

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Criminal Justice Committee

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BILL: SB 492

INTRODUCER: Senators Diaz de la Portilla, King, and others

SUBJECT: Violent Video Games

DATE: January 26, 2006

REVISED: 03/02/06

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	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Earlywine</u>	<u>Cooper</u>	<u>CM</u>	<b>Favorable</b>
2.	<u>Davis</u>	<u>Cannon</u>	<u>CJ</u>	<b>Favorable</b>
3.	<u></u>	<u></u>	<u>JU</u>	
4.	<u></u>	<u></u>	<u>JA</u>	
5.	<u></u>	<u></u>		
6.	<u></u>	<u></u>		

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## I. Summary:

This bill prohibits a person from selling or renting a violent video game to a minor and prohibits a minor from playing a violent video game in a video arcade. This bill requires that any violent video game imported or distributed in Florida must display a specific label.

This bill authorizes an “enforcing authority” to seek injunctive relief and civil penalties. Additionally, this bill declares a violation of the act a second degree misdemeanor and a subsequent violation a first degree misdemeanor.

This bill creates an unnumbered section of the Florida Statutes.

## II. Present Situation:

The Florida statutes currently prohibit the sale of material that is deemed to be harmful to minors. “Harmful to minors” is categorized in the statutes and case law as material that is characterized by its sexual content. Material has not been deemed to be “harmful to minors” because it is characterized by violence.

A minor is defined as a person under the age of eighteen.<sup>1</sup> “Harmful to minors” is defined 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:

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<sup>1</sup> Section 847.001(8), F.S.

- (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. . .<sup>2</sup>

Further, Florida law makes it a third degree felony for a person to knowingly sell, rent, or loan (sic) 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.<sup>3</sup>

Florida law also prohibits knowingly selling or renting a videocassette or videotape of a motion picture, or similar presentation to a minor.<sup>4</sup> A violation of such is a first degree misdemeanor.<sup>5</sup>

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, 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 non-sexual 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.”

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.

### III. Effect of Proposed Changes:

**Section 1** creates an unnumbered section of the Florida Statutes which prohibits the distribution of violent video games to minors. Subsection (1) provides legislative findings which state that Florida has a “compelling interest” in preventing aggressive behavior and psychological harm to minors who play violent video games. Subsection (2) establishes definitions that are used throughout the proposed legislation.

<sup>2</sup> Section 847.001(6), F.S.

<sup>3</sup> Section 847.012(2)(a), F.S.

<sup>4</sup> Section 847.013(2)(b), F.S.

<sup>5</sup> Section 847.013(2)(f), F.S.

Subsection (3) prohibits the sale or rental of violent video games to minors and prohibits minors from playing violent video games at video arcades if the games have been labeled as violent. This section also provides definitions for terms specific to the act.

Subsection (4) 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. Subsection (5) permits a violent video game to be sold or rented to a minor's parent, grandparent, aunt, uncle, or legal guardian without penalty.

Subsection (6) provides that 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. However, the bill does not address how this provision will be enforced.

This section authorizes an "enforcing authority" to institute a civil action to seek injunctive relief or civil penalty of not more than \$1,000 per violation or not more than \$250 if the person against whom the penalty is being assessed is an employee of a business selling, renting, or playing 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.

**Section 2** provides an effective date of October 1, 2006.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

**Pending Litigation Involving Violent Video Games and Labeling Requirements**

This proposed legislation is modeled after, and nearly identical to, a California statute<sup>6</sup> which was signed into law in October 2005. The statute similarly sought (1) to demonstrate that California had a compelling interest in preventing harm to minors who play video games; (2) to prohibit the rental or sale of violent video games to minors; and

<sup>6</sup> California Civil Code sections 1746-1746.5; Assembly Bill 1179.

(3) to require the labeling of violent video games with a two inch square bearing the number “18.”

In December a federal district court judge issued a temporary injunction prohibiting the enforcement of this new statute.<sup>7</sup> The court found that the plaintiffs, two trade organizations representing companies in the video industry, would likely succeed on the merits of their claim that prohibiting the rental or sale of the videos to minors would be a violation of the First Amendment as would the labeling requirement. According to conversations with parties on both sides of this litigation, the case has not been resolved at this time.

Staff has been unable to find any federal case where a governmental entity has been able to successfully defend a law which prohibits the sale or rental of violent video games to minors. To the contrary, those attempts to regulate speech have been found to run afoul of the First Amendment to the Constitution. Both the Seventh and Eighth U.S. Circuit Courts of Appeals have declared those laws unconstitutional as have four U.S. District Courts in Washington, Illinois, Michigan, and California.<sup>8</sup>

Because the video industry representatives have prevailed in their litigation against the government in earlier cases, they have been entitled to collect attorney’s fees and costs. It is estimated that they have collected almost \$1 million to date for their costs and fees in three separate cases.

### **Legal Issues**

Below is a discussion of general constitutional principles and specific issues which the U.S. District Court for the Northern District of California examined in issuing the temporary injunction against the newly enacted California statute.

#### ***First Amendment***

The First Amendment of the United States Constitution limits the ability of the government to regulate speech. Therefore any effort by the government to regulate the content of speech is presumed to be invalid and subject to strict scrutiny.<sup>9</sup> When government seeks to restrict the content of speech it bears the burden of demonstrating that the restriction is necessary to serve a “compelling state interest” and that the restriction is narrowly tailored or the least restrictive means to achieve that purpose.

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<sup>7</sup> *Video Software Dealers Association and Entertainment Software Association v. Schwarzenegger, et al.*, 401 F.Supp.2d 1034 (N.D. Cal.2005).

<sup>8</sup> See *American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7th Cir.2001); *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954 (8th Cir.2003); *Video Software Dealers Association v. Maleng*, 325 F.Supp.2d 1180 (W.D. Wash.2004); *Entertainment Software Association v. Blagojevich*, ---F.Supp.2d---, 2005 WL 3447810 (E.D.Ill.2005); *Entertainment Software Association v. Granholm*, 2005 WL 3008584 (E.D.Mich. Nov. 9, 2005); *Video Software Dealers Association and Entertainment Software Association v. Schwarzenegger, et al.*, 401 F.Supp.2d 1034 (N.D. Cal. Dec. 21, 2005).

<sup>9</sup> *R.A.V.v. City of St. Paul*, 505 US 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

### ***The First Amendment as Applied to Minors***

The United States Supreme Court has determined that the values protected by the First Amendment are no less applicable to children when the government seeks to control the flow of information to them.<sup>10</sup> One area that has been carved out as an exception is the area of sexually explicit material. The court has allowed restrictions on the access of this material for minors when it is otherwise constitutionally protected for adults.<sup>11</sup> The U.S. Supreme Court has not extended that exception to permit the restriction of violent material to minors. Federal appellate courts have explicitly rejected this extension.<sup>12</sup>

### ***Video Games***

Although video games are a new and popular form of artistic expression, they have been determined to be a protected form of expression under the First amendment.<sup>13</sup>

### ***Compelling Interest***

Section (1)(c) of this proposed legislation contains 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 who play violent video games.” In the Schwarzenegger case and in recent federal litigation the courts have criticized the evidentiary basis for similar findings, calling the causal link between the violent video games and violent behavior unpersuasive. The courts have not determined that these concerns create a compelling state interest.

### ***Labeling Requirement***

In the California case the court determined that the plaintiffs had demonstrated that they were likely to prevail on their allegation that the mandatory labeling of the video games was unconstitutionally compelled speech. The speech was deemed to be compelled because the government would be forcing the industry to declare that certain of its games were violent. In an Illinois federal district court case which considered a nearly identical labeling requirement on video games, the court held the provision to be violative of the First Amendment and therefore unconstitutional.<sup>14</sup> The court noted that labeling requirement forces retailers to place a label on their own product that might differ with and contradict their own opinion about the content of the game.

## **V. Economic Impact and Fiscal Note:**

### **A. Tax/Fee Issues:**

None.

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<sup>10</sup> *Erznoznik v. City of Jacksonville*, 422 US 205 (1968).

<sup>11</sup> *Ginsberg v. New York*, 390 US 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).

<sup>12</sup> See footnote 8.

<sup>13</sup> *American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

<sup>14</sup> *Entertainment Software Association v. Blagojevich*, ----F.Supp.2d----, 2005 WL 3447810 (E.D.Ill.2005).

**B. Private Sector Impact:**

The bill may have a negative impact upon rental and sales of video games. However, the financial impact may not be significant since the games could be purchased by persons who are 18 years old or older for use by younger persons.

**C. Government Sector Impact:**

The bill creates a new criminal offense which could result in misdemeanor convictions, with potential costs for prosecution and punishment.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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## **VIII. Summary of Amendments:**

None.

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