

BY ROXANNE CHRIST AND FARNAZ ALEMI

CLEAN GAMES

WITH VIDEO GAMES CLEARLY QUALIFYING AS PROTECTED SPEECH, THE KEY TO PROMOTING CHILD-FRIENDLY PRODUCTS RESTS ON INDUSTRY SELF-REGULATION

Video games have revolutionized entertainment. The relatively simple and inexpensive pleasure of, for example, a board game has been transformed into an economically sizeable, globally interactive, and sometimes controversial form of entertainment. The video game world is at least a \$27.5 billion global industry,¹ with nearly 100 million people playing video games in the United States alone.²

Video game growth continues to outpace other sectors of the entertainment industry. The biggest retail launch in the history of entertainment was not an album release or a movie blockbuster but the unveiling of *Halo 3* for the Xbox 360 console in 2007. The game raked in \$170 million in its first 24 hours of release in the United States. “The Xbox 360 title beat previous records set by

blockbuster theatrical releases like *Spider-Man 3* and novels such as *Harry Potter and the Deathly Hallows*.”³

Despite these successes, the video game industry is not without difficulties. Many people continue to believe that video games are bad for children. Some parents, watchdog groups, and churches decry video games as morally and psychologically unhealthy because they convey messages of violence, sex, and profanity. Some psychologists argue that the exposure to video game violence increases the risk that children will behave aggressively in real life, and lawmakers continue to try to push through legislation to regulate the video gaming industry.

Opponents of regulation often challenge the legislation’s constitutionality under the First Amendment. They also counter that no substantial evidence exists that violent video

games are in and of themselves harmful to children. Rather, it is the parent’s duty to safeguard children from games that are inappropriate for their age. There is already a body within the industry, the Entertainment Safety Ratings Board (ESRB), that informs consumers of the age appropriateness of games. Opponents believe the calls for more regulation unfairly focus on video games among other media, such as movies and television, that portray similar content.

In truth, both sides have valid concerns. But while the media focuses on the blame game and the legislation aimed at cleaning up the content, what counts most are the courts’

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holdings in response to these legislative efforts. Thus far, the courts have struck down attempts at regulating the industry.

The Fight for Regulation

Video games have been around since the late 1950s, but it was not until the release of *Mortal Kombat* as an arcade game in 1993 that many alarms were sounded about violence in video games. It was the first fighting game that used digitized characters and blood, rather than the traditional cartoonlike hand-animated graphics. U.S. Senators Joe Lieberman and Herbert Kohl did not think this game or others that depicted violence should be available to children. They were the catalysts behind the December 1993 joint congressional hearings on video game violence that led them to introduce a bill to impose a rating system if the industry itself did not develop one of its own.⁴ At the hearing, expert witnesses testified to their views on the violent and unhealthy aspects of video games: “[E]lectronic games...actually encourage violence as the resolution of first resort by rewarding participants for killing one’s opponents in the most grisly ways imaginable.”⁵ That era’s video game giants, Sega and Nintendo, agreed to support a self-regulating body, the ESRB, which was formed in 1994. This voluntary nonprofit is independent of the gaming industry and provides consumers with a rating system for games. The ESRB was formed by the Interactive Digital Software Association, which is now the Electronic Software Association.

The process for rating games is fairly straightforward. A game company submits answers to an ESRB questionnaire detailing its game’s storyline, content, and gameplay.⁶ Along with the paperwork the game company must submit a video containing the potentially most offensive content within the game, including but not limited to violence, sex, substance abuse, and gambling.⁷ A committee made up of at least three trained game raters evaluates the submission, provides feedback, and issues a preliminary ESRB rating.⁸ The ESRB staff then reviews everything again and makes the final rating decision.

There are seven ratings: EC (Early Childhood), E (Everyone), E10+ (Everyone 10 and older), T (Teen), M (Mature), AO (Adults Only), and RP (Rating Pending), which are displayed on the packaging.⁹ The back of the video game package also contains content descriptors, which detail elements in the game that triggered a rating. Examples include blood, nudity, and language.¹⁰

The M and AO ratings are the most extreme. An M-rated game may be sold at retailers, but an AO-rated game may not. Contrary to popular belief, it is not the ESRB that bans the AO games; rather, it is gener-

ally the console manufacturers and retailers. Nintendo, Sony, and Microsoft have policies prohibiting third-party AO-rated titles from appearing on their consoles.¹¹ In order to distribute and profit from an AO-rated game, the publisher has to edit out whatever triggered the AO rating and resubmit it to the ESRB. Should a video game publisher fail to disclose objectionable content in the games, the ESRB may fine the company up to \$1 million or refuse to rate its games, which effectively blocks retail sales.

The ESRB educates families through public service announcements on television and with retailers (such as Best Buy, Blockbuster Video, and GameStop) who belong to the ESRB Retail Council.¹² ESRB retail members are subject to mystery shopper audits to determine if employees of these retail stores are selling M or AO games to those under 17.¹³

Despite the ESRB’s efforts at self-regulation, watchdog groups are far from pleased with the content of video games available to minors. As more studies continue to publish data suggesting that violent video games increase aggression in children,¹⁴ video game opponents and legislators are growing more active. These groups object to the content of the video games, regardless of ratings meant to preclude minors from purchasing or gaining access to these games at the outset. For instance, Rockstar Games’s *Grand Theft Auto* (GTA)¹⁵ series is a well-known game that allows players to act out crimes for rewards.¹⁶ The ESRB has rated all eight titles of the series as M, citing to blood, violence, and strong language.¹⁷ Some groups still oppose its distribution, even with the rating.¹⁸ This issue is also regularly raised by politicians on a national stage. In March 2005, Senator Hillary Rodham Clinton spoke to the Kaiser Family Foundation on the subject of media sex and violence, pointing out that GTA is particularly harmful to youth because “[t]hey’re playing a game that encourages them to have sex with prostitutes and then murder them.”¹⁹

Legislation

The states’ attempts at regulation have generated controversy and public discourse. Courts have consistently held that video games are protected speech, and efforts by legislators to ban or limit the access to or the sale of games have been held unconstitutional under the First Amendment. State regulators often look to the U.S. Supreme Court’s holding in *Ginsberg v. New York* for how to enact constitutional laws to protect minors from obscenity.²⁰ In *Ginsberg*, the Court held that communications directed at minors under the age of 17 did not enjoy the same kind of protection under the First Amendment’s free-

dom of speech principles.²¹ Thus, lawmakers could make laws intended to prevent obscene materials from getting into the hands of minors. Courts interpreting *Ginsberg*, however, have not applied its holding beyond the context of sexual obscenity. Consequently, laws aimed at curbing video game violence continue to be routinely struck down.

The first of these cases was *American Amusement Machine Association v. Kendrick*, arising from the July 2000 Indianapolis Arcade Ordinance requiring businesses to label their coin-operated games that featured graphic violence or strong sexual content.²² It also prohibited children under 17 to play those games without parental consent. The Seventh Circuit reviewed the constitutionality of this ordinance and, in an opinion written by Judge Richard A. Posner, unanimously concluded that it would be dangerous for the government to control children’s access to information. Judge Posner cited the blind fanaticism of the young German soldiers under the Hitler regime during World War II.²³ “[T]o shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.”²⁴

Moreover, Judge Posner rejected the city’s argument that the ordinance was based on obscenity grounds by narrowly interpreting *Ginsberg* to apply only to matters involving sex, not violence. As Posner indirectly pointed out, this case does not involve obscenity but rather violence, and the two cannot be used interchangeably. And even if the violence was sufficiently obscene to qualify as offensive to a large sector of society, Posner still did not believe that *graphical* violence qualifies as offensive under obscenity laws.

Fighting words that incite people to violence may be regulated,²⁵ but Judge Posner was not convinced that violence in video games incites minors to act violently. The court rejected the psychological evidence on which the city relied,²⁶ as the studies did not reveal that video games have caused anyone to commit a violent act (as opposed to merely feeling aggressive) or have caused the average level of violence to increase. As a result, Posner ruled the ordinance unconstitutional.

The Eighth Circuit faced a similar constitutional challenge in the case of *IDS v. St. Louis County* in 2003.²⁷ The St. Louis violent video game law required minors under 17 to obtain parental consent before buying games with violent or sexually explicit content, or playing in arcades with such games. The court reiterated the basic First Amendment principle that content-based restrictions on speech are presumptively invalid and will be struck down absent a compelling state interest to restrict such

speech.²⁸ Like the Seventh Circuit, the court rejected psychology studies as justification for restricting content.²⁹

Furthermore, if “the First Amendment is versatile enough to ‘shield [the] painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll’...we see no reason why the pictures, graphic design, concept art, sounds, music, stories and narrative present in video games are not entitled to similar protection.”³⁰

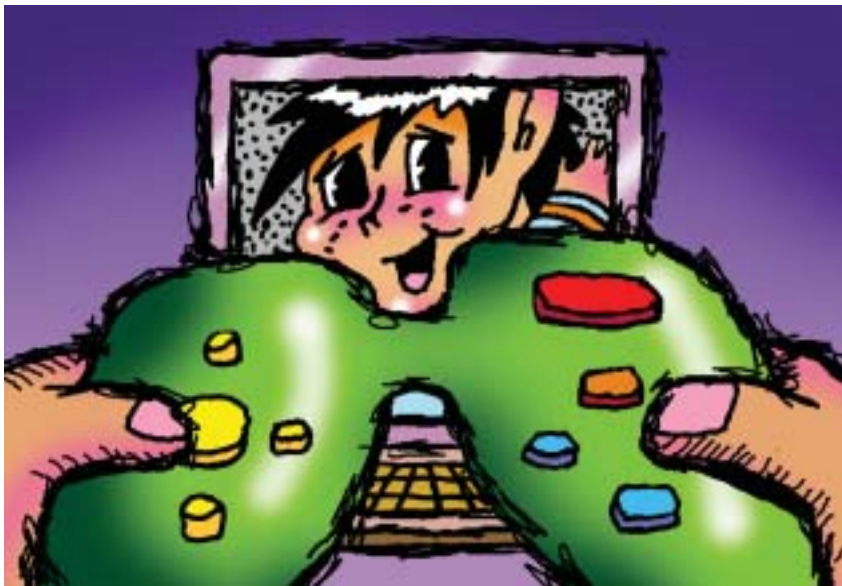
In at least seven other major lawsuits since *IDS*, the attempts of legislators to regulate the video game industry have been held unconstitutional. The legal issues raised in these challenges are mostly repeats of *Kendrick* and *IDS*. In 2004, for example, the Washington Federal District Court rejected the state’s argument that video games depicting violence against law enforcement should be regulated under obscenity laws,³¹ siding with the *Kendrick* holding that *Ginsberg* does not extend to regulating violence in video games: “[S]uch

depictions [of violence] have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation.”³² Again, the court did not find the social science research on violence and aggression compelling enough to regulate the graphical depiction of violence against police officers: “[T]here has been no showing that exposure to video games that ‘trivialize violence against law enforcement officers’ is likely to lead to actual violence against such officers.”³³

In 2006, the Seventh Circuit affirmed the district court’s holding in *ESA v. Blagojevich* granting a permanent injunction to prevent the implementation of the Illinois Sexually Explicit Video Game Law.³⁴ Although there was a counterpart Violent Video Games Law, the state did not appeal the loss. Instead, the state sought to implement the Sexually Explicit Video Game Law. However, the court rejected the state’s argument on the grounds that it did not meet the Supreme Court’s three-prong test under *Miller v. California*, under which obscene speech may be regulated if 1) an average person would find the work to appeal to the prurient interest, 2) the work is patently offensive, and 3) the work lacks

serious literary, artistic, political, or scientific value.³⁵ The court held that “[the state] created a statute that is constitutionally overbroad” because it failed to include language that the sexually explicit material, taken as a whole, lacks any serious literary, artistic, political, or scientific value.³⁶ As such, the Sexually Explicit Video Game Law was held unconstitutional.

Similarly, in Michigan,³⁷ Louisiana,³⁸ and Oklahoma³⁹ the courts held that the First Amendment protects the content in video



games and that attempts to regulate the content or the sale of video games will not pass muster under strict scrutiny.

California has also had difficulty in passing video game content laws that withstand constitutional challenge. For example, California Assembly member Leland Yee penned Chapter 638, which would have placed restrictions on selling or renting violent computer and video games to anyone under 18 if the violence was offensive to the community or if the violence was done in an “especially heinous, cruel, or depraved” manner.⁴⁰ The law would also have required game manufacturers and distributors to label the game packages with stickers displaying the number 18. Chapter 638 was enacted on October 7, 2005—and 10 days later, the Video Software Dealers Association (now the Entertainment Merchants Association) and the Entertainment Software Association filed suit, challenging the law’s constitutionality. In August 2007, Judge Ronald M. Whyte of the U.S. District Court of the Northern District of California granted the plaintiffs a permanent injunction barring enforcement of Chapter 638, holding that “the evidence does not establish that video games, because of their interactive nature or otherwise, are any more harmful than violent television, movies, internet sites or other

speech-related exposures.”⁴¹ The evidence did not provide for the required nexus between the protection of minors and the regulation of speech. The state of California appealed the decision to the Ninth Circuit.

Another recent video game case has received a similar ruling. In March 2008, the Eighth Circuit upheld an injunction against a Minnesota violent video games law that sought to impose a \$25 fine on those under 17 who rented or purchased a game rated AO or M.⁴² The appellate court affirmed the district court’s holding that the state did not prove that violent video games hurt children and that the law was thus unconstitutional.⁴³ Judge Roger I. Wollman wrote: “Whatever our intuitive (dare we say commonsense) feelings regarding the effect” of violent video games, precedent requires undeniable proof that such violence causes “psychological dysfunction. The requirement of such a high level of proof may reflect a refined es-

trangement from reality, but apply it we must.”⁴⁴

These judicial actions have been costly political exercises. If the ESA is successful in obtaining \$324,840 in fees from California, then it will have been awarded nearly \$1.9 million in fees and expenses for defending its rights in California.⁴⁵ As Michael D. Gallagher, president of the ESA, points out: “California citizens should be outraged at their elected leaders. Hard-earned tax dollars were spent on defending this law that California’s state leaders knew was unconstitutional.”⁴⁶

State legislators are not alone in this battle. Since the *Grand Theft Auto: San Andreas* scandal of July 2005, in which it was discovered that third-party software programs could unlock a private sex-themed minigame within the game known as *Hot Coffee*, the federal government has introduced three major bills to regulate the video game industry.⁴⁷

In September 2005, Senator Clinton introduced the U.S. Family Entertainment Protection Act (FEPA), calling for federal enforcement of the ESRB’s rating system. First, FEPA would impose initial fines of \$1,000 or 100 hours of community service to game vendors who sold games rated M or AO to minors; subsequent violations would trigger a \$5,000 fine or 500 hours of community service. Second, FEPA called for a Federal

Trade Commission (FTC) investigation of the ESRB's rating methodology. It would authorize the FTC to conduct random audits of retailers.⁴⁸ The bill was referred to the Senate Committee on Commerce, Science and Transportation, where it expired at the end of the 109th session of Congress.⁴⁹

Failure to pass the 2005 bill did not prevent Cliff Stearns, a member of the U.S. Congress, from proposing legislation in 2006 to grant the FTC the power to create rules governing video game ratings. The Truth in Video Game Rating Act (TVGRA)⁵⁰ would allow the FTC to commandeer the ESRB's game rating system and independently assign its own ratings. Moreover, it would implement rules prohibiting video game publishers from failing to disclose questionable content to the ratings board. The Entertainment Technology advisor, a blogging arm of Acacia Research Group,⁵¹ noted that the bill "seems somehow redundant, duplicating established industry efforts and necessitating additional taxpayer expenditure for re-enforcement of already-enforced strictures."⁵² The first version of this bill died in Congress. However, Senator Sam Brownback reintroduced the bill in 2007.

Yet another bill was the Video Game Decency Act, proposed by Representative Fred Upton in September 2006.⁵³ Rather than punish the ESRB, Upton's bill sought to punish developers and publishers that, to obtain a better rating, fail to disclose objectionable content to the ESRB. Upton's bill, like the Truth in Video Game Rating Act, did not pass into law and was resurrected in 2007.⁵⁴

The constitutional barrier to enforcement of these bills remains clear, however, so some state and federal legislators are beginning to channel their efforts in other directions. Idaho State Attorney General Lawrence Wasden has teamed with the ESRB to educate parents about ratings by personally broadcasting public service announcements: "[W]ith 1,000 new games released every year, how are parents to make, and help their kids make, good choices? The video game rating system is a good place to start. It includes age-appropriate ratings, along with information about what's actually in the game."⁵⁵ Similarly in Delaware, Lieutenant Governor John Carney and State Representative Helene Keeley, who had initially proposed a bill to make it illegal to sell M-rated games to minors, have opted to join forces with the ESRB to educate and encourage parents to pay attention to ratings and make safe choices for their children.⁵⁶ They plan to advertise on billboards, print, and radio broadcasts to spread this message.

Additionally, a recent FTC report to Congress has recognized the video game industry's "significant progress" in limiting its retail sales of mature games to minors, not-

ing that neither movie nor music retailers have reached this goal.⁵⁷ The FTC has also highlighted that the ESRB is a "useful and important tool that parents increasingly use to help them make informed decisions about games for their children."⁵⁸

Nevertheless, the video game industry will still face challenges. Most recently, New Mexico Representative Gail Chasey has introduced the Leave No Child Inside Act that would force New Mexico state consumers to pay a 1 percent excise tax on purchases of games, consoles, and televisions.⁵⁹ Although the purpose of the tax is to fund outdoor education programs for schoolchildren, the ESA, the Entertainment Merchants Association, and other organizations have mounted opposition, claiming this bill is singling out the video game industry indirectly as a means of regulating it. As EMA Vice President Sean Bersell expressed in his opposition, "Video games, like other forms of entertainment, are expressive products protected by the First Amendment.... A special tax on physical video game sales would place an unfair burden on store-based video game retailers in New Mexico as they compete against other video game delivery systems that are not subject to the same level of taxation."⁶⁰

Videos and Movies

The video game industry has been closely scrutinized—arguably more so than the film industry. Both industries have self-regulating bodies that oversee content and provide ratings for the public. The Motion Picture Association of America is a nonprofit business and trade association that rates movies on a voluntary basis—a similar model to the ESRB. The MPAA's ratings are not legally required, but they are the industry standard.⁶¹ Major studios have agreed to submit their movies for ratings before release into theaters or stores.⁶² Some stores, such as Wal-Mart, will not sell R-rated movies to minors.⁶³ Yet, politicians seem less critical of the MPAA than the ESRB. ESRB president Patricia Vance distinguishes the two organizations based on two factors: first, the MPAA is more established due to its age, about 30 years ahead of the ESRB; and second, people have the misperception that video games are predominantly intended for kids, when in fact, the average gamer is 33 years old.⁶⁴ One might also hypothesize that the movie industry's government relations function is larger, better coordinated, better funded, and more experienced.

Though the video game industry will face persistent challenges, one thing is clear: the ESRB has helpfully encouraged compromise. Supporters are increasingly abiding by the ESRB's standards to disclose content, retail the games properly, and promote awareness.

Critics are increasingly relying on the ESRB to regulate its own industry. The recent results have been positive. In a 2006 survey conducted by The Harrison Group, 84 percent of parents said they were familiar with the ESRB's rating system, and 68 percent believed the rating system was an effective means of determining whether a game was suitable for their children.⁶⁵ Perhaps, with more time, the ESRB will garner the same respect and confidence that the MPAA commands. ■

¹ *A History of Video Game Industry*, CNBC, Nov. 30, 2006, available at <http://www.msnbc.msn.com/id/15734058>.

² Mike Snider, *Your Next Move: Watch, Don't Play, Video Games*, USA TODAY, Aug. 13, 2007, available at http://www.usatoday.com/life/lifestyle/2007-08-13-gaming_N.htm.

³ See Stephany, *Halo 3 Sells an Estimated \$170 Million on Launch Day*, GAMING TODAY, Sept. 26, 2007, available at <http://news.filefront.com>; see also Dean Takahashi, *Halo 3 Early Results: \$170 Million in a Day Sets an Entertainment Record*, MercuryNews.com, Sep. 26, 2007, available at <http://blogs.mercurynews.com>.

⁴ Mark Walsh, *Coalition to Develop Rating System for Video Games*, EDUCATION WEEK, Dec. 15, 1993, available at <http://www.edweek.org/ew/articles/1993/12/15/15video.h13.html>.

⁵ Chris Kohler, *How Protests against Games Cause Them to Sell More Copies*, Wired Blog Network, Oct. 30, 2007, available at <http://blog.wired.com/games/2007/10/how-protests-ag.html> (quoting Steven Kent, *THE ULTIMATE HISTORY OF VIDEO GAMES* (2001)).

⁶ See Ratings Process, ESRB, available at http://www.esrb.org/ratings/ratings_process.jsp.

⁷ *Id.*

⁸ *Id.*

⁹ See Game Ratings & Descriptor Guide, ESRB, available at http://www.esrb.org/ratings/ratings_guide.jsp.

¹⁰ *Id.*

¹¹ See *Manhunt 2*, Wikipedia, available at http://en.wikipedia.org/wiki/Manhunt_2 (last visited Dec. 11, 2007).

¹² See *ESRB Retail Council*, ESRB, available at http://www.esrb.org/retailers/retail_council.jsp#piechart (last visited Dec. 12, 2007).

¹³ *Id.*

¹⁴ See Ben Carrozza, *Obvious: Psychology Study Finds Video Games May Cause Aggression*, DOSE.CA, Nov. 29, 2007, available at <http://www.dose.ca/games/story.html?id=fa6c70cb-27ec-4e7e-b4e4-72865c533c9c> (citing to University of Michigan psychology researcher and professor L. Rowell Huesmann's results of a study: "Exposure to violent electronic media has a larger effect than all but one other well-known threat to public health. The only effect slightly larger than the effect of media violence on aggression is that of cigarette smoking on lung cancer.")

¹⁵ See *Grand Theft Auto Legacy*, available at <http://www.rockstargames.com/grandtheftauto/> (last visited Dec. 11, 2007).

¹⁶ See Jon Newton, *Gaming Industry Peddles Murder-Ware to Teens*, TechNewsWorld (Oct. 20, 2004), available at <http://www.technewsworld.com/story/37445.html>; see also *Lawsuit: "Grand Theft Auto" Led Teen to Kill*, FOXNEWS.COM. (Feb. 16, 2005) ("A lawsuit claims the video game 'Grand Theft Auto' led a teenager to shoot two police officers and a dispatcher to death in 2003, mirroring violent acts depicted in the popular game.")

¹⁷ See *Grand Theft Auto Legacy*, available at

<http://www.rockstargames.com/grandtheftauto/> (last visited Dec. 11, 2007).

¹⁸ See, e.g., *Parents Television Council Wants Video Game Legislation*, GamePolitics.com, Jan. 25, 2008, available at <http://gamepolitics.com/2008/01/25/parents-television-council-wants-video-game-legislation>; Eric M. Weiss & Jose Antonio Vargas, *Video Games' Chaos Echoed in Streets, D.C. Leaders Say*, WASHINGTON POST, Feb. 4, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A61945-2005Feb3.html>; The Associated Press, *RTD May Ban Ads for Violent Video Games after Parents' Complaints*, ROCKY MOUNTAIN COLLEGIAN, Mar. 19, 2007, available at <http://media.www.collegian.com/media/storage/paper864/news/2007/03/19/News/RtdMay.Ban.Ads.For.Violent.Video.Games.After.Parents.Complaints-2780343.shtml>.
¹⁹ The Associated Press, *Clinton Seeks "Grand Theft Auto" Probe*, USA TODAY, Jul. 14, 2005, available at http://www.usatoday.com/news/washington/2005-07-14-clinton-game_x.htm (last visited Dec. 4, 2007). Even more controversial is *Manhunt 2*, another title from Rockstar Games. Though originally scheduled to be released in North America in July 2007, *Manhunt 2* was pushed back until the end of October because it had received an AO rating and was initially banned in the United Kingdom and Ireland.

²⁰ *Ginsberg v. New York*, 390 U.S. 629 (1969).

²¹ *Id.* at 635.

²² *American Amusement Machine Ass'n v. Kendrick*, 244 F. 3d 572 (7th Cir. 2001).

²³ *Id.* at 573.

²⁴ *Id.* at 577.

²⁵ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

²⁶ See Craig A. Anderson & Karen E. Dill, *Personality Processes and Individual Differences—Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 J. PERSONALITY & SOC. PSYCH. 772 (2000). Results from studies reveal that "exposure to violent video games will increase aggressive behavior in both the short term (e.g., laboratory aggression) and the long term (e.g., delinquency)."

²⁷ *IDSA v. St. Louis County*, 329 F. 3d 954 (8th Cir. 2003).

²⁸ *Id.*

²⁹ *Id.* at 959.

³⁰ *Id.* at 957 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995)).

³¹ *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

³² *Id.* at 1185.

³³ *Id.* at 1188.

³⁴ *ESA v. Blagojevich*, 469 F. 3d 641 (7th Cir. 2006). According to the Entertainment Software Association Web site, the ESA "is...dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet." See <http://www.theesa.com/about>.

³⁵ See *Miller v. California*, 413 U.S. 15 (1973).

³⁶ *Blagojevich*, 469 F. 3d at 648.

³⁷ *ESA v. Granholm*, 404 F. Supp. 2d 978, 981 (E.D. Mich. 2005) (imposing preliminary injunction against statute that included language "[c]onsidered as a whole, lacks serious literary, artistic, political, education, or scientific value for minors" in its definition of implicated content because statute was unlikely to survive strict scrutiny).

³⁸ *ESA v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006) (A statute that criminalized distribution of video and computer games that appealed to minors' morbid interests was nothing more than impermissible thought control.).

³⁹ *Entertainment Merch. Ass'n v. Henry*, No. 06-675 (W.D. Okla. filed Sept. 17, 2007) (holding that there is no support or "substantial evidence" that video

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games are harmful to minors and that "there is a complete dearth of legislative findings, scientific studies or other rationale to support passage of the act")

⁴⁰ Yee, A.B. 1179, ch. 638 tit. 1.2A §1746(B) (2005).

⁴¹ *VSDA v. Schwarzenegger*, No. C-05-04188 RMW WL 2261546 (U.S.D.C. N.D. Cal. Aug. 6 2006), available at <http://www.gamepolitics.com/images/legal/CA-final.pdf>.

⁴² See *ESA v. Swanson*, 2008 U.S. App. LEXIS 5634 (8th Cir. Minn., Mar. 17, 2008), affirming *ESA v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006).

⁴³ *ESA v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006).

⁴⁴ *ESA v. Swanson*, 2008 U.S. App. LEXIS 5634, at 12.

⁴⁵ Dan Hewitt, Press Release, California Owes Video Game Industry over \$320,000 in Legal Fees (Sept. 5, 2007), available at http://www.theesa.com/archives/2007/09/california_owes.php.

⁴⁶ *Id.*

⁴⁷ See Hot Coffee Minigame Controversy, available at http://en.wikipedia.org/wiki/Hot_Coffee_mod (last visited Dec. 10, 2007).

⁴⁸ Tor Thorsen, *Clinton Introducing Federal Game Regulation*, GameSpot, Nov. 29, 2005, available at <http://www.gamespot.com/ps2/action/gta4/news.html?sid=6140535&cpage=8>.

⁴⁹ See Family Entertainment Protection Act, S.B. 2126, 109th Cong., available at <http://www.govtrack.us/congress/bill.xpd?bill=s109-2126>.

⁵⁰ Truth in Video Gaming Act, H.R. 5912, 109th Cong., available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h5912ih.txt.pdf.

⁵¹ See Acacia Research Group, at <http://www.acaciarg.com>.

⁵² *Truth or Consequences...*, ENTERTAINMENT TECHNOLOGY ADVISOR, Aug. 11, 2006, available at <http://www.acaciarg.com/eta/index.php?p=11>.

⁵³ See Video Game Decency Act of 2006, H.R. 6120, 109th Cong., available at <http://www.govtrack.us/congress/bill.xpd?bill=h109-6120>.

⁵⁴ See Video Game Decency Act of 2007, H.R. 1531, 110th Cong., available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-1531>.

⁵⁵ Attorney General Wasden Joins ESRB for PSA Campaign on Video Game Ratings, Office of Attorney General Lawrence Wasden Press Release, Oct. 3, 2007, available at http://www2.state.id.us/ag/newsrel/2007/nr_oct032007.htm.

⁵⁶ Brendan Sinclair, *Delaware Pols Launch ESRB Ad Campaign*, GAME SPOT, Dec. 7, 2007, available at <http://www.gamespot.com/news/6183817.html?page=2>.

⁵⁷ FEDERAL TRADE COMMISSION, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN, Apr. 12, 2007, available at <http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf>.

⁵⁸ *Id.*

⁵⁹ *Video Game Retailers Come Out against New Mexico Tax Proposal*, GAME POLITICS.COM, Jan. 26, 2008, available at <http://gamepolitics.com/2008/01/26/video-game-retailers-come-out-against-new-mexico-tax-proposal>.

⁶⁰ *Id.*

⁶¹ See Motion Picture Association of America Film Rating System, Wikipedia, available at http://en.wikipedia.org/wiki/Motion_Picture_Association_of_America_film_rating_system (last visited Jan. 31, 2008).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Patricia Vance, As the Gaming World Turns, Dec. 13, 2006, available at <http://springsgamer.blogspot.com/2006/12/esrb-prez-patricia-vance.html> (last visited Jan. 31, 2006).

⁶⁵ Daemon Hatfield, *Parents: We Love the ESRB*, IGN NEWS, Dec. 5, 2006, available at <http://cube.ign.com/articles/749/749259p1.html>.