



March 2009

Victory For Video Gaming In California

I had previously written an article in November 2005 regarding In reaction to Governor Schwarzenegger's A.B. 1179, making it illegal for the sale of a "violent video game(s)" to anyone under the age of 18. The Video Software Dealers Association (VSDA) and the Entertainment Software Association (ESA) had filed suit to seek judicial determination that the statute was unconstitutional.

In 2007, Judge Ronald Whyte issued a preliminary injunction against enforcement upon determination that the statute was unconstitutional which was appealed by the Governor's office. As of last month, the 9th Circuit rejected the state's appeal.

For background, AB 1179 defined a "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 provided 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 required 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.

The VSDA and ESA had successfully 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.

The Governor's office unsuccessfully argued the Craig Anderson studies indicating games were dangerous for inciting violence in minors, without any causal proof, and particularly rejected the targeting of games as a specific medium without addressing the impact of all media.

Courts have historically rejected government regulated Free Speech with respect to video games. In *American Amusement Machine Association, et. Al v. Kendrick, et al.* 244 F3d 572 (US. Ct. App. 7th Cir.)(2001), the court reaffirmed children's' 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. This is a clear indication that video games are protected

speech. In *IDSIA 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.

With this victory, the proponents of the statute, relying on *Roper v. Simmons* 543 U.S. 551 (2005) by arguing that minors should be treated differently because of their brain development. However, the *Roper* case deals with capital punishment of minors and the argument has no real bearing against First Amendment Rights.

David Michail is a nationally ranked Technology, New Media, Video Game and Entertainment law attorney for metlawgroup in Los Angeles, California.

