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Video Gaming Under Attack In California

In reaction to Governor Schwartzenegger's signing into law A.B. 1179, which is slated to go into effect January 1, 2006, the Video Software Dealers Association (VSDA) and the Entertainment Software Association (ESA) have filed suit to seek judicial determination that the statute is unconstitutional.

AB 1179 is a statute that bans the sale or rental of a "violent video game" to anyone under the age of 18. The statute defines "violent video game" as a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting the image of a human being, if those acts are either depicted: (A) in a manner which is especially heinous, cruel or depraved in that it involves torture or serious physical abuse, or (B) falls within one of three standards: (1) a reasonable person considering the game as a whole would find the acts appeals to the deviant or morbid interest of minors; (2) is patently offensive to the prevailing standards of the community as to what is suitable for minors; or (3) it causes the game, as a whole, to lose its literary, scientific, artistic or political value.

The statute provides for an exception in that parents, guardians and adult family members may purchase or rent the game on the minor's behalf.

Further, AB 1179 provides that all product which falls under the statute must prominently display a packaging label depicting an "18" so as to notify consumers of the restriction to minors.

Penalties for violations include a $1,000 fine and potential criminal prosecution by local authorities.

The VSDA and ESA have argued the following grounds to strike down AB 1179, specifically: (1) the statute is unconstitutional as a violation of the First Amendment by placing legal restrictions on sale or rental to minors; (2) the statute usurps the rights of parents by restricting a minor's ability to rent or buy the game with their parent's consent; (3) the statute is unnecessary in light of voluntary industry imposed rating systems; and (4) the statute contains no meaningful standards to determine which materials are covered.

Courts have historically viewed government regulated Free Speech with respect to video games unfavorably. In *American Amusement Machine Association, et. Al v. Kendrick, et al.* 244 F3d 572 (US. Ct. App. 7th Cir.)(2001), the court reaffirmed childrens' First Amendment rights, and that targeting video games merely because they are interactive, does not afford them to be treated with less protection than motion pictures, television, literature and other photographic media. In *IDSA v. St Louis County* 329 F.3d 954, 957 (US. Ct. App. 8th Cir)(2003) the court did not find the county's arguments that video games should be treated any differently than other modes of entertainment and found the studies introduced by the county to be unpersuasive. Finally, in *Video Software Dealers Association v. Maleng, et.* al (325 F. Supp.2d 1180) (2004), the court rejected the state's arguments that video games should be regulated under obscenity law, noting that depictions of violence have been historically used in literature, art and media to portray important messages and that there is no historical precedent for restriction of this type of free speech.

Further, AB 1179 fails to account for online video games that do not involve an electronic amusement device per-se. This failure to address other delivery methods of video gaming may have been to avoid Commerce Clause defenses.

As the VSDA and ESA have successfully litigated this issue before, it appears that the state of California may have a difficult time defending its position, especially since criminal penalties are implicated. As the standard of review for these cases is strict scrutiny, each of the prior laws were invariably struck down because the underlying evidence (the Craig Anderson studies about the correlation to violence and video games) was not convincing to create a narrowly tailored nexus required for this standard of review. Unless California has something else to show the court, it will most likely not prevail in the constitutional challenge.

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