IP/ENTERTAINMENT LAW WEEKLY CASE UPDATE FOR MOTION PICTURE STUDIOS AND TELEVISION NETWORKS

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Table of Contents

Brown, Governor of California, et al. v. Entertainment Merchants Association et al., U.S. Supreme Court, June 27, 2011

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- The U.S. Supreme Court rules unconstitutional a California law that restricts the sale or rental of violent video games to minors, finding that violent video games are protected speech under the First Amendment, that the law was substantially underinclusive in pursuing the legitimate ends of protecting children, that it was substantially overinclusive in pursuing the legitimate ends of aiding concerned parents, and that it did not survive strict scrutiny.

Respondents, representing the video game and software industries, brought a preenforcement challenge to a California law that prohibited the sale or rental of violent video games to minors and required their packaging to be labeled "18." California Assembly Bill 1179 (2005), Cal. Civ. Code Ann. §§1746–1746.5 (the Act) covered games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political or scientific value for minors." Cal Civ. Code Ann. §1746(d)(1)(A). Both the District Court for the Northern District of California and the Ninth Circuit concluded that the Act violated the First Amendment. The U.S. Supreme Court granted certiorari and affirmed the decision, dividing its analysis to two parts, first determining that violent video games, the speech prohibited by the Act, are protected speech under the first Amendment, and second, determining that the Act does not pass strict scrutiny.

The Court first noted the basic principle of the First Amendment – that government has no power to restrict expression, with the exception of a few well-defined and narrowly limited classes of speech. The Court then looked to its own jurisprudence, noting that in its last term, it determined, in *U.S. v. Stevens*, that new categories of unprotected speech may not be created simply because a legislature concludes that certain speech is too harmful to be tolerated, even where the law contains a savings clause exempting depictions with serious, religious, political, scientific, educational, journalistic, historical or artistic value (language borrowed from the Court's obscenity jurisprudence). In *Stevens*, which concerned a federal statute that purported to criminalize certain depictions of animal cruelty, the Court was not persuaded by the

legislature's attempt to couch speech-content regulation by borrowing from the Court's obscenity jurisprudence. The Court also emphatically rejected the government's "startling and dangerous" proposition that it could create new categories of unprotected speech by applying a balancing test that weighed the value of a particular category of speech against its social costs – and then punish that category of speech if it failed the test.

Justice Scalia, writing for the Court, found *Stevens* controlling in this case. The violent speech prohibited by the Act was protected by the First Amendment and an obscenity-like savings clause would not save restrictions on speech where they were not based on depictions of sexual conduct. The Court distinguished this case from *Ginsberg v. New York*, where the Court upheld a New York statute regulating obscenity for minors, because that case approved a prohibition on the sale to minors of sexual material that would be obscene from the perspective of a child. Because obscenity is not protected expression, the New York statute could be sustained as long as the legislature's judgment that the prohibited materials were harmful to children was not irrational. However, because California does not have the power to prohibit selling offensively violent works to adults, it cannot create a wholly new category of content-based regulation that applies only for speech directed at children. The Court went on to say that though a state has a legitimate power to protect children from harm, that power does not extend to restricting ideas to which children may be exposed. The opinion pointed out that there is no long-standing tradition in this country of specially restricting children's access to depictions of violence, and the books given to children to read contain no shortage of gore. In fact, there is a tradition of prohibiting censorship, from movies, radio, comic books, to television and music lyrics.

The Court also rejected California's claims that video games present special problems because they are interactive – the player participates in the violence and determines its outcome. The Court reasoned that all literature is interactive and young readers have been able to determine outcomes since the publication of the first choose-your-own-adventure stories.

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can show that it passes strict scrutiny – that it is justified by a compelling government interest and is narrowly tailored to serve that interest. California must specifically identify an actual problem in need of solving and show that the curtailment of free speech is actually necessary to the solution.

As a means of protecting children from portrayals of violence, the Court rejected the Act as underinclusive. The Court found uncompelling the evidence the state put forth to show a causal relationship between violent video games and harmful effects on children. Noting that the studies upon which the state relied had been rejected by every other court to consider them, the Court stated that these studies do not prove that violent video games cause children to act more aggressively, but at best, suggest a correlation between exposure to violent entertainment and minute real-world effects like feeling more aggressive or talking more loudly – the same small effects produced by other media. Specifically, the court noted that the psychologist t upon whose findings California relied had testified in a similar lawsuit that the effects found after children have

been exposed to violent video games also have been found after children watch cartoons starring Bugs Bunny or when they play video games that are rated appropriate for all ages or even when they view a picture of a gun. Because California "wisely" declined to restrict cartoons, as well as sales of games for young children and the distribution of pictures of guns, its regulation on violent video games alone was "wildly underinclusive" when judged against its asserted justifications and raised "serious doubts" about whether the government was in fact pursuing the stated interest or disfavoring a particular speaker or viewpoint. The Court also noted that the Act was seriously underinclusive in that it permitted a parent, aunt or uncle to purchase the product for the minor, and without any means to verify the parental or familial relationship, other than the putative relative's say-so.

The Court rejected the Act as overinclusive based on its justification of aiding parental authority, reasoning that not all children who are forbidden to purchase violent video games on their own have parents who care whether they purchase those games. The Court also expressed doubt that punishing third parties for conveying protected speech to children just in case their parents disapprove of that speech is a proper governmental means of aiding parental authority. California also cannot show that the Act's restrictions meet a substantial need of parents who do wish to restrict their children's access to violent video games but cannot do so. The Court found much more effective the current self-regulatory system used by the industry that assigns age-specific rating to each video game, to ensure that minors cannot purchase seriously violent video games on their own and parents who do care about the matter can readily evaluate the games their children bring home.

Justice Alito filed a concurring opinion, in which Chief Justice Roberts joined. Justice Alito wrote that he would strike down the Act because the law's definition of "violent video game" is impermissibly vague and violative of the First Amendment, but expressed doubt as to whether the statute should be subject to strict scrutiny, and whether the interactive video game experience is similar to reading violence in books. Justice Thomas and Justice Breyer filed dissenting opinions. Justice Thomas concluded that the law is not facially unconstitutional, because laws requiring parental consent to speak to a minor do not abridge the freedom of speech within the original meaning of the First Amendment. Justice Breyer concluded that the law is facially constitutional, that it is not unconstitutionally vague, and that it passes strict scrutiny, relying heavily on peer-reviewed academic journal articles on the topic of psychological harm resulting from playing violent video games.

Penguin Group (USA) Inc. v. American Buddha, USCA Second Circuit, May 12, 2011
Click here for a copy of the full decision.

- Second Circuit vacates district court's dismissal of copyright infringement case for lack of personal jurisdiction, based on New York Court of Appeals' holding, in response to a certified question, that in cases involving a copyrighted printed literary work that is uploaded to the Internet, the location of the copyright holder, not the location of the infringing activity, determines the situs of injury for purposes of New York's long-arm statute.

Plaintiff Penguin Group (USA) Inc., a large publisher located in New York, brought an action for copyright infringement in federal court in New York against defendant American Buddha, a not-for-profit organization incorporated in Oregon and located in Arizona. American Buddha operates two web sites – the American Buddha Online Library and the Ralph Nader Library. Plaintiff alleged that American Buddha infringed its copyrights to four books by uploading them to American Buddha's websites and allowing users to download them. The district court granted defendant's motion to dismiss for lack of personal jurisdiction. The court concluded that, for the purposes of the state's " long-arm" statute, which provides jurisdiction over nondomiciliaries that commit tortious acts outside New York that result in injuries within New York, plaintiff's injury occurred in Arizona and Oregon, where the copying and uploading of the books took place, and not in New York, were plaintiff is located.

On appeal, the Second Circuit identified a split in state court decisions interpreting the limits of New York's long-arm statute, and certified the question to the New York Court of Appeals. In response, the Court of Appeals concluded that in copyright infringement cases involving the uploading of a copyrighted printed literary work to the Internet, the situs of injury for purposes of determining long-arm jurisdiction is the location of the copyright holder, not the location of the alleged infringing conduct.

Based on the Court of Appeals' holding, the Second Circuit vacated the district court's dismissal and remanded the case for consideration of the remaining factors relevant to the long-arm statute analysis.

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