



legislating access to video games?

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On October 11, 2006, a United States District Court in Oklahoma issued a preliminary injunction halting the implementation of an Oklahoma law that had sought to prohibit the sale to minors of video games depicting "inappropriate" violence. The Oklahoma ruling was the ninth court decision in five years striking down legislation prohibiting or penalizing the sale of certain video games to minors, and the fourth decision in just the last few months. Although most state laws attempting to restrict minors' access to violent video games have been struck down or enjoined, the growing pressure on state and federal legislators to enact such laws is undeniable. As of last summer, thirteen states and at least two municipalities had introduced legislation to restrict minors' access to video games. In eight of those states, and in both municipalities, the laws were enacted. At the federal level, legislation has been introduced that would impose fines and other penalties for the sale or rental of "Mature"-rated games to anyone under 17 years of age.

While the precise language of the laws restricting minors' access to video games varies, the substance of many of these laws is similar. Typically, such laws:

- Make it unlawful for any person to sell, rent, or make available video games that are "harmful" to minors.
- Define video games that are harmful to minors as those that contain "graphic violence," "visual representations of realistic serious injury to a human or human-like being," "human-on-human violence," "extreme and loathsome violence," and (in some cases) "strong sexual content" or "predominantly appeal to minors' morbid interest in violence or minors' prurient interest in sex."
- Carry penalties of fines (sometimes escalating with multiple violations), suspensions of business licenses, or (in at least one state) prison terms up to one year.

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practice areas

video game



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Because states have continued to pass these laws and likely will continue to do so in the immediate future, it is useful to examine briefly the reasons why the courts consistently have stricken these laws or enjoined their enforcement.

1) Video Games Are Protected Speech. Whatever one's personal feelings concerning video games, it is now a bedrock principle that video games are subject to the protection of the First Amendment. As one federal appeals court commented: "If the First Amendment is versatile enough to shield [the] painting of Jackson Pollock, 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 a similar protection." *Interactive Digital Software Assoc. v. St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003). Courts that have considered the issue also have confirmed that the "interactive" nature of video games does not diminish the games' protection under the First Amendment.

2) Insufficient Proof of a Causal Link Between Violent Games and Violent Behavior. Because video games are subject to First Amendment protection, under long-standing constitutional law principles, proponents of the legislation must prove that restricting minors' access to the games serves a "compelling" state interest and that the legislation is narrowly tailored to achieve that end. Proponents of video game legislation typically have argued that minors who play violent video games suffer psychological harm or are more likely to engage in violent, aggressive, and antisocial behavior. While some courts have held these are worthy goals that could justify video game legislation, advocates for such legislation thus far have been unable to provide empirical evidence proving any causal link between video games and psychological damage to, or violent crimes committed by, minors. Courts specifically have noted that the evidence presented either has been inconclusive or has failed to support a finding that violent video games are any more harmful to the consumer or to the public safety than violent movies or other forms of "passive" media. Apparently in reaction to these decisions, a bill was recently introduced in the United States Senate (the "Children and Media Research Advancement Act") authorizing the Center for Disease Control to spend approximately \$90 million to investigate "the cognitive, physical, and social behavioral impact of electronic media on child and adolescent development." That bill has not yet come up for a vote.

3) The Laws Are Overinclusive. Some courts have noted that, as drafted, the laws sweep within their scope games that may not arguably lead to violent behavior or threats to public safety. For example, a law enacted in the State of Washington sought to forbid the distribution to minors of video games that contain "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." The District Court permanently enjoined enforcement of the law, noting that, even if the state's interest in preventing violence toward law enforcement officers was compelling, the law impacted "more constitutionally protected speech than is necessary to achieve the identified ends."

4) The Laws Are Vague. Lastly, courts have expressed concern that certain terminology used in the legislation is overly vague, making the laws difficult to apply. Courts specifically have noted the difficulty in applying open-ended terms such as "serious physical harm" and "violence." Courts even have observed a difficulty in applying the term "human" to video games whose characters are part human, sometimes human, human but with superpowers, or otherwise "fanciful."



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It is worth noting that not every law restricting video game sales to minors has been challenged or enjoined. For example, in May and June 2006, laws were passed in Louisiana and Maryland that added "obscene" games (i.e., those that consist of descriptions or depictions of illicit sex) to a preexisting list of materials that may not be sold or distributed to minors. These laws are not being challenged by the Entertainment Software Association, the trade association of video game publishers that advocates treating video games the same as other media, such as books and movies. The battle over legislation attempting specifically to restrict the sale of violent video games is likely to continue among video game publishers, religious and family advocacy groups, legislators, and the courts. Whether any such law can be drafted that will survive constitutional scrutiny remains to be seen. However, it seems clear that any law hoping to do so must be narrowly drafted and must be aimed at a specific and identifiable harm that has been proven by empirical evidence to be the result of video games.