UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VIDEO SOFTWARE DEALERS ASSOCIATION, *et al.*,

Plaintiffs,

v.

NORM MALENG, *et al.*,

Defendants.

No. C03-1245L

ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the Court on "Plaintiffs' Motion for Preliminary Injunction." On June 5, 2003, companies and associations of persons that create, publish, distribute, sell, rent, and/or make available to the public computer and video games brought this action seeking to enjoin enforcement of Washington House Bill No. 1009, 58th Leg., Reg. Sess. (2003) (hereinafter, the "Act"). Plaintiffs argue that the Act violates the First Amendment by creating penalties for the distribution of computer and video games to minors based solely on their content and viewpoint. Having reviewed the memoranda, declarations,[1] and exhibits submitted by the parties and having considered the arguments of counsel, the Court finds as follows:

[1] "Plaintiffs' Motion to File Supplemental Declaration of Ed Fries in Support of Reply to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction" is GRANTED.

I. STANDING

As an initial matter, defendants argue that plaintiffs lack standing to pursue their claims. "The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy." Preiser v. Newkirk, 422 U.S. 395, 401 (1975). The first and foremost requirement of a case and controversy is that "there must be alleged (and ultimately proved) an 'injury in fact' – a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-03 (1998) (internal citations and quotations marks omitted). At this point in time, the Act has not yet gone into effect and has not been applied to any of the named plaintiffs. In addition, it is not at all clear how defendants will interpret and enforce the statute: throughout the briefing and argument of this motion, they have steadfastly refused to respond to plaintiffs' various questions regarding matters of interpretation.

Nevertheless, the normal standing requirements are sometimes relaxed in the First Amendment context. Courts have been willing to entertain claims that state legislation is unconstitutional "on its face" based not on injuries the plaintiff has actually suffered, "but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). In this case, the named plaintiffs have identified various injuries that they as game creators, distributors, and retailers will suffer as soon as the Act becomes effective. Even if plaintiffs have not yet suffered a cognizable injury, in the context of a facial challenge they have standing to assert the First Amendment rights of their consumers, the minors who are deprived of access under the Act. American Amusement Machine Assoc. v. Kendrick, 244 F.3d 572, 576-77 (7th Cir. 2001) (allowing video game manufacturers to champion the First Amendment rights of children).

II. PRELIMINARY INJUNCTION

In determining whether to grant a preliminary injunction, the Ninth Circuit traditionally considers: the likelihood of plaintiff's success on the merits; the possibility of irreparable injury to plaintiff if an injunction is not issued; the extent to which the balance of hardships favor plaintiff; and whether the public interest will be advanced by the injunction. See Miller v. California Pac. Med. Ctr., 19 F.3d 449, 456 (9th Cir. 1994); Los Angeles Memorial Coliseum Comm. v. National Football League, 634 F.2d 1197, 1201 (9th Cir. 1980). The analysis is often compressed into a single continuum where the required showing of merit varies inversely with the showing of irreparable harm. See United States v. Odessa Union Warehouse Co-Op, 833 F.2d 172, 174 (9th Cir. 1987). Thus, a party may obtain a preliminary injunction by showing "either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor." Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 965 (9th Cir. 2002).

A. Success on the Merits

The party claiming the protections of the First Amendment has the burden of showing that the conduct at issue expresses some idea or thought. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984). Communications designed to entertain the listener, rather than to impart information or debate public affairs, are eligible for constitutional protections. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967). In evaluating a person's claim that conduct is expressive, the Court considers "whether an intent to convey a particularized message is present, and whether the likelihood is great that the message would be understood by those who viewed it." Nordyke v. King, 319 F.3d 1185, 1189 (9th Cir. 2003) (citation and internal quotation marks omitted).

As pointed out by defendants, the early generations of video games may have lacked the requisite expressive element, being little more than electronic board games or computerized races. The games at issue in this litigation, however, frequently involve intricate,

if obnoxious, story lines, detailed artwork, original scores, and a complex narrative which evolves as the player makes choices and gains experience. All of the games provided to the Court for review are expressive and qualify as speech for purposes of the First Amendment. In fact, it is the nature and effect of the message being communicated by these video games which prompted the state to act in this sphere. As recently noted by the Eighth Circuit: "Whether we believe the advent of violent video games adds anything of value to society is irrelevant; guided by the first amendment, we are obliged to recognize that 'they are as much entitled to the protection of free speech as the best of literature.'" Interactive Digital Software Association v. St. Louis County, 329 F.3d 954, 958 (8th Cir. 2003) (citing Winters v. New York, 333 U.S. 507, 510 (1948)). Defendants have not argued that the video games fall into one of the few categories of speech that have been historically unprotected, *i.e.*, obscenity or "fighting words." Thus, a finding that the games at issue are expressive leads to the conclusion that they are protected under the First Amendment.[2]

The fact that the video games at issue are constitutionally protected does not, however, mean that all regulation of that speech is constitutionally defective. The state may regulate speech based on its content (as opposed to the time, manner, and place in which its published) if it can show that the regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end. Republican Party of Minn. v. White, 536 U.S. 765, 774-75 (2002). Such content-based regulations are presumptively invalid, however (R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992)) and are rarely permitted (United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 818 (2000)). In enacting House Bill 1009, the legislature noted two compelling interests: (1) "to curb hostile and antisocial behavior in Washington's

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[2] The parties have not discussed, and the Court is not in a position to address, the possibility that graphic violence of the type portrayed in Postal II is a third category of speech which is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

youth" and (2) "to foster respect for public law enforcement officers." Defendants merged these two purposes in their response to plaintiffs' motion, apparently abandoning the "foster respect" element[3] in favor of a "public safety" focus. Response at 11-12 ("The Legislature was motivated to curb hostile and antisocial behavior of youths, including violence and aggression toward law enforcement officers."). Defendants argue that the state has compelling interests in the well-being of its youth and in discouraging criminal violent behavior.

Federal courts have repeatedly recognized that the state has a legitimate and compelling interest in safeguarding both the physical and psychological well-being of minors. See Sable Communications of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989); Interactive Digital, 329 F.3d at 958. Simply identifying a compelling state interest is not enough, however:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434, 1455 (D.C. Cir. 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. See Edenfield v. Fane, 507 U.S. 761, 770-71 (1993); Los Angeles v. Preferred Communications, Inc., 476 U.S. [488, 496 (1986)] ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity") (internal quotation marks omitted); Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist'") (citation omitted).

Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 667 , 664-65 (1994). See also Playboy, 529 U.S. at 816-17. Once the state shows that the psychological well-being of Washington's youth is in genuine jeopardy, it has the additional burden of showing that the regulation is narrowly tailored to address that problem "without unnecessarily interfering with First Amendment freedoms."

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[3] Governor Locke, however, emphasized the need to foster respect of law enforcement officers in his comments upon signing House Bill 1009 into law on May 20, 2003. Press Release, *available at* http://access.wa.gov/news/2003/May/n2003420_5997.asp.

Sable Communications, 492 U.S. at 126. Where strict scrutiny applies, courts strike down speech restrictions "[i]f a less restrictive alternative would serve the Government's interest." Playboy, 529 U.S. at 813. Even the less exacting test applied to content-neutral regulations requires that the state show "that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" Turner Broad. Sys., 512 U.S. at 665 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

In defending the Act, defendants rely heavily on the legislature's finding that "there has been an increase in studies showing a correlation between exposure to violent video and computer games and various forms of hostile and antisocial behavior." In general, courts must "accord substantial deference to the predictive judgments" of the legislature. Turner Broad. Sys., 512 U.S. at 665 (citing Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973)). Where the challenged legislation restricts or limits freedom of speech, however, the courts must ensure that the legislature's judgments are based on reasonable inferences drawn from substantial evidence. Turner Broad. Sys., 512 U.S. at 666; Century Communications Corp. v. F.C.C., 835 F.2d 292, 304 (D.C. Cir. 1987) ("when trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures"). On this point, defendants have produced a number of studies which report a correlation between a minor's exposure to depictions of violence and the development of aggressive tendencies and anti-social behaviors. Plaintiffs point to a like number of studies which conclude that no such correlation has yet been established. The Court need not determine whether access to violent video games poses a real threat to the psychological well-being of Washington youth at this stage of the litigation because plaintiffs have raised serious questions regarding defendants' ability to show that the limitations imposed by the Act are the least restrictive alternative available or even that they will, in fact, alleviate the supposed threat in a direct and material way.

Most of the studies on which the legislature relied evaluated the effects of

portrayals of violence in media other than video games or studied effects on persons outside the targeted group (*e.g.*, college students in Anderson, C.A., & Dill, K.E. (2000), "Video games and aggressive thoughts, feelings, and behavior in the laboratory and in life," *Journal of Personality and Social Psychology*, 78, 772-790). A reasonable inference to be drawn from the studies cited by defendants is that the depictions of violence with which we are constantly bombarded in movies, television, computer games, interactive videos games, *etc.*, does, in fact, have an immediate and measurable effect on the level of aggression experienced by viewers and may have an enhanced effect on youngsters.[4] Putting aside the issue of less restrictive alternatives, it appears unlikely the state can show its chosen remedy will alleviate the identified problem. The state has not made any attempt to regulate the total amount of violence to which minors are exposed nor has it attempted to regulate all of the graphic violence depicted in video games, such as the murder and decapitation of women in Grand Theft Auto: Vice City. It has instead attempted to restrict access to a single type of violent representation (harm to identifiable law enforcement officers) in a single medium (video games). The record currently before the Court does not provide any justification for this seemingly arbitrary choice.[5] Depending on the interest the state is attempting to further, the law's prohibition on the distribution of certain violent video games to minors may be either over- or under- inclusive. Such a restriction will have no effect at

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[4] The state may also be able to present further evidence at trial regarding the unique characteristics of video games that distinguish them from, and potentially make them more harmful than, other forms of media, such as their interactive qualities, the first-person identification aspect, the "hands-on" manipulation of the action, and the addictive quality of repeated stimulus yielding unpredictable results.

[5] For example, the anecdotal evidence the state uses to buttress its compelling-state-interest argument all relates to violent acts aimed at classmates, teachers, or school administrators, not assaults on police or fire fighters. Response at 2 ("Merely to state the names of several towns (e.g., Littleton, Colorado, Paducah, Kentucky, and Jonesboro, Arkansas) is to call to mind the horrific violence visited upon them by individuals with a penchant for violent video games."). These violent acts by teenagers also have been blamed on the influence of violent movies (*e.g.*, "The Matrix") and music videos (*e.g.*, Pearl Jam's "Jeremy").

all on the other channels through which violent representations are presented to children, nor will it keep minors from playing extremely violent video games: only those involving police officers would be off-limits. If, on the other hand, the state is really interested in restricting access to only the most vile portrayals of violence, such as the scenes from Grand Theft Auto III and Postal II included in Attachment A to the Declaration of Ronda Larson, the Act appears to sweep too broadly in that it would restrict access to games which mirror mainstream movies or reflect heroic struggles against corrupt regimes, such as "Minority Report: Everybody Runs." Some of the games that fall within the Act's reach are specifically rated as appropriate for teenagers. Plaintiffs have raised serious questions regarding defendants' ability to show that the Act, even if crafted to further a compelling state interest, is narrowly tailored to alleviate the perceived harm.[6]

B. Irreparable Harm

If the Act is ultimately found to be unconstitutional, its enforcement at this point in the litigation would cause not only plaintiffs but also others not before the Court to refrain from engaging in constitutionally protected speech or expression. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." S.O.C., Inc. v. County of Clark, 152 F.3d 1136, 1148 (9th Cir. 1998) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). Defendants, on the other hand, face nothing more than a delay in their enforcement authority. Even if this delay causes additional exposure of minors to violent video games, the current record cannot support a finding that such a delay would work an undue hardship on either the children or the public.

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[6] The Court has indicated that the defendants face an uphill struggle at trial to overcome the "serious questions" raised by plaintiffs. Given the fact that within the last two years two Circuit Courts have unanimously struck down legislative attempts to impose regulations in this area, defendants must recognize the difficulty of the task that lies ahead. However, defendants will be given a full and fair opportunity to present evidence at trial to overcome the serious concerns articulated by the Court.

III. CONCLUSION

Plaintiffs have raised serious questions regarding the constitutionality of House Bill 1009 and the balance of hardships tips in their favor. Defendants and their officers, employees, and representatives are hereby enjoined until resolution of this action, or until further order of this Court, from enforcing Washington House Bill No. 1009, 58th Leg., Reg. Sess. (2003).

DATED this 10th day of July, 2003.

Robert S. Lasnik
United States District Judge