



Regulation of Video Game Content

Presented by Jerry Nagae

October 13, 2010

[Your Innovation Partners] | CHRISTENSEN | O'CONNOR
JOHNSON | KINDNESS

The Video Game Business



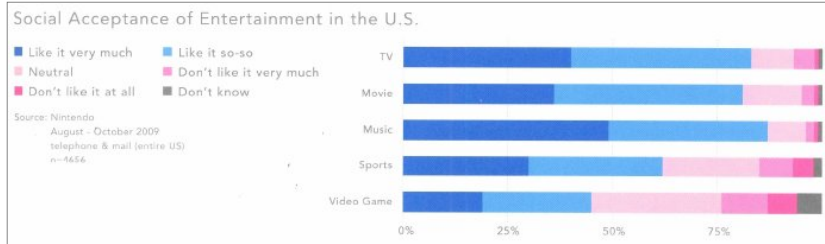
- Game software sales 2009 - \$10.5 billion
 - \$8 billion - in console software
 - \$2 billion - portable system software
 - \$.5 billion - computer game software
- Growth rate 2005-2009
 - Entertainment software > 10%
 - Entire U.S. economy < 2%
- Employment Level
 - Entire industry: 120,000 direct and indirect employment in 34 states
 - Top 5 states
 - CA, TX, WA, NY, MA
 - 75% of all jobs

Game Player Demographics

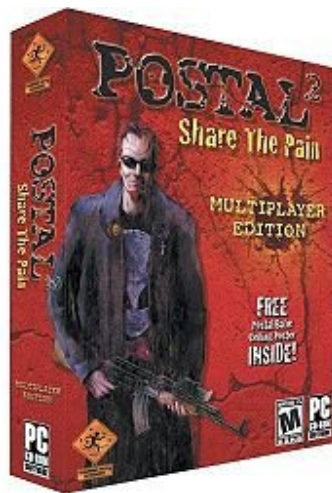


- Computer or video games played in 67% of U.S. households
- Average game player: 34, playing for 12 years
- 26% of Americans over 50 play video games
- Average age of most frequent game purchaser: 40
- 40% of all game players are female
 - i. Women over 18 constitute 33% of game players
 - ii. Boys under 17 make up 20% of game players

Game Player Demographics



Postal 2



California Act



A person may not sell or rent a video game that has been labeled as a violent video game, to a minor.[\[1\]](#)

Violent video games are defined as:

- A. Depicting killing, maiming, dismembering, or sexually assaulting an image of a human being in a manner that meets all of the following requirements:
- a reasonable person, considering the game as a whole, would find it appeals to a deviant or morbid interest of minors;
 - is patently offensive to prevailing standards in the community as to what is suitable for minors; and
 - causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors; or

[\[1\]](#) Violators are subject to a civil penalty of up to \$1,000.

California Act (Continued)



- B. Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.[\[2\]](#)

[\[2\]](#) Assembly Bill 1179 was signed by Governor Schwarzenegger on October 7, 2005, codified at California Civil Code §§ 1746-1746.5. The Act had been scheduled to be effective January 1, 2006.

Definition Source



- The Act borrows from the federal death penalty jury instructions to define:
 - cruel
 - depravity
 - heinous
 - torture
 - serious physical abuse
- The Act states that "pertinent factors in determining whether the killing depicted in a video game is especially heinous, cruel or depraved include infliction of gratuitous violence upon the victim beyond necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim."

Labeling Requirements



Each "violent video game" imported into or distributed in California must:

- be labeled with a solid white "18" outlined in black;
- appear on the front face of the game's package;
- be no less than two inches by two inches in size"

Challenge to Act



Act challenged by Video Game Software Dealers Association (now Entertainment Merchants Association) and Entertainment Software Association.

DJ Complaint and Motion for Preliminary Injunction filed, arguing:

- Video games are a form of expression protected by the First Amendment, even for minors;
- The definition of "violent video game" is unconstitutionally vague; and
- The labeling requirement under the Act violates the First Amendment.

Plaintiff's Main Vagueness Argument



Not possible to know what is meant by "enables a player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics."

Court: the Act has a two-step definition of violent video games:

- First, in the video game, the range of options available to the player must include killing, maiming, dismembering, or sexually assaulting an image of a human being.
- Second, the foregoing acts must be depicted in a manner that does either of the following:

....enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics.

Thus, the Act restricts only certain forms of violence against "an image of a human being," and there are no restrictions on violence against non-humans.

Application of Definition of Violent Video Games to *Postal 2*



The range of options available to a player includes killing, maiming, dismembering or sexually assaulting an image of a human being.

The game meets both prongs of the second part of the definition:

- First Prong:
 - Shooting schoolgirls in the knee, and then setting them on fire appeals to the deviant interests of minors.
 - This is patently offensive to the standards of some communities, as to what is suitable for minors.
 - Game appears to have no literary, artistic, political, or scientific value for minors.
- Second Prong:
 - Shooting schoolgirls in the kneecap is inflicting serious injury, and then setting them afire and urinating on them as they crawl about is especially cruel and depraved.

Protected Speech Under the First Amendment



Video games, though merely a form of entertainment, are nonetheless protected by the First Amendment.

The parties differed on what standard should be applied in reviewing the California statute:

- Plaintiffs: The "strict scrutiny" test should apply. The state must prove that the expression being regulated is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Brandenburg v. Ohio*.
- The State: The "rational basis" standard used by the Supreme Court in *Ginsberg v. New York*, should apply.

Protected Speech Under the First Amendment *(Continued)*



Court ruled that the strict scrutiny test applies:

- The state didn't adequately explain why the deferential *Ginsberg* test with respect to nudity and sexual content should be extended to violent video games.
- The state had argued that there are few constitutional boundaries to its powers to limit minors' access to expression that the state can establish to be harmful to minors, includes games about embezzling, bomb-building, and shoplifting.

Application of "Strict Scrutiny" Test to Content Based Regulations



- Content based regulations are presumptively invalid.
- Expression based on content can be limited only if the state:
 - has a compelling interest to further;
 - chooses the least restrictive means to further such interest.
- Compelling interest: protecting the physical and psychological well-being of minors. State "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting Sys. Inc. v. F.C.C.*

Application of "Strict Scrutiny" Test to Content Based Regulations (*Continued*)



- "Strict scrutiny" test was not met. The evidence provided by the state, including studies presented from experts, did not establish a causal link between violent video games and violent behavior.
- The Court did not reach the issue of whether the Act employed the "least restrictive means."

Labeling Requirement



- Analyzed as the right of commercial speech under the First Amendment:
 - For commercial speech to be protected under the First Amendment, must be lawful and not misleading;
 - The considered government interest in limiting speech must be substantial;
 - The regulation must directly advance the government's interest;
 - The restriction cannot be more extensive than needed to achieve the governmental interest.
- The Court summarily relied on *Entm't Software Ass'n v. Blagojevich* (E.D. Ill. 2005) where a similar labeling requirement was found to be compelled commercial speech and violative for the First Amendment.

Permanent Injunction Hearing Cross-Motions for Summary Judgment



Both parties moved for summary judgment.

Plaintiffs: same three arguments as in Motion for a Preliminary Injunction:

- Video games are a form of expression protected by the First Amendment, even for minors;
- The definition of "violent video game" is unconstitutionally vague;
- The labeling requirement violates the First Amendment.

Permanent Injunction Hearing Cross-Motions for Summary Judgment (*Continued*)



Defendants:

- The Act was narrowly tailored to further a compelling state interest;
- The Act was neither impermissibly vague nor violative of the First Amendment.

The Court only addressed the issue of whether the Act violates the First Amendment right of free speech.

Standard Applicable to the Act – Strict Scrutiny



As before, the Court applied “strict scrutiny” test, but indicated that under this test it is possible for a narrowly-drawn regulation to legally address a compelling state interest, in spite of the First Amendment.

Under strict scrutiny, to be constitutional, the Act must:

- promote the compelling interest of protecting the psychological and physical well-being of minors;
- by the least restrictive means; and
- the means must actually further this interest.

The Act Promotes a Compelling Interest



- The Court found that the purpose of the Act was:
 - i. To prevent violent, aggressive, and antisocial behavior by minors who play violent video games; and
 - ii. To prevent psychological and neurological harm to minors.

The Act Does Not Choose the Least Restrictive Means



- Subsection B:

Of the two definitions of "violent video games", the Act provides no exception for "material with some redeeming value," thus is too broad. So, the definition could apply to classic literature.
- Subsection A:

The state has not shown that the act will accomplish its goals more effectively than the existing industry-based ESRB standards. The state must prove that a plausible, less restrictive alternative would be ineffective.



EARLY CHILDHOOD - Titles rated EC (Early Childhood) have content that may be suitable for ages 3 and older. Contains no material that parents would find inappropriate.



MATURE - Titles rated M (Mature) have content that may be suitable for persons ages 17 and older. Titles in this category may contain intense violence, blood and gore, sexual content and/or strong language.



EVERYONE - Titles rated E (Everyone) have content that may be suitable for ages 6 and older. Titles in this category may contain minimal cartoon, fantasy or mild violence and/or infrequent use of mild language.



ADULTS ONLY - Titles rated AO (Adults Only) have content that should only be played by persons 18 years and older. Titles in this category may include prolonged scenes of intense violence and/or graphic sexual content and nudity.



EVERYONE 10+ - Titles rated E10+ (Everyone 10 and older) have content that may be suitable for ages 10 and older. Titles in this category may contain more cartoon, fantasy or mild violence, mild language and/or minimal suggestive themes.



RATING PENDING - Titles listed as RP (Rating Pending) have been submitted to the ESRB and are awaiting final rating. (This symbol appears only in advertising prior to a game's release.)



TEEN - Titles rated T (Teen) have content that may be suitable for ages 13 and older. Titles in this category may contain violence, suggestive themes, crude humor, minimal blood, simulated gambling, and/or infrequent use of strong language.

ESRB Content Descriptors



- Alcohol Reference** - Reference to and/or images of alcoholic beverages
- Animated Blood** - Discolored and/or unrealistic depictions of blood
- Blood** - Depictions of blood
- Blood and Gore** - Depictions of blood or the mutilation of body parts
- Cartoon Violence** - Violent actions involving cartoon-like situations and characters. May include violence where a character is unharmed after the action has been inflicted
- Comic Mischief** - Depictions or dialogue involving slapstick or suggestive humor
- Crude Humor** - Depictions or dialogue involving vulgar antics, including "bathroom" humor
- Drug Reference** - Reference to and/or images of illegal drugs
- Fantasy Violence** - Violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life
- Intense Violence** - Graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons and depictions of human injury and death
- Language** - Mild to moderate use of profanity
- Lyrics** - Mild references to profanity, sexuality, violence, alcohol or drug use in music
- Mature Humor** - Depictions or dialogue involving "adult" humor, including sexual references
- Nudity** - Graphic or prolonged depictions of nudity
- Partial Nudity** - Brief and/or mild depictions of nudity

ESRB Content Descriptors

(Continued)



- Real Gambling** - Player can gamble, including betting or wagering real cash or currency
- Sexual Content** - Non-explicit depictions of sexual behavior, possibly including partial nudity
- Sexual Themes** - References to sex or sexuality
- Sexual Violence** - Depictions of rape or other violent sexual acts
- Simulated Gambling** - Player can gamble without betting or wagering real cash or currency
- Strong Language** - Explicit and/or frequent use of profanity
- Strong Lyrics** - Explicit and/or frequent references to profanity, sex, violence, alcohol or drug use in music
- Strong Sexual Content** - Explicit and/or frequent depictions of sexual behavior, possibly including nudity
- Suggestive Themes** - Mild provocative references or materials
- Tobacco Reference** - Reference to and/or images of tobacco products
- Use of Drugs** - The consumption or use of illegal drugs
- Use of Alcohol** - The consumption of alcoholic beverages
- Use of Tobacco** - The consumption of tobacco products
- Violence** - Scenes involving aggressive conflict. May contain bloodless dismemberment
- Violent References** - References to violent acts

The State Did Not Show That the Act Actually Furthers the Articulated Interest



The state relied upon studies by Dr. Craig Anderson. Same conclusion had been reached by other courts, including *Blagojevich* and *Entertainment Software Ass'n v. Hatch* (D. Minn. 2006). No showing:

- that violent video games alone caused injury to children;
- that because of their interactive nature, violent video games are more harmful than violent television, movies, or other types of speech; and
- that violent video games had different effects on minors of different ages, so the act applies the same to all children and minors up to the age of 17.

Appeal to the Ninth Circuit Court of Appeals



The Ninth Circuit affirmed:

- The California Act violates free speech under the First Amendment, and
- The Act's labeling requirement is unconstitutional compelled speech.

Violation of First Amendment Right – Strict Scrutiny Test



Ninth Circuit also analyzed the California Act under the strict scrutiny standard, which it applied a bit differently than the District Court.

- Strict scrutiny requires a showing of a compelling state interest which is being met by the least restrictive means.

Compelling state interest: "preventing psychological or neurological harm to minors who play violent video games." [\[3\]](#)

[\[3\]](#) By the time of the appeal to the Ninth Circuit, the State has dropped the other articulated interest of "preventing violent, aggressive or antisocial behavior."

Violation of First Amendment Right – Strict Scrutiny Test (Continued)



No compelling state interest found because:

- The state could not adequately demonstrate that the Act would prevent psychological and neurological harm to minors.
- None of the studies demonstrated a causal connection between the playing of violent video games and psychological and neurological harm.
- Though some of the research showed a correlation in this regard, but no causal connection was found, as required to establish a compelling interest.

Violation of First Amendment Right – Strict Scrutiny Test (Continued)



The Court specifically declined to adopt the "rational basis" or "variable obscenity" standard of *Ginsberg v. New York*.

- *Ginsberg* decision pertained to prohibition on selling sexually explicit materials to minors.
- *Ginsberg* distinguished from the present situation because it dealt with a subcategory of pre-existing non-protected speech, i.e., sex-based expression. The subcategory being obscenity to minors.
- The present regulation would create a new category of unprotected speech, that based on depiction of violence.

Violation of First Amendment Right – Strict Scrutiny Test (Continued)



Ginsberg court substantively limited its holding to sex-based expression, wherein it stated: "we have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the state."

Least Restrictive Alternative



Although not required, the Ninth Circuit also held that even if the state could demonstrate a compelling interest in preventing psychological or neurological harm to minors, the Act would still fail because it did not establish that there are no less restrictive alternatives to meet its interests.

- The state improperly focused on what it considered to be the "most effective" means to meet its interest.
- State argued that the ESRB rating system was voluntary, and did not have the force of law.
- The state also did not demonstrate that parental implementation of control systems now available on video game consoles could not serve the government's purpose.

Labeling Provision Violates Commercial Speech



- Commercial speech is generally accorded less protection than other forms of expression.
- Regulations that compel commercial speech have been upheld where the required speech consisted of "purely factual and uncontroversial information." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). (Supreme Court upheld a state's requirement that an attorney include in his advertisements a disclosure that clients may be responsible for litigation costs.)
- Here, the labeling requirement failed under the "factual information" standard because the sale and rental prohibition of the Act was found unconstitutional, the "18" sticker does not convey factual information because it cannot characterize the video game as both "violent" and "not subject to first amendment protection."

Granting of Certiorari



The State of California appealed the Ninth Circuit's decision to the U.S. Supreme Court. For the first time the Court will consider the restriction on banning of certain video games.

- The following two questions were presented:
 1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?
 2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny under *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622, 666 (1994), is the state required to demonstrate a direct causal link between violent video games and physical or psychological harm to minors before the state can prohibit the sale of video games?
- Hearing is scheduled for November 2.

Arguments by the Parties Legal Test



- (a) California: *Ginsberg* rational basis standard should apply:

State has a vital interest in reinforcing parents' authority to direct upbringing of children and to protect their physical and psychological welfare as well as their ethical and moral development.

Arguments by the Parties

Legal Test *(Continued)*



EMA Counter-argument:

- The state has not shown that parents have any trouble monitoring the games that their children play.
- Although parents have the right to determine the material and view points to which their children should be exposed, it does not follow that the government may determine in the first instance what expression is worthy of protection.
- Every new form of media has met with concern regarding its effect on values of youth. Pulp novels, comic books, music, the Internet all have been subject to similar attempts at censorship, supported with supposed social science research.
- In each case, the Supreme Court has applied strict scrutiny review of regulations as presumptively unconstitutional.

Arguments by the Parties

Legal Test *(Continued)*



- (b) California: state should have the authority to limit children's access to violent video games:
- Juveniles have a lack of maturity and an under-developed sense of responsibility.
 - They are more vulnerable or susceptible to negative influences and peer pressure.
 - Parts of their brains involving behavior control continue to mature through late adolescence.

Arguments by the Parties

Legal Test *(Continued)*



EMA Counter-argument:

- State has not shown causal connection between playing video games and behavior real harm to minors. Research cited by State has been rejected by every court that has considered it, including the research of Dr. Craig Anderson.
- 67% of American households play video games. But in the last 15 years, juvenile violent crime has significantly declined.

Arguments by the Parties

Legal Test *(Continued)*



(c) California Argument:

- No rational basis exists for treating violent material any differently from sexual material with respect to the protection of minors.
- Applying *Ginsberg* to violent video games strikes a balance between the right of minors and the fundamental interests of parents and the state.
- States can restrict minors' access to patently offensive materials that appeal to deviant interests unless the material has some serious redeeming value for minors.

Arguments by the Parties

Legal Test *(Continued)*



EMA Counter-argument:

- Supreme Court has unambiguously held that obscenity is limited "to works which depict or describe sexual conduct." *Miller v. California*.
- Images of violence, unlike explicit descriptions of sex, have always played an important role in literature, including children's literature, Greek mythology, the Bible, Star Wars, Harry Potter.
- Depictions of violence have never been considered a category of unprotected expression.

Arguments by the Parties

Legal Test *(Continued)*



California:

- The Supreme Court has limited the rights of children before:
- At school, offensive speech has been regulated and books deemed vulgar have been removed.

EMA Counter-argument:

- Schools are a special setting and cannot be equated with restricting minors' rights away from school.

Arguments by the Parties

Legal Test *(Continued)*



California:

- Rights of minors have been restricted in numerous ways. Minors can't:
 - Vote
 - Marry without parental consent
 - Serve on juries
 - Buy cigarettes
 - Gamble at casinos

EMA Counter-argument:

- First Amendment right of minors is generally co-extensive with that of adults except under well-defined circumstances.

Arguments by the Parties

Direct Causal Link



California:

- The Supreme Court has never required a legislative body to prove a direct causal nexus between offensive material and physical or psychological harm to minors.
- It is not possible to provide proof of such causal link because the required studies would necessitate isolating subjects from all other forms of violence except video games.
- California has drawn reasonable inferences of harm caused to minors from playing violent video games based on studies and social science considered by the legislature. Studies included:
 - Observing and surveying minors regarding violent material they consumed.

Arguments by the Parties

Direct Causal Link *(Continued)*



- Observing and surveying minors' interactions with other children and teachers, as well as their school performance.
- Obtaining correlations from such observations and surveys.
- Forming professional opinions regarding the impact that a consumption of violent materials has on minors.
- Drawing conclusions regarding the impact that consumption of violent materials can have on the physical and psychological well-being of minors.
- Studies considered by the California Legislature conclusively established a connection between playing violent video games and aggressive behavior by minors.

Arguments by the Parties

Direct Causal Link *(Continued)*



EMA Counter-argument:

- The 9th Circuit correctly held that strict scrutiny test applies, including that which actually serves a compelling state interest.
- California has not shown that:
 - Video games are harmful to children.
 - The effects of video games on children are any different than other types of media--TV, movies, books.
- Violent video games are only a small fraction of media violence to which children are now exposed.

Arguments by the Parties Least Restrictive Means of Serving the States' Compelling Interest



California:

- Relies on 2004 FTC report to Congress that 69% of children from 13-16 could purchase M-rated video games from retailers.
- ESRB program is voluntary and not all game publishers seek a game rating.
- Children can find instructions on the Internet to bypass parental control functions of game consoles.

Arguments by the Parties Least Restrictive Means of Serving the States' Compelling Interest *(Cont'd.)*



EMA Counter-argument:

- FTC's 2009 study shows that 50% of 17 year olds were turned away when trying to purchase an M-rated game.
- Parents are present 83% of the time when video games are purchased by minors.
- California failed to show that current ESRB ratings are ineffective or if an educational program to enforce ratings would be a better alternative.
- The State has not shown that children are actually attempting to bypass the parental control functions of video games even if instructions for doing so are on the Internet.

Vagueness of the California Act



A vagueness of the Act will have a chilling effect on video game developers and also on other media, including movies.

EMA asserts that the Act is vague with respect to the meaning of:

- Image of a human being
 - Some have characters that appear human but then transform into other beings (and vice-versa) – zombies, aliens, demi gods or cartoon characters like Super Mario.
 - Not clear if the image of human beings can be harmed in a way that is within the statute. Does killing a character that springs back to life fall within the statute?
- Appealing to deviant or morbid interest of minors.
 - How is this applied to video games?
 - Is it deviant or morbid to blow up an attacking zombie; to kill a rebel soldier using a sniper; break the arm of an opponent in a fighting game?

Amicus Briefs



- Four briefs were filed in support of the State of California, as listed in the accompanying materials.
- Twenty-seven amicus briefs were filed in support of the EMA and ESA, as listed in the accompanying materials.