

Censorship of Video Game Content: Time to Fight Back

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INTRODUCTION

It has been said, "Censorship is the bastard child of technology." Technological advances in video gaming software have created a rapid evolution from 1970's arcade game technology to today's role playing games, featuring an almost life-like level of realism, which mirrors the natural world in all of its graphic violence and sexual activity. In tandem with electronic gaming's rapid evolution and realism has been a meteoric rise in popularity and revenues which now rivals that of the motion picture industry.¹ This tremendous growth and change has also spurred protest from family values groups. The fact that violence, sex, and videogames seem to play well in the media has brought out a fair number of lawmakers, eager to prove their "family values" mettle by answering the call that something be done at the legislative level to control access by minors to this increasingly violent and sexually-explicit game content.

This paper will explore the current efforts to control dissemination of graphic videogames at both the state and federal levels, and will discuss how such efforts have fared in the courts. The reader will then be provided with an evaluation of the industry's future, along with some suggestions as to how parental concerns can be balanced with the rights of game developers.

THE REALITY OF VIRTUAL REALITY

Videogames have evolved from the primordial "**Pong**" to modern virtual reality in a relatively short time. As the little green aliens on the screen began to take on more lifelike characteristics, games started to deal with increasingly adult themes. Videogame developers were no longer hindered by the perception that "videogames are for kids," and they began to embrace the "darker" side of human activity. Today's games fascinate, terrify, repulse, and

¹ Robert Corn-Revere, "New Technology and the First Amendment: Breaking The Cycle of Repression," 17 *Hastings Comm. & Ent. L.J.* 247, 264 (1994).

sexually arouse users with such intensity that some claim that they threaten the ability of users to separate fantasy from reality.²

MMORPG's like **Second Life**^{®™} allow users to create a virtual alter ego, and engage in the entirety of human activity, from land acquisition to dating – from sex to serial killing. It is only a matter of time before game developers will begin exploring deeply taboo subjects, such as pedophilia, incest, or rape. This potential has the videogame industry stepping back to ask itself whether any content boundaries exist, or if free expression rights should allow for examination of all these topics. Opinions vary widely on this issue, and consensus appears to be elusive. The certainty is that videogames are destined to reflect elements of the human condition never contemplated by the developers of the innocuous Space Invaders[®], and some backlash is likely to result.

PREVIOUS LEGISLATIVE ATTEMPTS

Already, nine states have passed bills that restrict the sale of violent or sexually-explicit videogames.³ Similar bills are pending in several others.⁴ Fortunately for the videogame industry, the courts have thus far been uniformly protective of the game developers free expression rights, and have struck down these laws on First Amendment grounds. Importantly, the courts have unanimously held that videogames constitute protected “speech” under the Constitution, particularly given the extensive themes and artistic/literary content included in modern games.⁵

State lawmakers have struggled to define what constitutes a “violent” videogame, and how such determinations should be made. Some have focused on specific acts of violence towards police officers, while others have attempted to use a modified “obscenity” test; focusing on whether the game has serious literary, artistic, political, or scientific value with respect to what is appropriate for minors.⁶ However, First Amendment jurisprudence dictates that the government may only regulate the sale and distribution of erotic, as opposed to violent, media. Only when an expressive work crosses a certain line of eroticism will the courts approve restrictions on otherwise protected speech.⁷ This counterintuitive dichotomy has served to frustrate many legislators, and their attempts to restrict the sale of violent videogames exclusively to adults have met with crushing defeats in the courts.⁸ It is unlikely, however, that this string of legal victories will continue unbroken. At some point, lawmakers will find the “sweet spot” of regulation, and pass a law that will be upheld.

² C. Branch, “Games, Fantasy, or Reality?” *Watchman.org*; K. Gagne, “Moral Panics Over Youth Culture and Video Games,” *Worcester Polytechnic Institute* (April 27, 2001).

³ The jurisdictions which have passed such legislation are California, Illinois, Louisiana, Michigan, Minnesota, Oklahoma, Washington, Indianapolis, Indiana, St. Louis, Missouri and Maryland.

⁴ New York, North Carolina, Utah and Virginia, and possibly Massachusetts.

⁵ *Interactive Digital Software Association v. St. Louis County, Missouri*, 329 F.3d 954 (8th Cir. 2003); *Entertainment Software Association v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

⁶ Compare Cal. Civil Code § 1746 (violent = “killing, maiming, or assaulting any image of a human being.”) with 720 Il.Cs. 5/12B-15 (violent = “human on human violence”) with RCW 9.91.180, Washington HB No. 1009 (violence = “any violent act against a ‘public law enforcement officer’”).

⁷ *Miller v. California*, 413 U.S. 15 (1973); *Reno v. ACLU*, 521 U.S. 844 (1997); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

⁸ See fn. 6, *supra*.

CASE LAW

The first case to recognize the constitutional protections afforded to videogame content was *Interactive Digital Software Association v. St. Louis County*.⁹ The case was initiated as a challenge to St. Louis County's ordinance restricting the sale of violent videogames to minors. After denying the industry's motion for summary judgment, the District Court dismissed the complaint and upheld the Ordinance's constitutionality. The Eighth Circuit Court of Appeals reversed, on the grounds that the Ordinance violated the First Amendment.¹⁰ The Appellate Court focused on the fact that the county attempted to restrict access to violent videogames based specifically on their content, along with the alleged harms potentially befalling those who play them.¹¹

Where laws seek to regulate speech based on content, the courts are bound to analyze the laws under a very stringent method of legal review known as "strict scrutiny." Under this test, the government bears the heavy burden of demonstrating that the law is justified by a "compelling governmental interest," and that the least restrictive means have been used to achieve the interest.¹² The strict scrutiny test has been the downfall of numerous videogame laws, given the inability of the state governments to demonstrate any actual "harm" resulting from violent videogame play, as would be necessary to satisfy the state's initial burden. In case after case, the state or local government seeking to justify the videogame restriction failed to come forth with any convincing evidence demonstrating that playing videogames causes any discernible harm to either children or adults.

In the next legal challenge, *Video Software Dealers Assn. v. Maleng*,¹³ the plaintiffs, including an industry trade association, challenged the State of Washington's ban on selling violent videogames to minors.¹⁴ The Washington statute prohibited only violence against a "public law enforcement officer."¹⁵ In attempting to justify the law, the State attempted to argue that the violent content regulated by the law fell into the category of "obscenity" and was "harmful to minors," under existing legal standards. However, the court rejected the invitation from the state to expand the definition of "obscenity" or "harmful materials" to include violence.¹⁶ In addition to faulting the government for failing to establish a sufficient governmental interest in regulating violence, the court invalidated the law based on the fact that it was unconstitutionally vague, in that it failed to precisely identify the range of videogames the State sought to regulate.¹⁷

⁹ 200 F.Supp.2d 1126, 1128 (E.D. Mo. 2002), *rev'd* 329 Fed 3^d 954, 960 (8th Cir. 2003), *reh'g en banc den.* (8th Cir. 2003).

¹⁰ *Id.* at 329 F.3d 957 (finding "no reason" why a "novel medium" such as videogames are not entitled to the same protection as other speech.)

¹¹ 329 F.3d at 960.

¹² *Id.*

¹³ 2004 WL 1609141 (W.D. Wash. 2004).

¹⁴ RCW 9.91.180, Washington HB No. 1009 (2003).

¹⁵ *Id.*

¹⁶ *Maleng, supra.*

¹⁷ *Id.*

Later challenges met with a similar fate: The State of California passed *Cal. Civil Code* § 1746, restricting the sale of violent videogames, and requiring that the games carry a particular label identifying them as such. The content regulated under the Act involved any depictions of “killing, maiming, or assaulting of any image of a human being.”¹⁸ The District Court threw invalidated the law by rendering a preliminary injunction, holding that while the Statute was not unconstitutionally vague, it likely violated the First Amendment due to the government’s failure to establish a compelling state interest in protecting minors from violent videogame content.¹⁹

Illinois jumped into the fray, passing a statute prohibiting the sale of violent and sexually-oriented videogames to minors, requiring forced labeling, prohibiting self-checkout procedures, and requiring warning signs near points of sale.²⁰ In ruling on the *Entertainment Software Association’s* Motion for Preliminary Injunction against the law, the court noted that the State did not submit sufficient proof that violent videogames incited lawless action, aggressive behavior, or “brain damage” (as alleged by the State).²¹ The court ruled that the State’s ability to regulate violence is limited to media inciting imminent lawless action.²² However, the State’s mere desire to censor violent videogame content was insufficient to support a legitimate governmental interest, as required to support the legislation.²³ The ruling was affirmed on appeal to the Seventh Circuit.²⁴ A similar ruling resulted from the First Amendment challenge to Michigan’s violent videogame legislation, which was enjoined in November 2005, on First Amendment grounds.²⁵

Minnesota drafted a bill with a different approach, this time penalizing minors who sought to purchase or rent Mature (M) or Adults Only (AO) rated games. In July of 2006, United States District Court Judge James M. Rosenbaum issued a permanent injunction, citing the state’s lack of sound evidence to prove that the law was warranted.²⁶ Judge Rosenbaum pointed to the failure of similar bills, while chastising legislators for drafting a bill with such obvious constitutional flaws: “The Court will not speculate as to the motives of those who launched Minnesota’s nearly doomed effort to ‘protect’ our children. Who, after all, opposes protecting children? But, the legislators drafting this law cannot have been blind to its constitutional flaws.”²⁷

Towards the end of 2006, attempts by Oklahoma and Louisiana legislatures met a similar fate. In issuing a preliminary injunction to the Oklahoma ‘Harmful to Minors’ law, Judge Robin Cauthron of the Western District, noted that the Plaintiffs presented strong arguments that the statute is unconstitutional and that the language is unconstitutionally vague.²⁸

¹⁸ Cal. Civil Code § 1746.

¹⁹ *Videogame Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d. 1034 (ND Cal. 2005).

²⁰ 720 ILCS 5/12 B. 15.

²¹ *Blagojevich, supra*.

²² *Id.*

²³ *Id.*

²⁴ *Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006).

²⁵ *Entertainment Software Ass’n v. Granholm*, 426 F.Supp.2d 646 (E.D. Mich. 2006).

²⁶ *Entertainment Software Ass’n, et al., v. Hatch, et al.* 443 F. Supp. 2d 1065 (Minn. 2006).

²⁷ *Id.*

²⁸ *Entertainment Merchants Ass’n., et al., v. Henry, et al.*, 2006 WL 2927884 (W.D. Okla., October 11, 2006).

Although not subjecting the Act to a full First Amendment analysis, Judge Cauthron stated “that the Plaintiffs are substantially likely to prevail in this case even if the Act is subjected to a lower level of scrutiny.”²⁹ In the bayou, Louisiana legislators enlisted the help of anti-game activist, attorney Jack Thompson, in drafting a bill that they hoped would withstand any court challenge. Act 441 drew largely upon the *Miller* Test, overlooking the fact that the *Miller* Test applies to obscenity, not violence. Also, the law failed to require that the games be evaluated “as a whole” as required by the *Miller* Test. Judge James Brady, District Court Judge in the Middle District of Louisiana, issued a preliminary injunction in August, finding that video games are protected free speech. Again, he noted that the state had overlooked previous cases that have ruled that video games are protected under the First Amendment, and “are as much entitled to the protection of free speech as the best of literature.”³⁰ He also stated that there are less restrictive alternatives currently available, such as parental controls that allow them to determine which games their children can play.³¹ In November 2006, Judge Brady ruled that the law is, in fact, unconstitutional and issued a permanent injunction from the bench.³²

After six years of timely and costly legal battles, perhaps legislators are starting to wizen up. Utah Representative Kay McIff introduced HB 50 in the 2007 Session, a bill aimed at restricting the sale of violent video games to minors. After a brief and tumultuous introduction and warnings against passage by the Attorney General, efforts to adopt the bill were dropped. Instead, McIff plans to propose a non-binding House Resolution condemning video game violence.

As a result of these legal (and other) challenges, it is now well-established that modern videogames are entitled to full First Amendment protection. This is significant since regulations impacting speech based on its content are presumed to be unconstitutional, and governed by a completely different set of legal rules and principles than legislation impacting just about any other topic. Consistently, state and local governments have faltered when attempting to establish a causal link between videogame violence and real world aggression – particularly in children. The anecdotal observations by sociologists and psychologists in this regard have thus far been insufficient to justify a ban on the sale of expressive materials, even to children.

WHAT DOES THE FUTURE HOLD?

The losses in court have not dissuaded censorship advocates from encouraging lawmakers to keep trying to pass these laws. Politicians at the state and federal levels continue to view the videogame industry as a convenient ‘whipping boy’ to be trotted out any time a diversion is required. Even after the string of losses in federal court, the State of North Carolina is considering a bill banning, again, violent videogames.³³ Similar efforts have occurred in Florida, Utah, Maryland, Virginia, and Oklahoma. Nonetheless, any attempt to

²⁹ *Id.*

³⁰ Ruling on Motion for Preliminary Injunction and Motion to Dismiss, p.11, *Entertainment Software Association, et al., v. Charles Foti, et al.*, 451 F. Supp. 2d 823 (M.D. La., 2006).

³¹ *Id.*

³² *ESA, et al., v. Foti, et al.*, 451 F. Supp. 2d 823 (M.D. La., 2006).

³³ *Video Game Bill Introduced in North Carolina Senate*, www.GamePolitics.com, (February 8, 2007.)

equate violence with explicit sexuality will likely be rejected by the courts, given the clear constitutional protections afforded violent videogames recognized by established judicial precedent.

A. Sexually Oriented Regulations

Undoubtedly, lawmakers will eventually learn from their failed efforts in the courts, and attempt to tweak both their legislative and judicial strategies. One strategy may be to focus only on sexually-oriented video game content. Efforts to restrict erotic videogames may receive a much warmer reception in the courts given the historical precedent referenced above. However, the continued viability of these arguments is not a sure thing. In 2004, the United States Supreme Court rendered its decision in *Lawrence v. Texas*³⁴ wherein the Court invalidated the nation's anti-sodomy laws. The rationale used by the Court for its decision is important, and may lay the groundwork for a change in the approach to legislation based on enforcement of a "moral code." The majority of Justices in that case found that the government's interest in enforcing morality can no longer justify legislation affecting fundamental freedoms.³⁵ In fact, this revolutionary decision caused Justice Scalia to lament the potential demise of all laws premised on morality, such as those prohibiting prostitution, bigamy, bestiality, and importantly: obscenity.³⁶ Although one district court picked up on this concern, and struck down the federal obscenity statute based largely on *Lawrence v. Texas*,³⁷ that decision was later reversed by the Third Circuit Court of Appeal.³⁸ The full impact of the *Lawrence v. Texas* case is not yet known, however, the winds of constitutional change may be blowing in favor of erotic expression.

B. Violence Regulations

Some change could be in the works regarding how violent content is addressed by the courts as well, but that change may be detrimental to the videogame industry. As mentioned above, in striking down previous regulatory attempts to date, courts have largely relied upon the lack of evidence of "harm" allegedly caused by videogame violence. However, family values groups are focused on generating scientific evidence to justify restrictions on violent videogames, particularly with regard to consumption by minors. These groups realize that the courts will not "rubber stamp" legislative attempts to restrict access to videogames just because some county council or state legislature thinks it's a good idea. Moreover, the government will be unable to meet its censorship burden by simply calling some hack psychologist or scientist to the stand to testify as to anecdotal incidents of violent behavior by teens after playing certain videogames. The censors have learned that "real" evidence is required, if the courts are to begin taking their arguments seriously. The industry can therefore expect to see mounting evidence in the form of studies suggesting a link between real world

³⁴ 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

³⁵ 539 U.S. at 560.

³⁶ 539 U.S. at 586-605.

³⁷ *U.S. v. Extreme Associates, Inc.*, 352 F.Supp.2d 578 (W.D. Pa. 2005).

³⁸ *U.S. v. Extreme Associates, Inc.*, 431 F.3d 150 (3d Cir. 2005).

violence, and exposure to violent videogames. The initial studies are starting to come out.³⁹ To the extent that these studies are not discredited – either by challenging their conclusions or their methodology – the government may begin achieving more success in the courts, when seeking to justify violent videogame legislation.

C. A Call to Arms

This should be a call to arms for the videogame industry. A substantial knowledge bank must be generated by the industry's trade groups and leaders, on the issue of whether videogames impact the real world behavior or attitudes of players. Moreover, the opposition's studies and testimony must be critically evaluated and publicly discredited, where appropriate. Widespread dissemination of this industry-sponsored information should occur, to help educate the public.

D. The Court of Public Opinion

Of course, the battles in the courts are only part of the equation, and will never ultimately resolve the issues. This battle between censors and proponents of free expression must be waged and won in the court of public opinion as well. Only when the impetus for passing videogame restrictions dries up, will the legislative and legal battles cease. While certain conservative factions will mount objections to violent or sexually oriented videogame entertainment forever, the majority of lawmakers' constituencies can be educated as to the fallacy of the censors' arguments. Current evidence utterly fails to establish causation between real world violence and videogame consumption. While proponents of regulation will point to occasional cases of violent outbursts sometime after an individual played a violent videogame, the fact that the media consumption occurred before the violence does not mean that the violence occurred because of the media intake. It would be just as reasonable to assume that playing a game of basketball causes violent behavior, if the individual played basketball before the violent outburst occurred. The public will respond favorably to truthful information about videogame consumption.

E. Working with Parents

In order to protect its own interests, the videogame industry must learn to work with parents who desire to shield their children from violent or sexually-explicit videogames. While the ultimate responsibility falls on the parent, a climate of cooperation must be fostered by the industry to facilitate implementation of each parent's decision on behalf of their children. Insufficient and/or misleading game ratings, hidden content, media intake, and questionable marketing activities directed toward children will only lead to an adversarial relationship between videogame distributors and the nation's parents. This will, in turn, lead to more legislative attempts to ban violent and/or sexually-oriented content, forcing an endless round of legislation and litigation. To break this cycle, the videogame industry must collectively ask itself how it can empower parents with sufficient information about videogame content to allow

³⁹ E.g., University of Missouri-Columbia Study: Bartholow, B. D., Bushman, B. J., & Sestir, M. A. (in press). Chronic violent videogame exposure and desensitization: Behavioral and event-related brain potential data. *Journal of Experimental Social Psychology*

informed purchasing decisions at the point of sale – whether that is a retail location, or via Internet download. It must also re-double its efforts to avoid inappropriate marketing of mature-rated games to children, or through venues populated by minors.

While game-makers view publication of videogames as a right, the government sees it as a privilege – a privilege that the government will be all too happy to take away for political gain. While the courts afford a last line of defense, the videogame industry should heed parents' calls to review marketing practices, effectively label content, and voluntarily regulate point of sale activity before the government finds a way to take control.⁴⁰

CONCLUSION

As videogames become ubiquitous in American homes, and as the generation that grew up on video game entertainment becomes parents themselves, attitudes will change and conservative hysteria will hopefully be relegated to amusing background noise. However, the videogame industry must become active in protecting its own collective interests to mitigate any damage that could occur before attitudes calcify. Media outreach, governmental relations, symposiums, and other visible efforts to educate the public are critical at this unique juncture in the videogame industry's development. This will drive a wedge between reasonable parents and hysterical censors. If the videogame industry speaks for parents along with children, and is perceived as their ally, the elements of censorship will be left with no support.

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⁴⁰ Efforts are now under way to have the Federal Trade Commission take control of the voluntary videogame rating system, the ESRB, under legislation recently introduced by Rep. Cliff Stearns (R-Fla.), see: HR 5912, a.k.a. The Truth in Video Game Rating Act."