

An hourglass-shaped graphic with a globe of the Earth inside. The top bulb is dark grey, and the bottom bulb is light blue. The central neck is light grey. The globe is rendered in shades of blue and grey.

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Report RL33232

Constitutionality of Proposals to Prohibit the Sale or Rental to Minors of Video Games with Violent or Sexual Content or "Strong Language"

Henry Cohen, American Law Division

August 23, 2007

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Legislative Attorney

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Summary

It has been proposed that Congress prohibit the sale or rental to minors of video games that are rated “M” (mature) or “AO” (adults-only) by the Entertainment Software Ratings Board. This board is a non-governmental entity established by the Interactive Digital Software Association, and its ratings currently have no legal effect. The Board’s website sets forth the criteria for its “M” and “AO” ratings:

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.

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.

The Supreme Court has never ruled on the constitutionality of a statute that restricted minors’ access to violent or sexually oriented video games, but all nine lower federal courts that have ruled on such a statute have found it unconstitutional. Based on the holdings of these courts, it appears that, for a prohibition of the sale or rental to minors of video games with violent content to be upheld, the government would have to present empirical evidence that these games harm minors or cause them to become violent. The prohibition of the sale or rental to minors of video games containing sexual content, however, would seem more likely to be upheld without empirical evidence that such games harm minors.

Nevertheless, the apparent vagueness and broad scope of the current criteria for “M” and “AO” ratings might cause a statutory prohibition on the sale or rental to minors of video games that incorporates those ratings to be found unconstitutional on its face, even if the sale or rental to minors of some of the video games to which the “M” or “AO” rating apply could constitutionally be prohibited by more narrowly tailored legislation.

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Introduction

It has been proposed that Congress prohibit the sale or rental to minors of video games that are rated “M” (mature) or “AO” (adults-only) by the Entertainment Software Ratings Board. This board is a non-governmental entity established by the Interactive Digital Software Association, and its ratings currently have no legal effect. The Board’s website sets forth the criteria for its “M” and “AO” ratings:

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The primary constitutional issue that a proposal to prohibit the sale or rental to minors of video games with “M” or “AO” ratings raises is whether it would violate the First Amendment’s guarantee of freedom of speech. If it would not violate the First Amendment, then it would constitute a valid regulation of interstate commerce within Congress’s power to enact under the Commerce Clause.² Congress would also apparently have the power to delegate the promulgation of video game standards to a private entity, as the Supreme Court has upheld Congress’s power to delegate regulatory power to private entities in other contexts.³

First Amendment Principles

The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech,” but the Supreme Court allows various exceptions to this prohibition. Obscenity, for example, is not protected by the First Amendment, but most sexually oriented material has not been judged to be obscene and is protected by the First Amendment.⁴ Even a statute that restricts protected speech on the basis of its content may be constitutional, but the Supreme Court generally will uphold such a statute only if it passes “strict scrutiny.” This means that, to be found constitutional, the statute must be necessary “to promote a compelling interest” and be “the least restrictive means to further the articulated interest.”⁵ The Supreme Court has “recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.

¹ http://www.esrb.org/esrbratings_guide.asp (bold in original). We will refer to “minors” throughout this report, as it seems unlikely that it would make a difference from a constitutional standpoint whether a proposal applied to 17- or 18-year olds.

² “The Congress shall have Power... To regulate Commerce... among the several States...” Art. I, § 8, cl. 3.

³ See, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION (2002), at 88-90; http://www.crs.gov/products/conan/Article01/topic_S1_4_4_2.html.

⁴ The Supreme Court has created a three-part test, known as the *Miller* test, to determine whether a work is obscene. The *Miller* test asks: “(a) whether ‘the average person applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted). See, CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*, by Henry Cohen.

⁵ *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989).

This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.”⁶

Violent and sexual material

By “literature that is not obscene by adult standards,” the Court was referring to “[s]exual expression which is indecent but not obscene.”⁷ It was not referring to material with violent content, and the courts tend to treat restrictions on sexual material differently from restrictions on violent and other non-sexual material. With respect to non-sexual material, the Supreme Court requires that, “[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it 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.”⁸ This is true even with respect to governmental restrictions on speech to which, unlike “indecent” speech, the Supreme Court accords less than full First Amendment protection and therefore applies less than strict scrutiny.⁹

With respect to sexually explicit material, by contrast, the courts generally assume, without requiring evidence, that it is harmful to minors, or to consider it “obscene as to minors,”¹⁰ even if it is not obscene as to adults. They therefore find it not entitled to First Amendment protection with respect to minors, whether it is harmful to them or not. Considering the constitutionality of a federal statute that required cable television operators to prevent “signal bleed” to customers who had not subscribed to channels primarily dedicated to sexually oriented programming, a federal district court wrote:

We are troubled by the absence of evidence of harm presented both before Congress and before us that the viewing of signal bleed of sexually explicit programming causes harm to children and that the avoidance of this harm can be recognized as a compelling State interest. We recognize that the Supreme Court’s jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required when sexually explicit programming and children are involved.¹¹

The court therefore found that the statute served a compelling governmental interest. It held the statute unconstitutional, however, because it found that it did not constitute the least restrictive means to advance the interest. The Supreme Court affirmed on the same ground, apparently assuming the existence of a compelling governmental interest, but agreeing that a less restrictive means could have been used.

In another case, a federal court of appeals, upholding the statute that bans “indecent” radio and television broadcasts from 6 a.m. to 10 p.m., noted “that the Supreme Court has recognized that

⁶ *Id.*

⁷ *Id.*

⁸ *Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622, 664 (1994) (incidental restriction on speech).

⁹ *Id.* See also, *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993) (restriction on commercial speech); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000) (restriction on campaign contributions).

¹⁰ *Interactive Digital Software Association v. St. Louis County, Missouri*, 329 F.3d 954, 959 (8th Cir. 2003); *citing Ginsberg v. New York*, 390 U.S. 629 (1968).

¹¹ *Playboy Entertainment Group, Inc. v. United States*, 30 F. Supp. 2d 702, 716 (D. Del. 1998); *aff’d*, 529 U.S. 803 (2000).

the Government's interest in protecting children extends beyond shielding them from physical and psychological harm. The statute that the Court found constitutional in *Ginsberg* sought to protect children from exposure to materials that would 'impair[] [their] *ethical and moral* development.... Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material...."¹² A dissenting judge in the case noted that, "[t]here is not one iota of evidence in the record ... to support the claim that exposure to indecency is harmful—indeed, the nature of the alleged 'harm' is never explained."¹³

Despite the above rulings, it has been noted that—

The Court seems to be becoming less absolute in viewing the protection of all minors (regardless of age) from all indecent material (regardless of its educational value and parental approval) to be a compelling governmental interest. In striking down the Communications Decency Act of 1996, the Court would "neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all 'indecent' and 'patently offensive' messages communicated to a 17-year-old—no matter how much value the message may have and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 878 (1997). In *Playboy Entertainment Group*, 529 U.S. at 825, the Court wrote: "Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech." The Court also would "not discount the possibility that a graphic image could have a negative impact on a young child" (*id.* at 826), thereby suggesting again that it may take age into account when applying strict scrutiny.¹⁴

Overbreadth

The Supreme Court has written:

The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others. The doctrine is predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions. Overbreadth doctrine has wide-ranging effects, for a statute found to be substantially overbroad is subject to facial invalidation.¹⁵

¹² *Action for Children's Television v. Federal Communications Commission*, 58 F.3d 654, 662 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996) (brackets and italics supplied by the court). *Ginsberg*, *supra* footnote 10, *infra* footnote 41, upheld a New York statute that prohibited the sale to minors of what the Court called "'girlie' picture magazines." 390 U.S. at 634.

¹³ *Id.* at 671 (D.C. Cir. 1995) (Edwards, C.J., dissenting).

¹⁴ *See*, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION (2004), at 1233, n.1146 (n.1174 in the Web version at http://www.crs.gov/products/conan/Amendment01/topic_3_12_12.html).

¹⁵ *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989). The same reasoning would seem to apply if a speech restriction imposed only civil sanctions, as civil as well as criminal penalties can chill speech, as the court of appeals noted in *Federal Election Commission v. Lance*, 635 F.2d 1132, 1141 (5th Cir. 1981) ("It is reasonable to suppose that even if section 441b were overbroad it would not have a 'chilling effect' substantial enough to justify invoking the overbreadth exception to the standing rule, since no one need risk criminal or civil penalties to test the statute's constitutionality.").

What this means in the present context is that, if a retailer affected by the proposal under consideration were to challenge it as violating the First Amendment, then it would not matter whether the sale or rental to minors of a particular video game by that retailer could constitutionally be proscribed. Even if the sale or rental to minors of that particular video game could constitutionally be proscribed, the court would strike down the law on its face if it applied to a substantial number of other video games whose sale to minors could not constitutionally be proscribed. Put another way, the overbreadth doctrine renders a statute “invalid in all its applications (i.e., facially invalid) if it is invalid in any of them.”¹⁶

Violent Video Game Decisions

The Supreme Court has never ruled on the constitutionality of a statute that restricted minors’ access to violent video games, but every lower federal court—two courts of appeals and seven district courts—that has ruled on such law has found it unconstitutional and issued an injunction against its enforcement.¹⁷

Two federal courts of appeals (the Seventh and Eighth Circuits) have considered the constitutionality of local ordinances (Indianapolis’ and St. Louis County’s, respectively) prohibiting making violent video games accessible to minors, and both refused to treat violent material like sexual material or to find it “obscene as to minors.”¹⁸ Both courts, rather, held the ordinances unconstitutional on the ground that the government had failed to present adequate evidence that violent video games are harmful to minors.

What sort of evidence would be adequate to persuade a court that there was a compelling interest in denying minors access to violent video games? In the St. Louis County case, the Eighth Circuit held:

Before the County may constitutionally restrict the speech at issue here, the County must come forward with empirical support for its belief that “violent” video games cause psychological harm to minors. In this case, as we have already explained, the County has failed to present the “substantial supporting evidence” of harm required before an ordinance that threatens protected speech can be upheld. We note, moreover ... that the County may not simply surmise that it is serving a compelling state interest because “society in general believes that continued exposure to violence can be harmful to children.” Where first

¹⁶ *Ada, Governor of Guam v. Guam Society of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012 (Scalia, J, dissenting to denial of certiorari). This is apparently an overstatement, in that the doctrine, as noted above, is one of *substantial* overbreadth. The Supreme Court has “insisted that a law’s application to protected speech be substantial ... before applying the ‘strong medicine’ of overbreadth invalidation.” *Virginia v. Hicks*, 539 U.S. 113, 119-120 (2003) (citation omitted).

¹⁷ In every case but the Seventh Circuit’s and the Oklahoma district court’s, the court issued a permanent injunction. In the Seventh Circuit case, the court found the plaintiffs entitled to a preliminary injunction because they showed “a strong likelihood of ultimate victory should the City persist with the case.” *American Amusement Machine Association v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001). There is no subsequent reported decision in the case. The Oklahoma federal court found the plaintiffs entitled to a preliminary injunction because they “are substantially likely to prevail in this case” *Entertainment Merchants Association v. Henry*, CIV-06-675-C (W.D. Okla., October 11, 2006).

¹⁸ *American Amusement Machine Association*, *supra* footnote 17; *Interactive Digital Software Association*, *supra* footnote 10. The St. Louis “ordinance also restricts minors’ access to video games with strong sexual content, but plaintiffs do not challenge those provisions of the ordinance.” *Interactive Digital Software Association*, *supra*, 329 F.3d at 956 n.1.

amendment rights are at stake, “the Government must present more than anecdote and supposition.”¹⁹

St. Louis County also asserted that it has a compelling interest in “assisting parents to be the guardians of their children’s well-being.” As to this the Eighth Circuit said that in no case “does the Supreme Court suggest that the government’s role in helping parents to be the guardians of their children’s well-being is an unbridled license to governments to regulate what minors read and view.”²⁰

In the Indianapolis case, Judge Richard Posner, holding for the Seventh Circuit that a preliminary injunction against enforcement of the Indianapolis ordinance was warranted, wrote:

The City rightly does not rest on “what everyone knows” about the harm inflicted by violent video games. These games with their cartoon characters and stylized mayhem are continuous with an age-old children’s literature on violent themes.... The City instead appeals to social science to establish that games such as “The House of the Dead” and “Ultimate Mortal Kombat 3,” games culturally isomorphic with (and often derivative from) movies aimed at the same under 18 crowd, are dangerous to public safety. The social science evidence on which the City relies consists primarily of the pair of psychological studies that we mentioned earlier.... These studies do not support the ordinance. There is no indication that the games used in the studies are similar to those in the record of this case or to other games likely to be marketed in game arcades in Indianapolis. The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. And they do not suggest that it is the *interactive* character of the games, as opposed to the violence of the images in them, that is the cause of the aggressive feelings. The studies thus are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive entertainments.²¹

Seven federal district courts—in Washington, Illinois, Michigan, Minnesota, Oklahoma, Louisiana, and California—have also struck down statutes that denied minors access to violent video games. We discuss these seven cases in the order in which they were decided.

In 2004, a district court struck down a statute enacted by the state of Washington, finding that “there 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.”²²

In 2005, a district court struck down an Illinois statute that prohibited both violent and sexually explicit video games, finding, with respect to the prohibition of violent video games, that “defendants have failed to present substantial evidence showing that playing violent video games causes minors to have aggressive feelings or engage in aggressive behavior.”²³

¹⁹ *Interactive Digital Software Association*, *supra* footnote 10, 329 F.3d at 959 (citations omitted).

²⁰ *Id.* at 959-960.

²¹ *American Amusement Machine Association*, *supra* footnote 17, 244 F.3d at 578-579 (emphasis in original). Judge Posner also cited great literature with graphic descriptions of violence, including the *Odyssey*, *The Divine Comedy*, and *War and Peace*, as well as “the classic fairy tales collected by Grimm, Andersen, and Perrault,” and commented: “To 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.” *Id.* at 577.

²² *Video Software Dealers Association v. Maleng*, 325 F. Supp. 2d 1180, 1188 (W.D. Wash. 2004).

²³ *Entertainment Software Association v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff’d*, 469 F.3d 641 (7th continued...)

In March 2006, a district court struck down a Michigan statute that, in the court's words, "regulates the distribution of both sexually explicit video games and ultra violent explicit video games to those under the age of 17. The plaintiffs only challenge the second part of the Act dealing with ultra violent explicit video games."²⁴ The court found that "defendants have failed to present substantial evidence showing that playing violent video games causes minors to have aggressive feelings or engage in aggressive behavior."²⁵ The court also found that the statute would have a "chilling effect" on video game retailers because it "would make the retailers themselves responsible for determining which games are considered ultra-violent. Since they could not determine this in advance, the retailers would likely steer clear of any game with the potential of such violence in order to avoid civil and criminal liability, thus denying constitutionally protected free speech to minors and adults."²⁶ The court found, in addition, that "[t]he defendants have also failed to consider less restrictive ways of achieving their interests ... such as undertaking an advertising campaign to inform parents of the [voluntary] ratings system [developed by the Entertainment Software Ratings Board] and what to watch out for when purchasing games for their children, much like the theater industry did when ratings were first introduced."²⁷ Finally, the court found the Michigan statute to be "unconstitutionally vague."²⁸

In July 2006, a district court struck down a Minnesota statute that would have imposed a civil penalty of up to \$25.00 on persons under 17 who knowingly rented or purchased a video game rated AO or M by the Entertainment Software Rating Board (ESRB).²⁹ Minnesota is in the Eighth Circuit, so the court was bound by the holding of the Eighth Circuit case discussed above that video games are protected speech and that governmental restrictions on their distribution are subject to strict scrutiny.³⁰ The district court found that the state had failed to meet its burden of providing "substantial, actual 'empirical support for its belief that "violent" video games cause psychological harm to minors."³¹ The court also found a violation of due process in the state's delegation of its authority to the ESRB to determine which video games a person under 17 may rent or purchase.³²

In October 2006, a district court in Oklahoma granted a preliminary injunction against enforcement of a statute that "criminalizes the display, sale, or other dissemination of" violent video games, as defined by the statute.³³ The court found that "[p]laintiffs present strong

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Cir. 2006). The state appealed the district court decision only with respect to sexually explicit video games; the court of appeals decision on that issue is discussed in the next section of this report.

²⁴ Entertainment Software Association v. Granholm, 426 F. Supp. 2d 646, 648 (E.D. Mich. 2006).

²⁵ *Id.* at 653.

²⁶ *Id.* at 654.

²⁷ *Id.* at 654-655.

²⁸ *Id.* at 656.

²⁹ Entertainment Software Association v. Hatch, 443 F. Supp. 2d 1065 (D. Minn. 2006). The ESRB's AO and M ratings refer to sex as well as violence (see page 1 of this report), so we might have discussed this case in either this or the next section of this report.

³⁰ *Interactive Digital Software*, *supra* footnote 19.

³¹ *Hatch*, *supra* footnote 29, 443 F. Supp. 2d at 1069, quoting *Interactive Digital Software*, *supra* footnote 19, 329 F.3d at 959.

³² *Id.* at 1070-1071.

³³ *Entertainment Merchants Association v. Henry*, *supra* footnote 17.

arguments that the Act contains unconstitutional content-based restrictions and that the Act's language is unconstitutionally vague.”

In December 2006, a district court in Louisiana granted a permanent injunction against a statute that criminalized the distribution to minors of violent video games.³⁴ The court found that, “when it comes to regulating expression in order ‘to curb violent behavior,’ the State must satisfy the standards set forth in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Under *Brandenburg*, the government must prove that the target expression “is *directed* to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.”³⁵ In addition, “the Statute cannot be defended on the grounds that it is designed to protect minors from some form of ‘psychological harm,’ as that amounts to nothing more than ‘impermissible thought control.’”³⁶ The court also found the statute underinclusive because “violent video games are only ‘a tiny fraction of the media violence to which modern American children are exposed,’” and found “that there are less restrictive alternatives which would achieve the State’s goals ... including encouraging awareness of the voluntary ESRB video game rating system”³⁷ Finally, the court found the statute unconstitutionally vague.

In 2007, a district court struck down a California statute that “requir[ed] that certain violent video games be labeled and prohibit[ed] the rental or sale of those games to minors.”³⁸ The court found that “there as been no showing that violent video games as defined in the Act, *in the absence of other violent media*, cause injury to children. In addition, 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.”³⁹

Sexually Explicit Video Games Decision

As noted above, in 2005, a federal district court struck down an Illinois statute that prohibited both violent and sexually explicit video games. The state appealed only with respect to sexually explicit video games, and the Seventh Circuit affirmed.⁴⁰ The Seventh Circuit applied strict scrutiny and quickly found that the state’s identified purpose in “shielding children from indecent sexual material and in assisting parents in protecting their children from that material” is “clearly” compelling. The Seventh Circuit, however, found the Illinois statute to fail the second prong of strict scrutiny because it “is not narrowly tailored and is overbroad.” This was because it banned “access to material that has serious social value for minors,” even though doing so was unnecessary for the state to achieve its stated purpose.⁴¹ Even apart from this problem, the court

³⁴ Entertainment Software Association v. Foti. No. 06-431-JJB-CN (M.D. La., December 4, 2006). This opinion grants a permanent injunction “[f]or the reasons set forth at the hearing on the motions of November 29, 2006 and in the Court’s August 24, 2006 Ruling on Motion for Preliminary Injunction and Motion to Dismiss.” The August 24, 2006 ruling is reported at 451 F. Supp. 2d 823 (M.D. La. 2006).

³⁵ 451 F. Supp. 2d at 831 (citations omitted, emphasis added by the district court).

³⁶ *Id.*

³⁷ *Id.* at 833.

³⁸ Video Software Dealers Association v. Schwarzenegger, No. C-05-04188 RMW (N.D. Cal., August 6, 2007), slip op. at 1.

³⁹ *Id.* at 15-16 (emphasis supplied by the court).

⁴⁰ Entertainment Software Association v. Blagojevich, *supra* footnote 23.

⁴¹ The Illinois statute banned the sale or rental of “any sexually explicit video game to any minor” and defined “sexually explicit” as appealing to the prurient interest of minors and patently offensive with respect to minors. This (continued...)

found that “the statute could still not survive strict scrutiny because the plaintiffs have identified other less restrictive alternatives.... Most obviously, the State could have simply passed legislation increasing awareness among parents of the voluntary ESRB ratings system.”

Application of the Decisions to the Proposal

Violent content

With respect to a First Amendment challenge to the prohibition of the sale or rental to minors of video games with violent content, a court following the relevant precedents would apply strict scrutiny, which means that it would uphold the provision only if it finds that it serves a compelling governmental interest by the least restrictive means. The determinative question with respect to whether the prohibition serves a compelling interest would apparently be whether the government can “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.”⁴² All six cases cited above found inadequate the government’s evidence as to the harm caused by violent video games, but one cannot know whether a court in the future will consider the same research rejected by courts in the past, or, if it does, whether it will find it more persuasive than have courts in the past.

If a court were to find a compelling governmental interest in the prohibition of the sale or rental of video games with violent content, then it would have to decide whether the prohibition constituted the least restrictive means to advance the interest. A point in favor of the proposal’s constitutionality with respect to this question is that video game stores would know from the “M” or “AO” rating exactly which videos they could not legally sell or rent to minors. They would not, therefore, face the situation that the court found that stores could face in one of the cases discussed above, namely that, “[w]ithout wholesale, indiscriminate refusals to sell video games to minors by store operators it appears impossible to protect sellers from prosecution.... Nor is it reasonable to expect store clerks to play each level of each game to determine if it falls within the act’s definition of ultra-violent explicit.”⁴³

Under the proposal, however, although retailers would know which video games they were prohibited from selling or renting to minors, they could nevertheless argue that the proposal prevented them from selling or renting to minors some video games that are constitutionally protected with respect to minors. In addition, producers of video games could argue that the proposal’s vagueness would prevent them from knowing which video games would be rated “M”

(...continued)

definition parallels the first two prongs of the *Miller* test for obscenity, but omits a parallel to the third prong, which is that, to be obscene, material must, “taken as a whole, lack[] serious literary, artistic, political, or scientific value.” *Miller v. California*, *supra* footnote 4. In *Ginsberg v. New York*, *supra* notes 10 and 12, the Supreme Court upheld a statute that prohibited the sale to minors of material that the statute labeled as “harmful to minors,” which it defined so as to parallel all three prongs of a predecessor to *Miller* test, although, by applying each prong in terms of minors (i.e., “appeals to the prurient ... interest of minors,” etc.), the statute, like the Illinois video game statute, applied not only to material that was obscene under the *Miller* test.

⁴² *Turner Broadcasting System*, *supra* footnote 8.

⁴³ *Entertainment Software Association v. Granholm*, 404 F. Supp. 2d 978, 983 (E.D. Mich. 2005) (issuing a preliminary injunction that preceded the permanent injunction issued in *Entertainment Software Association v. Granholm*, *supra* footnote 24).

or “AO” and therefore prohibited from being sold or rented to minors, and that the proposal’s overbreadth would prohibit from being sold or rented to minors some video games that were constitutionally protected with respect to minors. In other words, producers of video games could argue that the proposal would chill their speech because it might deter them, for market reasons, from producing video games that were constitutionally protected with respect to minors. Producers, that is, might fear that some video games that were constitutionally protected with respect to minors would be rated “M” or “AO” and therefore would not be sold or rented to minors, and that there was not a sufficient adult market for such games to make it worthwhile for them to produce them, or that, even if there were, the producers would make less money because minors would not be allowed to purchase or rent video games that were constitutionally protected.

A person challenging the prohibition of the sale or rental of video games with violent content as overly restrictive might argue that the language that defines the “M” and “AO” ratings is vague and overbroad. Specifically, such a person might argue that the phrases “intense violence,” “sexual content,” “strong language,” and “nudity” are unconstitutionally vague, and that a video game’s having one or more of these features does not necessarily cause it to lose First Amendment protection as to minors, and therefore the prohibition on renting or selling to minors video games with one or more of these features would render the proposal unconstitutionally overbroad.

Note that the use of “and/or” in the “M” and the “AO” ratings means that “intense” violence under the “M” rating need not include blood and gore (nor be “prolonged,” as under the AO rating), and that “strong language” is sufficient for an “M” rating, even if it is unrelated to violence or sex. The breadth of the ban on the sale or rental to minors of video with “strong language” might be especially problematic. The Supreme Court has written:

[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.... Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.⁴⁴

Furthermore, the Court has also found that the First Amendment applies “not only [to] ideas capable of relatively precise, detached explication, but [to] otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.”⁴⁵ “Strong language,” therefore, is protected speech, including generally for minors; the only exception the Supreme Court has found is with respect to the use of “indecent” language on broadcast radio and television during hours—but not all 24—when children are likely to be in the audience.⁴⁶

⁴⁴ *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-214 (1975) (citations omitted).

⁴⁵ *Cohen v. California*, 403 U.S. 15, 26 (1971).

⁴⁶ *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978).

Sexual content

Because the courts generally assume, without requiring evidence, that sexually explicit material is harmful to minors, the proposal's prohibition of the sale or rental of video games with sexual content might more easily pass the "compelling governmental interest" prong of the strict scrutiny test than would the proposal's prohibition of the sale or rental of video games with violent content. Even here, however, the "M" rating refers merely to "sexual content," by contrast with the "AO" rating's reference to "graphic sexual content." Sexual content, especially if it is not graphic, does not necessarily constitute pornography, but may concern such subjects as birth control and sexually transmitted diseases. (Video games may not typically address such matters, but, under the substantial overbreadth doctrine discussed above, it might not be necessary that they do for a court to find the proposal facially invalid.) It might be impossible for the government to demonstrate a compelling interest in denying minors access to *all* material with sexual content.⁴⁷ If a court did not rule on this question and instead applied the "least restrictive means" prong of the strict scrutiny test, then it might find the proposal overbroad in applying to all material with sexual content in an effort to deny minors access to some of it.⁴⁸ The "M" rating, like the statute that the Seventh Circuit struck down in the one federal case that addressed a ban on video games with sexual content, is not limited to material that is "obscene as to minors" (i.e., to material that taken as a whole, lacks serious literary, artistic, political, or scientific value).⁴⁹

An "AO" rating may be imposed on video games with "graphic sexual content and nudity," which suggests that nudity alone would not suffice for an "AO" rating, though it might be considered "sexual content" and suffice for an "M" rating. This seems problematic, because the Supreme Court has written that nudity alone "does not place otherwise protected material outside of the First Amendment."⁵⁰ This statement was not made with reference to minors' First Amendment rights, but, if a court, in applying the First Amendment, took into account the ages of minors who typically buy or rent video games, the extent of the nudity portrayed, and the manner in which it is portrayed, then it might find the proposal's coverage of nudity vague and overbroad.

Application to "M"- and "AO"-rated video games

Because the proposal would prohibit the sale or rental to minors of video games with either "M" or "AO" ratings, the constitutionality of each of these prohibitions should be examined separately. Video games with "M" ratings, as noted, "may contain intense violence, blood and gore, sexual content, and/or strong language." If a video game contained any one of these features, then it would be rated "M" and could not be sold or rented to minors. If it would be unconstitutional to prohibit the sale or rental to minors of video games simply because they contain strong language, or simply because they contain sexual content—without regard to the particular strong language

⁴⁷ See, text accompanying footnote 14, *supra*, especially the Supreme Court's comment in *Reno* that it would "neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all 'indecent' and 'patently offensive' messages communicated to a 17-year-old—no matter how much value the message may have and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute."

⁴⁸ In other words, it appears that, if the proposal applied to sexual material with serious value, then it might be struck down under either prong of the strict scrutiny test.

⁴⁹ *Entertainment Software Association v. Blagojevich*, *supra* footnote 23. As noted, the Seventh Circuit in this case also found that the statute in question did not constitute the least restrictive means because "the State could have simply passed legislation increasing awareness among parents of the voluntary ESRB ratings system."

⁵⁰ *Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981).

or the particular sexual content—then the substantial overbreadth doctrine would seem likely to render unconstitutional a prohibition on the sale or rental to minors of “M”-rated video games, given the current criteria for an “M” rating.

Video games with “AO” ratings, as noted, “may include prolonged scenes of intense violence and/or graphic sexual content and nudity.” Applying the same reasoning just applied to video games with “M” ratings, if it would be unconstitutional to prohibit the sale or rental to minors of video games simply because they contained prolonged scenes of intense violence, without regard to their literary value or the possibility of harm, then the substantial overbreadth doctrine would seem likely to render unconstitutional a prohibition on the sale or rental to minors of “AO”-rated video games, given the current criteria for an “AO” rating.

Conclusion

In conclusion, it appears that, for a prohibition of the sale or rental to minors of video games with violent content to be upheld, the government would have to present empirical evidence that these games harm minors or cause them to become violent. The prohibition of the sale or rental to minors of video games containing sexual content, however, would seem more likely to be upheld without empirical evidence that such games harm minors.

Nevertheless, the apparent vagueness and potential overbreadth of the current criteria for “M” and “AO” ratings might cause a statutory prohibition on the sale or rental to minors of video games that incorporates those ratings to be found unconstitutional on its face, even if the sale or rental to minors of some of the video games to which the “M” or “AO” rating apply could constitutionally be prohibited by more narrowly tailored legislation.

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