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California Commands Conscience: Chapter 638 Regulates Violent Video Game Sales

Graham Owen

Code Sections Affected

Civil Code §§ 1746, 1746.1, 1746.2, 1746.3, 1746.4, 1746.5 (new).
AB 1179 (Yee); 2005 STAT. Ch. 638.

I. INTRODUCTION

Imagine children controlling and watching a man named Carl Johnson participate in intercourse and oral sex.¹ Carl Johnson, or “CJ,” is the main character in the popular game *Grand Theft Auto: San Andreas*.² A recently discovered code in the computer version of the game allows players to make CJ participate in sexually explicit acts.³ The Entertainment Software Rating Board (ESRB), created by the video game industry to self-regulate video games sold according to content,⁴ initially rated the game “M” for mature audiences over sixteen years old because, even without the discovered code, the game contains intense violence accompanied by blood and gore, sexually explicit scenes, strong language, and drug use.⁵ Senator Hillary Clinton requested that the United States Federal Trade Commission (FTC) determine whether *Grand Theft Auto: San Andreas* should be reclassified as “AO” for adults only,⁶ but the ESRB reclassified the game “AO” before any official conclusion.⁷

Regardless of whether a game is rated “M” or “AO,” the ESRB has no power to ensure that retailers do not sell or rent the graphic games to children under seventeen.⁸ While laws already regulate sales of sexually explicit video games to

1. See *Clinton Pans Video Game's Sex*, RED HERRING, July 13, 2005, available at <http://www.redherring.com/PrintArticle.aspx?a=12750§or=Industries> [hereinafter *Clinton*] (on file with the *McGeorge Law Review*) (reporting that the video game *Grand Theft Auto: San Andreas* contains scenes featuring oral sex, nudity, and simulated intercourse).

2. See *Game Rating Board Probing 'Grand Theft'*, L.A. TIMES, July 9, 2005, at C3 (stating *Grand Theft Auto* “has been among the best-selling [video games] in history”); Rockstar Games, *Grand Theft Auto San Andreas*, <http://www.rockstargames.com/sanandreas/> (last visited Sept. 10, 2005) (on file with the *McGeorge Law Review*) (advertising basic plot information about the game).

3. *Yee Urges Ratings Board to Come Clean in Probe*, AM. CHRON., July 14, 2005, <http://www.americanchronicle.com/articles/viewArticle.asp?articleID=1168> [hereinafter *Yee*] (on file with the *McGeorge Law Review*).

4. Entertainment Software Rating Board, *Frequently Asked Questions*, http://www.esrb.org/esrbratings_faqs.asp (last visited Sept. 10, 2005) [hereinafter *ESRB FAQs*] (on file with the *McGeorge Law Review*).

5. *Clinton*, *supra* note 1.

6. *Yee*, *supra* note 3.

7. *Programmers: Video Games Need a Woman's Touch*, WPVI.COM, July 21, 2005, <http://abclocal.go.com/wpvi/story?section=entertainment&id=3273059> (on file with the *McGeorge Law Review*).

8. *ESRB FAQs*, *supra* note 4.

minors,⁹ California recently enacted Chapter 638 to regulate the sale of violent video games to minors.¹⁰ The new law prohibits retailers from selling or renting the games to children under eighteen,¹¹ sets an offender's liability at a maximum of \$1000 per violation,¹² and allows parents to report violations to local prosecutors.¹³

II. BACKGROUND

Relatively few laws regulate video game rentals and sales to minors in California.¹⁴ One law prohibits people from selling or renting video games that advertise alcohol or tobacco to minors.¹⁵ Other statutes require video game arcades and retailers to post signs educating customers about the ESRB video game rating system.¹⁶ A more general statute prohibits anyone, other than a child's parent or guardian, from distributing harmful matter to a minor.¹⁷ California defines harmful matter as "matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and . . . depicts or describes in a patently offensive way sexual conduct and . . . lacks serious literary, artistic, political, or scientific value for minors."¹⁸

More than ninety percent of video games sold in the United States are published by companies that belong to the Entertainment Software Association.¹⁹ In 1994, the Entertainment Software Association created the ESRB to rate and regulate video games according to content.²⁰ Since then, the ESRB developed seven different ratings and over thirty different content descriptors that it applies to video games based on content.²¹ Publishers who are members of the Entertainment Software Association are legally bound to disclose the content of

9. See CAL. PENAL CODE §§ 311.1-4 (West 2004) (applying to all sexually explicit content).

10. CAL. CIV. CODE § 1746.1(a) (enacted by Chapter 638).

11. *Id.*

12. *Id.* § 1746.3.

13. *Id.* § 1746.4.

14. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1179, at 3 (Sept. 8, 2005) (listing only two video game regulations).

15. CAL. PENAL CODE § 308.5(a) (West 2004).

16. CAL. BUS. & PROF. CODE §§ 20600, 20650 (West 2004).

17. See CAL. PENAL CODE §§ 313.1-2 (West 2004) (requiring presence of sexual content to classify matter as "harmful").

18. *Id.* § 313(a).

19. Entertainment Software Rating Board, About ESRB, <http://www.esrb.org/about.asp> (last visited Sept. 10, 2005) [hereinafter About ESRB] (on file with the *McGeorge Law Review*).

20. *Id.*

21. See Entertainment Software Rating Board, Game Rating & Descriptor Guide, http://www.esrb.org/esrbratings_guide.asp (last visited Sept. 10, 2005) (on file with the *McGeorge Law Review*) (showing rating symbols for early childhood, everyone, everyone 10+, teen, mature, adults only, and rating pending and listing content descriptors such as "Alcohol Reference," "Blood and Gore," and "Sexual Themes").

their video games to the ESRB and label their video games with ratings subsequently issued by the ESRB.²² The ESRB may sanction publishers, with a fine or otherwise, for non-compliance with the rating system.²³

Though publishers comprising the Entertainment Software Association must comply with the ESRB rating system, retailers have no such obligation.²⁴ The FTC conducted a nationwide, undercover survey in 2003 and found that children ages thirteen to sixteen were able to purchase “M” rated video games sixty-nine percent of the time.²⁵ The FTC, however, concluded that “[a] well-constructed self-regulatory system can be more prompt, flexible, and effective than government regulation, and can be especially appropriate when government intervention would raise significant First Amendment concerns.”²⁶

Courts that have addressed the issue have held that video games are entertainment²⁷ and are therefore protected “speech” under the First Amendment.²⁸ The government may nevertheless constitutionally restrict protected speech when it uses the least restrictive means to further a compelling interest.²⁹

California Assembly Member Yee, who holds a doctorate in Child Psychology, articulated the compelling state interest addressed by Chapter 638.³⁰ He claimed teens “wire[] . . . the circuits for self control, responsibility, and relationships they will carry with them into adulthood” and that “studies [of children who play violent video games] prove causation of aggression.”³¹

Absent a compelling state interest, the Constitution allows the government to restrict unprotected speech, such as obscenity.³² The Supreme Court has ruled that only sexual content can qualify as obscene speech.³³

22. ESRB FAQs, *supra* note 4.

23. *Id.*

24. *Id.*

25. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1179, at 13-14 (Sept. 8, 2005).

26. ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, & INTERNET MEDIA, COMMITTEE ANALYSIS OF AB 450, at 6 (May 2, 2005).

27. Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003); Am. Amusement Machine Ass’n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

28. *See* Shad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) (holding entertainment is protected by the First Amendment).

29. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

30. ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, & INTERNET MEDIA, COMMITTEE ANALYSIS OF AB 450, at 3 (May 2, 2005). AB 450 was a previous, failed version of Chapter 638. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1179, at 2-3 (Sept. 8, 2005). When AB 450 stalled on the assembly floor, Assembly Member Yee hijacked AB 1179. *Id.*

31. ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, & INTERNET MEDIA, COMMITTEE ANALYSIS OF AB 450, at 3 (May 2, 2005); *see also* *Video Games Can Be Good For Your Health*, MED. NEWS TODAY, July 15, 2005, <http://www.medicalnewstoday.com/medicalnews.php?newsid=27474> (on file with the *McGeorge Law Review*) (“[T]here is a growing body of evidence highlighting the more negative aspects of play, particularly on children and adolescents. . . . These include risk of video game addiction and increased aggressiveness.”).

32. *E.g.*, *Miller v. California*, 413 U.S. 15, 24 (1973) (holding valid an obscenity law).

33. *Id.* at 27.

III. CHAPTER 638

Chapter 638 contains findings that minors exposed to violent video games exhibit decreased frontal lobe brain activity and are more likely to exhibit violent, aggressive, and antisocial behavior.³⁴ Chapter 638 declares California “has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games.”³⁵

Chapter 638 defines 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 an image of a human being.”³⁶ It requires the afore quoted options to either (1) satisfy a three-part test borrowed from the United States Supreme Court’s obscenity test³⁷ or (2) be characterized as “especially heinous, cruel, or depraved . . . [and] involve torture or serious physical abuse.”³⁸ The statute requires the second option to include additional abuse apart from killing the virtual victim, such as unconsciousness or disfigurement.³⁹

The three-part test developed by the United States Supreme Court in *Miller v. California*, used to determine whether material is obscene, is modified in Chapter 638⁴⁰ to determine whether material is violent.⁴¹ The three elements as applied in Chapter 638 are: whether (1) “[a] reasonable person, considering the [video] game as a whole, would find [it] appeals to a deviant or morbid interest of minors;”⁴² (2) “[i]t is patently offensive to prevailing standards in the community as to what is suitable for minors;”⁴³ and (3) “[i]t causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.”⁴⁴

Chapter 638 requires violent video games to be labeled with a two inch square “18” in white text on a black background.⁴⁵ A person is liable for a \$1000 fine or less, determined by a court, if the person imports or distributes a violent video game to a child under eighteen years old.⁴⁶ Only a parent, legal guardian, or other adult acting on behalf of a minor to whom a violent video game was sold

34. See 2005 Cal. Stat. ch. 638, § 1(a).

35. *Id.* § 1(c).

36. CAL. CIV. CODE § 1746(d)(1) (enacted by Chapter 638).

37. See *infra* note 40 and accompanying text.

38. CAL. CIV. CODE § 1746(d)(1) (enacted by Chapter 638).

39. *Id.* § 1746(d)(3).

40. See 413 U.S. 15, 24 (1973) (“[O]bscene materials are] limited to works which, taken as a whole, [1] appeal to the prurient interest in sex, [2] which portray sexual conduct in a patently offensive way, and [3] which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”).

41. CAL. CIV. CODE § 1746(d)(1)(A).

42. *Id.* § 1746(d)(1)(A)(i).

43. *Id.* § 1746(d)(1)(A)(ii).

44. *Id.* § 1746(d)(1)(A)(iii).

45. *Id.* § 1746.2.

46. *Id.* §§ 1746.2-.3.

may report the violation to a local prosecutor.⁴⁷ Specified people are exempt from prosecution under Chapter 638: parents, grandparents, aunts, uncles, legal guardians,⁴⁸ and employees who are solely salesclerks with no managerial duties or ownership interest in the company.⁴⁹ If charged, a defendant may escape liability by proving the child showed, and the defendant reasonably relied on, evidence that the child was older than seventeen, such as a driver's license.⁵⁰

Lastly, Chapter 638 claims severability; if a court holds any section of the Chapter invalid, the other sections are still valid if they can operate without the invalid section.⁵¹

IV. ANALYSIS OF THE NEW LAW

As a practical matter, Chapter 638 cannot penalize retailers for selling violent video games to minors based on the preexisting ESRB ratings because it would be contrary to the California Constitution. Further, the ESRB, as a non-governmental entity, is not allowed to control the scope of Chapter 638 by determining which games are appropriate for which ages.⁵²

More importantly, Chapter 638 raises a First Amendment freedom of speech issue.⁵³ The law is susceptible to a First Amendment challenge because courts have held that video games are entertainment,⁵⁴ thus are protected by the First Amendment.⁵⁵

A. *Is California's Interest Compelling?*

First Amendment protection is not absolute; the government may restrict protected speech using the least restrictive means to further a compelling interest.⁵⁶ Legislative findings codified in Chapter 638 state that video games cause psychological harm to minors and California has a compelling interest in preventing that harm.⁵⁷ The Supreme Court has found a compelling state interest

47. *Id.* § 1746.4.

48. *Id.* § 1746.1(c).

49. *Id.* § 1746.3.

50. *Id.* § 1746.1(b).

51. *Id.* § 1746.5.

52. *See* CAL. CONST., APPX. I, ART. III, § 1 (stating no person shall exercise legislative powers).

53. *See* Editorial, *Sordid Titles are Anything but Child's Play*, SAN JOSE MERCURY NEWS, May 2, 2005, at 6B (stating the First Amendment is the biggest concern).

54. *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

55. *See* *Shad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (stating entertainment is protected by the First Amendment).

56. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

57. *See* 2005 Cal. Stat. ch. 638, § 1(a), (c).

in protecting the psychological well being of children,⁵⁸ so Chapter 638 will likely satisfy this element of a First Amendment analysis.

B. Does Chapter 638 Promote the State Interest?

The First Amendment requires that laws abridging a granted liberty must achieve the purpose of the law. The stated purpose of Chapter 638 is to prevent “violent, aggressive, and antisocial behavior, and . . . psychological or neurological harm to minors who play violent video games.”⁵⁹ Though those opposing Chapter 638 do not dispute causation,⁶⁰ courts in previous cases have found insufficient evidence to prove that violent video games cause aggression in minors.⁶¹

However, the Washington District Court in *Video Software Dealers Association v. Maleng* found sufficient evidence to infer that some video games may increase aggressive tendencies of some players.⁶² Nevertheless, the court found insufficient evidence that video game violence against virtual law enforcement officers caused violence against actual law enforcement officers.⁶³ The Washington law evaluated in *Maleng* is distinguishable from Chapter 638, however, because the Washington law targeted video game violence against a particular group.⁶⁴ Chapter 638 is more general and prohibits heinous violence against any human character.⁶⁵ If *Maleng* is any indication, a court might find that violent video games cause increased aggressive tendencies in minors and hold that Chapter 638 adequately promotes California’s interest in preventing those tendencies.⁶⁶

C. Is Chapter 638 Narrow Enough?

Having found that California may have a compelling state interest in regulating sales of violent video games to minors,⁶⁷ the question arises whether Chapter 638 is sufficiently narrow to achieve that state interest without unduly restricting protected speech.⁶⁸ By adopting language from the Supreme Court’s obscenity analysis, Chapter 638 attempts to restrict the sale of only the most

58. *Sable*, 492 U.S. at 126.

59. 2005 Cal. Stat. ch. 638 § 1(c).

60. See, e.g., Letter from Francisco Lobaco, Legis. Dir., ACLU, to Assembly Members, Cal. State Assembly (Apr. 26, 2005) (on file with the *McGeorge Law Review*); Letter from Pamela B. Williams, Vice President, Cal. Retailers Ass’n, to Assembly Member Yee, Cal. State Assembly (Apr. 13, 2005) [hereinafter Williams Letter] (on file with the *McGeorge Law Review*) (typifying opposition letters to Chapter 638 that are silent on the issue of causation of aggression).

61. Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 578-79 (7th Cir. 2001).

62. Video Software Dealers Ass’n v. Maleng, 325 F. Supp. 2d 1180, 1188 (D. Wash. 2004).

63. *Id.*

64. WASH. REV. CODE § 9.91.180 (West 2005).

65. CAL. CIV. CODE § 1746(d)(1) (enacted by Chapter 638).

66. *Maleng*, 325 F. Supp. 2d at 1188.

67. See *supra* Part IV.A.

68. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

violent video games.⁶⁹ Opponents of Chapter 638 argue the law is not narrow enough because the voluntary ESRB rating system is less restrictive.⁷⁰ This is a weak argument, however, because voluntary censorship is generally less restrictive than a legal requirement. The Supreme Court has held that obscenity law is narrow enough to promote government interests without unduly restricting protected speech⁷¹ and obscenity law is broader than voluntary censorship. As a result, Chapter 638 may pass constitutional muster as narrowly tailored enough to promote the state interest.

D. *Violence is Not Obscene*

The government may restrict speech that is not protected, such as obscenity.⁷² Less graphic material is more readily classified as obscene for minors than it is for adults,⁷³ but the Supreme Court has held that violence is not obscene.⁷⁴

The constitutionality of a law that uses obscenity language to regulate material that is not sexually explicit is undecided. This raises an interesting question for Chapter 638: would the Supreme Court apply the same reasoning it has used to uphold obscenity law to a statute that defines violence using language taken from obscenity law? It is doubtful. Violent content has been distinguished from sexual content because the Court claims violent expression has historically played more important roles than sexual expression.⁷⁵ The highly political aspect of violent expression is what the First Amendment seeks to protect.⁷⁶

E. *The First Amendment and Definiteness*

The Supreme Court has held laws that are too vague are unconstitutional, particularly when First Amendment concerns are involved.⁷⁷ Though obscenity law raises First Amendment concerns, harmful to minors obscenity laws have been upheld as definite enough to comply with the Constitution.⁷⁸ Because it

69. CAL. CIV. CODE § 1746(d)(1)(A)(i)-(iii) (enacted by Chapter 638).

70. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1179, at 12 (Sept. 8, 2005).

71. *Miller v. California*, 413 U.S. 15, 24 (1973).

72. *Id.* at 23-25.

73. *See, e.g., Ginsberg v. New York*, 390 U.S. 629, 637 (1968) (holding a New York statute prohibiting sale of pornography to minors under seventeen did not violate the First Amendment and allowing more restrictions for minors than for adults). *But see Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975) (holding minors are usually entitled to the same First Amendment protections as adults).

74. *Miller*, 413 U.S. at 27. *But see Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 185 (D. Wash. 2004).

75. SENATE JUDICIARY COMMITTEE, BILL ANALYSIS OF AB 1179, at 7-8 (Sept. 8, 2005).

76. *Id.*

77. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

78. *E.g., Ginsberg*, 390 U.S. at 637; *Upper Midwest Booksellers Ass'n v. Minneapolis*, 780 F.2d 1389, 1395 (1985). *But see Cyberspace Commc'ns v. Engler*, 55 F. Supp. 2d 737, 747 (E.D. Mich. 1999) (holding a Michigan "harmful to minors" law that prohibited internet providers from displaying sexually explicit material

defines violent video game in terms of obscenity,⁷⁹ a court may find Chapter 638 is sufficiently definite to pass constitutional muster.

Before the California Legislature enacted Chapter 638, video game renters and retailers were concerned that the criteria was too vague for them to determine on their own which video games are too violent to sell to minors under eighteen.⁸⁰ To assuage the concern, the Legislature added a provision requiring each game classified as a violent video game pursuant to Chapter 638 be labeled with a large, white "18."⁸¹ This provision places on manufacturers the burden of determining which video games are violent as defined by Chapter 638.

V. CONCLUSION

Chapter 638 raises constitutional questions. Even though Chapter 638 uses the language of obscenity law to define a violent video game,⁸² and the language is already recognized by the Supreme Court as narrow enough to satisfy constitutional due process,⁸³ violence is not included in the Supreme Court's recognized definition of obscenity.⁸⁴

As a practical matter, a constitutional challenge to Chapter 638 may be unlikely. The Chapter assigns video game manufacturers the burden to determine what a violent video game is and label video games accordingly.⁸⁵ The scenario does not seem very different from what the ESRB achieved before the California Legislature enacted Chapter 638.⁸⁶ The ESRB will simply have to change its rated "M" label to a two inch square "18." Maybe, as the FTC opined, regulating violent video game sales and rentals to minors should have been left to the private sector,⁸⁷ rather than using legislative resources to create a law that is constitutionally suspect and simply requires video game manufacturers to alter the labels they already place on video games.

to minors violated the First Amendment because there was no feasible way to determine age via the internet, so the law would have chilled adult expression).

79. CAL. CIV. CODE § 1746(d)(1)(A)(ii) (enacted by Chapter 638).

80. Letter from Sean Devlin Bersell, Vice President of Public Affairs, Video Software Dealers Ass'n, to Assembly Member Yee, Cal. State Assembly (Mar. 14, 2005) (on file with the *McGeorge Law Review*); Williams Letter, *supra* note 62 (on file with the *McGeorge Law Review*).

81. CAL. CIV. CODE § 1746.2 (enacted by Chapter 638).

82. *Id.* § 1746(d)(1)(A).

83. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

84. *Miller v. California*, 413 U.S. 15, 27 (1973). *But see* *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (D. Wash. 2004).

85. CAL. CIV. CODE §§ 1746-46.5.

86. About ESRB, *supra* note 19.

87. ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, & INTERNET MEDIA, COMMITTEE ANALYSIS OF AB 450, at 6 (May 2, 2005).

* * *