ESSENTIAL FACTS
ABOUT VIDEO GAMES AND COURT RULINGS

There have been many efforts on the part of state and local legislative bodies to regulate access to games. However, the Courts have ruled nine times in six years that computer and video games are protected speech, and efforts by these legislative bodies to ban or limit access to or the sale of games they find objectionable will inevitably run afoul of the First Amendment of the United States Constitution.

To provide a clear and easy to understand summary of various court rulings, the Entertainment Software Association (ESA) is providing this document with key sections highlighted. For the complete text of a decision, please contact Jeff Woodbury, at 202.223.2400.

Western District of Oklahoma, United States District Court
EMA, et al., v. Henry, et al.
October, 2006

On October 11, 2006, Judge Robin Cauthron, District Court, Western District of Oklahoma, issued a preliminary injunction preventing the implementation of an Oklahoma statue to prohibit the sale of video games depicting "inappropriate" violence to minors. In the decision, the Court stated that plaintiffs presented strong arguments that the Act contains unconstitutional content-based restrictions and that its language is unconstitutionally vague.

The Entertainment Software Association (ESA) and Entertainment Merchants Association (EMA) are now waiting for the Court's ruling on the summary judgment, which asks for a permanent injunction to the Oklahoma law.

Middle District of Louisiana, United States District Court
ESA, et al., v. Foti, et al.
November, 2006

On November 29, 2006, Judge James Brady, District Court, Baton Rouge, ordered a permanent injunction to block implementation of a Louisiana statute seeking to ban the sale of violent video games to minors. Remarkably, Judge Brady issued his ruling from the bench rather than through a written order or opinion and stated that he was granting permanent injunction based on the reasoning behind the court's August ruling which granted a preliminary injunction.

In his August decision, Judge Brady wrote that the state had overlooked a series of previous cases which found that video games are protected free speech. According to that opinion, video games "….are as much entitled to the protection of free speech as the best of literature." With regard to the "social science" presented, the judge stated, "….It appears that much of the same evidence has been considered by

numerous courts and in each case the connection was found to be tentative and speculative.... The evidence that was submitted to the Legislature in connection with the bill that became the Statute is sparse and could hardly be called in any sense reliable."
Significantly, Judge Brady found that, "....less restrictive alternatives [which would achieve the state's goals] exist, including encouraging awareness of the voluntary ESRB video game rating system (which provides guidance to parents and other consumers), and the availability of parent controls that allow each household to determine which games their children can play."

The ESA will immediately make an application for attorneys' fees.

To view the decision in its entirety, please go to: http://www.lamd.uscourts.gov/

District of Minnesota, United States District Court
ESA, et al., v. Hatch, et al.
July, 2006

On July 31, 2006, Judge James M. Rosenbaum, US District Court, Minnesota, issued a permanent injunction to halt implementation of a Minnesota law which sought to penalize minors for the purchase or rental of M or AO rated games.

In his decision, Judge Rosenbaum stated that "…there is no showing whatsoever that video games, in the absence of other violent media, cause even the slightest injury to children." The Court then raised questions about the Legislature's motives in passing such an obviously unconstitutional law, stating "several other states have tried to regulate minors' access to video games. Every effort has been stricken for violating the First Amendment....The Court will not speculate as to the motives of those who launched Minnesota's nearly doomed effort to "protect" our children. Who, after all, opposes protecting children? But, the legislators drafting this law cannot have been blind to its constitutional flaws."

Like all other courts to rule on this issue, Judge Rosenbaum rejected the science presented by the state purporting to show a link between violent games and violent behavior and thoughts. "Should the injunction be granted, the state argues the children of Minnesota's psychological well-being and ethical and moral development will be harmed. The problem with this argument is the state's inability to show the truth of this position. As shown above, there is a paucity of evidence linking the availability of video games with any harm to Minnesota's children at all. A person, indeed a legislature, may believe there is a link and a risk of harm, but absent compelling evidence, the belief is pure conjecture. The state's professed concerns, in the absence of evidence showing them to be well-founded, do not outweigh the chilling effect on free speech that would result from the Act becoming effective."

The Court also rejected the state's attempt to incorporate ESRB ratings into the law, stating that such a delegation of authority to a private entity violates the First Amendment. The Court found the retailer signage requirements unconstitutional as well.

The ESA and EMA have made an application for attorneys' fees and are awaiting the Court's decision at this time.

To view the decision in its entirety, please go to: http://tinyurl.com/ezd5r

Eastern District of Michigan, United States District Court
ESA, et al., v. Granholm, et al.
April, 2006

On April 3, 2006, the Hon.George Caram Steeh, US District Court, Eastern District of Michigan, issued a permanent injunction halting the implementation of this Michigan bill, which sought to ban violent video game sales to minors.

In his decision, the Judge firmly dismissed the state's claim that the interactive nature of video games makes them less entitled to First Amendment protection. "The interactive, or functional aspect, in video games can be said to enhance the expressive elements even more than other media by drawing the player closer to the characters and becoming more involved in the plot of the game than by simply watching a movie or television show," Judge Steeh wrote. "It would be impossible to separate the functional aspects of a video game from the expressive, inasmuch as they are so closely intertwined and dependent on each other in creating the virtual experience."

Regarding the "science" presented by the state purporting to show a link between violent games and violent behavior and thoughts, the Court said, "Dr. [Craig] Anderson's studies have not provided any evidence that the relationship between violent video games and aggressive behavior exists." It then added that the evidence introduced alleging that new brain mapping studies show a link between violent games and aggressive thought is equally unpersuasive. "The research not only fails to provide concrete evidence that there is a connection between violent media and aggressive behavior, it also fails to distinguish between video games and other forms of media," the Judge wrote.

Addressing the state's claims that video games are more harmful than TV because the player controls the action, the Court said there is no evidence to support such a claim, adding that "….it could just as easily be said that the interactive element in video games acts as an outlet for minors to vent their violent or aggressive behavior, thereby diminishing the chance they would actually perform such acts in reality....Not only does the Act not materially advance the state's stated interest, but it appears to discriminate against a

disfavored 'newcomer' in the world of entertainment media. Thus, 'singling out' the video game industry does not advance the state's alleged goal," the Judge concluded.

On November 30, 2006, Judge Steeh ordered the State of Michigan to pay ESA, EMA, and the Michigan Retailers Association $182,000 in attorneys' fees and costs as a result of the August 2006 permanent injunction granted in favor of the video game industry.

To view this decision in its entirety please go to: http://tinyurl.com/jae73

Northern District of California, United States District Court
VSDA, et al., v. Schwarzenegger, et al.
December, 2005

On December 21, 2005, Judge Ronald Whyte, United States District Judge for the Northern District of California, handed down a preliminary injunction halting the implementation of California's law that would restrict the sale of violent video games and require the unconstitutional and subjective labeling of video games.

In a decision that drew upon the judicial rulings of cases where similar legislation had been deemed unconstitutional, Judge Whyte wrote that "…games are protected by the First Amendment," and that plaintiffs "…are likely to prevail in their argument that the Act violates the First Amendment."

Regarding research purporting to show a link between video games and behavior, Judge Whyte cited other rulings which found that the research does not establish a causal link between violent video games and violent behavior, does not assess the significance of any link, nor does it compare video games to other forms of media violence to which minors are exposed. He writes, "This Court anticipates that [the state] here may face similar problems proving the California legislature made 'reasonable inferences based on substantial evidence.'"

The ESA and EMA are now waiting for the Court's ruling on the summary judgment, which asks for a permanent injunction to the California law.

To view this decision in its entirety please go to: http://tinyurl.com/eptf2

Northern District of Illinois, United States District Court
ESA, et al., v. Blagojevich, et al.
December, 2005

In a strongly worded 53 page decision, Judge Matthew Kennelly permanently enjoined the Illinois' Violent Video Games Law and Sexually Explicit Video Games Law on December 2, 2005.

Resoundingly dismissing the research in support of the statute presented by the State of Illinois, the Judge ruled that the "[state has] failed to present substantial evidence showing that playing violent video games cause minors to have aggressive feelings or engage in aggressive behavior." The decision came after a three day trial in which the state presented the testimony from Dr. Craig Anderson and Dr. William Kronenberger in support of its position. With respect to Dr. Anderson's claim that violent video games cause aggressive behavior, the Court said that "…neither Dr. Anderson's testimony nor his research establish a solid causal link between violent video game exposure and aggressive thinking and behavior… researchers in this field have not eliminated the most obvious alternative explanation: aggressive individuals may themselves be attracted to violent video games." In response to Dr. Kronenberger's claim that violent video games cause a reduction in brain activity, the Court said "…there is barely any evidence at all, let alone substantial evidence, showing that playing violent video games causes minors to 'experience a reduction of activity in the frontal lobes of the brain which is responsible for controlling behavior.'"

In his decision, the Judge found fault with the argument that legislation is the answer to protecting children from inappropriate media, writing that "…if controlling access to allegedly 'dangerous' speech is important in promoting the positive psychological development of children, in our society that role is properly accorded to parents and families, not the state."

Finally, Judge Kennelly determined that "the state may have a compelling interest in assisting parents with regulating the amount of media violence consumed by their children, but it does not have a compelling interest in singling out video games in this regard. In fact, the under inclusiveness of this statute – given that violent images appear more accessible to unaccompanied minors in other media – indicates that regulating violent video games is not really intended to serve the proffered purpose."

After striking the Illinois law as unconstitutional, Judge Kennelly ordered the State of Illinois to pay the video game industry $510,000 to cover their attorney's fees in this case.

To view this decision in its entirety please go to: http://tinyurl.com/z3a8e

United States Court of Appeals Seventh Circuit
ESA, et al., v. Blagojevich, et al.
November 2006

On November 27, 2006, Judge Williams, Seventh Circuit, ruled in favor of the ESA and reaffirmed the District Court ruling that granted a permanent injunction halting implementation of the Illinois Sexually Explicit Video Game Law (SEVGL). The State of Illinois appealed the district court ruling with regards to the SEVGL, but not the portion of the law that dealt with violent video games (VVGL).

In his opinion Judge Williams reaffirmed the court's observation that children have First Amendment rights stating that "history has shown the dangers of giving too much censorship power to the State over materials intended for young persons." The Court ruled that the SEVGL failed to meet the standards required by the First Amendment. More specifically, the statute's definition of "sexually explicit" failed to meet a prong of the three pronged test required by the Supreme Court for the regulation of obscene material. Judge Williams further stated that the state of Illinois "created a statute that is constitutionally overbroad" in failing to include language in the statute that the sexually explicit material taken as a whole does not have serious literary, artistic, political, or scientific value, as required by the Supreme Court test.

Judge Williams also discussed the State's exclusion of the requirement that any material in question be "considered as a whole" in determining criminal penalties. The judge used the videogame *God of War* to illustrate the point that the overbroad nature of the SEVGL makes "likely the prospect of criminal prosecutions for the sale of games that have social importance for minors." As expressed by the court, "[t]here is serious reason to believe that a statute sweeps to broadly when it prohibits a game that is essentially an interactive, digital version of the Odyssey."

Finally, the judge stated that the SEVGL could not survive constitutional muster because the State failed to consider other less restrictive alternatives to the SEVGL. "Most obviously, the State could have simply passed legislation increasing awareness among parents of the voluntary ESRB ratings system."

The court also affirmed the district court's holding that the SEVGL's signage and brochure requirements are unconstitutional. Judge Williams found the signage requirements overbroad, stating that "[l]ittle imagination is required to envision the spacing debacle that could accompany a small retailer's attempt to fit three signs, each roughly the size of a large street sign, into such a space."

The ESA is making an application for attorneys' fees in this case.

Western District of Washington, United States District Court
Video Software Dealers Association, et al., v. Maleng, et al.
325 F. Supp.2d 1180
July 2004

On July 15, 2004, Judge Robert Lasnik, Western District of Washington, permanently enjoined a Washington State law that would prohibit the sale of video games that depict violence against law enforcement officers.

In his ruling, Judge Lasnik rejected the state's argument that video games should be regulated under obscenity law, and declined the state's invitation to expand the narrowly defined obscenity exception to include portrayals of violence. Judge Lasnik wrote that "such depictions [of violence] 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." Reinforcing that games are protected by the First Amendment, Judge Lasnik wrote: "The games at issue...[have] story lines, detailed artwork, original scores, and a complex narrative which evolves as the player makes choices and gains experiences. All of the games provided to the Court for review are expressive and qualify as speech for purposes of the First Amendment. In fact, it is the nature and effect of the message being communicated by those video games which prompted the state to act in this sphere."

Dismissing the claims of the state's expert witnesses and the studies presented, Judge Lasnik determined that "...the Court finds that the current state of research cannot support the legislative determinations that underlie the Act because 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."

Additionally, Judge Lasnik found that the state's attempt to ban the sale of games depicting violence against law enforcement officers was impossibly vague and "failed to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."

After striking the Washington law as unconstitutional, Judge Lasnik ordered the State of Washington to pay the video game industry $344,000 to cover their attorney's fees in this case.

To view this decision in its entirety please go to: http://tinyurl.com/glapd

United States Court of Appeals for the Eighth Circuit
IDSA v. St. Louis County
329 F.3d 954, 957
June 2003

On September 25, 2002, in a unanimous decision of a three judge panel, the Honorable Morris S. Arnold, of the Eight Circuit Court of Appeals, struck down the St. Louis violent video game law and found that First Amendment protects a wide array of content, including video games.

The Eighth Circuit held that if "the First Amendment is versatile enough to 'shield [the] painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,' ... we see no reason why the pictures, graphic design, concept art, sounds, music, stories and narrative present in video games are not entitled to similar protection," and then went on to elaborate on First Amendment protections, stating that " [We] do not mean to denigrate the government's role in supporting parents, or the right of parents to control their children's exposure to graphically violent materials. We merely hold that the government cannot silence protected speech by wrapping itself in the cloak of parental authority... To accept the County's broadly-drawn interest as a compelling one would be to invite legislatures to undermine the First Amendment rights of minors willy-nilly under the guise of promoting parental authority."

Regarding the concern that games are harmful to minors because of their content, the Court found the County's evidence and, once again, studies by Craig Anderson, et al., to be unpersuasive. The opinion stated that the "conclusion that there is a strong likelihood that minors who play violent video games will suffer a deleterious effect on their psychological health is simply unsupported in the record...[T]his vague generality falls far short of a showing that video games are psychologically deleterious. The County's remaining evidence included the conclusory comments of county council members; a small number of ambiguous, inconclusive, or irrelevant (conducted on adults, not minors) studies; and the testimony of a high school principal who admittedly had no information regarding any link between violent video games and psychological harm...Where First Amendment rights are at stake, 'the Government must present more than anecdote and supposition.'"

After striking the St. Louis law as unconstitutional, the Court ordered the defendants to pay the video game industry $180,000 to cover their attorney's fees in this case.

To view this decision in its entirety please go to: http://tinyurl.com/cdb6n

United States Court of Appeals for the Seventh Circuit
American Amusement Machine Association, et al. v. Kendrick, et al.
244 F.3d 572
March 2001

In a unanimous three judge panel decision, the Honorable Richard A. Posner, of the Seventh Circuit, declared the Indianapolis Arcade Ordinance unconstitutional, reaffirming that children have First Amendment rights.

In his ruling, Judge Posner stated that "[T]o 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. Maybe video games are different. They are, after all, interactive. But this point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own. Protests from readers caused Dickens to revise Great Expectations to give it a happy ending, and tourists visit sites in Dublin and its environs in which the fictitious events of Ulysses are imagined to have occurred. The cult of Sherlock Holmes is well known."

In reference to scientific studies, such as research by Craig Anderson, et al., provided to the Court arguing that interactive games cause violent behavior, the Court wrote "[T]here 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. It is highly unlikely that they are more harmful, because 'passive' entertainment aspires to be interactive too and often succeeds."

After striking the Indianapolis Arcade Ordinance as unconstitutional, the Court ordered the defendants to pay the arcade industry $318,000 to cover their attorney's fees in this case.

To view this decision in its entirety please go to: http://tinyurl.com/zgo4n