of the film-makers or actors."), at [http://smokefreemovies.ucsf.edu/solution/anti\\_tobacco\\_ads.html](http://smokefreemovies.ucsf.edu/solution/anti_tobacco_ads.html) (last visited July 5, 2005).

227. See *id.*

228. Cornelia Pechmann & Chuan-Fong Shih, *Smoking Scenes in Movies and Antismoking Advertisements Before Movies: Effects on Youth*, 63 J. MARKETING 1 (Jul. 1999).

229. *Id.* at 9.

230. *Id.* at 7.

231. *Id.* at 6, 9.

232. See *supra* note 203.



home videos with smoking scenes.<sup>233</sup> However, if Hollywood adopted only an R rating for on-screen smoking, and no PSAs, then the numerous teens who sneak into R-rated movies and watch such movies on home video would still be exposed to smoking scenes. This enforcement problem is especially relevant because studios admit to marketing R movies to teens.<sup>234</sup> Therefore, for the R-rating approach to work at all, enforcement would be essential; theaters must prevent teens from sneaking into R movies without a parent. However, such prevention is unlikely; the National Association of Theaters of Owners' (NATO)<sup>235</sup> enforcement record is abysmal.<sup>236</sup>

NATO, the largest theater trade organization, is the major Hollywood engine responsible for implementing PSAs.<sup>237</sup> NATO cannot claim cost as a prohibitive factor in implementing PSAs. In fact, quite possibly, nonprofit groups such as the American Cancer Society, the American Heart Association, and the American Lung Association would be willing to pay for the PSAs, or at least help Hollywood cover the expense.<sup>238</sup> Even without such assistance, the costs are relatively minor. For example, Massachusetts, which has implemented PSAs, paid just \$43 per screen per week to run its ads.<sup>239</sup> As researcher Cornelia Pechmann writes, PSAs are a "win-win" situation.<sup>240</sup>

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233. GLANTZ, *supra* note 203. Watching videotapes and DVDs are the primary means by which teens see R rated movies. *Id.*

234. See FTC: MARKETING VIOLENCE, *supra* note 131, at 13 (reporting that Hollywood targets children under the age of 17 for R rated movie marketing).

235. "[NATO] is the largest exhibition trade organization in the world, representing more than 26,000 movie screens in all 50 states and in more than 20 countries worldwide. [M]embership includes the largest cinema chains in the world and hundreds of independent theater owners too." NATO, ABOUT NATO, at <http://www.natoonline.org/aboutnato.htm> (last visited July 5, 2005). NATO also co-founded the movie rating system with MPAA. NATO RESPONSE, *supra* note 201, at 1.

236. FTC: MARKETING VIOLENCE, *supra* note 131. "Despite the official policy that children under 17 should not be admitted to an R-rated movie unless accompanied by a parent or guardian, such children gain access in a variety of ways." *Id.* at 19. In the summer of 2000, the FTC conducted an undercover study of NATO enforcement: rating information was not posted 46% of the time; a child was able to purchase a ticket for an R movie 46% of the time, and the employee asked the child's age only 48% of the time. *Id.* In NATO's response to the FTC's report, NATO promised compliance inspections, among other affirmative steps to bolster enforcement. NATO RESPONSE, *supra* note 201, at 3.

237. See NATO RESPONSE, *supra* note 201, at 4 (adopting various educational measures).

238. Pechmann & Shih, *supra* note 228 at 10.

239. *Id.* Assuming that these cost estimates are reasonably representative, antismoking advertisements could be run for six months on the roughly 49,000 United States movie screens for approximately \$40 million. *Id.* The ads would run periodically, rather than before every movie with smoking, to minimize tedium. *Id.* Some other states have taken a proactive role in funding antismoking PSAs before movies with smoking. In addition to Massachusetts, last year the Vermont Department of Health started a statewide PSA campaign, asking theaters to show a thirty-second anti-tobacco trailer before any movie in which there was smoking. Nine of twenty-one theaters agreed to show the trailers. Press Release, Vermont Dep't of Health, Vermont Teens Launch Statewide Effort to Encourage Theaters to Show Anti-Smoking Movie Trailers (Mar. 26, 2003), <http://smokefreemovie>.

NATO, however, as well as independent theater owners, is under no obligation to run antismoking ads, and could be reluctant, even when offered payment.<sup>241</sup> One concern may be that the ads will be too serious and even depressing for consumers, putting a damper on the otherwise carefree theater experience.<sup>242</sup> Theater owners seem to prefer using lighthearted, humorous advertisements.<sup>243</sup> Moreover, designing anti-smoking PSAs that are effective but also lighthearted may be a difficult assignment. Research demonstrates that anti-smoking PSAs that focus on social disapproval are most effective with adolescent audiences.<sup>244</sup> Accordingly, PSAs only curtail teens' smoking intentions when they depict smokers as disheveled "losers" in a variety of unattractive life circumstances.<sup>245</sup> It remains to be seen whether ad executives can design social disapproval PSAs that are sufficiently light-hearted to satisfy Hollywood.

#### IV. CONCLUSION

Sufficient investigation into tobacco product placement is still necessary, even years after the Justice Department announced its intention to act. If product placement continues, the ramifications for Big Tobacco should be severe. In any case, however, Hollywood bears some measure of responsibility for the continued problem. Consequently, pressure for change must be applied directly to Hollywood. The PSA approach has the potential to be tremendously useful in reducing the impact of movie smoking on children. Hollywood cannot use its First Amendment rhetoric to deflect calls for the PSA, because PSAs do not place limits

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ucsf.edu/news/Vermont\_News\_Release.html (last visited July 5, 2005). These nine theaters, however, were all independently owned. E-mail from Moira L. Cook, Tobacco Control Chief, Vermont Department of Health, to Matthew Fuchs (Mar. 14, 2005, 20:48:03) (on file with the Journal of Health Care Law & Policy). Those belonging to NATO declined to show the PSAs; when contacted, they referred the Vermont Department of Health to the national office. *Id.* Vermont is currently organizing another PSA campaign; Vermont's commissioner of health and attorney general have already agreed to sign on to a letter strongly encouraging theaters to run trailers. *Id.* Despite the relatively small expense of PSAs, given the general limitations on state budgets, states like Massachusetts and Vermont would wholeheartedly welcome Hollywood's financial assistance.

240. Pechmann & Shih, *supra* note 228, at 11.

241. *Id.* at 10.

242. *Id.* Theaters may also be concerned because the amount of time they can devote to running anything before a movie is finite; moviegoers will not stand for too much time taken away from the feature film. E-mail from Marlene Trestman, *supra* note 40. In fact, in a lawsuit pending in the Midwest, theater patrons claim they were deceived by a theater into believing a film would start at a certain time, when instead they were forced to watch advertisements and trailers. *Id.*

243. Pechmann & Shih, *supra* note 228 at 10. (citing Lisa Unsworth (1997), Houston Herstak Favat Advertising Agency (now part of Arnold Communication), personal communication, Boston, MA.)

244. Cornelia Pechmann et al., *What to Convey in Antismoking Advertisements for Adolescents: The Use of Protection Motivation Theory to Identify Effective Message Themes*, 67 J. MARKETING 1, 11 (Apr., 2003), <http://web.gsm.uci.edu/antismokingads/articles/trdrp3jm.pdf> (last visited July 5, 2005).

245. *Id.* at 11-15. PSAs that emphasized adverse health effects, on the other hand, were ineffective because of typical teenage notions of invincibility, e.g., immunity to disease. *Id.*

on creative freedoms. Moreover, the PSA, in comparison to other options such as the R rating, is feasible. It would therefore be wise for consumers to focus its calls for change on the PSA approach.<sup>246</sup> Although government leaders have been thwarted in the past, they can still play a constructive role by publicizing the problems caused by smoking in movies, thereby stoking consumer resentment towards Hollywood. In addition, litigation may be a useful route to apply Hollywood-directed pressure. The causes of action discussed here should be explored and pursued.

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246. Consumer pressure for PSAs is indispensable because the government is probably incapable of compelling theaters to run PSAs through legal measures. This is true even though PSAs do not implicate First Amendment concerns. The government could probably only attempt to require PSAs via consumer protection laws. Most states have passed versions of consumer protection laws due to the inadequacy of protection through common and federal law. See J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347 (1992). To be subject to regulation by these laws, a practice or act must be unfair or deceptive. Further, according to most laws, this deception must result in the failure to disclose a material fact. NAT'L CONSUMER LAW CTR., INC., SAMPLE SUMMARY OF STATE STATUTES, [http://www.consumerlaw.org/publications/manuals/content/samples/M5udap\\_814-817.pdf](http://www.consumerlaw.org/publications/manuals/content/samples/M5udap_814-817.pdf) (last visited July 5, 2005). However, Marlene Trestman, an Assistant Attorney General of Maryland, seriously questions whether these laws could be construed to require PSAs. It would have to be shown that the theater's deceit or misrepresentation is about a material fact leading to the purchase of the movie ticket or sale of popcorn. E-mail from Marlene Trestman, *supra* note 40. "You'd have to argue that it was unfair or deceptive . . . because [the movie] didn't show harmful consequences [of smoking]. I don't think that's [enough] to make a [consumer protection] case." *Id.*