

**GAMING THE SYSTEM:  
AN EXAMINATION OF THE  
CONSTITUTIONALITY OF VIOLENT VIDEO  
GAME LEGISLATION**

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## INTRODUCTION

With over ten billion dollars in U.S. sales in 2009<sup>1</sup> alone, the video game industry is one of the largest entertainment industries in the world, rivaling both the film and music industries in sales.<sup>2</sup> Although the average video game player is thirty-five years old<sup>3</sup> and more than 25% of video game players are over age fifty,<sup>4</sup> 97% of adolescents play video games regularly.<sup>5</sup> Furthermore, a recent study by the National Institute on Media and the Family found that 87% of pre-teen and teenage boys have played a Mature-rated video game.<sup>6</sup>

Given the overall popularity of video games, especially among adolescents, it is not surprising that there has been a legislative push in recent years to prevent the sale of violent video games to minors. In the past eight years, however, U.S. courts have struck down twelve attempts to impose civil or criminal penalties on retailers and/or the video game industry for the sale of violent video games to minors, most commonly on First Amendment grounds.<sup>7</sup>

This Note argues that legislative attempts to implement civil – and in some cases, criminal – penalties for the sale of violent video games to minors are unconstitutional on First Amendment grounds, and that the video game industry has done an admirable, competent, and effective job of self-regulating which video games are appropriate for minors. Part I examines the current state of self-regulation of violent video game

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<sup>1</sup> *Industry Facts*, THE ENTM'T SOFTWARE ASS'N, <http://www.theesa.com/facts/index.asp> (last visited Nov. 24, 2010).

<sup>2</sup> Ferry, *Global Video Game Sales Surpass Movie Industry in 2008!*, VIDEO GAME BLOGGER (Apr. 9, 2008), <http://www.videogamesblogger.com/2008/04/09/global-video-game-sales-surpass-movie-industry-in-2008.htm#>.

<sup>3</sup> Brian A. Primack, *Video Games: Play or "Playlike Activity"?*, 37 AM. J. PREVENTATIVE MED. 370, 379 (2009).

<sup>4</sup> *Games & Violence*, THE ENTM'T SOFTWARE ASS'N, <http://www.theesa.com/facts/violence.asp> (last visited Nov. 24, 2010).

<sup>5</sup> Jason Mick, *Study Shows 97 Percent of Kids Play Video Games*, DAILY TECH (Sept. 17, 2008), <http://www.dailytech.com/Study+Shows+97+Percent+of+Kids+Play+Video+Games/article12985.htm>.

<sup>6</sup> Press Release, Office of the Governor of Ill., Gov. Blagojevich Proposes Bill to Make Ill. First State to Prohibit Sale or Distribution of Violent and Sexually Explicit Video Games to Minors (Dec. 16, 2004), *available at* <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3586>.

<sup>7</sup> *See generally Essential Facts About Video Games and Court Rulings*, THE ENTM'T SOFTWARE ASS'N, 1 (Mar. 2009), *available at* <http://www.theesa.com/facts/pdfs/EFCourtsandRulingsMarch09.pdf>.

sales in the electronic entertainment industry. Specifically, Part I explores the Entertainment Software Ratings Board and the ratings system now in place for video games, as well as how the industry treats the sale of violent video games to minors. Part II offers a look at the major American controversies surrounding violence in video games. Part III examines a sampling of other nations' violent video game laws and regulations, including the two countries perhaps best known for their strict violent video game legislation,<sup>8</sup> Australia and Germany. Part IV offers a representative sampling of state and federal court rulings relevant to various legislative attempts to criminalize or impose civil penalties on the sale of violent video games.

Part V focuses on California State Senator Leland Yee's and Governor Arnold Schwarzenegger's thus-far-unsuccessful attempts at violent video game legislation in California,<sup>9</sup> and Governor Schwarzenegger's petition for certiorari to the Supreme Court on the matter in *Video Software Dealers Ass'n v. Schwarzenegger*.<sup>10</sup> Part VI argues that the video game industry, with the help of the Entertainment Software Administration (hereinafter "ESA"),<sup>11</sup> has done an admirable job of self-regulating both the video game ratings system and the sale of violent video games to minors. This Note further advocates that the Supreme Court must hear *Video Software Dealers Ass'n v. Schwarzenegger* because the First Amendment issues raised in that case are matters of first impression for the Court that need to be settled in light of the sheer number of failed legislative attempts and court battles surrounding this issue. This Note concludes that the Supreme Court should ultimately affirm the Ninth Circuit's ruling and declare that California Civil Code Section 1746, which attempts to legislate violent video game sales to minors, is unconstitutional.

### ***I. VIDEO GAME INDUSTRY SELF-REGULATION AND GAME RATINGS***

The ESA describes itself as "the U.S. association exclusively dedicated to serving the business and public affairs needs of companies

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<sup>8</sup> Some might say censorship.

<sup>9</sup> See CAL. CIV. CODE § 1746 (West 2009).

<sup>10</sup> *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 2398 (2010).

<sup>11</sup> THE ENTM'T SOFTWARE ASS'N, <http://www.theesa.com> (last visited Nov. 24, 2010).

that publish computer and video games for video game consoles, personal computers, and the Internet.”<sup>12</sup> The ESA’s dues-paying members, which include industry heavyweights such as Electronic Arts, Microsoft, Sony, Disney Interactive Studios, MTV Games, Nintendo, and Take-Two Interactive, fund the association.<sup>13</sup> The ESA represents its members’ interests on issues ranging from software piracy to intellectual property issues and government relations.<sup>14</sup>

In 1994, the ESA formed the Entertainment Software Ratings Board (hereinafter “ESRB”).<sup>15</sup> The ESRB is a non-profit organization that promulgates content ratings for video games and helps enforce industry-adopted advertising guidelines.<sup>16</sup> In 2009, the ESRB assigned 1791 ratings to computer and console software, and video games.<sup>17</sup> Although there is no legal requirement to do so, virtually all video games are rated by the ESRB.<sup>18</sup> Most major retailers, including Walmart and GameStop, will not sell any video games that the ESRB has not rated.<sup>19</sup>

ESRB ratings are comprised of both “rating symbols” and “content descriptors.”<sup>20</sup> Video game manufacturers place ESRB rating symbols on both the front and back of their products.<sup>21</sup> Content descriptors are printed next to the rating symbol on the back of the video game box.<sup>22</sup> Rating symbols are comprised of a black-and-white box with the words “Content Rated by the ESRB” underneath, as well as both a letter code to denote the game’s rating, and language describing what that code means.<sup>23</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *ESA Members*, THE ENTERTAINMENT SOFTWARE ASSOCIATION, <http://www.theesa.com/about/members.asp> (last visited Nov. 24, 2010).

<sup>14</sup> THE ENTERTAINMENT SOFTWARE ASSOCIATION, *supra* note 11.

<sup>15</sup> *Related Organizations*, THE ENTERTAINMENT SOFTWARE ASSOCIATION, <http://www.theesa.com/about/related.asp> (last visited Nov. 24, 2010).

<sup>16</sup> *Frequently Asked Questions*, ENTERTAINMENT SOFTWARE RATING BOARD, <http://www.esrb.org/ratings/faq.jsp#2> (last visited Nov. 24, 2010).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *ESRB Retail Council*, ENTERTAINMENT SOFTWARE RATING BOARD, [http://www.esrb.org/retailers/retail\\_council.jsp#members](http://www.esrb.org/retailers/retail_council.jsp#members) (last visited Nov. 24, 2010); *Id.*

<sup>20</sup> *Game Ratings & Descriptor Guide*, ENTERTAINMENT SOFTWARE RATING BOARD, [http://www.esrb.org/ratings/ratings\\_guide.jsp](http://www.esrb.org/ratings/ratings_guide.jsp) (last visited Nov. 24, 2010).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

The content descriptor on the back contains detailed information on why the ESRB gave the video game a particular rating.<sup>24</sup> Typical content descriptors for an M-rated video game might include: “Blood and Gore,” “Intense Violence,” “Mature Humor” or “Strong Language.”<sup>25</sup> The URL for the ESRB’s website is printed below the content descriptors and the rating symbol on the back of the video game box.<sup>26</sup> On the website, consumers can find definitions of the various content descriptors.<sup>27</sup> For example, “Intense Violence” is defined as “[g]raphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons and depictions of human injury and death.”<sup>28</sup>

In addition to rating video games for content, the ESRB promulgates advertising guidelines for ESRB-rated video games through its Advertising Review Council (hereinafter “ARC”).<sup>29</sup> All products displaying an ESRB rating are contractually mandated to follow these guidelines.<sup>30</sup> Failure to comply with the ARC guidelines can result in fines or “corrective actions.”<sup>31</sup>

ARC places several requirements on advertisers. First, “[a]n advertisement should accurately reflect the nature and content of the product it represents and the rating issued (i.e., an advertisement should not mislead the consumer as to the product’s true character).”<sup>32</sup> Second, “[a]n advertisement should not glamorize or exploit the ESRB rating of a product or a ruling or determination made by ARC, nor misrepresent the scope of ARC’s determination.”<sup>33</sup> Third, “[a]ll advertisements should be created with a sense of responsibility toward the public.”<sup>34</sup> Fourth, “[n]o advertisement should contain any content that is likely to

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See Game Ratings & Descriptor Guide, supra* note 20.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Principles and Guidelines for Responsible Advertising Practices*, ENTMT SOFTWARE RATING BD., [http://www.esrb.org/ratings/principles\\_guidelines.jsp](http://www.esrb.org/ratings/principles_guidelines.jsp) (last visited Nov. 24, 2010).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Principles and Guidelines for Responsible Advertising Practices, supra* note 29.

cause serious or widespread offense to the average consumer.”<sup>35</sup> Finally, “[c]ompanies must not specifically target advertising for entertainment software products rated ‘Teen,’ ‘Mature,’ or ‘Adults Only’ to consumers for whom the product is not rated as appropriate.”<sup>36</sup>

In its 2008 Year in Review Report Card, the National Institute on Media and the Family rated American video game retailers a B+ (on a scale of F to A+) for adherence to the industry custom of not selling “M” and “AO” video games to minors.<sup>37</sup> According to a 2008 Federal Trade Commission (hereinafter “FTC”) study, video game retailers checked photo ID before selling “M” and “AO” video games 80% of the time, up from only 42% in 2006.<sup>38</sup> The National Institute on Media and the Family gave the ESRB itself extremely high marks, with A’s for both the ESRB ratings themselves and for the ESRB’s continued attempts to educate the public about video game ratings and what they mean through ratings summaries.<sup>39</sup>

In comparison to the industry’s high marks,<sup>40</sup> parents did not fare as well in the National Institute on Media and the Family Video Game Report Card, with a grade of “incomplete.”<sup>41</sup> The Report Card noted: “[a]ll segments of the [video game] industry have made significant improvements in recent years. Parents now have more information and tools than ever before. False Parents need to pay more attention to the amount of time and the types of games their kids play.”<sup>42</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Mike Fahey, *NIMF’s 2008 Report Card Praises Industry, Scolds Parents*, KOTAKU (Nov. 25, 2008), <http://kotaku.com/5098717/nimfs-2008-report-card-praises-industry-scolds-parents>.

<sup>38</sup> Press Release, Fed. Trade Comm’n, Undercover Shoppers Find It Increasingly Difficult for Children to Buy M-Rated Games (May 8, 2008), *available at* <http://www.ftc.gov/opa/2008/05/secretshop.shtm>.

<sup>39</sup> Fahey, *supra* note 37.

<sup>40</sup> Video game console manufacturers also received an “A” for the year, thanks to the inclusion of parental controls and timing devices in their products. *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Matt Peckham, *Games Industry Scores High on Video Game Report Card*, ABC NEWS (Nov. 26, 2008), <http://abcnews.go.com/Technology/PCWorld/story?id=6338072>.

## II. A BRIEF HISTORY OF AMERICAN CONTROVERSIES SURROUNDING VIOLENT VIDEO GAMES

In 1997, Evangelical Christian and conservative legal activist,<sup>43</sup> Jack Thompson,<sup>44</sup> sued Nintendo of America, Sega of America, Sony Corporation and Atari Corporation, as well as two internet pornography websites and the makers of the Hollywood Film *The Basketball Diaries*, claiming that depictions of violence in the media led fourteen-year-old Michael Carneal to open fire on several students at Heath High School, killing three and wounding five.<sup>45</sup> Thompson lost the suit,<sup>46</sup> but the suggestion that violent media, and particularly violent video games, led to real-world violence generated media attention.<sup>47</sup>

In 2001, in the wake of the Columbine High School shootings, the family of one of the murdered teachers sued several video game manufactures, claiming that the hyper-violent video game *Doom* by id Software had inspired the massacre.<sup>48</sup> Before the killings, one of the Columbine shooters wrote in a journal, "It'll be like the LA riots, the Oklahoma bombing, WWII, Vietnam, Duke<sup>49</sup> and Doom all mixed together . . . I want to leave a lasting impression on the world."<sup>50</sup> The court dismissed the lawsuit, noting that a ruling in favor of the plaintiff would have a chilling effect on free speech.<sup>51</sup>

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<sup>43</sup> Laura Sydell, 'Left Behind' Video Game Draws Fire, NPR (Dec. 24, 2006), <http://www.npr.org/templates/story/story.php?storyId=6669946>.

<sup>44</sup> Mr. Thompson was a practicing attorney until he was disbarred in 2008. Fla. Bar v. Thompson, 979 So. 2d 917, 921 (Fla. 2008).

<sup>45</sup> James v. Meow Media, Inc., 300 F.3d 683, 687 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003).

<sup>46</sup> *Id.*

<sup>47</sup> *C.f.* William Glaberson, *When Grief Wanted a Hero, Truth Didn't Get in the Way*, N.Y. TIMES, July 25, 2000, at A1 (describing media attention to school shootings, including the Carneal shooting, which Mr. Thompson blamed on violent video games).

<sup>48</sup> Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1268 (D. Colo. 2002) (plaintiff sued id Software, Acclaim Entertainment, Inc., Activision, Inc., Capcom Entertainment, Inc., Eidos Interactive, Inc., GT Interactive Software Corp., Interplay Entertainment Corp., Nintendo of America Inc., Sony Computer Entertainment America Inc., Square Soft, Inc., Midway Home Entertainment, Apogee Software, Atari Corporation, Meow Media, and Sega of America).

<sup>49</sup> "Duke" presumably refers to "Duke Nukem," another video game. The Associated Press, *Columbine Lawsuit Against Makers of Video Games, Movies Thrown Out*, FREEDOM FORUM (Mar. 5, 2002), <http://www.freedomforum.org/templates/document.asp?documentID=15820>.

<sup>50</sup> *Id.*

<sup>51</sup> Sanders, 188 F. Supp. 2d at 1281.

Thompson was back in the news in 2005, after he filed suit on behalf of the families of three police officers who were murdered by eighteen-year-old Devin Moore.<sup>52</sup> Thompson claimed that Moore acted out a scenario from the video game *Grand Theft Auto: Vice City* when he shot and killed the officers.<sup>53</sup> Allegedly, Moore told police: “Life is like a video game. Everybody’s got to die sometime.”<sup>54</sup> Moore was convicted of three counts of murder.<sup>55</sup> A civil suit followed.<sup>56</sup>

Perhaps because of the increased media attention surrounding potential connections between video game violence and real-life violence, Senators Hillary Clinton, Joseph Lieberman, Tim Johnson, and Evan Bayh introduced the Family Entertainment Protection Act bill to Congress in November 2005.<sup>57</sup> The bill sought to impose a fine of \$1000 or 100 hours of community service for first-time offenders who sell “M” or “AO” rated games to minors.<sup>58</sup> Repeat offenders could be fined as much as \$5000, or face 500 hours of community service.<sup>59</sup> The bill also required the FTC to investigate the ESRB in order to determine whether it had properly rated video games.<sup>60</sup> The bill was referred to the Senate Committee on Commerce, Science and Transportation.<sup>61</sup> However, no further action was taken on the bill, and it expired at the end of the 109th session of Congress.<sup>62</sup>

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<sup>52</sup> Curt Feldman, *Jack Thompson Huffs, Puffs, Provokes*, GAMESPOT (Nov. 21, 2005, 3:52 PM), <http://www.gamespot.com/news/6140202.html>.

<sup>53</sup> Ed Bradley, *60 Minutes: Can a Video Game Lead to Murder?*, CBSNEWS.COM, <http://www.cbsnews.com/stories/2005/03/04/60minutes/main678261.shtml> (last visited Nov. 24, 2010).

<sup>54</sup> *Id.*

<sup>55</sup> Tony Smith, *‘Grand Theft Auto’ Cop Killer Found Guilty*, THE REGISTER (Aug. 11, 2005, 12:50 GMT), [http://www.theregister.co.uk/2005/08/11/gta\\_not\\_guilty/](http://www.theregister.co.uk/2005/08/11/gta_not_guilty/).

<sup>56</sup> *Id.*

<sup>57</sup> S. 2126, 109th Cong. (2005).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> S. 2126: *Family Entertainment Protection Act: Committee Assignments*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s109-2126&tab=committees> (last visited Nov. 24, 2010).

<sup>62</sup> S. 2126: *Family Entertainment Protection Act: Overview*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s109-2126> (last visited Nov. 24, 2010).



### III. AN OVERVIEW OF HOW OTHER COUNTRIES HAVE LEGISLATED VIOLENT VIDEO GAMES

#### A. Australia

Australia has no industry equivalent to the ESRB. The Office of Film and Literature Classification, a division of the Australian government, handles ratings for all forms of entertainment.<sup>63</sup> Video game ratings range from “E” for everyone, to “MA 15+,” which restricts content to those fifteen and older.<sup>64</sup> Films in Australia share the same ratings as video games, except that films can feature two ratings that are more restrictive: “R 18+” and “X 18+,” both of which restrict content to those over eighteen years of age.<sup>65</sup> Because video game ratings stop at “MA 15+,” no video games that the Office of Film and Literature Classification finds inappropriate for minors over fifteen but under eighteen may be sold in Australia.<sup>66</sup> This result led to a number of high-profile video games being banned in Australia. Most recently, *Left 4 Dead 2* was given RC (refused classification) status by the Office of Film and Literature Classification in September 2009,<sup>67</sup> because “the game contains realistic, frenetic and unrelenting violence which is inflicted upon ‘the Infected’ who are living humans infected with a rabies-like virus that causes them to act violently.”<sup>68</sup> Australia’s Federal Attorney-General, Robert McClelland, recently announced that there would be a discussion of whether to create an 18+ rating for video games at Australia’s next attorneys-general meeting in April 2010.<sup>69</sup>

<sup>63</sup> *What We Do*, CLASSIFICATION.GOV.AU, [http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia\\_Whatwedo\\_Whatwedo](http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia_Whatwedo_Whatwedo) (last visited Nov. 24, 2010).

<sup>64</sup> *Classification Markings on Film and Computer Games*, CLASSIFICATION.GOV.AU, [http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationMarkings\\_ClassificationMarkingsonFilmandComputerGames](http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationMarkings_ClassificationMarkingsonFilmandComputerGames) (last visited Nov. 24, 2010).

<sup>65</sup> *Id.*

<sup>66</sup> *What We Do*, *supra* note 63.

<sup>67</sup> *Classification Database – Left 4 Dead 2 (RC)*, CLASSIFICATION.GOV.AU, <http://www.classification.gov.au/www/cob/find.nsf/d853f429dd038ae1ca25759b0003557c/d2a2ca035e56eee5ca257671007af7aa?OpenDocument> (last visited Nov. 24, 2010).

<sup>68</sup> James Kozanecki, *Left 4 Dead 2 Banned in Australia*, GAMESPOT (Sept. 17, 2009, 12:37 PM), <http://au.gamespot.com/news/6228600.html?tag=latestheadlines;title;1>.

<sup>69</sup> *Game Ratings Debate Slated for April*, ADELAIDE NOW (March 3, 2010, 5:07 PM), <http://www.adelaidenow.com.au/news/breaking-news/game-ratings-debate-slated-for-april/story-e6frea73-1225836664852>.

*B. Germany*

Section 131 of the Strafgesetzbuch (penal code) of Germany prohibits any depiction of violence in the media (including video games) that “describe cruel or otherwise inhuman acts of violence against human beings in a manner which expresses a glorification or rendering harmless of such acts of violence or which represents the cruel or inhuman aspects of the event in a manner which injures human dignity.”<sup>70</sup> A number of high-profile video games have been refused ratings classification in Germany, including *Dead Rising*, *Crackdown*, and *Gears of War*.<sup>71</sup> Each game received an “M” rating in the United States for its depiction of violence.<sup>72</sup>

On June 5, 2009, the Ministers of the Interior of the sixteen German federal states held a meeting in which they agreed to seek a ban on all video games “where the main part is to realistically play the killing of people or other cruel or unhuman acts of violence against humans or manlike characters.”<sup>73</sup> According to the Minister of the Interior of Lower Saxony, “[v]iolent games lower the inhibition level for real violence and spree killers have again and again played such before they did the crime.”<sup>74</sup> This undertaking by the German Ministers may be a reaction to the March 2009, shooting deaths of fifteen individuals, mostly students, in Winnenden, Germany.<sup>75</sup> The killer, seventeen-year-old Tim Kretschmer, reportedly spent the night before the murders playing violent video games.<sup>76</sup>

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<sup>70</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, § 131(1) (Ger.).

<sup>71</sup> Justin Towell, *Banned in Europe*, GAMES RADAR, <http://www.gamesradar.com/f/banned-in-europe/a-20080512101412281097/p-3> (last visited Nov. 24, 2010).

<sup>72</sup> ENTERTAINMENT SOFTWARE RATING BD., <http://www.esrb.org/index-js.jsp> (last visited Nov. 24, 2010).

<sup>73</sup> *All Violent Video Games to be Banned in Germany*, GAMEZINE.CO.UK (June 5, 2009, 8:06 PM), <http://www.gamezine.co.uk/news-story/2009/6/5/all-violent-video-games-to-be-banned-in-germa>.

<sup>74</sup> *Id.*

<sup>75</sup> *German Shooting Linked to Far Cry 2. Really?*, GAMEZINE.CO.UK (Mar. 16, 2009, 1:21 PM), <http://www.gamezine.co.uk/news-story/2009/03/16/comment-german-shooting-linked-to-far-cry-2-r>.

<sup>76</sup> *Id.*

#### **IV. A SAMPLING OF COURT CASES RELEVANT TO THE LEGISLATION OF VIOLENT VIDEO GAMES IN THE UNITED STATES**

The United States is the largest market for video games worldwide.<sup>77</sup> Given the immense popularity of video games in this country, it is unsurprising that there has been a marked increase in attempts to legislate video game content in the United States.<sup>78</sup> Where attempted legislation was aimed at criminalizing or otherwise punishing the sale of violent video games to minors, those attempts have failed.<sup>79</sup> In the past eight years, U.S. courts have struck down twelve attempts to impose civil or criminal penalties on retailers and/or the video game industry for the sale of violent video games to minors, most commonly on First Amendment grounds.<sup>80</sup>

##### *A. Washington*

Legislators in Washington attempted to regulate the sale of violent video games to minors in 2004 by enacting Section 9.91.180.<sup>81</sup> This legislation provided civil penalties for selling or renting a violent video game to a minor.<sup>82</sup> A violent video game was defined as “a video or computer game that contains realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer.”<sup>83</sup> In *Video Software Dealers Ass’n v. Maleng*,<sup>84</sup> the Court held the statute unconstitutional on First Amendment grounds.<sup>85</sup> Washington argued that it had a compelling interest in preventing violence against police

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<sup>77</sup> *Video Game Industry Seeks Catalyst for Christmas Season*, FFOG.NET (Nov. 2, 2010), <http://ffog.net/video-game-industry-seeks-catalyst-for-christmas-season-20105145.html>.

<sup>78</sup> *Essential Facts About Video Games and Court Rulings*, *supra* note 7, at 1.

<sup>79</sup> *Legal Issues*, THE ENTMT’T SOFTWARE ASS’N, <http://www.theesa.com/policy/legalissues.asp> (last visited Nov. 24, 2010).

<sup>80</sup> *Essential Facts About Video Games and Court Rulings*, *supra* note 7, at 1.

<sup>81</sup> WASH. REV. CODE § 9.91.180 (2004).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

<sup>85</sup> *Id.* at 1190.

officers and that the statute was narrowly tailored to that effect.<sup>86</sup> The Court found, however, that the State failed to establish a causal link between violent video games and violence against police.<sup>87</sup> The Court reasoned that “[violent] depictions 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.”<sup>88</sup>

### *B. Illinois*

In 2006, the Illinois Legislature enacted Illinois Public Act 94-0315,<sup>89</sup> which imposed civil penalties on those who sell violent video games to minors, and required stickers labeled “18” to be placed on all violent video games.<sup>90</sup> Under the Act, violent video games are defined as having “depictions of or simulations of human-on-human violence in which the player kills or otherwise causes serious physical harm to another human. ‘Serious physical harm’ includes depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape.”<sup>91</sup>

In *Entertainment Software Ass’n v. Blagojevich*,<sup>92</sup> the Seventh Circuit found that the Act’s definitions might be unconstitutionally vague, and even if they were not, the Act was unconstitutional in light of its First Amendment implications because it was not narrowly tailored.<sup>93</sup> The Court opined that rather than making it illegal to sell violent video games to minors, “the State could have simply passed legislation increasing awareness among parents of the voluntary ESRB ratings system.”<sup>94</sup>

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<sup>86</sup> *Id.* at 1186.

<sup>87</sup> *Id.* at 1184.

<sup>88</sup> *Id.* at 1185.

<sup>89</sup> 2005 Ill. Laws 94-0315 (enacted 720 ILL. COMP. STAT. 5/12A-25 (2005)).

<sup>90</sup> *Id.*

<sup>91</sup> 720 ILL. COMP. STAT. 5/12A-10(e) (2002).

<sup>92</sup> *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006).

<sup>93</sup> *Id.* at 650.

<sup>94</sup> *Id.* at 650-651.

*C. Michigan*

In 2005, the Michigan Legislature passed a law that created both civil and criminal penalties for “knowingly disseminate[ing] to a minor an ultra-violent explicit video game that is harmful to minors.”<sup>95</sup> The legislature defined “ultra-violent explicit video game” as “a video game that continually and repetitively depicts extreme and loathsome violence.”<sup>96</sup>

In *Entertainment Software Ass’n v. Granholm*,<sup>97</sup> the district court found that video games are protected free speech under the First Amendment, and that Michigan failed to provide suitable evidence of a link between violent video games and violent behavior to pass strict scrutiny.<sup>98</sup> The Court also found the Act’s definitions of violence to be unconstitutionally vague because they could easily be read to illegalize content with artistic merit.<sup>99</sup>

*D. Louisiana*

In 2006, the Louisiana Legislature passed a law criminalizing the sale, lease, or rental of video games that appealed “to a minor’s morbid interest in violence.”<sup>100</sup> The legislation was challenged in *Entertainment Software Ass’n v. Foti*.<sup>101</sup> Applying strict scrutiny, the Court found the statute void for vagueness.<sup>102</sup> The Court reasoned that “[a] statute designed to protect minors from some form of ‘psychological harm,’ . . . amounts to nothing more than ‘impermissible thought control.’ The First Amendment forbids governmental restrictions on speech based on the provocative or persuasive effect of that speech on its audience.”<sup>103</sup>

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<sup>95</sup> 2005 Mich. Pub. Acts 108.

<sup>96</sup> *Id.* (“Extreme and loathsome violence” was defined as “real or simulated graphic depictions of physical injuries or physical violence against parties who realistically appear to be human beings, including actions causing death, inflicting cruelty, dismemberment, decapitation, maiming, disfigurement, or other mutilation of body parts, murder, criminal sexual conduct, or torture.”).

<sup>97</sup> *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006).

<sup>98</sup> *Id.* at 650-52.

<sup>99</sup> *Id.* at 656.

<sup>100</sup> LA. REV. STAT. ANN. § 14:91.14 (2006); *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 825 (M.D. La. 2006).

<sup>101</sup> *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006).

<sup>102</sup> *Id.* at 836.

<sup>103</sup> *Id.* at 831.

### V. A DEEPER LOOK AT CALIFORNIA'S ATTEMPTS TO LEGISLATE VIOLENT VIDEO GAMES

In 2005, then-California State Assemblyman Leland Yee entered the video game legislation debate when he criticized Rockstar North, the developer of the *Grand Theft Auto* series of video games, for inadvertently leaving sexually explicit code<sup>104</sup> in the video game *Grand Theft Auto: San Andreas*.<sup>105</sup> Yee also criticized the ESRB for rating *Grand Theft Auto: San Andreas* “M” and not “AO.”<sup>106</sup> Later that same year, Yee successfully introduced two bills to the California General Assembly, collectively referred to as the Ultra Violent Video Game Bills, which sought to ban the sale of violent video games to minors.<sup>107</sup> The bills were signed into law in October 2005, as California Civil Code Section 1746.<sup>108</sup>

Section 1746 makes it illegal to sell or rent violent video games to minors.<sup>109</sup> The law defines violence as “killing, maiming, dismembering, or sexually assaulting an image of a human being,” if such violence “appeals to deviant or morbid interests of minors,” is “patently offensive to prevailing standards in the community as to what is suitable for minors,” “causes the [video] game, as a whole, to lack serious literary, artistic, political, or scientific value for minors,” or “[e]nables 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.”<sup>110</sup> Similar to the Illinois act described earlier, Section 1746 also requires stickers reading “18” to be placed on the front of all violent video games.<sup>111</sup>

The Video Software Dealers Association and the ESA filed suit,

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<sup>104</sup> The code was accidentally left imbedded on the disc for the game, but inaccessible without hacking into the copy-protected disc with a third-party computer program. Rockstar N., NO MORE HOT COFFEE, <http://www.nomorehotcoffee.com> (last visited Nov. 24, 2010).

<sup>105</sup> Brendan Sinclair, *Spot On: Leland Yee Talks Hot Coffee*, GAMESPOT (July 15, 2005, 12:15 PM), <http://www.gamespot.com/news/6129209.html>.

<sup>106</sup> *Id.*

<sup>107</sup> CAL. CIV. CODE § 1746 (West 2005).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* § 1746.1 (a).

<sup>110</sup> *Id.* § 1746 (d)(1).

<sup>111</sup> *Id.* § 1746.2.

seeking an injunction to stop Section 1746 from taking effect.<sup>112</sup> The Court granted an injunction.<sup>113</sup> In its ruling, the Court expressed skepticism that the law could pass muster under strict scrutiny, based on limitations the First Amendment places on controlling speech and also because of the difficulty of showing a sufficient causal link between violent video games and real-life violence.<sup>114</sup>

On appeal, the Ninth Circuit affirmed the lower court's decision.<sup>115</sup> The Court began by noting that "[e]xisting case law indicates that minors are entitled to a significant measure of First Amendment protections."<sup>116</sup> The Court also noted that "content-based regulations are presumptively invalid and subject to strict scrutiny, and that if less restrictive means for achieving a state's compelling interest are available, they must be used."<sup>117</sup>

The California Attorney General argued that it had two compelling reasons for restricting the sale of violent video games: "(1) 'preventing violent, aggressive, and antisocial behavior;' and (2) 'preventing psychological or neurological harm to minors who play violent video games.'"<sup>118</sup> Although the State attempted to present scientific evidence to support its position, the Court remained unconvinced.<sup>119</sup> The Court found that the State's evidence, consisting primarily of studies conducted by its expert witness, Dr. Craig Anderson,<sup>120</sup> tended to show a correlation between violent behavior and the playing of violent video

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<sup>112</sup> See *Video Software Dealers Ass'n v. Schwarzenegger (Video Software Dealers I)*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005), *injunction granted, motion denied*, No. C-05-04188 RMW, 2007 U.S. Dist. LEXIS 57472 (N.D. Cal., Aug. 6, 2007).

<sup>113</sup> *Id.* at 1048.

<sup>114</sup> *Id.* at 1046. "[T]he plaintiffs have shown at least that serious questions are raised concerning the States' ability to restrict minors' First Amendment rights in connection with exposure to violent video games, including the question of whether there is a causal connection between access to such games and psychological or other harm to children." *Id.* at 1048.

<sup>115</sup> *Video Software Dealers Ass'n v. Schwarzenegger (Video Software Dealers II)*, 556 F.3d 950 (9th Cir. 2009), *motion denied*, 130 S. Ct. 2398 (2010).

<sup>116</sup> *Id.* at 957.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 961.

<sup>119</sup> *Id.* at 964.

<sup>120</sup> Dr. Anderson is an Iowa State University Professor of Psychology. *Craig A. Anderson*, IOWA STATE UNIV. DEP'T OF PSYCHOLOGY, <http://www.psychology.iastate.edu/~caa/> (last visited Nov. 24, 2010).

games, but failed to show causation.<sup>121</sup> The Court also found “flaws” in Dr. Anderson’s methodology.<sup>122</sup> In May 2009, California petitioned the United States Supreme Court for certiorari in an attempt to save Section 1746.<sup>123</sup> The Court subsequently granted certiorari and recently heard oral arguments.<sup>124</sup>

**VI. THE SUPREME COURT SHOULD AFFIRM THE NINTH CIRCUIT’S RULING IN VIDEO SOFTWARE DEALERS ASS’N V. SCHWARZENEGGER.**

The Supreme Court should affirm the Ninth Circuit’s ruling. The Supreme Court has never explicitly ruled that video games are protected speech, so the issue of whether video games constitute protected free speech would be a matter of first impression for the Court.

*A. The Supreme Court Should Settle Lingering First Amendment Questions.*

In the absence of clear and controlling guidance from the Supreme Court, the issue of whether the sale of violent video games to minors can be legislated will continue to be debated at the state level, at great expense to both taxpayers and the video game industry. For example, the Court in *Video Software Dealers Ass’n v. Schwarzenegger* ordered the State of California to reimburse the ESA \$282,794 in attorney’s fees incurred as a result of that case.<sup>125</sup> The *Granholm*<sup>126</sup> case forced Michigan to pay the ESA \$182,000 in attorney’s fees.<sup>127</sup> *Blagojevich*<sup>128</sup> and *Maleng*<sup>129</sup> required Illinois and Washington to pay the ESA \$510,000 and

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<sup>121</sup> *Video Software Dealers Ass’n v. Schwarzenegger (Video Software Dealers II)*, 556 F.3d 950, 964 (9th Cir. 2009), *motion denied*, 130 S. Ct. 2398 (2010)..

<sup>122</sup> *Id.* at 963 (“For example, the study states that “[t]here are no published longitudinal surveys specifically focusing on effects of violent video games on aggression.””).

<sup>123</sup> Adam Thierer, *Calif. Appeals Video Game Decision to Supremes; What if They Take It?*, THE TECHNOLOGY LIBERATION FRONT (May 21, 2009), <http://techliberation.com/2009/05/21/calif-appeals-video-game-decision-to-supremes-what-if-they-take-it>.

<sup>124</sup> S. Gregory Boyd, *Video Game Regulation and the Supreme Court: Schwarzenegger v. Entertainment Merchants Association*, GAMASUTRA (Nov. 1, 2010), [http://www.gamasutra.com/view/feature/6191/video\\_game\\_regulation\\_and\\_the\\_.php](http://www.gamasutra.com/view/feature/6191/video_game_regulation_and_the_.php).

<sup>125</sup> *Essential Facts About Video Games and Court Rulings*, *supra* note 7, at 2.

<sup>126</sup> *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006).

<sup>127</sup> *Essential Facts About Video Games and Court Rulings*, *supra* note 7, at 6.

<sup>128</sup> *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006).

<sup>129</sup> *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).



\$344,000, respectively, in attorney's fees.<sup>130</sup> In the past decade, courts have ordered nine states to pay a total of over \$2,065,000 in attorneys' fees alone to various video game industry organizations in the wake of failed anti-violence legislation.<sup>131</sup> When one factors in state attorneys' salaries and other litigation costs, the cost to taxpayers grows even greater.

By finally settling the issue of the constitutionality of violent video game legislation, such as that presented in *Video Software Dealers Ass'n v. Schwarzenegger*,<sup>132</sup> the Supreme Court can save the taxpayers from continuing to pay for litigation of the issue on a state-by-state basis. A final decision on the matter would also allow state-employed attorneys to spend limited time and resources on other cases.<sup>133</sup> In addition to saving taxpayers and states money, a final determination on this issue by the country's highest court would settle the highly contested and contentious legal question of whether the fast-proliferating world of electronic entertainment enjoys the same First Amendment protections as other, more established forms of entertainment, such as film<sup>134</sup> and music.<sup>135</sup>

Despite other states' lack of success in passing violent video game legislation, six states, New York, Massachusetts, Pennsylvania, Utah, Maryland, and Georgia, currently have violent video game bills in some stage of the legislative process.<sup>136</sup> As one proponent of anti-violent video game legislation says, "[t]he increasing number of state and possible federal laws proscribing a minor's access to violent video games makes this . . . an issue to be eventually taken up by the Court."<sup>137</sup>

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<sup>130</sup> *Essential Facts About Video Games and Court Rulings*, *supra* note 7, at 10.

<sup>131</sup> *Essential Facts About Video Games and Court Rulings*, *supra* note 7, at 1-2, 4-12 (the states are: Oklahoma, California, Louisiana, Minnesota, Michigan, Illinois, Washington, Missouri, Indiana).

<sup>132</sup> *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009).

<sup>133</sup> With a projected budget gap of over \$40 billion by June 2010, California can use all of the financial help it can get. Jane Wells, *California Crisis Deepens - Are Other States To Follow?*, CNBC (Feb. 2, 2009, 11:42 AM), <http://ori.cnb.com/id/28978169>.

<sup>134</sup> Paul McMasters, *The Magic of Movies vs. the Mind of the Censor*, FIRST AMENDMENT CTR. (Mar. 28, 2000), <http://www.firstamendmentcenter.org/commentary.aspx?id=2374>.

<sup>135</sup> Ken Paulson, *Arts & First Amendment Overview*, FIRST AMENDMENT CTR., <http://www.firstamendmentcenter.org/Speech/arts/overview.aspx> (last visited Dec. 1, 2010).

<sup>136</sup> *Gamepolitics Legislative Tracker*, GAMEPOLITICS.COM, <http://www.gamepolitics.com/legislation.htm> (last visited Nov. 24, 2010).

<sup>137</sup> Brief for the State of California as Amicus Curiae Supporting Respondent at 8,

*B. The Supreme Court Should Affirm the Ninth Circuit's Ruling in Video Software Dealers Ass'n v. Schwarzenegger*

In a brief of amicus curiae submitted to the Supreme Court<sup>138</sup> in support of California's position that California Civil Code Section 1746<sup>139</sup> is constitutional, State Senator Leland Yee presented California's position as to why the state should be able to regulate the sale of violent video games to minors. Senator Yee argued that "California has a compelling inter-est [sic] in protecting the physical and psychological care of minors."<sup>140</sup> This is an uncontroversial assertion, but Yee adds, "[w]hen juxtaposed against the backdrop of protecting the First Amendment, this Court has held that the Constitution does not confer the protection on communication aimed at children as it does for adults."<sup>141</sup> Yee is referring to the "variable obscenity" standard of scrutiny,<sup>142</sup> as opposed to the more usual standard of strict scrutiny, adopted by the Supreme Court in *Ginsberg v. New York*.<sup>143</sup> In *Ginsberg*, the Court held that a lesser "variable" standard of scrutiny could apply to a First Amendment analysis in a case involving sexually explicit, obscene material<sup>144</sup> allegedly aimed at children.<sup>145</sup>

However, Senator Yee's argument fails on two levels. First, other than broadly asserting that they are both harmful to minors,<sup>146</sup> Yee fails to explain why the Court should treat sexually "obscene" material and violent video games the same way. No U.S. court has ever held a video game obscene, whether for violence or sexual content.<sup>147</sup> Yee does not even attempt to establish that a video game can be obscenely violent, or that violent video games and sexually obscene material have a similar

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Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009), available at <http://sfcitizen.com/blog/2009/08/04/senator-leland-ye-is-taking-his-case-to-the-united-states-supreme-court/>.

<sup>138</sup> *Id.*

<sup>139</sup> CAL. CIV. CODE § 1746 (West 2005).

<sup>140</sup> Brief for the Respondent, *supra* note 137, at 3.

<sup>141</sup> *Id.*

<sup>142</sup> The variable obscenity standard is so-called because it would vary based on a case-by-case analysis of the obscene material in question, but it would generally provide for a less rigorous standard than the strict scrutiny usually applied in First Amendment cases. *Id.*

<sup>143</sup> *Ginsberg v. New York*, 390 U.S. 629 (1968).

<sup>144</sup> Specifically, two pornographic magazines. *Id.* at 631.

<sup>145</sup> *Id.* at 636.

<sup>146</sup> Brief for the Respondent, *supra* note 137, at 1.

<sup>147</sup> *Games & Violence*, *supra* note 4.

effect on minors' wellbeing, yet he asks the Court to treat the two in the same manner: to weaken minors' First Amendment rights by providing for a lower standard of scrutiny for violent video game legislation. Surely, if Senator Yee wishes to curb minors' First Amendment rights, it would be reasonable at least to attempt to define, characterize or quantify the harm he seeks to prevent. Yee makes no such attempt.<sup>148</sup>

Perhaps Senator Yee is unable to explain the harm violent video games cause to children because there is no reliable research or study that stands for the proposition that violent video games pose *any* harm to children. As noted above, part of the reason the Ninth Circuit struck down Section 1746 was because California failed to show that there was any correlation between adolescents playing violent video games and violent behavior,<sup>149</sup> and because of a flaw in the methodology that the State's chief expert used to show a correlation between violent games and violent behavior.<sup>150</sup>

Flawed methodology seems to be fairly common in studies purporting to show a causal link between video games and real-life adolescent aggression. A 2007 comprehensive survey of the major studies suggesting a causal link between violent entertainment and violent action found that, "[i]n nearly 80 percent of the studies investigated . . . the measures of aggression were paper-and-pencil reports – often simple check marks on a scale . . . . There are few studies that investigate whether the predicted [aggressive] behavior actually occurs (and those few studies indicate that it does not)."<sup>151</sup> As the ESA points out on its website, "[n]umerous authorities, including the U.S. Surgeon General, the Federal Trade Commission, the Federal Communications Commission and several U.S. District Courts have examined the scientific record and found that it does not establish any causal link between violent programming and violent behavior."<sup>152</sup>

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<sup>148</sup> Nor, it should be noted, do any of the other proponents of Section 1746, such as the conservative "pro-family" group Eagle Forum Education and Legal Defense Fund, which also wrote an amicus brief in support of the law. Brief for the State of California as Amici Curiae Supporting Respondent, *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), available at <http://www.eagleforum.org/topics/briefs/>.

<sup>149</sup> *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 964 (9th Cir. 2009).

<sup>150</sup> *Id.*

<sup>151</sup> THOMAS GRIMES, JAMES A. ANDERSON & LORI BERGEN, *MEDIA VIOLENCE AND AGGRESSION: SCIENCE AND IDEOLOGY* 70 (2007).

<sup>152</sup> *Games & Violence*, *supra* note 4.

In fact, many would argue video games can be a positive influence on children. Sixty-four percent of parents find video games to be a positive part of their children's lives.<sup>153</sup> A 2005 systemic review of scientific studies conducted by the Swedish National Institute of Public Health concluded that there is "[s]trong evidence that video and computer game playing has positive effects on spatial abilities and on reaction time. . . . Spatial ability is believed to be one of the most important parts of our intelligence."<sup>154</sup> Another 2005 study found that video games may potentially benefit young players, including "providing children with the opportunity to negotiate society's rules and roles, allowing children to experiment with aggression in a safe setting without real world consequences, facilitating children's development of self-regulation of arousal, and serving as an effective tool in clinical settings"<sup>155</sup>

Studies suggesting a link between video games and violent behavior in adolescents and those indicating that video games exert a positive influence should be taken with a grain of salt. This is because, according to one clinical researcher, "there are so many other variables which have not been controlled for in previous research" including social, mental, and situational factors.<sup>156</sup>

Senator Yee's argument also fails because, as he notes in his amicus brief, the *Ginsberg* "variable obscenity standard" that he would have the Court follow is explicitly for obscene material "aimed at children."<sup>157</sup> Yee makes no argument that unduly violent video games are marketed towards or in any other way "aimed at" children – perhaps because they are not. As previously discussed, video game retailers overwhelmingly self-adhere to a policy of refusing to sell "Mature"

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<sup>153</sup> *Game Player Data*, THE ENTM'T SOFTWARE ASS'N, <http://www.theesa.com/facts/gameplayer.asp> (last visited on Nov. 24, 2010).

<sup>154</sup> ANTON LAGER & SVEN BREMBERG, SWEDISH NAT'L INST. OF PUB. HEALTH, HEALTH EFFECTS OF VIDEO AND COMPUTER GAME PLAYING – A SYSTEMIC REVIEW 13 (Gary Watson trans., 2005).

<sup>155</sup> Dorothy E. Salonijs-Pasternak, *The Next Level of Research on Electronic Play: Potential Benefits and Contextual Influences for Children and Adolescents*, HUMAN TECHNOLOGY, 18 (Apr. 2005), <http://www.humantechnology.jyu.fi/articles/volume1/2005/salonijs-pasternak-gelfond.pdf>.

<sup>156</sup> *Games & Violence*, *supra* note 4 (quoting Dr. Guy Porter, University of Sydney, Australia).

<sup>157</sup> Brief for the Respondent, *supra* note 137, at 3.

(“M”) and “Adults Only” (“AO”) video games to minors.<sup>158</sup>

Senator Yee further argues that, unlike books and films, “violent video games . . . can contain up to 800 hours of footage with the most atrocious content often reserved for the highest levels and can be accessed only by advanced players after hours upon hours of progressive mastery.”<sup>159</sup> For this reason, Yee contends, parents are less equipped to regulate their children’s video game experiences than they are books or films their children might experience.<sup>160</sup> Yee, however, cites no examples of 800-hour-long video games or of video games that become progressively more violent “upon hours of progressive mastery.”<sup>161</sup> Yee is incorrect in his estimation of video game length. Although the interactive nature of video games makes it impossible to state unequivocally that no game has ever reached 800 hours in length, video games on average contain between ten to twenty hours of content.<sup>162</sup> Yee provides absolutely no support for his claim that violent video games become progressively more violent as the player progresses. As one journalist noted, “[w]e have yet to encounter a game that doesn’t give up its tone or level of violence within an hour or two of play; the content is far from hidden.”<sup>163</sup>

Given the software industry’s success in self-regulating the sale of adult content to minors, one might well ask why the industry is so opposed to legislation like Section 1746. After all, if the industry is doing as good a job as it alleges, why fear laws that would penalize acts in which the industry itself claims not to engage? One answer is that even though the industry is doing the best it can, there is no way to guarantee a 100% success rate in keeping violent video games out of the hands of children. Both human error and children’s ingenuity will ensure that at least some violent games find their way into the hands of minors. Given this reality, the electronic entertainment industry may rightly balk at the prospect of suffering civil or criminal penalties for something that will always be, to one extent or another, beyond its

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<sup>158</sup> Fahey, *supra* note 37.

<sup>159</sup> Brief for the Respondent, *supra* note 137, at 5.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Ben Kuchera, *Sensationalist Legal Brief Aims to Revive CA Game law*, ARS TECHNICA (July 23, 2009, 11:20 AM), <http://arstechnica.com/gaming/news/2009/07/sensationalist-legal-brief-aims-to-revive-ca-game-law.ars>.

<sup>163</sup> *Id.*

control, especially when its efforts “outpace” every other entertainment industry with respect to keeping violent content away from minors.<sup>164</sup>

Those in the video game industry may also rightly be concerned about who is writing potential video game legislation. As noted above, Senator Yee’s inaccurate assertions about video games<sup>165</sup> demonstrate a fundamental lack of understanding about the product he is trying to regulate. Even though most video game players are in their mid-thirties,<sup>166</sup> many older Americans, including legislators, continue to think of video games as children’s toys.<sup>167</sup> This being so, it is understandable that the video game industry is wary of legislators who can barely check their own e-mail passing sweeping First Amendment legislation aimed at entertainment software.<sup>168</sup>

In addition, admittedly, no industry wants to be regulated. The freer an industry is of government regulation, the freer it is to make a profit as it sees fit. Industry self-regulation does not exactly have a sterling reputation as of late, but at a time when industry self-regulation is considered a great source of woe,<sup>169</sup> the ESA has shown how it can be done effectively. More than 80% of parents say they are aware of the ESRB ratings system and more than 70% use the system in making buying decisions for their children.<sup>170</sup> This high level of parental awareness can be traced directly to the ESA’s education and outreach efforts, as the National Institute on Media and the Family’s 2008 “A” rating for the ESRB suggests.<sup>171</sup> In 2008, the ESRB began a new parental awareness campaign, distributing guides to video game ratings and online safety to all 26,000 American Parent Teacher Association

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<sup>164</sup> This according to the FTC’s most recent report to congress. Owen Good, *FTC Report Lauds Game Industry as the ‘Most Responsible’ Entertainment Marketer*, KOTAKU.COM (Dec. 5, 2009, 4:30 PM), <http://kotaku.com/5419723/ftc-report-lauds-game-industry-as-the-most-responsible-entertainment-marketer>.

<sup>165</sup> Kuchera, *supra* note 162.

<sup>166</sup> Primack, *supra* note 3.

<sup>167</sup> See generally Steven Leunens, *The Generation Game*, TEK-9.ORG (Jan. 14, 2010, 6:11 PM), [http://www.tek-9.org/articles/reds\\_corner\\_the\\_generation\\_game-433/red%92s\\_corner\\_the\\_generation\\_game-1.html](http://www.tek-9.org/articles/reds_corner_the_generation_game-433/red%92s_corner_the_generation_game-1.html).

<sup>168</sup> In fairness, it should be noted that a surprising 26% of Americans who are over age of 50 play video games. *Industry Facts*, *supra* note 1.

<sup>169</sup> Joseph Stiglitz, *5 Disastrous Decisions That Got Us into This Economic Mess*, VANITY FAIR (Dec. 11, 2008), available at [http://www.alternet.org/economy/111709/5\\_disastrous\\_decisions\\_that\\_got\\_us\\_into\\_this\\_economic\\_mess](http://www.alternet.org/economy/111709/5_disastrous_decisions_that_got_us_into_this_economic_mess).

<sup>170</sup> *Games & Violence*, *supra* note 4.

<sup>171</sup> Fahey, *supra* note 37.

chapters.<sup>172</sup> It may well be that in taking the lead on parental outreach and self-regulation of violent video game sales, the ESA is acting more out of a desire for self-preservation than beneficence. After all, an industry that makes over ten billion dollars per year<sup>173</sup> has a lot to protect. The legal and compliance costs associated with government regulation of violent video games could be astronomical. But whether out of fear of the alternative or a sense of civic duty, or perhaps more likely, a healthy combination of the two, the ESA has shown that it is up to the job when it comes to self regulation.

## VI. CONCLUSION

Given how proactive and effective the video game industry is in its efforts to self-regulate, legislative attempts to penalize the sale of violent video games to minors, such as Senator Yee's efforts, are both unconstitutional and unnecessary. There is certainly nothing wrong with protecting minors from exposure to ultra-violent materials. However, states' attempts at enacting such protection through legislation, such as California Civil Code Section 1746, have thus far proven unconstitutional because they are far too broad in scope and exceedingly vague in their proscriptions.

The Supreme Court's ruling in *Video Software Dealers Ass'n v. Schwarzenegger* is critical because the First Amendment issues raised are matters of first impression for the Court. Given the high number of failed legislative attempts and court battles surrounding this issue, Supreme Court guidance would prove valuable. The Court should ultimately affirm the Ninth Circuit's ruling and declare that California Civil Code Section 1746 is unconstitutional.

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<sup>172</sup> Mike Fahey, *ESRB And PTA Launch National Parental Awareness Campaign*, KOTAKU (Apr. 21, 2008), <http://kotaku.com/382100/esrb-and-pta-launch-national-parental-awareness-campaign>.

<sup>173</sup> *Industry Facts*, *supra* note 1.