Insight
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ENTERTAINMENT LAW

A New Game Plan

By Guylyn Cummins

On Feb. 20, 2009 the 9th Circuit Court of Appeals struck down a California law banning the sale or rental of "violent video games" to minors and requiring such games to be labeled "18" (the legal age for adults). While this decision may surprise some California lawmakers and parents, its holding is fully consistent with substantial U.S. Supreme Court precedent entitling minors to a significant measure of First Amendment protection, and leaving parents with the duty to supervise "appropriate" content.

The lawsuit to invalidate California Civil Code Sections 1746 through 1746.5 (the Violent Video Games Act) was filed by several video software associations against California's governor and other elected officials. The act was sponsored by Sen. Leland Yee, D-San Francisco, a child psychologist, and signed into law on Oct. 7, 2005, by Gov. Schwarzenegger.

The act prohibited the selling or renting video games labeled as "violent" to minors. Violators were subject to a civil penalty of up to $1,000 per violation.

The act defined a "violent video game" as any game where the range of options available to the player includes killing, maiming, dismembering or sexually assaulting an image of a human being if those are acts are depicted in one of two ways:

"Either in manner that appeals to deviant or morbid interests of minors, is patently offensive to what is suitable to minors according to community standards, and where the game as a whole lacks serious literary, artistic, political or scientific value for minors; or, in a manner that enables the player to virtually inflict serious injury upon images of human beings or characters with substantial human characteristics in an especially heinous, cruel or depraved manner that involves torture or serious physical abuse to the victim."

The first method borrowed legal doctrine from obscenity laws. Obscenity is not protected speech under the First Amendment as it is deemed to have no value to society, i.e., to be without serious literary, artistic, political or scientific value. The second method borrowed language from federal death penalty jury instructions to define "cruel," "depraved," "heinous" and "serious physical abuse" to include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim.

The act also required each "violent video game" imported into or distributed into California to be labeled with "18" in large lettering on the front of the package.

To justify passage of the act, California asserted it served two compelling interests: preventing violent, aggressive and anti-social behavior; and preventing psychological or neurological harm to minors who play violent video games.

The video game associations urged the court to strike down the act as violating minors' rights guaranteed by the First and 14th amendments. The court so ruled.

The court first struck down the act's ban on sales or rentals of "violent video games" to minors as an invalid content-based restriction on expressive speech. Video games are a form of expression protected by the First Amendment, and the act sought to restrict expression based on game content, i.e., violence.

Like other courts before it, the court adopted the "strict scrutiny" standard of review for the act, and not the less protective "variable obscenity standard" urged by California. The court noted the obscenity standards have been limited to non-protected, sex-based expression — not violent content that is protected by the First Amendment — and refused to go "where no other court had gone" before.

The court held the act could not survive strict scrutiny under the First Amendment, both because California failed to prove any compelling interest supported its enactment and because other less restrictive alternatives were available to protect minors. The court first looked to the breadth of the content of video games potentially affected by the act, noting it was highly diverse and included games like "Grand Theft Auto: Vice City," "Postal 2" and "Duke Nukem 3D," which show myriad ways in which characters can kill or injure their adversaries. The court also noted that some of these games have extensive plot lines that parallel historic events or place the player in a position to evaluate and make moral choices.

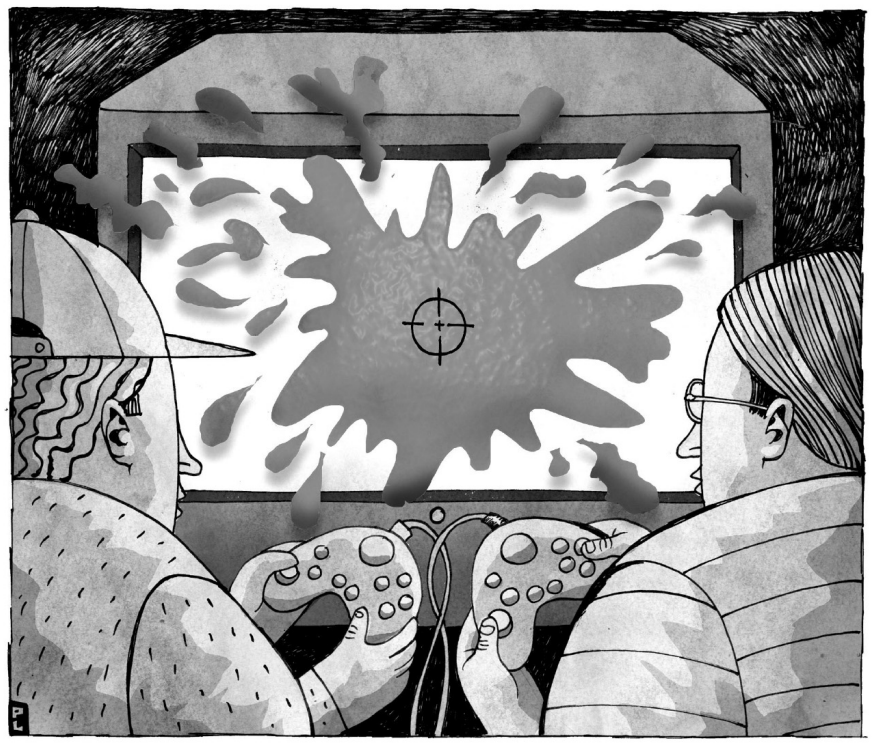
The court next noted the video game industry itself has a voluntary rating system to provide consumers and retailers with knowledge about the content of video games. The Entertainment Software Rating Board, an independent, self-regulated body, rates the content of games voluntary submitted to it with one of six age-specific ratings, ranging from early childhood to adults only (18 and over). It also assigns each game one of 30 content descriptors, like "animated blood," "blood and gore," "cartoon violence," "crude humor," "fantasy violence," "intense violence," "language," "suggestive themes" and "sexual violence."

In applying strict scrutiny, the court noted that the Supreme Court has held that minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination and protective materials to them.

Content-based regulations are also presumptively invalid. Where restrictions on protected speech are not "narrowly tailored" to promote a compelling governmental interest, or a less restrictive alternative would serve the government's purpose, the regulation cannot stand.

Here, the court rejected California's argument that the act was supported by the compelling interest of protecting children playing violent video games from "actual harm to the brain." While acknowledging there is an abstract compelling interest in protecting the physical and psychological well-being of minors, the vourt ruled California failed to prove the harm was real and that the act would in fact alleviate that harm in a direct material way. The court also underscored that the Supreme Court has held government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

The studies California relied on to support its compelling interest were faulty. They themselves even contained disclaimers that significantly undermined the inferences drawn by California in support of its psychological harm rationale. The relative paucity of literature also showed a "glaring empirical gap" in video game violence research due to the lack of longitudinal studies. Furthermore, nearly all of the research California proffered was based on correlation — not evidence of causation — and therefore failed in methodology to prove California's claimed interest. While a state is not required to demonstrate a "scientific certainty," it must do more than California did to meet its burden of showing a compelling interest.



Even were a compelling interest shown by California, however, less restrictive alternative existed to protect minors. The industry itself has implemented enforcement methods like ratings, and parental controls on modern gaming systems could serve the government's purpose. Additionally, an enhanced education campaign directed toward retailers and parents concerning the industry rating system could help achieve California's asserted interest of protecting minors.

The court additionally struck the act's "18" labeling requirement as unconstitutional. While freedom of speech protections generally prohibit the government from telling people what they must say, courts have upheld a few commercial speech restrictions that require the inclusion of "purely factual and uncontroversial information" in advertising. Compelled disclosures must be justified by the need to dissipate the possibility of consumer confusion or deception and be "reasonably related" to the government's interest in preventing that confusion or deception.

Here, instead of requiring the disclosure of purely factual information, the act unconstitutionally forced video game manufacturers to carry California's subjective opinion, a message with which the industry disagrees. Additionally, because the Act cannot constitutionally characterize video games as "violent" and beyond First Amendment protections for minors, the "18" label did not convey accurate factual information, as there is no state-mandated age threshold for the purchase or rental of video games. The mandated "18" label therefore conveyed only a false statement that certain conduct is illegal when it is not, and California has no legitimate reason to force retailers to affix false information to their products.

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