

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Personal Responsibility: This bill creates civil and criminal penalties for the previously legal activities.

Empower Families: The bill prevents children from accessing violent video games without the aid of a person over the age of eighteen.

B. EFFECT OF PROPOSED CHANGES:

Current Situation

Currently, Florida law prohibits the sale of harmful materials to minors. A minor is defined as a person under the age of eighteen¹, and “harmful to minors” as:

[A]ny reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.²

Further, Florida law makes it a third degree felony for a person to knowingly sell, rent, or loan for monetary consideration material to a minor if the material is:

[A] picture, photograph, drawing, sculpture, motion picture film, videocassette, or similar visual representation or image of a person or portion of the human body which depicts nudity or sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors.³

Florida law, through a similar statute,⁴ makes the same conduct a first degree misdemeanor.⁵

Under current law, it appears that the sale or rental of a video game to a person under 18 years old could be charged as a violation of either statute, if the video game includes visual representation or images of nudity or certain types of sexual conduct and is harmful to minors. However, there is no current prohibition against the sale or rental of video games containing representations or images of nonsexual violence.

Although it is not required by law, many commercially-distributed video games display content and suitability ratings on the cover. The Entertainment Software Ratings Board (ESRB) of the Entertainment Software Association (ESA), rates video games by content and age-appropriateness. In addition to the age-appropriateness rating, the ESRB system includes content descriptors such as “blood and gore,” “intense violence,” and “strong sexual content.”

¹ Section 847.001(8), F.S.

² Section 847.001(6), F.S.

³ Section 847.012(2)(a), F.S.

⁴ Section 847.013(2)(b), F.S.

⁵ Section 847.0013(2)(f), F.S.

The American Amusement Machine Association has drafted ratings for coin-operated arcade machines that provide information to consumers analogous to the information provided by the ratings established by the Entertainment Software Rating Board for home video games. It is not age based and uses color-coded Parental Advisory Disclosure Messages to alert players to game content.

Effect of Proposed Changes

This bill creates an unnumbered section of the Florida Statutes to provide that violent video games may not be sold or rented to minors. Additionally, the section provides that a minor may not be permitted to play a violent video game at a video arcade if the video game has been labeled as violent. This section also provides definitions for terms specific to the act such as "Violent video game" and "serious physical abuse." This section provides an affirmative defense to a person who is shown evidence that the player of the video game was not a minor or that the manufacturer failed to label a violent video game as required by this section. A violent video game may be sold or rented, without liability, to a minor's parent, grandparent, aunt, uncle or legal guardian or rented over the internet with a credit card.

This bill also provides that the every violent video game imported or distributed in Florida for retail sale, rental or playing in an arcade must be labeled with a solid white "18" of not less than 2 inches by 2 inches outlined in black on the front of the video game package by the manufacturer.

This bill authorizes a county, municipality, the attorney general, the department of legal affairs (if a violation occurs in more than one judicial circuit), or any person aggrieved by a violation to seek injunctive relief and authorizes the imposition of civil penalties. The penalties are limited to not more than \$1,000 per violation for a person with managerial responsibility for a business entity selling, renting, or allowing a minor to play the violent video game. Any civil penalties collected will be deposited into the General Revenue Fund. If a civil penalty is assessed, this section also authorizes the enforcing authority reasonable attorney's fees and costs. This section provides that a violation of the act is a second degree misdemeanor, and a second or subsequent violation is a first degree misdemeanor. In addition, this provision would allow anyone harmed by a violation of the act to seek damages.

This bill provides an effective date of October 1, 2006.

C. SECTION DIRECTORY:

Section 1

This bill creates an undesignated section of Florida Statutes and provides legislative findings, definitions; prohibits selling or renting a "violent video game" to a minor or allowing a minor to play such a game in an arcade; provides affirmative defense for relying on identification; prohibits importation or distribution of games into the state for retail sale, rental, or arcade playing with out a special label; provides for "enforcing authority" to institute civil action to seek injunctive relief or impose civil penalty for failing to follow minor access restrictions or failing to label; provides attorney's fees; provides for criminal penalties.

Section 2

Provides for an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

STORAGE NAME: h0647b.BR.doc
DATE: 4/17/2006

PAGE: 3

This bill requires civil penalties collected as a result of this statute to be deposited into the General Revenue Fund and may consequently increase state revenues by an indeterminate amount.

2. Expenditures:

This bill creates a new criminal offense which could result in misdemeanor convictions and associated costs for prosecution and punishment. Also, there could be expenditures to defend the constitutionality of the law if it is challenged in addition to costs and attorney's fees if the challenge is successful.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill creates authority for municipalities and counties to seek injunctive relief and to seek the imposition of civil penalties. If those entities choose to exercise that authority litigation expenses might be incurred. The bill does provide for the recovery of attorney's fees if the entity is successful.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. Video game manufacturers will have to create and affix the necessary labels. Additionally, an unspecified private entity will have to screen the games utilizing the standards set forth in the bill to determine whether a label is necessary.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

First Amendment

The First Amendment to the United States Constitution restricts the ability of government to regulate speech. The United States Supreme Court has held that a government restriction of speech that is based on content is presumptively invalid.⁶ In those situations, the government bears the burden of demonstrating that the restriction is necessary to serve a compelling state interest and that the restriction is narrowly tailored to achieve that end.⁷

Compelling Interest Analysis

HB 647 provides a legislative finding that Florida has a "compelling interest in preventing violent, aggressive, and antisocial behavior and in preventing psychological or neurological harm to minors

⁶ *R.A.V. v. St. Paul, Minn.*, 505 US 377, 382, 395 (1992).

⁷ *Id.*

who play violent video games.” In contrast, recent federal trial court decisions have been critical of the evidentiary basis for similar findings and, consequently, have not recognized these concerns as creating a “compelling interest.”⁸

First Amendment Protection for Minors

The Supreme Court has held that “In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors.”⁹ One noteworthy exception is in the area of sexually explicit material. The Court has allowed restrictions on the access of this type of material for minors when it is otherwise constitutionally protected for adults.¹⁰ However, the Supreme Court has not yet extended that exception to allow the restriction of *violent* material to minors and lower federal courts have explicitly rejected such an extension.¹¹

Previous Litigation on Violent Video Game Regulation: Circuit and District Courts

Two federal appellate courts have held that video games, including violent ones, are protected forms of expression similar to books, movies, and other literary forms.¹² Additionally, the issue of violent video games has been the subject of a number of federal trial court decisions, including one issued March 31, 2006 that permanently enjoined Michigan’s state law prohibiting the distribution of “ultra violent explicit video games.”¹³ To date, no federal or state court has decided in favor of the government restricting minors’ access to violent video games.¹⁴ In *VSDA v. Schwarzenegger*, a federal trial court enjoined the enforcement of a California law that is nearly identical to the bill currently under consideration.¹⁵ The court discussed two areas of concern with the California law that this analysis has not previously addressed:

Vagueness

Various federal trial courts have found legislative definitions of violent video games to be unconstitutionally vague because they do not provide standards precise enough for those subject to the law to understand their application.¹⁶ However, in *Schwarzenegger* the court held that the plaintiffs challenging the law did not demonstrate they were likely to succeed on a vagueness theory.¹⁷ The definitions in this bill are the same as those in the California law.

⁸ For the most extensive review see *ESA v. Blagojevich*, No. 05C4265, 2005 WL 3447810 (N.D. Ill. Dec. 2, 2005). See also *VSDA v. Schwarzenegger*, 401 F. Supp. 2d. 1034 (N.D. Cal. Dec. 21, 2005); *ESA v. Granholm*, No. 05-CV-73634, 2005 WL 3008584 (E.D. Mich. Nov. 9, 2005);

⁹ *Erznoznik v. City of Jacksonville*, 422 US 205, 212-13 (1975)(stating also that “[s]peech...cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.”) Id. at 214.

¹⁰ See *Ginsberg v. New York*, 390 US 629 (1968). (upholding a New York statute that protected children from non-obscene, and therefore constitutionally protected, material).

¹¹ See *Video Software Dealers Ass’n v. Maleng*, 325 F.Supp.2d 1180 (W.D.Wash. 2004); *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F.Supp.2d 1034 (N.D.Cal. 2005)

¹² *American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7th Cir.2001), cert. denied, 534 U.S. 994, 122 S.Ct. 462, 151 L.Ed.2d 379 (2001); *Interactive Digital Software Association v. St.Louis County, Missouri*, 329 F.3d 954 at 958 (8th Cir. 2003). The 6th Circuit has also held video games to be protected from civil liability by the First Amendment. See *James v. Meow Media*, 200 F.3d 683 (6th Cir., 2002)

¹³ *ESA v. Granholm*, Case No. 05-73534, E.D. Mich. (March 31, 2006). The judge ruled in favor of the software manufacturer plaintiffs on a motion for summary judgment and issued a permanent injunction. The law in question was already subject to a temporary injunction issued in 2005.

¹⁴ *ESA v. Blagojevich*, No. 05C4265, 2005 WL 3447810 (N.D. Ill. Dec. 2, 2005); *VSDA v. Schwarzenegger*, 401 F. Supp. 2d. 1034 (N.D. Cal. Dec. 21, 2005); *ESA v. Granholm*, No. 05-CV-73634, 2005 WL 3008584 (E.D. Mich. Nov. 9, 2005); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004)

¹⁵ *VSDA v. Schwarzenegger*, 401 F. Supp. 2d. 1034 (N.D. Cal. Dec. 21, 2005). The bill language can be found at : http://www.mediacoalition.org/legal/ESAvSchwarzenegger/ab_1179.pdf

¹⁶ See *Blagojevich*, *Maleng*, and *Granholm*.

¹⁷ *VSDA v. Schwarzenegger*, 401 F. Supp. 2d. at 1042.

Labeling requirement

The *Schwarzenegger* court also held plaintiffs had demonstrated a likelihood of success on their claim that mandatory labeling of video games unconstitutionally compelled speech by forcing the software manufacturer to declare its game violent.¹⁸ The California labeling provision is identical to the one in this bill. A separate federal trial court has declared a similar labeling provision to be unconstitutional.¹⁹

Neither the *Schwarzenegger* case, nor any other case directly addressing violent video games is considered binding on Florida state courts or federal courts located in the state. However, the weight of case law in other jurisdictions is persuasive authority.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

See section IV.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 5, 2006 the Business Regulation Committee adopted an amendment to the bill and reported it favorably with the committee substitute. The amendment made the following changes:

- An exception to the bill was added that removes liability for games rented over the internet with a credit card.
- A definition for the term “victim” was added.
- The language capping the value of civil penalties for non-managerial employees was removed. This raises the question of what value penalty, if any, can be levied on non-managerial employees. The sponsor’s intent was to completely remove non-managerial employees from civil liability.

¹⁸ Id. at 1047. (Citing Supreme Court Precedent that a “[C]ourt should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.”) Id.

¹⁹ *Blagojevich at* *85-56.