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Opinion No. 00-060

Constitutionality of Limiting Minor's Access to Video Games

QUESTIONS

1. Can the State limit a minor's access to video games as proposed by House Bill 2187?

2. Can the State incorporate the voluntary standards of the Interactive Digital Software Association?

OPINIONS

1. No. The language of the proposed bill calls for an unauthorized delegation of legislative authority and contains vague references in its definition of "graphic violence."

2. No. The State cannot rely on the standard of the Interactive Digital Software Association to determine whether a video game should be included in the ban on sales and rentals to minors. However, the State can require that information on the Association's Entertainment Software Rating Board be made available to consumers.

ANALYSIS

1. Section (b)(1) of the proposed bill states:

> A person commits an offense if the person sells, rents or otherwise provides for use for a charge any video game to a minor which contains scenes or depictions of graphic violence as determined by the Entertainment Software Rating Board. The first violation of this subsection shall be a Class B misdemeanor.

By leaving the determination of which video games contain scenes and depictions of graphic violence to the Entertainment Software Rating Board, this subsection includes an unconstitutional delegation of power to a non-governmental entity. Courts have long held that the independent movie rating system cannot be used to determine whether a movie receives constitutional protection. *Motion Picture Ass'n v. Specter*, 315 F. Supp. 825 (E.D. Pa. 1970); *Swope v. Lubbers*, 560 F. Supp.

1328 (W.D. Mich. 1983). Similarly, use of the Entertainment Software Rating Board to determine the State's standard for "graphic violence" is impermissible.

Section (a)(2) of the proposed bill states:

> "Graphic violence" includes, but is not limited to, depictions of:
>
> (A) Decapitation.
> (B) Bloodshedding.
> (C) Dismemberment.
> (D) Grotesque cruelty.

The Tennessee Supreme Court has held that the use of the phrase "excess violence" defined as "the depiction of acts of violence in such a graphic and/or bloody manner as to exceed common limits of custom and candor, or in such a manner that it is apparent that the predominant appeal of the material is portrayal of violence for violence's sake" is unconstitutionally vague. *Davis-Kidd Booksellers v. McWherter,* 866 S.W.2d 520, 532 (Tenn. 1993).

The usual standard for determining whether a statute is vague is whether "men of common intelligence must necessarily guess at its meaning." *Broadrick v. Oklahoma,* 413 U.S. 601, 607, 93 S.Ct. 2908, 37 L.Ed.2d. 830 (1973). Certainly decapitation and dismemberment are clear terms. However, the use of "bloodshedding" and "grotesque cruelty" makes the decision as to what constitutes "graphic violence" subjective. Thus, under this proposed legislation, video game merchants have little guidance as to the nature of the proscribed game.

Section (c) states:

> Any person or business offering any video game or computer game for sale, loan or use must make available the most recent listings of the Entertainment Software Rating Board for the inspection and review by any potential purchaser, user or transferor of such video or computer game. Failure to make such information available shall constitute a Class B misdemeanor for a first offense and a Class A misdemeanor for a second or subsequent violation of this subsection.

Because this section deals with disclosure, as opposed to a direct restriction on speech, it appears to be constitutional. Undoubtedly, ratings information can be useful and important to a consumer reviewing various video and computer games for purchase. *See Time Warner Entertainment v. FCC,* 93 F.3d 957, 982 (D.C. Cir. 1996).

2. As discussed in question one, the State cannot rely on the ratings created by the Entertainment Software Rating Board, a creation of the Interactive Digital Software Association, to determine whether sales or rentals of video or computer games should be restricted to minors.

According to the brochure accompanying your request for an opinion, the Rating Board has created six categories for rating video and computer games. Each category is characterized by a vague description of the nature of the game. For example, a "mature" rating means "the content may be suitable for persons ages 17 and older. May contain mature sexual themes or more intense violence or language." This imprecise language, if incorporated as part of the statute, would not pass a constitutional vagueness challenge.

Further, the rating is generated following review of the game by three raters "who come from all walks of life and have undergone extensive training by the ESRB." The raters review the products, a computer tabulates the results, and an ESRB staff member determines the final rating. Because this system is vague and lacking in ascertainable standards, its use would not withstand a constitutional challenge.

However, requiring video and computer game sales and rental centers to display the ratings developed by the Association's rating board is permissible, as previously discussed.

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