

October 26, 2011

Senator Russell Prescott
Chairman, Commerce Committee
New Hampshire Senate
8 Farm Road
Kingston, NH 03848

Re: Memorandum of Law Regarding First Amendment Protection for Video Games

Dear Chairman Prescott,

In the course of considering enacting a statutory right of publicity, it has been suggested that video games are not protected by the First Amendment. We are an organization that defends the First Amendment rights of our members. Those members represent most of the publishers, booksellers, librarians, recording, film and video game manufacturers, recording, video, and video game retailers in New Hampshire and the rest of the United States. They have asked me to submit this memo to clarify this area of law.

One can no longer argue that video games are not protected by the Constitution. There is a substantial body of case law, most notably a major Supreme Court ruling from the 2010-11 term, that makes clear that video games are entitled to full First Amendment protection. In June, the Court issued a decision in *Brown v. Entertainment Merchants Association* that struck down a California law that would have banned minors from accessing video games with certain violent imagery. 131 S. Ct. 2729 (2011). The Court ruled that video games are fully protected speech; it applied strict scrutiny, the highest standard of review, in assessing the Constitutionality of the law and found that the California statute violated the First Amendment. Justice Scalia, writing for the majority, specifically acknowledged that, “[L]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection.” *Id.* at 2733.

The Court went on to explain that the novelty of video games is not a rationale for treating them differently from books, movies or magazines with respect to the First Amendment. “And whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not

vary” when a new and different medium for communication appears. *Id.* (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). The Court also dismissed the notion that interactive nature of video games is a basis for providing less protection under the Constitution. “As Judge Posner has observed, all literature is interactive. “[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.” *Id.* at 2738 (quoting *American Amusement Machine Assn. v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (striking down a similar restriction on violent video games)).

In his opinion, Justice Scalia further observed that while the state of California argued that these video games should not be protected as to minors in this limited instance, it was not claiming that video games are not protected speech. “California correctly acknowledges that video games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.” *Id.* Despite dissenting from the majority opinion, even Justice Breyer conceded that video games are protected speech. He noted that video games do have an element of playing but conceded that this is not sufficient to place them outside the protection of the First Amendment. “Video games combine physical action with expression... [B]ut because video games also embody important expressive and artistic elements, I agree with the Court that the First Amendment significantly limits the State’s power to regulate. And I would determine whether the State has exceeded those limits by applying a strict standard of review.” *Id.* at 2765 (internal citations omitted).

The Supreme Court ruling in *Brown* was the culmination of a decade of legal challenges to laws passed in numerous jurisdictions seeking to restrict access to video games. Every lower court that had addressed the question held that video games are fully protected speech, and receive the same First Amendment protection as books, movies, and magazines. *See, e.g. Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 957-58 (8th Cir. 2003) (quotation omitted) (holding video games as protected as “the best of literature”); *James v. Meow Media, Inc.*, 300 F.3d 683, 695-96 (6th Cir. 2002) (explaining that the First Amendment protects video games against attempts to regulate their “expressive content” or “communicative aspect”); *American Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577-78 (7th Cir. 2001) (describing in detail video games’ expressive qualities, including their ability to convey “age-old themes of literature,” messages, and ideologies, “just as books and movies do”); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 167, 181 (D. Conn. 2002) (holding that video games are fully protected where regulated based on “expressive elements”); *see also Entertainment Software Ass’n v. Swanson*, 519 F. 3d 768 (8th Cir. 2008); *Entertainment Merchants Ass’n v. Henry*, No. 06-675, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); *Entertainment Software Ass’n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entertainment Software Ass’n v. Granholm*, 426 F. Supp. 2d (E.D. Mich. 2006); *Entertainment Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005) (appealed on other grounds); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp 2d 1180 (W.D. Wash. 2004).

We respectfully advise the legislature that we believe that this is a fully settled area of law. If you would like to discuss this area of law further, please contact David Horowitz at 212-587-4025 #3 or at horowitz@mediacoalition.org.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
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