Video Game Regulation and the Supreme Court: Schwarzenegger v. Entertainment Merchants Association

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[Attorney Greg Boyd takes a detailed look at the arguments in the upcoming Supreme Court case on First Amendment issues as regards video games, and then analyzes the possible reasons SCOTUS accepted the case and what outcomes may arise from it.]

Content regulation generates more discussion than almost any other issue in the game industry. One of the “biggest” cases ever in the game industry, and certainly the most important case on games, is now pending before the Supreme Court. That case, Schwarzenegger v. EMA, is about a California law designed to limit the sale of violent video games to minors.

On November 2, 2010, the Supreme Court will hear oral arguments in the case. Based on those arguments and associated written material, the Court will then decide whether the law is unconstitutional. Because this is a Supreme Court decision, the result will be binding nationwide, not just in California.

As a result of the far reaching effects and strong feelings, it is easy to find a great deal of opinion and misinformation related to the case.

This article aims to be as factual and unbiased as possible in its reporting and analysis of the case. Below, we will discuss the history of the case, the main arguments for both sides, and an analysis of the potential consequences of the decision.

The California law was originally introduced by Leland Yee, a Democrat and state senator for California. The intent of the law was to prevent violent video games from being sold to minors, and required a 2 by 2 inch sticker placed on each game labeled as violent that read “18+”.

This label would be in addition to any ESRB rating on the game. The primary responsibility for compliance would fall on retailers, who could be fined $1,000 per violation for noncompliance.

An obvious first question is, “What exactly constitutes a violent video game under the statute?” The statute has an extensive definition section that makes an effort to answer the question. The definition from the statute is:
Violent video game means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.

(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.

(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim. (Cal. Civ. Code § 1746(d)(1) (2009)).

Some of the more legally minded may recognize the first half of the definition. This is nearly identical to the famous Supreme Court test for obscenity known as the Miller test. It is slightly modified by adding the element addressing minors, but this is clearly an effort to make the statute consistent with prior Court precedent.

The legislation was passed at the California state level, but never went into effect. As a first step in the case history, the ESA (in the case with the EMA) brought the legislation before a federal district court for a preliminary injunction hearing. This is a type of hearing that, if successful, can stop something from happening, such as preventing a law from going into effect.

The ESA won that lower court decision. The court granted a preliminary injunction which prevented the legislation from ever going into effect. California appealed the decision to the 9th Circuit Court of Appeals. At the appellate level, California lost the case again, so the legislation was still unenforceable. After this second loss, California appealed one final time to the Supreme Court.

At this stage of the case history, it is worth noting that not all cases appealed to the Supreme Court get heard there. For most cases in California, the 9th Circuit Court of Appeals would be the last stop. After a decision by that court, the Supreme Court appeal starts with a type of application process. Each year about 10,000 cases are offered up to the Court for review. Of those, only about 100 will actually make it to oral argument.

The parties file a petition asking the Supreme Court to hear the case, and four of the nine Justices must vote in favor of the hearing for the case to make it before
the Court. When the Supreme Court decides to hear a case it is called “granting a writ of certiorari” or more often shortened to “granting cert.”

There are many possible reasons for the Supreme Court to grant cert. Most commonly, the Court does so for issues of great national importance where states are split on an issue. A state split means that given the same facts, federal courts in different areas of the country are ruling in different directions. A “split” is a way of expressing that there is a disagreement on what the law is in the country, so the Supreme Court decision is needed to make a definitive ruling.

In some cases, the reasons for granting cert. are mysterious. The order granting cert. is usually only a sentence or two long. The reasons may be stated in the Court’s opinion, but often the reasons are only inferred much later by Supreme Court scholars after a decision is made. The Court reviews everything associated with the decision, and argues about the reasons for granting cert. in context with some historical perspective.

In this case, there is no state split on this issue. The states have been unsuccessfully trying to regulate content in games for years. To date, there have been 12 cases in eight years trying to impose some type of state-level regulation on video games. The ESA has challenged all of these cases through a process similar to the California case, and won every time.

In fact, a recent victory in Illinois, the ESA also won an award of $510,000 in attorneys’ fees as well as the victory squashing the legislation. The ESA also received a $282,794 reimbursement of attorneys’ fees in California for this case.

Overall, the ESA has received more than $2M in attorneys’ fees from a number of regulation cases. The attorneys’ fees award is significant because it is unusual in the U.S., where each party usually pays its own fees.

The precedent cases are unanimous, and there is no reason to expect a different result in future cases. So, removing the “state split” idea for granting cert., legal scholars are left guessing why the Supreme Court took the case. We may not ever know for certain, but we will have a better idea after the Court decides this case.

Why do the states keep losing? The reason is tied to First Amendment protection of free speech. The government cannot usually regulate speech, but there are some narrow exceptions.

A person cannot yell “fire” in a crowded theater. Obscenity, such as child pornography, is not considered speech and therefore is not protected. Still, these are exceptions to the general rule are very narrow.

To date, courts have looked at this type of state legislation as regulation of free speech. Specifically, the courts viewed it as a type of regulation referred to as a
“content-based regulation.” The statutes are evaluating the content of the speech, game violence, and making a prohibition based on that content.

This type of regulation is possible under the First Amendment, but very difficult. It is so difficult because the standard of judicial review or “test” that a content-based regulation has to pass in order to be deemed Constitutional is enormously burdensome.

Before the court chooses which test to apply, both parties argue about what test is appropriate. This article will limit the discussion to the test normally applied in content-based regulation cases: the “strict scrutiny” test. The rationale behind the test is that the Constitution prevents the government from regulating the content of speech except under the narrowest of circumstances.

To pass the test, a statute must: (1) “serve a compelling governmental interest,” and (2) be “narrowly tailored” to satisfy that interest. Narrowly tailored means there must be no less restrictive way to accomplish the goal. The compelling governmental interest prong of the argument means that there has to be a proven and powerful governmental interest at stake.

The state statutes have been failing this test for two main reasons. First, the compelling governmental interest prong is difficult because there is no solid data to support the claim that exposure to violent games harms adults or children. Certainly, some studies have indicated that harmful effects may be possible. However, those studies appear to be preliminary at best, and most are widely criticized by serious academia for a number of reasons, including flawed methodology or obvious political agenda.

Second, the ESRB is already in place with a robust rating system for games. To pass the "narrowly tailored" prong of the test, a party has to show that there is no less restrictive means to achieve the state goal.

While the ESRB may not be perfect enforcement, the self-regulatory effort is a serious one. Those opposing the statutes argue that the ESRB rating system, or some other mechanism, is always possible as a less restrictive means to accomplish the statute’s stated goals. In short, the statutes have not been “narrowly tailored" enough in the past and have failed this prong of strict scrutiny.

The Bigger Picture

Prior to this section, the article has, to the extent possible, been a simple factual reporting of the California statute, the case history and related issues. However, it would be unfair to only discuss the case in a cold, analytical light. The next few paragraphs are devoted to some of the deeper policy considerations and possible consequences of the case.
Certainly, no one is questioning video games as speech in any of these cases to date. All parties agree that video games are speech, and are granted Constitutional protection. The question is what level of protection?

It should also be noted that no one is trying to “ban” certain types of video games completely. The California case in particular is about placing a sticker on a retail box, and some additional vigilance as it relates to sales of games to minors.

Still, some people against the legislation do believe that, at its root, this is an attack on games as art and/or games as speech. There is also a fear that this is the sharp end of a wedge ending in more aggressive game legislation.

Even the potentially flawed and preliminary studies on the possible link between games and violence leave legitimate questions outstanding. These questions do deserve to be answered definitively.

The answers will require further empirical study, but we can frame the debate in this hypothetical context: is it entirely fair to think that games should be treated the same as other creative forms of speech?

What about Moore’s law essentially doubling computing power every two years? This is rapidly taking the industry toward photorealism. New technologies such as 3D projection and motion sensing, coupled with photorealism might mean we are likely just a few years away from immersive, photo-real, game experiences without a controller.

From there, how far is it to the Holy Grail of the holodeck that every gamer has dreamt about for the last 30 years? The main reason that game violence was not a large issue in the Pac-Man era, but presents a real issue now, relates directly to technological advances.

The game industry has created a bit of a tension with its own assertion regarding the teaching ability of games. The industry as a whole touts the powerful ability of games to teach everything from memory skills, flight simulation and military training, to surgery.

Yet, it also maintains that realistic violent games do not teach or motivate violent behavior. It is difficult to make the fine division between a military simulation teaching certain skills and a similar game not teaching those skills. This is made more difficult in the fully immersive, 3D, photo-real, movement controlled game environments of the near future.

The answer may lie in the fundamental distinction between fiction and non-fiction. There are books and films that teach and others that entertain. The books and films written for non-fiction audiences are constructed differently than those for fiction audiences. In other media, the intent and structure have been enough that people have usually been able to tell the difference. Empirically, it looks as if we do not know the answer to that question definitively for games.
In the 1940s and ‘50s, comic books were widely thought to contribute to juvenile delinquency. This led to the creation of the Comics Code Authority in the 1950s. Growing up in the 1970s and 80s, I have firm memories of the waning parental concern over the “dangers of rock and roll” and the growing parental concern over children spending too much time playing Dungeons & Dragons.

All of those cultural influences terrorizing youth seemed to pass by rather blandly in retrospect. For a thousand years before that, there was a long line of banned plays, books, and even opera. Two thousand five hundred years ago Socrates drank hemlock for “corrupting the youth of Athens.” And now, ironically, parents will do whatever it takes to try to get youth to learn a little Socrates or go to the opera.

The fear and censorship around many of these media forms seems to coincide with the birth of new media forms. No one gets very excited over plays, operas, or philosophy these days. Books seem to keep their wrath-invoking power, but in historical contexts, even that appears to be waning in liberal Western society. Are games just the newest media form to succumb to an irrational fear and censorship, or is there something deeper here?

At the very least, it deserves thoughtful consideration. Game media is more immersive, more compelling, and more interactive than anything that has come before. Games also benefit from technological advances in ways that these other media generally do not.

Plays, film, and opera have not changed that much compared to what the last 30 years has brought to games and what the next 30 years will bring. Furthermore, to the extent those other media do change, it is often through technology that was introduced and perfected for use in games (CGI, mo-cap, 3D, interactivity etc).

It would be surprising to the legal community if this case went against all the prior similar cases on content-based regulation. The consensus expectation is that this case will fit with the other state cases on this issue (and the two lower court decisions in California). The preliminary injunction will likely be upheld and the statute will likely be held unconstitutional.

Still, there is a lot of buzz in the legal community about why the case was taken up by the Supreme Court at all. Remember, the case is competing for roughly one hundred oral argument spots among ten thousand applicants. Is it that all of the other courts have gotten it wrong? Perhaps the strict scrutiny standard applied above, and commonly throughout the other content-based regulation cases, is the incorrect standard. Perhaps this is a case of the High Court stepping in to settle the issue in a more final way.

The Court could see that, clearly, the states are not “getting it” with the other cases, and they know this type of legislation has already cost the state taxpayers more than $2 million in reimbursed legal fees.
The game industry and legal community cannot be sure of the reasons at this stage. However, everyone is sure that this case is the biggest case in the history of the game industry, and one of the biggest cases the Court will hear this year by any measure. People on both sides are anxiously awaiting the result.

For further reading:

www.mediacoalition.org – This group sides with ESA on the issue, but has posted all of the filings from each group which are easily available for viewing in .pdf form. It is an excellent factual resource that, through a study of the filings, show the full breadth of both sides of the issue.

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